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Government, Law and Policy Journal

A Publication of the New York State Bar Association
Committee on Attorneys in Public Service, produced in cooperation with the
Government Law Center at Albany Law School








Beverage Alcohol Law: Regulation and Policy

Balancing Social and Economic Needs

- Financial Interest and Ownership Barriers
- Interplay Between Federal and State Law
- Direct Shipping Litigation Post-*Granholm*
- Post and Hold Regime in a Post-*Costco* World
- Relationship Between the Law and Communities
- Economic Development of the Hospitality Industry
- Economic Development and the Three-Tier System
- Underage Drinking
- "Sober Homes"
- "DMV and ABC?"

NEW YORK STATE BAR ASSOCIATION

NYSBA 2011 Annual Meeting

Hilton New York

January 24-29, 2011

Committee on Attorneys in Public Service

Educational Programs— 2011 Awards for Excellence in Public Service

Tuesday, January 25, 2011

Supreme Court Update: The Roberts Court at Age Five (9:00 a.m. - 12:15 p.m.)

John G. Roberts has been Chief Justice of the United States for five years. During that time, two Justices have retired and two new Justices have joined the Court. This session will discuss Supreme Court decisions of the October 2009 term and cases pending in the 2010 term and explore where the Chief Justice has taken the Court and Constitution to date and what the future holds.

Speakers: William D. Araiza, Professor of Law, Brooklyn Law School; Jason Mazzone, Gerald Baylin Professor of Law, Brooklyn Law School

Government in a Time of Economic Crisis: Doing More With Less (2-5:15 p.m.)

Panel 1: (2-3:15 pm) ***Don't Let a Good Crisis Go to Waste: Opportunities Created in Times of Fiscal Hardship.*** Pressure to close significant budget deficits has often created opportunities to make government more efficient, whether it is through agency / department mergers or consolidation, or simply by eliminating waste. This panel will include presentations on how the recent fiscal crisis has given us an opportunity to improve government in New York State.

Speakers: Chief Administrative Judge Ann Pfau, Office of Court Administration; Richard Ravitch, Lieutenant Governor to Governor David Paterson; Blair Horner, Legislative Director, NY Public Interest Research Group

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Panel 2: (3:30-5 pm) ***Labor Issues in a Time of Cutbacks and Utilizing Federal Resources to Mitigate Those Issues.*** New York State has been forced to consider significant cuts in government spending as well as other avenues to reduce the deficit (mergers, layoffs). At the same time, federal funding (e.g., stimulus funding, Medicaid, Race to the Top) has been made available to mitigate the financial harm to the individual states and to spur job creation. This panel will discuss the labor issues associated with such reductions (pensions; health care benefits) and how federal funding has played a role in State fiscal planning.

Speakers: Robert Ward, Deputy Director, The Rockefeller Institute of Government; Timothy J. Gilchrist, President of the Moynihan Station Development Corporation (MSDC), a subsidiary of Empire State Development; John Galligan, NY Conference of Mayors and Municipal Officials; Mary Kavaney, Deputy Secretary for Public Safety, Governor's Office for Public Safety

Awards For Excellence in Public Service Reception:
5:30–7:00 p.m.

2011 Honorees:

Norman Goodman, New York County Supreme Court, Jerome Lefkowitz, Public Employment Relations Board, and Frederick P. Schaffer, The City University of New York

Committee on Attorneys in Public Service:
Peter S. Loomis, Chair

Annual Meeting Planning Committee: Michael Barrett, Spencer Fisher, Catherine Christian

Awards Committee Chairs: Anthony Cartusciello, Donna Hintz

Register online: www.nysba.org/am2011

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Editorial Office
GLP Journal
Government Law Center
Albany Law School
80 New Scotland Avenue
Albany, NY 12208
518.445.2329

Send Address Changes to:
Records Department
New York State Bar Assoc.
One Elk Street
Albany, New York 12207
518.463.3200
mis@nysba.org

Message from the Chair

By Peter S. Loomis

In June I began my second year as Chair of the Committee on Attorneys in Public Service (CAPS), and in late September I retired from my position as Chief Administrative Law Judge at the New York State Department of Transportation. I expect that retirement will happily provide me with more time to devote to the work of CAPS, which is recognized within the Association as the focal point for public sector attorneys.

In my last message, for the spring 2010 issue of the *Government, Law and Policy Journal*, I talked about the challenge of attracting more public sector lawyers to Association membership, and the benefits of such membership, including the sense of personal satisfaction and growth that can result from the ability to interact with peers. Too often, I noted, attorneys in government offices are isolated within their agencies and have few opportunities to share ideas or concerns with others in similar situations. On our Committee we continue to explore productive ways of reaching out to attorneys in the public sector, and one that I want to bring to the attention of the *Journal's* readership in this message is the CAPS blog. Thanks to our Technology Subcommittee, co-chaired by Christina Roberts-Ryba and Jackie Gross, with the assistance of Barbara Beauchamp, of the Bar Center staff, our blog is up and running and is easily accessible from a link on the Association's website or at http://nysbar.com/blogs/CAPS. Readers of the *Journal* may recall that the start of the CAPS blog was announced in a full page ad on the inside front cover of the spring 2010 issue. As I said in that announcement, "This tool promises to be a wonderful way to communicate to attorneys in public service items of interest that they might well otherwise miss. Blogs are most useful and attract the most interest when they are current and updated on a regular basis, and our subcommittee is committed to making the CAPS blog the Bar Association's best." Since its inception in April, I am happy to report that largely through the untiring and dedicated efforts of Jackie Gross, our blog is current and has frequent updates. In addition to the news items of interest, the blog also contains a number of links that can be useful to the public sector attorney. I invite *Journal* readers to take a look at the CAPS blog and to provide any suggestions or comments to our Technology co-chairs. Items of interest that readers think are worthy of posting on the blog can also be sent to Jackie at jackiegrossesq@aol.com, and will be most welcome by the subcommittee.

In this message I also want to make special mention of the work of our Awards and Citations Subcommittee. Currently co-chaired by Tony Cartusciello and Donna Hintz, this Subcommittee has been responsible since CAPS' inception for our Committee's Annual Award for Excellence in Public Service, and for the last two years, for our Citations for Special Achievement in Public Service. The subcommittee works each year with Bar Center staff to invite nominations for these honors and then chooses finalists from the names of those nominated for the full Committee's consideration. The list of those who have been honored each year at our Annual Meeting Awards reception is impressive, and represents the finest in public service in New York State, including high profile individuals, those who have devoted their careers to serving the public but whose names are not well known outside the profession, and whole offices whose public service achievements were deemed worthy of special recognition.

Because CAPS recognized after several years of bestowing our Excellence awards that there were still many deserving public sector attorneys whose accomplishments were going unrecognized, the subcommittee, through the work of Tony Cartusciello and his then co-chair, Bob Freeman, developed our Special Achievement Citation. Our inaugural Citation honorees were discussed in my fall 2009 *Journal* Message, and this past June 16th CAPS presented its second annual citations during a reception at the Bar Center in Albany. Those receiving 2010 Citations were Lisa M. Burianek, deputy bureau chief of the Environmental Protection Bureau in the New York State Department of Law, and the Committee on Pattern Jury Instructions of the Association of Supreme Court Justices of the State of New York, chaired for more than 30 years by Hon. Leon Lazer.

As this issue of the *Journal* goes to press, CAPS has selected its 2011 Excellence award winners, who will receive their plaques at the Annual Meeting reception, and who are Hon. Norman Goodman, the County Clerk of New York County, Clerk of the Supreme Court, New York County, and Commissioner of Jurors; Jerome Lefkowitz, Chair of the New York State Public Employment Relations Board (PERB); and Frederick (Rick) P. Schaffer, General Counsel and Senior Vice Chancellor for Legal Affairs at the City University of New York (CUNY). I personally look forward to honoring these three deserving individuals in January and express my continued thanks to the Awards and Citations Subcommittee for its work. The

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Editor's Foreword

By Rose Mary K. Bailly

New York has a long history regarding beverage alcohol. New York enacted its first excise tax in 1709 while it was still a colony. In 1808, the first temperance society in the country was organized in Moreau, New York. And in 1855, New York had its first, and short lived, taste of prohibition. When nationwide Prohibition ended in 1934, the Alcohol Beverage Control Law that governs New Yorkers today was enacted. It has been amended from time to time but at its heart it remains essentially the same law created in 1934.

In 2007, concerned that the law was outdated, the Legislature directed the New York State Law Revision Commission to undertake a study of the law and the current state of the regulation of beverage alcohol in New York, and to recommend any necessary changes to the law. In its Final Report, issued in December 2009, the Commission concluded that, notwithstanding the problems of underage drinking and intoxication, and their associated concerns, overall the goals of beverage alcohol control, namely promoting temperance in consumption and respect for and obedience to the law, have been achieved in this state, and that these goals remain as important today as they were in 1934. The Commission also made numerous recommendations to update and refine the ABC law consistent with those goals and the state's public policy of protecting the public's health, safety and welfare. The Commission's Report is available on the Commission's website at http://www.lawreview.state.ny.us.

Given the interest in beverage alcohol regulation sparked by the Commission's report, we were delighted that Keven Danow and Vincent O'Brien, two well known and well regarded experts in the area of beverage alcohol control, agreed to be the guest editors of this Issue of the *Government Law and Policy Journal*. They set the stage with their opening essays.

The law and regulation of beverage alcohol is steeped in history. Several articles explore that history and its influential role on our ABC law. Keven Danow, in *History: The Key to Understanding Beverage Alcohol Regulation*, and Vincent O'Brien, in *Why Do We Have Financial Interest and Ownership Barriers Between Industry Suppliers, Wholesalers and Retailers?*, provide an overview of how history shaped the law. Barbara Hancock drills down into the details of how New York's law came to be in *A Short History of New York's Alcoholic Beverage Control Law*. Nicolas Bergman explains the long-standing federal-state relationship in *The Interplay Between Federal and State Law in the Regulation of Alcoholic Beverages: A Primer on Modern Tied-House Law.*

Several of these traditional principles of beverage alcohol regulation by a state recently have been challenged both in New York and elsewhere. The challenges arise from a tension between the authority of states to regulate beverage alcohol on the one hand and both the provisions of the Commerce Clause and the provisions of the Sherman Antitrust act on the other. Earlier this year, H.R. 5034., a bill that appears to push back against Commerce Clause challenges, was introduced in the House of Representatives. Known as the Comprehensive Alcohol Regulatory Effectiveness Act of 2010, the bill would restrict interstate shipment of wine. Deborah Skakel and Elizabeth I. Sher discuss the challenges to direct shipping laws in *Variations on a Theme: Direct Shipping Litigation Post-Granholm*. Ms. Skakel also analyzes the antitrust challenges to requirements that wholesalers post and hold their prices for 30 days in *New York's Post and Hold Regime in a Post-Costco World.*

As beverage alcohol has become more socially acceptable, regulating retail businesses has offered its own set of challenges. Adrian Hunte discusses the efforts to strike a balance between communities and retailers of beverage alcohol in *New York State Alcoholic Beverage Control Law and Quality of Life: The Relationship Between the Law and Communities on the Road to Eudaimonia*. Scott Wexler's article *Economic Development of the Hospitality Industry Under the Watchful Eye of the ABC Law* gives us an industry's perspective. Steve Casscles and Drew Wilson look at the economic development of New York's craft beverage alcohol industries in *New York's Farm & Micro Distilleries, Wineries, and Breweries: The Tension Between Economic Development and the Three-Tier System.*

Any discussion of beverage alcohol would be incomplete without considering the problems of underage drinking, intoxication, and alcoholism. In *Underage Drinking: What Can Be Done About It?*, Romana Lavalas examines statistics on underage drinking and reviews the effectiveness of various provisions of the ABC Law, the Vehicle and Traffic Law and the Penal Law in addressing the problem. Sarah Harrington takes a look at how various communities have responded to concerns about underage drinking in *New York's Local Social Host Laws.* Professor Michael Hutter examines the civil liability of restaurants, bars and other commercial establishments for having sold beverage alcohol to intoxicated individuals in *Imposing Civil Liability Upon Commercial Providers of*

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Guest Editor's Foreword

By Keven Danow

Judge Noah S. "Soggy" Sweat, Jr., a member of the Mississippi State Legislature, when asked for his stance on whiskey, answered for all Americans:

> If when you say whiskey you mean the devil's brew, the poison scourge, the bloody monster, that defiles innocence, dethrones reason, destroys the home, creates misery and poverty, yea, literally takes the bread from the mouths of little children; if you mean the evil drink that topples the Christian man and woman from the pinnacle of righteous, gracious living into the bottomless pit of degradation, and despair, and shame and helplessness, and hopelessness, then certainly I am against it.
>
> But, if when you say whiskey you mean the oil of conversation, the philosophic wine, the ale that is consumed when good fellows get together, that puts a song in their hearts and laughter on their lips, and the warm glow of contentment in their eyes; if you mean Christmas cheer; if you mean the stimulating drink that puts the spring in the old gentleman's step on a frosty, crispy morning; if you mean the drink which enables a man to magnify his joy, and his happiness, and to forget, if only for a little while, life's great tragedies, and heartaches, and sorrows; if you mean that drink, the sale of which pours into our treasuries untold millions of dollars, which are used to provide tender care for our little crippled children, our blind, our deaf, our dumb, our pitiful aged and infirm; to build highways and hospitals and schools, then certainly I am for it.
>
> This is my stand. I will not retreat from it. I will not compromise.

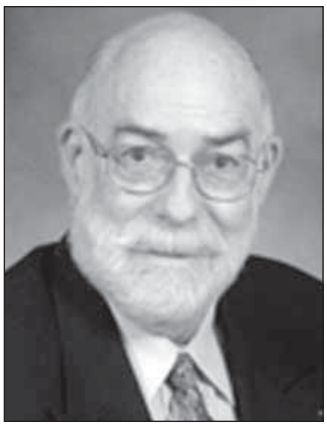
Because beverage alcohol has the capacity to bring so much joy and cause so much tragedy, it holds a unique place in American history, law, politics and commerce.

Beverage alcohol laws are a labyrinth created from the need to balance a public desire for health and safety against the people's desire for pleasure and the State's need for revenue. Rose Mary Bailly, the editors and staff of the *Government, Law and Policy Journal*, Vince O'Brien and the contributing authors have created an indispensible intellectual roadmap for anyone who wishes to navigate that maze. I thank them and the reader for allowing me to participate in such a worthwhile project.

Keven Danow is a founding member of Danow, McMullan & Panoff, P.C., 275 Madison Ave. Suite 1711, New York, NY 10016 (kdanow@dmppc.com). He was awarded the degree of Juris Doctor, with honors, from Fordham University School of Law and has a Bachelor of Business Administration degree, with honors, from Adelphi University. In addition to being licensed to practice law in the State of New York, Mr. Danow was certified as a public accountant by the New York State Education Department. Mr. Danow's particular areas of concentration include guiding clients through the regulation complexities involved in the manufacture, importation, distribution and sale of beverage alcohol. Mr. Danow is a contributing editor of BeverageMedia.

Guest Editor's Foreword

By Vincent O'Brien



We are asked constantly by overseas producers of beverage alcohol, "Why are your laws so restrictive when it comes to selling beverage alcohol in the U.S.? We do not have a single other global market that makes our sales and marketing efforts so difficult."

The answer is quite simple. No other major beverage alcohol producing and consuming country has experienced "the grand experiment" called Prohibition in the last century. The overwhelming majority of state beverage alcohol laws date back to the repeal of Prohibition and they were consciously designed to be restrictive in order to prevent the perceived "abuses and evils" that led to the enactment of Prohibition. Many of these laws, and the rulings and regulations issued pursuant to them, are outdated, archaic and have long since outlived their usefulness. For a very minor example, New York has extremely restrictive supplier advertising sign size restrictions intended to make it easier for the "cop on the beat" to peer into a store to ensure that no illegal or immoral activities were taking place and that no robberies were in progress. When was the last time New York had "cops on the beat"? Not for at least a generation in my experience. Yet the law remains.

Fortunately, however, help is in sight. After a two year study, the New York Law Revision Commission has produced a report containing many recommendations for streamlining and updating both the Agency that regulates the beverage alcohol industry, the New York State Liquor Authority ("The Authority"), and the underlying laws and regulations enforced by the Authority.

The Law Revision Commission recommendations have been well received by the Authority and they inspired the Authority to undertake its own comprehensive internal review. The industry anxiously awaits the results of these combined efforts.

Vincent O'Brien is senior counsel with Nixon Peabody LLP and head of the beverage alcohol practice group at Nixon Peabody. He has extensive experience in beverage alcohol law. Mr. O'Brien is a frequent lecturer and speaker on beverage alcohol issues at both state and national conferences as well as international symposia and conferences, such as Vinexpo, Vinitaly, Intervitis, Pacific Rim wine festivals, and Impact Seminars. He received the degree of Juris Doctor from Fordham University School of Law School, cum laude. He has an L.L.M. in taxation from New York University Graduate School of Law, an M.B.A. from New York University Graduate School of Business, and a B.A. from Fordham University, magna cum laude.

History: The Key to Understanding Beverage Alcohol Regulation

By Keven Danow

Approaching beverage alcohol law without a working knowledge of its history can only lead to confusion and despair. No other legal commodity is subject to such bizarre rules. Why can't a supplier or wholesaler give a gift to a retailer? Why separate the sales of beverage alcohol on premise from sales to go? Why so many restrictions on who can be licensed and where a licensed premise may be located? To understand the answers to these questions, it is necessary to have a sense of the part beverage alcohol played in the history of our great country.

Because the United States of America was a nation starting from scratch, it was unlike any other nation in the world. Land and wood were cheap. Labor was dear. People were treasured for what they could do, not their parentage. People came, worked to save enough to start a new life, and moved west. Wherever one looks into American history, beverage alcohol played its part.

Thomas Jefferson wrote the first draft of the Declaration of Independence in a Philadelphia tavern. Today political partisans gravitate to television stations and computer sites where they can hear from "talking heads" reinforcing their point of view. Early American taverns served the same purpose. There were taverns for the Hamiltonians and taverns for the Jeffersonian Democrats. The patriots who led the revolution met in taverns.[1] As new towns arose, they built a church and a tavern. If there were not enough people, itinerant preachers would make rounds, but there was always a tavern. Political meetings took place there and tavern keepers became highly influential men who could be relied upon to "deliver the vote."

Before there were railroads and refrigerated cars, it took too long to move fresh produce and grain to distant markets. Stored grain would rot, but whisky lasted. In the western parts of the country, which, following the revolution, including western Pennsylvania, whisky was used as currency. In order to create political pressure for a centralized banking system, Alexander Hamilton argued that the United States Government should assume the revolutionary war debt of the several states.[2] Hamilton proposed funding the assumed debt through a whisky tax.[3] Westerners, who used whisky as currency, had no way to pay such a tax and rebelled.[4]

Until the latter part of the nineteenth century, the sale of beverage alcohol was a local issue. For the most part, people drank locally made products, sales were intrastate, and regulation was done on a local level. The federal government concerned itself with the collection of taxes. Although local concerns about levels of consumption led to early temperance movements and some early statewide legislation, the Civil War soon drowned out all other concerns.[5]

But railroads and the industrial revolution changed everything. Breweries and distilleries could get their goods to larger markets. Seeking guaranteed outlets for their beverages, suppliers began by giving gifts to bar owners to entice them to buy their products. When the competition became stiff, they entered into agreements to reduce the price of their goods in exchange for a promise of an exclusive outlet. Such agreements were difficult to enforce and often another supplier would offer a lower price and buy the bar away.

Ironically, the answer to the supplier's prayers came in the form of the Temperance Movement. In an attempt to limit the number of bars, those in the Temperance Movement pushed through high license fees. Faced with high entrance fees, bar owners turned to suppliers who were happy to oblige. Suppliers made large loans to the bar owners. Although these loans were often interest free, they came with a price. The bars were controlled "lock, stock and barrel" by the suppliers. Sell or perish was the rule.

Prior to Prohibition, the saloon was also the primary source for the take home trade. A large part of the saloon's income came from the sale of beer in "growlers," small pails with lids which would growl from the escaping carbonation.[6] It was common for a father to send his child down to the saloon to pick up a growler and bring it home.

Bars remained open twenty-four hours a day, seven days a week. In order to attract customers they offered patrons a free lunch, usually extremely salty food intended to spur maximum thirst. They offered drinks on credit and supplemented their income and draw with gambling. Furthermore, "[s]aloons were a theatre of politics too. Local bigwigs, particularly the Tammany Hall Democrats, relied on the immigrant vote to maintain power. In return for the bloc support of a saloon, a politician would '[assist] the bar trade by helping saloonkeepers evade temperance laws and [keep] customers happy with personal favours.'"[7]

Government's attempt to curb drinking often made matters worse. In 1896, New York passed the Raines Law, which among other things forbade the sale of alcohol on Sundays.[8] There was an exception, which allowed service by a hotel during a meal or in the bedroom. To be considered a hotel, a premise had to have ten rooms for lodging and serve food with liquor. Almost immediately after the law was passed, Raines Saloons began to appear. A portion of the premise, usually the floor above the saloon, was divided into ten small bedrooms. The addition of these rooms encouraged prostitution. In order to meet the food requirement, the proprietors invented the "brick sandwich," which consisted of two pieces of bread with a brick in the middle.[9]

Abstinence seemed to be the only answer. Slowly, state by state and county by county, the South became almost completely dry.[10] As states elected to ban alcohol within their borders, they found themselves thwarted by the United States Supreme Court's interpretations of the interstate commerce clause of the United States Constitution, which reserves to Congress the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[11]

In a series of cases, the Supreme Court set forth rules which allowed states to ban beverage alcohol manufactured within its borders, but not to forbid goods shipped into the state from foreign countries and sister states in their original packages.

The frustration of those in the Temperance Movement was palpable. Because the Supreme Court ruled that issues of interstate commerce were within the sole province of Congress, they turned to Congress for the solution. Congress obliged them with the Wilson Act, which provides:

> That all fermented, distilled or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory, enacted in the exercise of its police power to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.[12]

One might think that since the Supreme Court had established Congress as the sole authority over interstate commerce, the clear intention of Congress would settle the issue and each state would be free to regulate beverage alcohol within its borders. But in truth, what the Supreme Court really wanted was to insure that commerce remained "national in its character and…governed by a uniform system."[13]

In a series of decisions, the Supreme Court emasculated the Wilson Act and effectively restored the law to its pre-Wilson Act status by declaring "upon arrival"[14] meant delivery to the parties to whom the beverages were consigned. A dry state was powerless to stop an out-of-state seller, an out-of-state shipper, or railroad from shipping beverage alcohol into the state. Once again, a state could ban alcohol production inside its borders but could do nothing about shipments to its citizens from outside the state.

Spurred by those in the Temperance Movement, Congress tried once more, passing the Webb-Kenyon Act, which made it a violation of federal law to ship an intoxicating beverage interstate with the intent that it be used or sold in violation of the laws of the destination state.[15] While Webb-Kenyon was found to be constitutional, it contained no penalty provisions and consequently had little effect. Four years later the Reed Amendment provided that a violation of the Webb-Kenyon Act would result in a $1,000 fine.[16] It too failed to stem the flow of beverage alcohol into dry states.

National Prohibition, which seemed to be the only solution, was impossible. Until 1913, the federal government was economically dependent on the sale of alcohol. Wholly forty percent of the federal revenue came from taxes imposed on its sale.[17] In 1913, the playing field changed. With the help of the Temperance Movement, the Sixteenth Amendment to the Constitution passed.[18] Income taxes replaced taxes on alcohol. The way was now clear for the passage of a constitutional amendment banning the sale of beverage alcohol.

A constitutional amendment banning the sale of beverage alcohol anywhere in the United States rendered all interstate commerce issues moot. However, each solution created its own problems. Congress failed to fund enforcement. The combination of an unpopular law and impotent enforcement led to a massive crime wave and total disrespect for the law.[19] Where saloons were inhabited by men, speakeasies sprung up everywhere and women joined the party. Prohibition fostered disrespect for the law. The Great Depression began to erode respect for property rights. Together they threatened to erode the foundations of capitalism.

John D. Rockefeller Jr. and his father were strong proponents of Prohibition. They contributed in excess of $800,000 and their considerable personal political clout to the passage and support of the Eighteenth Amendment.[20] When, on July 7, 1932, the eve of the Republican Convention, John D. Rockefeller Jr. issued a statement to the press in which he confessed that he had reluctantly concluded that the benefits brought by Prohibition were

more than outweighed by the evils which flourished since its adoption, it marked the death knell for the "noble experiment."[21]

Repeal was not enough; systems had to be established which revitalized respect for the law. Toward that end, John D. Rockefeller, Jr. commissioned the study, "Toward Liquor Control."[22] Regardless of which state's law is under analysis, almost the entire statutory scheme is derived from that study.

In a section entitled, "The Background of the Problem" the authors state:

> The saloon, as it existed in pre-prohibition days, was a menace to society and must never be allowed to return. Behind its blinds degradation and crime were fostered, and under its principle of stimulated sales poverty and drunkenness, big profits and political graft, found a secure foothold. Public opinion has not forgotten the evils symbolized by this disreputable institution and it does not intend that it shall worm its way back into our social life.[23]

"Toward Liquor Control" was so well received and the resulting legislation worked so well that few people remembered the saloon "as it existed in pre-prohibition days"[24] or how the nation got to the point where Prohibition seemed like the solution to the evils it wrought. The report reached six conclusions:

1. Statewide, bone-dry prohibition will prove unsuccessful in controlling the problem of alcohol unless the system had overwhelming public support.
2. Light wine and beers do not constitute a serious social threat.
3. While many states will follow the license method, it is seriously flawed because it retains the profit motive.
4. The best solution is to bring heavier alcoholic beverages under state control through a state-run monopoly of all off premise sales.
5. The primary purpose of taxation should be social control, not revenue.
6. Although education is a slow process, it carries the heaviest share of the burden of the social control.[25]

The report essentially favored the idea of a control State. If the state maintained a monopoly over the sale of beverage alcohol, the profit motive would be removed. Without the profit motive, there would be no spur to over consumption.

A key issue in the report was to ban the "tied house" system. If a state were to adopt a licensing system, it was imperative that the supplier tier be separated from the retail tier. Suppliers must not be allowed to own or control the retailers.

> The "tied-house," and every device calculated to place the retail establishment under obligation to a particular distiller or brewer, should be prevented by all available means…. The "tied house" system had all the vices of absentee ownership. The manufacturer knew nothing and cared nothing about the community. All he wanted was increased sales. He saw none of the abuses, and as a non-resident he was beyond local social influence. The "tied house" system also involved a multiplicity of outlets, because each manufacturer had to have a sales agency in a given locality…. [I]n relation to the liquor problem it is a matter of crucial importance because of its effect in stimulating competition in the retail sale of alcoholic beverages…. There are many devices used by brewers and distillers to achieve this same end, such as the furnishing of bars, electric signs, refrigerating equipment, the extension of credit, the payment of rebates, the furnishing of warranty bonds when required to guarantee the fulfillment of license conditions and of bail bonds when the dealer is haled into court. A license law should endeavor to prohibit all such relations between the manufacturer and the retailer, difficult though this may be.[26]

The report also recommended license tiers, which distinguished licenses for beer and wine from licenses for spirits and a distinction between on- and off-premise licenses.[27] Shifting consumption from on-premise licensees to the home was a major objective of post prohibition control. As the study noted, "[t]he license law should prohibit, as far as possible, all sales practices which encourage consumption. This would include treating on the house, sales on credit or IOU's, bargain days, and reduced prices previous to elections."[28]

The study further commented that:

> Closely related to the limitation of the number of licenses is the restriction of the location and character of places where liquor may be sold. In the past, saloons were prohibited in some states within a specified distance of schools and churches. [L]icense laws should also prohibit screens, upstairs rooms, and back rooms,

> and the presence of gambling and slot machines, and should establish general regulations with regard to lavatories….[29]

Times have changed. In an age of charge cards, Federal Express, and the Internet, consumers and regulators are once again questioning the wisdom of the "tied house" regulations. Few, if any, remember the saloon "as it existed in pre-prohibition days."[30] Without that memory, the reasons and purposes behind the federal and state laws regulating the importation, sale, and distribution of beverage alcohol become unfathomable. Nothing crystallizes this separation between those who remember and those who have forgotten more than Justice Stevens' dissent in *Granholm v. Heald*.[31] Rejecting the majority opinion, which subordinated the Twenty-First Amendment to the Commerce Clause, Justice Stevens, who lived through Prohibition, wrote:

> Today many Americans, particularly those members of the younger generations who make policy decisions, regard alcohol as an ordinary article of commerce, subject to substantially the same market and legal controls as other consumer products. That was definitely not the view of the generations that made policy in 1919 when the Eighteenth Amendment was ratified or in 1933 when it was repealed by the Twenty-first Amendment. On the contrary, the moral condemnation of the use of alcohol as a beverage represented not merely the convictions of our religious leaders, but the views of a sufficiently large majority of the population to warrant the rare exercise of the power to amend the Constitution on two occasions. The Eighteenth Amendment entirely prohibited commerce in "intoxicating liquors" for beverage purposes throughout the United States and the territories subject to its jurisdiction. While §1 of the Twenty-first Amendment repealed the nationwide prohibition, §2 gave the States the option to maintain equally comprehensive prohibitions in their respective jurisdictions….
>
> In the years following the ratification of the Twenty-first Amendment, States adopted manifold laws regulating commerce in alcohol, and many of these laws were discriminatory. So-called "dry states" entirely prohibited such commerce; others prohibited the sale of alcohol on Sundays; others permitted the sale of beer and wine but not hard liquor; most created either state monopolies or distribution systems that gave discriminatory preferences to local retailers and distributors. The notion that discriminatory state laws violated the unwritten prohibition against balkanizing the American economy—while persuasive in contemporary times when alcohol is viewed as an ordinary article of commerce—would have seemed strange indeed to the millions of Americans who condemned the use of the "demon rum" in the 1920s and 1930s. Indeed, they expressly authorized the "balkanization" that today's decision condemns. Today's decision may represent sound economic policy and may be consistent with the policy choices of the contemporaries of Adam Smith who drafted our original Constitution; it is not, however, consistent with the policy choices made by those who amended our Constitution in 1919 and 1933.[32]

Justice Stevens further concluded:

> My understanding (and recollection) of the historical context reinforces my conviction that the text of §2 should be 'broadly and colloquially interpreted.' Indeed, the fact that the Twenty-first Amendment was the only Amendment in our history to have been ratified by the people in state conventions, rather than by state legislatures, provides further reason to give its terms their ordinary meaning. Because the New York and Michigan laws regulate the "transportation or importation" of "intoxicating liquors" for "delivery or use therein," they are exempt from dormant Commerce Clause scrutiny. As Justice Thomas has demonstrated, the text of the Twenty-first Amendment is a far more reliable guide to its meaning than the unwritten rules that the majority enforces today. I therefore join his persuasive and comprehensive dissenting opinion.[33]

When reviewing beverage alcohol laws, rules and regulations, it would be wise to remember George Santayana's admonition: "[t]hose who cannot remember the past are condemned to repeat it."[34]

Endnotes

1. For an explanation of the important role that taverns played in early American life, see Randall Huff, American Popular Culture Through History: The Revolutionary War Era 55 (2004).
2. Jerry W. Markham, A Financial History of the United States: From Christopher Columbus to the Robber Barons, 1492-1900, at 78 (2002).

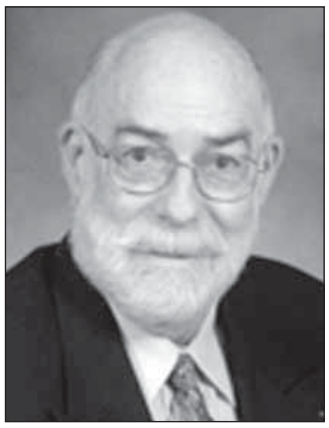
3. Ron Chernow, Alexander Hamilton 468 (2004).
4. *See id.*
5. *See generally* Joseph R. Gusfield, Symbolic Crusade: Status Politics and the American Temperance Movement 52 (1986) (discussing the national legislative victories of the Temperance Movement in the 1840s).
6. *See* Michael A. Lerner, DRY MANHATTAN: PROHIBITION IN NEW YORK CITY 102 (2007).
7. Simon Rees, *New York Saloons 1845–1895,* Historical Eye, http://www.historicaleye.com/Newyorksaloons.html (last visited Oct. 4, 2010).
8. Because most men worked a six-day week with Sunday off, Sundays were the Saloons' biggest day.
9. Jacob Riis, The Battle With the Slums 224 (1906).
10. *See* Lawrence M. Friedman, American Law in the Twentieth Century 102 (2002) (noting the slew of states that had turned dry within the first decade of the twentieth century).
11. U.S. Const. art. I, § 8, cl. 3.
12. Wilson Act of 1890, ch. 728, 26 Stat. 313 (codified as amended at 27 U.S.C. § 121 (2010)).
13. Leisy v. Hardin, 135 U.S. 100, 109 (1890).
14. 27 U.S.C. § 121.
15. Webb-Kenyon Act, ch. 90, 37 Stat. 699 (1913) (codified as amended at 27 U.S.C. § 122 (2010)).
16. For an in-depth analysis of the Reed Amendment at the time of its passage, see John K. Graves, *The Reed "Bone-Dry" Amendment*, 4 VA. L. REV. 634 (1917).
17. DANIEL OKRENT, LAST CALL: THE RISE AND FALL OF PROHIBITION 54 (2010).
18. *See* GUSFIELD, *supra* note 5, at 94 (explaining that prohibitionists lobbied for a federal income tax).
19. *See generally* KENNETH D. ROSE, AMERICAN WOMEN AND THE REPEAL OF PROHIBITION 45 (1996) (mentioning that one of the legacies of prohibition was an unprecedented crime wave in America).
20. *Id.* at 134.
21. *See* Harry G. Levine, The Birth of American Alcohol Control: Prohibition, the Power Elite, and the Problems of Lawlessness, CONTEMP. DRUG PROBS. 63-115 (Spring 1985), *available at* http://dragon.soc.qc.cuny.edu/Staff/levine/The-Birth-of-American-Alcohol-Control.pdf; RAYMOND B. FOSDICK & ALBERT L. SCOTT, TOWARD LIQUOR CONTROL (Harper & Brothers 1933).
22. FOSDICK & ALBERT, *supra* note 21.
23. *Id.* at 16.
24. *Id.*
25. *Id.* at 18–19.
26. *Id.* at 43–44.
27. *Id.* at 46.
28. *Id.* at 49.
29. *Id.* at 45.
30. *Id.* at 16.
31. Granholm v. Heald, 544 U.S. 460 (2005).
32. *Id.* at 494-96.
33. *Id.* at 496-97.
34. GEORGE SANTAYANA, THE LIFE OF REASON 284 (Charles Scribner's Sons 1906) (1905).

Keven Danow is a founding member of Danow, McMullan & Panoff, P.C., 275 Madison Ave. Suite 1711, New York, NY 10016 (kdanow@dmppc.com). He was awarded the degree of Juris Doctor, with honors, from Fordham University School of Law and has a Bachelor of Business Administration degree, with honors, from Adelphi University. In addition to being licensed to practice law in the State of New York, Mr. Danow was certified as a public accountant by the New York State Education Department. Mr. Danow's particular areas of concentration include guiding clients through the regulation complexities involved in the manufacture, importation, distribution and sale of beverage alcohol. Mr. Danow is a contributing editor of *BeverageMedia*.

Why Do We Have Financial Interest and Ownership Barriers Between Industry Suppliers, Wholesalers and Retailers?

By Vincent O'Brien

Pre-Prohibition



One will quickly learn the answer to that question by reading any summary or history of Prohibition in the United States. The brewers of the day were so intent on opening as many saloons as possible to promote (i.e., push) their products, that a would-be saloon-keeper could be established in business with a capital investment of as little as $200. The brewers would cover all the rest, including rent, licensing costs and barrels of beer. An extra price surcharge on each barrel was designed to reimburse the brewer's investment and to lock the saloon-keeper into enormous pressure to sell as much as possible to repay the debt. The result of these practices in Chicago's blue collar districts was as many as one pub for every 150 local residents.

How could all those saloons survive? By promoting consumption with every conceivable incentive from free lunches and snacks to, in many cases, illegal side businesses. Obviously they also were usually obligated exclusively to promote the products of the brewer that put them, and kept them, in business. Retailer freedom of choice, as to which products to stock, was virtually non-existent.

It was this plethora of "tied" brewer supported and financed saloons and dictated product choices and their impact on neighborhoods, that were cited as principal reasons for voter support of Prohibition.

Post-Prohibition

It should be readily understood and accepted then that, upon repeal of Prohibition, virtually all states drafted legislation that they thought would prevent the re-occurrence of the perceived "evils" that caused Prohibition. At the top of every legislature's list of "don'ts" was "do not allow the return of tied saloons or 'houses.'"

It is also worth noting that, despite the fact that local wineries (there were no national wineries) and, for the most part, distilleries, were not involved in the saloon abuses that fueled Prohibition fervor, the tied house laws that surfaced after Prohibition universally apply to all beverage alcohol suppliers.

Definition of Tied House

As used in this discussion, "tied house" refers specifically to prohibited ownership and investment restrictions, whether direct or indirect, and whether through financial interests or otherwise, between suppliers' and retailers.

The term "tied house" also refers, in many post-Prohibition laws, to restrictions on certain trade practices that have the potential for creating the equivalent of a tied house; e.g., offering financial support or other inducements in exchange for commitments to promote certain products. Thus, in many states, trade practice rules are found under the heading "Tied House Laws."

Because the overwhelming majority of retailer or "saloon" financial support came from brewers, and brewer-owned or dominated wholesalers, most post-Prohibition tied house laws prohibited ownership and/or financial interests between suppliers and retailers or between wholesalers and retailers. There were few restrictions on the ownership of wholesalers by suppliers. To this day it is still permissible in many states for a supplier to own and operate a wholesale distributorship entity and, indeed, a number of states allow a supplier to self-distribute.

Federal Rule

Interestingly, under Federal law, there is a specific exemption related to total ownership of retailers by either wholesalers or suppliers. Anything less than total ownership is prohibited because of the ability to use partial ownership as leverage to influence the purchasing decisions of the partly owned entity. Total ownership is permitted under the theory that a 100% owner cannot unduly influence itself.

The Nature of Tied House Barriers

A typical tied house law provides:

> "Distillers, wholesalers, winemakers, brewers or their employees, officers or agents shall not, except as provided in this section, directly or indirectly, have any financial interest in the retail business for sale of intoxicating liquors, and shall not, except as provided in this section, directly or indirectly, loan, give away or furnish equipment, money, credit or property of any kind, except ordinary commercial credit for liquors sold to such retail dealers.[…]." Missouri Alcoholic Beverage Law § 311.070.1

Historically these restrictions have been interpreted conservatively in the absence of very specific statutory exceptions. For example, when Seagram bought Universal Studios, the purchase required an exception amendment to California's tied house law. The resulting exception granted exempt status to "any" theme park that happened to fit within the precise metes and bounds description of the real estate occupied by Universal Studios.

Similar legislation in New York allowed Seagram, or "anyone else" (in theory only), to hold a financial interest in a landmark status designated restaurant located off the lobby of 375 Park Avenue that occupies a specific delineated premises (otherwise known as the Four Seasons Restaurant in what was then known as The Seagram Building).

As "mom and pop" retailers gave way to "corporate" retailers and then, as both domestic and global conglomerates came into favor, several states looked for ways to accommodate conglomerate investments in local hotels, restaurants, and tourism; notwithstanding that those conglomerates also had ownership interests in wineries, breweries or distilleries. Virginia was the first to provide for conglomerate tied house exceptions (Code of Virginia)

> § 4.1-215. Limitation on manufacturers, bottlers and wholesalers; exemptions.
>
> B. This section shall not apply to:
>
> 4. Manufacturers, bottlers or wholesalers of alcoholic beverages who do not (i) sell or otherwise furnish, directly or indirectly, alcoholic beverages or other merchandise to persons holding a retail license or banquet license as described in subsection A and (ii) require, by agreement or otherwise, such person to exclude from sale at his establishment alcoholic beverages of other manufacturers, bottlers or wholesalers;

Subsequently, when the South Carolina Legislature was informed that it was losing a $90,000,000 hotel and convention center development to North Carolina, because of its tied house restrictions (the hotel chain was owned by a conglomerate that also owned a European distiller), the South Carolina legislature quickly passed its version of a conglomerate exception that permitted construction of the hotel complex in South Carolina (Code of Laws)

> *SECTION 61-4-735***.** Regulation of practices between wine manufacturers, importers, wholesalers, and retailers.
>
> (D) A producer, winery, vintner, and importer of wine are declared to be in business on one tier, a wholesaler on another tier, and a retailer on another tier. For the purpose of this section, a manufacturer or producer of wine is declared to be a tier one business, a wholesaler or an importer owned solely by a wholesaler is declared to be a tier two business, and a retailer is declared to be a tier three business. Except as provided in Sections 61-4-720 and 61-4-730, a person or entity in the wine business on one tier or a person acting directly or indirectly on his behalf may not have ownership or financial interest in a wine business operation on another tier. This limitation does not apply to the interest held on July 1, 1993, by the holder of a wholesale permit in a business operated by the holder of a retail permit at premises other than where the wholesale business is operated. For purposes of this subsection, ownership or financial interest does not include the ownership of less than one percent of the stock in a corporation with a class of voting shares registered with the Securities and Exchange Commission or other federal agency under Section 12 of the Securities and Exchange Act of 1934, as amended, or a consulting agreement under which the consultant has no control over business decisions and whose compensation is unrelated to the profits of the business. Notwithstanding this prohibition or the prohibition contained in Section 61-4-940(D), a manufacturer or importer of beer or wine may own in whole or in part a business that holds an on-premises retail beer and wine permit provided that:
>
> (1) All beverages to be handled or sold by the retail dealer must be purchased from licensed wholesalers and purchased on the same terms and conditions as do other retail dealers.
>
> (2) Sales of any product produced or distributed by the manufacturer or importer must not exceed ten percent of the annual gross sales of beer or wine by the retail permit holder.

The Future of Tied House Restrictions

States other than Virginia and South Carolina chose to address the subject of exceptions on a case-by-case basis similar to the New York and California approaches. Usually, like the Universal Studios and Four Seasons Restaurants exceptions noted above, these case-by-case exceptions were also drawn so narrowly that only the applicant in question qualified for relief.

In 2009 however, the Washington State legislature took the bold and unique approach of completely eliminating its tied house law.

> The legislature…recognizes that the historical total prohibition on ownership of an interest in one tier by a person with an ownership interest in another tier, as well as the historical restriction on financial incentives and business relationships between tiers, is unduly restrictive.
>
> **New Section. Sec. 3**. A new section is added to chapter 66.28 RCW to read as follows:
>
> (1) Notwithstanding any prohibitions and restrictions contained in this title, it shall be lawful for an industry member or affiliate to have a direct or indirect financial interest in another industry member or a retailer, and for a retailer or affiliate to have a direct or indirect financial interest in an industry member unless such interest has resulted or is more likely than not to result in undue influence over the retailer or the industry member or has resulted or is more likely than not to result in an adverse impact on public health and safety.

Clearly the needs of both states and industry have changed dramatically more than three quarters of a century after passage of post-Prohibition tied house laws. Have the tied house laws, as decided by Washington State, totally outlived the reasons for their existence? Or, will the reasoning that led to their existence survive, either in the original format or in a format similar to the modified Virginia and South Carolina conglomerate approaches? The economic needs of individual states may well be a major factor in determining the answer to the question of "To what extent will we have barriers between the tiers in the future?"

Vincent O'Brien is senior counsel with Nixon Peabody LLP and head of the beverage alcohol practice group at Nixon Peabody. He has extensive experience in beverage alcohol law. Mr. O'Brien is a frequent lecturer and speaker on beverage alcohol issues at both state and national conferences as well as international symposia and conferences, such as Vinexpo, Vinitaly, Intervitis, Pacific Rim wine festivals, and Impact Seminars. He received the degree of Juris Doctor from Fordham University School of Law School, cum laude. He has an L.L.M. in taxation from New York University Graduate School of Law, an M.B.A. from New York University Graduate School of Business, and a B.A. from Fordham University, magna cum laude.

A Short History of New York's Alcoholic Beverage Control Law

Barbara S. Hancock

New York's Alcoholic Beverage Control Law, enacted in 1934 shortly after the end of Prohibition, has been in effect for seventy-six years. While the intervening years have brought many changes to the law,[1] its basic bone structure is still in place. There have been many claims recently from the public and the alcohol industry that the law is not working, and that it needs a complete overhaul, and so a few years ago, the State Legislature directed the Law Revision Commission to study the Alcoholic Beverage Control Law and its administration, and make recommendations for reform. After more than two years of intensive study, the commission came to the conclusion that New York's system of alcoholic beverage control remains fundamentally sound and continues to serve its purpose of "regulat[ing] and control[ling] the manufacture, sale, and distribution of alcoholic beverages…for the protection, health, welfare and safety of the people of the state."[2] The commission found that the many amendments to the law over the years had rendered it unwieldy and, in some places, unnecessarily difficult to comprehend, but that by and large, the original drafters of our law basically got it right.

The abuse of alcohol has long been a major problem in this country. In the early nineteenth century, researchers estimated that between fifty and seventy-five percent of all poverty cases in the United States, and sixty-six to seventy-five percent of all crimes, were caused by drink.[3] In 1901, the Committee of Fifty found that twenty-five percent of poverty could be traced directly or indirectly to liquor, and fifty percent of crime involved liquor; thirty-one percent of the time, liquor was the primary cause of crime.[4]

New York has tried various approaches to curbing the abuse of alcohol. Early legislation sought to pick off drunkards one at a time, but the ever-growing supply of over-consumers outstripped the ability of the civic authorities to keep up.[5] An 1857 law even tried to prevent individual drinkers from obtaining alcohol. A wife who submitted a complaint and proof to the appropriate authorities that her husband was a habitual drinker of intoxicating substances could obtain a six-month notice, issued to all local dealers, forbidding sale of alcohol to the husband.[6]

In 1855, New York enacted a law prohibiting the sale or distribution of liquor except for medical, chemical, or sacramental purposes.[7] The law was openly defied, notably by the Mayor of New York City, who refused to enforce it.[8] One year later, the Court of Appeals found the law unconstitutional, because it deprived individuals of due process by substantially destroying their property, i.e., alcoholic beverages, which they had owned and possessed prior to the effective date of the law.[9]

In 1857, to circumvent this judicial restraint on outright prohibition, the State Legislature enacted a new liquor excise law that banned the sale of liquor on Sundays,[10] the workingman's sole day off. The law required saloonkeepers to obtain a license from a three-member county board of excise commissioners.[11] Another, even more local layer of excise boards was added in 1870, consisting of various village or town officials, or, for cities, mayoral appointees.[12] To qualify for an on-premises license under the 1857 law, the applicant's establishment had to qualify as an inn, tavern, or hotel, by providing at least three beds for guests plus stabling and hay or pasturage for four horses.[13] Twelve years later, the law was amended to exempt establishments selling beer and ale from having to qualify as an inn, tavern, or hotel, thus making it much easier to open a saloon as long as it did not serve hard liquor.[14]

In 1896, the "Raines Law"[15] cracked down on Sunday drinking by restricting liquor sales to guests of hotels with at least ten furnished bedrooms, as long as the drinks were served with meals or in the guests' rooms.[16] Within weeks of the law's enactment, almost every saloon in the city had transformed itself into a "Raines Law" hotel.[17] Brooklyn, for example, had thirteen hotels before the Raines Law, but more than two thousand soon thereafter.[18] Prostitutes began using the available rooms by the hour since in most cases there was no actual demand for hotel accommodations. The "Raines sandwich" served with drinks was a sturdy, reusable prop made of "two pieces of bread with a brick between."[19] No sales of liquor were permitted within 200 feet of a building occupied exclusively as a school or church.[20] The Raines Law also centralized the licensing of retail alcohol sales, eliminating the local excise commissions and boards established mid-century in favor of a state commissioner of excise, appointed by the governor for a five-year term.[21]

Despite the laws' efforts to keep the liquor business in check, saloons thrived, and consumption of alcohol rose dramatically. By the late 1880s, Manhattan had 12,000 to 15,000 saloons,[22] or one saloon for every 150 inhabitants.[23] In 1850, the total annual consumption of beer in the U.S. was 36 million gallons; in 1870, it was 204 million gallons;

in 1880, 414 million gallons; and in 1890, 855 million gallons, an increase of about 2,400% during a period when the population increased from 23 million to 63 million, an increase of about 300%.[24]

Essentially, 19th century laws presupposed an economic and political climate that no longer existed.[25] The mid-century model of expecting local independent tavern-keepers of good character to be responsive to local regulation was completely unrealistic when giant corporations came to control the saloons. The later model, with centralized licensing, failed because of strong ties between the liquor interests and politics.

The saloons became an all-important vehicle for the big national breweries to create and maintain a competitive advantage.[26] The industrial age had brought innovations—like pasteurization, refrigerated railroad cars, and bottle caps—that transformed breweries from strictly local enterprises to huge national powerhouses, aided by the completion of the transcontinental railroads, which helped bring exponential growth to the industry.[27]

Competition between the big national breweries was fierce. To gain an edge in a market, or to keep up with a competitor, a brewery would heavily subsidize a saloon in return for an exclusive franchise for that brewery's products.[28] For a relatively modest investment of only a couple hundred dollars, a man could go into business as a saloon-keeper, with the brewery providing various forms of credit, such as financing saloon leases, bars, beer taps and other fixtures, and even providing glassware and food.[29] These "tied house" arrangements, in which an establishment was obligated to sell the brand of one distiller or brewer exclusively, brought an explosion of retail outlets, with every brewer expanding into new markets and seeking to increase its business in old markets.[30] By the early 1900s, about seventy percent of saloons in the U.S were owned by or otherwise controlled by the big breweries.[31] In New York, more than 80 percent of the saloons were indentured to the breweries.[32]

To satisfy the demands of these absentee owner brewers eager to maximize their profits and recoup their loans, as a matter of business necessity, saloonkeepers were compelled to stimulate their sales of all kinds of alcoholic beverages.[33] Bartenders had no compunctions against serving alcohol to a customer who was already drunk, as long as he still had money in his pocket, or to teenagers who stopped by the saloon after school.[34] Saloonkeepers provided tables for gamblers, as long as the house got a cut of the pot. They watered down the whiskey. They kept close ties with the neighborhood brothel—if they did not actually run it.[35] Some saloons even provided private rooms with couches.[36]

The stench of spilled beer and of the filth on the pavement outside a saloon could carry for half a block.[37] Many neighborhoods housed numerous saloons.[38] It was the *public* nature of drunkenness and filth that offended even those who had no problem with consumption of alcohol in the home or in a private club or equivalent; after 1870, there were increasing protests against the licensing of saloons near schools, stores, and markets, where women and children would have to walk a gauntlet of drunks rolling out of saloons, brawling, engaging in socially objectionable behavior, or passed out on the sidewalk.[39] Rules prohibiting saloons within a fixed distance of schools and churches were widely enacted,[40] based on the assumption that an establishment serving liquor would be badly run, and "an affront to decent people."[41] Today, we might wonder why on earth the civil authorities would allow one bad bar to stay open at all, much less block after block of bad bars, year after year, or why they would fail to take measures to assure that saloons were proper, respectable places. We might also wonder why such a juicy opportunity for an aspiring politician would go begging. The answer lies in the saloons' and the breweries' roles in the realm of local and national politics.

Saloons and corrupt political machines were closely linked in many parts of the country, with New York's saloons with Tammany Hall among the most notorious offenders.[42] Saloon ownership, if not quite a prerequisite for entry into local politics, provided enormous influence through links to Tammany Hall.[43] Saloons delivered votes for Tammany candidates; never mind if repeat voters such as vagrants or petty crooks had to be plied with free food or liquor.[44] Saloons provided convenient venues for local ward bosses to hand out cash and political favors, including jobs, and in turn, the saloons provided the bosses with cash.[45] Through local empires built on saloons, Tammany Hall bosses controlled over $150 million in city contracts every year.[46] Little wonder that reformers saw the destruction of saloons as a sure way to clean up politics.[47] More broadly, the alliance between liquor and politics was widely considered the real reason for the success of the Prohibition movement, because the arrangement not only protected even the worst of the saloons from the law, but also allowed liquor interests to influence legislation in their own favor.[48] As baldly stated in a 1931 report, "the liquor vote was the largest unified, deliverable vote."[49]

Another political factor was the total disenfranchisement of half of the population. The big breweries' trade association, fearing that women—who often were the direct or indirect victims of the rampant alcohol abuse of their husbands or fathers—would vote for Prohibition, adopted as official policy the opposition to women's suffrage, "everywhere and always."[50] With their huge political slush funds they made sure their employees showed up at anti-suffrage rallies and got them to vote in referenda, used saloons for get-out-the vote drives, bribed suffragists to switch sides, and distributed free articles to newspapers replete with bogus quotations.[51] Such tactics ultimately proved counter-productive. Even women who ordinarily would have had little inclination to support Prohibition were so disgusted after decades of such tactics that many came to support it.[52] Beginning in 1910, seven

western states went dry; all had recently granted women the right to vote.[53]

Through all this period, temperance advocates continued to advocate their cause, despite their lack of success in shutting down saloons in New York City. Indeed, the high point of their movement came with the January 17, 1920 adoption of the Eighteenth Amendment to the United States Constitution, which prohibited "the importing and exporting and manufacture, sale, or transportation of alcoholic beverages within the United States and its territories."[54]

Soon, the country was awash with illegal trafficking in beer and whiskey, run by organized crime, which resorted to violence to secure and control its illicit fiefdom, and enabled by wholesale corruption of the political and criminal justice system.[55] Speakeasies were ubiquitous; by 1927, in New York City alone, there were over 30,000 —"twice as many as all legal bars and restaurants and nightclubs *before* Prohibition."[56] The "Crusaders," a national anti-Prohibition, pro-temperance group, attempted to create a "dot map" of Manhattan in 1930, one dot per speakeasy, but abandoned the attempt, "because the result would be merely a large blot."[57]

An aggressive campaign to padlock illegal clubs began in 1925, and succeeded in closing 500 establishments in its first six months.[58] In response to the padlocking campaign, clubs and speakeasies simply evolved into smaller, more anonymous, bare-bones establishments that could reopen at new locations in a matter of days.[59] Frequent name changes, hidden entrances, peepholes and liquor supplies hidden in adjoining buildings[60] also helped speakeasies to keep up their cat-and-mouse games with the authorities.[61] Speakeasies could turn up just about anywhere from warehouse basements to apartments.[62] Enforcement of the law proved elusive,[63] and federal and state governments were losing excise tax revenue to the coffers of organized crime.[64]

On December 5, 1933, the Prohibition experiment ended with the ratification of the Twenty-First Amendment of the United States Constitution, repealing the Eighteenth Amendment.[65] The Twenty-First Amendment allowed the states to prohibit or regulate the importation of alcoholic beverages into their jurisdiction, and their sale within their jurisdiction.[66] States had the option of regulating alcoholic beverages by directly controlling them or by adopting a "three-tier system" of distribution, whereby manufacturers, wholesalers, and retailers are licensed by the State to engage in business with one another.[67]

In developing the alcoholic beverage control law that would govern the state after the repeal of Prohibition, New York could draw from its history of laws regulating alcohol.[68] But still, the sorry experience with saloons and the lawlessness of the Prohibition era convinced policymakers that it was time to re-think the design of their alcoholic beverage control laws. Several comprehensive approaches emerged during the early 1930s, when it became increasingly apparent that Prohibition just might not be around for the long haul. The most prominent of the proposals to emerge was the so-called "Rockefeller Report," commissioned by John D. Rockefeller, Jr., a lifelong "dry," in 1933.[69] It recommended that states control off-premises retail sales of alcohol through "a system by which the state, through a central authority, maintains an exclusive monopoly of retail sale for off-premises consumption."[70] Alternatively, states could license private sellers; however, such a system "contains a fundamental flaw in that it retains the private profit motive which makes inevitable the stimulation of sales."[71]

Two other major proposals came from the New York chapter of the Women's Organization for National Prohibition Reform (WONPR) and from the national Association Against the Prohibition Amendment (AAPA), both influential "wet" organizations that advocated repeal. The WONPR plan would limit private profit at all levels of the system.[72] For example, a seven-member Liquor Control Commission appointed by the Governor would license distilleries and breweries whose entire output would be sold to the Commission, with profit limited to 6% of capital.

The feature of the WONPR program that attracted the most interest was a provision for "refreshment rooms," i.e., "social gathering spots for fellowship, amusement, and recreation," run by a statewide distributing company, where drinks could be served without profit, and food and soft drinks could be sold for profit.[73]

Under the AAPA plan, a private monopoly would be licensed to sell alcoholic beverages, with all prices regulated by the state, and profits restricted.[74] A state liquor commission of five members, appointed by the governor, would control and regulate manufacture, sale, transportation, and importation of alcohol, and would approve the locations of sales outlets. Manufacturers would sell to the liquor corporation, which would handle all transportation and importation, and conduct all retail package sales at sales outlets approved by the municipalities in which they were located, limited to no more than one outlet per 5,000 inhabitants.[75]

Seen against the backdrop of these three major proposals, New York's law, adopted on May 10, 1934,[76] was remarkably liberal, especially considering that the principal author of the WONPR plan was one of its drafters.[77] As the chairman of one of the groups tasked with formulating the law stated:

> It was necessary…to take into account two stubborn facts. No system of liquor control rules can succeed in a State like New York, with a mixture of races and ideas and tastes, unless the rules are sufficiently liberal to win the respect of those who are asked to submit to them.

> That fact was proved true under prohibition. On the other hand, in an orderly Commonwealth like New York no plan can be expected to succeed unless it can convince thoughtful citizens of its essential soundness and its applicability to the situation. If it is too strict it won't work. If it is too lax and throws away all restraints it won't last.[78]

A primary concern of many reformers was how to protect the retail trade from undue pressure by large corporations for ever-increasing profits.[79] One view, as seen above, was to control the profits: put the manufacture and sale of alcoholic beverages in the hands of the government or a monopoly, and let the profits flow to the government.

New York's approach was to prohibit ties between manufacturers or wholesalers and retailers. The "tied house" was the "villain of the temperance movement" in the years before Prohibition,[80] and represented much of the evil that the temperance movement sought to eliminate.[81] The drafters' goal was to eliminate "the stranglehold which the brewers had on places of retail sale, and [to limit] the brewers' field of operation, thus cutting down their opportunities for excess profits."[82]

Another primary goal was to break up the alliance between the big liquor interests and politics. Under the new law, the licensing system was to be regulated not on the village and county level, as in earlier law, but by a State Liquor Authority (SLA).[83] The SLA was to be composed of five Commissioners appointed by the Governor.[84] Another provision aimed at cutting ties between liquor and politics was to give to the SLA the power to revoke licenses without having first to obtain a conviction in the courts, as under pre-Prohibition law in New York, which allowed the liquor interests' favorite politicians to protect offenders by leaning on magistrates not to produce convictions.[85] The law also sought to insulate the SLA from politics and the liquor industry by requiring a balance of political affiliations on the board.

As one of the law's drafters explained:

> Under the regulations,…the liquor dealer will have to conduct his business respectably, like any other business man. He will do so in order to keep his record clear with the State board, which alone has the power to license him or to revoke his permit. So long as he does that he will not live in fear of the exactions of petty local officialdom that in the old days sought to graft on him. If the State licensee has no violation against his record, he can expect to continue in business unmolested. He can be as independent as any other merchant in telling any blackmailing collector of tribute to go to blazes. There will be no excuse for liquor-political alliances like those of bygone times, with their consequent corruption and disgraces. The rules give the State reason to expect orderly conduct of the trade, and the trade has reason to expect in return the chance to operate without having to sink to the practices that brought disaster in the past.[86]

To restrain bootleggers and speakeasies, the question was how to make alcoholic beverages available to the public through legitimate channels at a reasonable price, while still raising revenues for the government, or in other words, how to compete successfully against the speakeasy, and thereby eliminate that institution.[87] Here again, there were different approaches suggested: either put sales in the direct or indirect control of the government, so that revenues derived from the difference between wholesale and retail prices, or have a private system, where the government's revenues came from excise taxes and license fees.

New York chose the latter, seeking to keep license fees low, especially for retail licenses to sell beer and wine, seen as a way of encouraging the consumption of drinks with lower alcohol content.[88] Although a higher license fee might bring in more revenue to the state, experience in states with "high license" systems demonstrated that high costs pressed a retailer into pushing for more sales in order to make up for the cost of the license; thus, the worst places were the ones best able to pay the high fees.[89]

The drafters sought to prevent the return of the saloon by restricting sales for on-premises consumption to hotels, restaurants, clubs, dining cars, and vessels. They were very uncomfortable with allowing service across a bar and banned it because it was seen as increasing per capita consumption; to the general public, the bar was also the sign of a saloon, and the term "bar room" was synonymous in the public mind with the word "saloon."[90] Both provisions were later abandoned, as the problem was not so much the saloon, as the lack of effective regulation, and enforcement of the law.[91]

Numerous provisions were intended to promote moderate consumption. Alcoholic beverages could be sold only at tables where food could be served, and only beer could be sold across bars.[92] No retail sales on credit were permitted.[93] Spirits had to be sold only in their original packages for off-premises consumption.[94] No wine or liquor could be served to a minor under the age of eighteen, an intoxicated person, or a habitual drunkard.[95] No signs advertising brands of liquors were allowed.[96]

The Chairman of the Liquor Board said of these measures:

> [T]here are the rules against selling to minors and against serving drink to a

> customer who has had enough. There were such rules in the old days, and they were as hard to enforce as any other liquor rules when the bartender had political friends at court to protect him. These, however, are new days. The seller who runs his place according to law under the system now contemplated will never need pull, while the seller who breaks the law will never have pull enough to escape the penalty of losing his privilege.[97]

If the people who crafted New York's Alcoholic Beverage Control Law in 1933-4 could visit a town or city in this state in 2010, they would be much gratified to see their system at work: a beer distributor's delivery truck with huge signs identifying the brand double-parked in front of a bar while the driver wheels in fresh supplies; a tavern displaying signs for multiple brands of beer; liquor stores displaying a huge variety of brand-name wines and liquors; and people sitting at outdoor cafe tables, sipping drinks and sharing mysterious foodstuffs like nachos and Buffalo wings. We think nothing of such everyday sights, but to a visitor from 1933, these would be signs of the defeat of bootlegging; the end of a system in which the tavern owners were deep in debt to absentee landlord breweries pushing product no matter what the social costs; the return of the craft of manufacturing high quality alcoholic products and of a respectable type of retail store; and a major cultural shift toward the civilized drinking customs they so admired on study trips to Europe. They would notice the buffer zone without retail liquor in the vicinity of schools and places of worship. They would also recognize the development of a trend for which they could not claim credit, but of which they strongly approved: the bar or tavern is simply not as important to entertainment and civic life as the saloon was at the turn of the twentieth century.[98]

Endnotes

1. *See, e.g.*, The New York State Revision Comm'n, Report on the Alcoholic Beverage Control Law and its Administration (2009), *available at* www.lawrevision.state.ny.us [hereinafter NYS Revision Comm'n Report].
2. N.Y. Alco. Bev. Cont. Law § 2 (McKinney 2000).
3. The Liquor Problem: A Summary of Investigations by the Comm. of Fifty 1893-1903, at 95 (1905).
4. *Id.* at 10.
5. Under the law adopted in 1857, anyone caught intoxicated in public was to be locked up until he dried out, then tried, and fined three to ten dollars and/or imprisoned ten days to six months. 1857 N.Y. Laws ch. 628, § 17. An 1896 law contained similar penalties, and deemed any person found intoxicated in a public place a disorderly person, who could be arrested without warrant while so intoxicated. 1896 N.Y. Laws ch. 112, § 40.
6. 1857 N.Y. Laws ch. 628, § 19.
7. 1855 N.Y. Laws ch. 231.
8. Mayor Fernando Wood instructed the police not to seize imported liquors, and warned them that "[a]n error in this regard may lay you liable to severe personal responsibility." *The Prohibitory Law. Mayor Wood's Proclamation Thereon,* N.Y. Times, June 26, 1855, at 2.
9. *See* Wynehamer v. People, 13 N.Y. 378 (1856).
10. The ban on Sunday sales may not have been exclusively based on respect for the traditional Christian sabbath. Because Saturdays were paydays for many workers, dry Sundays could offer some barrier to spending the week's pay on alcohol at the saloon. *See, e.g., Economic Aspects of the Liquor Problem*, Bulletin of the Dep't of Labor 547 (1898).
11. 1857 N.Y. Laws ch. 628, § 1.
12. 1870 N.Y. Laws ch. 175.
13. 1857 N.Y. Laws ch. 628, § 8.
14. 1869 N.Y. Laws ch. 856.
15. 1896 N.Y. Laws ch. 112. The law was named for Senator John Raines, the legislator who had sponsored the bill as a reform measure against prostitution.
16. 1896 N.Y Laws c. 112, § 31(i)(2).
17. *See* Mara L. Kiere, *The Committee of Fourteen and Saloon Reform in New York City, 1905-1920*, 26 Bus. & Econ. History 573, 575 (1997); John P. Peters, *Suppression of the "Raines Law Hotels,"* 32 Annals of the American Academy of Pol. & Soc. Sci. 86, 88 (1908); Michael A. Lerner, Dry Manhattan: Prohibition in New York City 25 (2007) [hereinafter Lerner].
18. Daniel Okrent, Last Call: The Rise and Fall of Prohibition 50 (2010) [hereinafter Okrent].
19. *Id.*
20. 1896 N.Y. Laws ch. 112, § 24(2).
21. 1896 N.Y. Laws ch. 112 §§ 3, 6.
22. Edmund Morris, The Rise of Theodore Roosevelt 516 (1979).
23. Edwin G. Burrows & Mike Wallace, Gotham, A History of New York City 1162 (1999).
24. Norman H. Clark, Deliver Us From Evil: An Interpretation of American Prohibition 55 (1976) [hereinafter Clark, Deliver Us From Evil].
25. *See* National Comm'n on Law Observance and Enforcement, Report on the Enforcement of the Prohibition Laws of the United States (1931) (also known as the Wickersham Commission) [hereinafter Wickersham Report].
26. By 1914, only about one hundred breweries controlled over 50% of the nation's production of beer, and a single holding company controlled over 90% of the production of liquor. Lerner, *supra* note 17, 22–23.
27. Clark, Deliver Us From Evil, *supra* note 24, at 55.
28. *Id.*
29. *See* Okrent, *supra* note 18, at 29. As a liquor administrator commented after the repeal of Prohibition, "[w]hen someone else sets a licensee up in business, buys his license, furnishes him with a house to do business in and puts in the fixtures and his stock who is Lord and Master there—society or the man who pays for all this?" Captain W.S. Alexander, Administrator of the Federal Alcoholic Admin., Address Before the National Alcoholic Beverage Control Ass'n, August 24, 1938, *in* Clark Byse, *Alcoholic Beverage Control before Repeal*, 7 L. & Contemp. Prob. 556 n.85 (1940) [hereinafter Byse].
30. *See id.* at 555–56, Wickersham Report, *supra* note 25, at 6.
31. Okrent, *supra* note 18, at 30.
32. *Id.*
33. Norman H. Clark, The Dry Years: Prohibition & Social Change in Washington 58 (rev. ed. 1988); Wickersham Report, *supra* note 25, at 6.

34. A liquor dealer at a convention in 1874 argued that "The open field for the creation of appetite is among the boys…and I make the suggestion, gentlemen, that nickels expended in treats to the boys now will return in dollars to your tills after the appetite has been formed." JOHN KOBLER, ARDENT SPIRITS: THE RISE AND FALL OF PROHIBITION 177 (1973) [hereinafter KOBLER].

35. Even if there was no formal business arrangement with houses of prostitution, increased receipts from the bar sufficed to compensate the owner for any extra space and furniture, while the women were provided a "hang-out." RAYMOND CALKINS, SUBSTITUTES FOR THE SALOON: AN INVESTIGATION MADE FOR THE COMM. OF FIFTY UNDER THE DIRECTION OF FRANCIS G. PEABODY, ELGIN R.L. GOULD AND WILLIAM M. SLOANE 11 (1901). Brewers in the Midwest were said to buy houses for use as houses of prostitution, supply them with beer, and provide the money for fines. ERNEST GORDON, WHEN THE BREWER HAD THE STRANGLEHOLD 82-83 (1930).

36. CLARK, DELIVER US FROM EVIL, *supra* note 24, at 57.

37. KOBLER, *supra* note 34, at 174–76. The beer industry recognized that the system of saloons it had nurtured was problematic. An anti-prohibition strategist hired by the chief national association of brewers catalogued the problems: "selling in prohibited hours, gambling, selling to intoxicated men, rear rooms, unclean places, invading residential districts, the country saloon, the social evil, selling to minors, keeping open at night, brewers financing ignorant foreigners who are not citizens, the American bar, brewery-controlled saloons, cabarets, Sunday selling, treating, free lunch, sales to speakeasies, bucket trade, signs, screens, character of the men, too many saloons." OKRENT, *supra* note 18, at 33.

38. *See, e.g.*, NYS LAW REVISION COMM'N REPORT, *supra* note 1, app. C.

39. CLARK, DELIVER US FROM EVIL, *supra* note 24, at 57.

40. Byse, *supra* note 29, at 547.

41. Mrs. John S. Sheppard, *Since Repeal: Progress and New Problems; Despite Big Gains, Says Mrs. Sheppard, the Bootlegger Issue and the Threat of Politics in Liquor Control Remain*, N.Y. TIMES, April 8, 1934, at XX1. Nevertheless, the same establishment could legally be allowed to be located in residential neighborhoods, in the midst of the homes of young children and church-goers. *Id.*

42. LERNER, *supra* note 17, at 23.

43. *Id.*

44. LERNER, *supra* note 17, at 24.

45. *Id.*

46. *Id.*

47. *Id.*

48. Mrs. John S. Sheppard, *After Repeal: Great Problems*, N. Y. TIMES, Oct. 22, 1933, at SM1 [hereinafter Sheppard, *After Repeal*].

49. WICKERSHAM REPORT, *supra* note 25, at 6.

50. OKRENT, *supra* note 18, at 64.

51. *Id.* at 64–65.

52. *Id.* at 66.

53. *Id.*

54. EDWARD BEHR, PROHIBITION: THIRTEEN YEARS THAT CHANGED AMERICA 80 (1996) [hereinafter BEHR].

55. Carl H. Miller, *We Want Beer: Prohibition and The Will To Imbibe—Part 2*, BEER HISTORY, *available at* http://www.beerhistory.com/library/holdings/prohibition_2.shtml (last visited Oct. 9, 2010).

56. BEHR, *supra* note 54, at 87 (emphasis in the original).

57. *Dot Map of Capital with Speakeasies; Crusaders Assert Liquor is Sold within the Shadow of the Capitol*, N.Y. TIMES, October 12, 1930, at N1, reproduced in this issue at page 22. The Crusaders claimed to have counted 32,000 speakeasies in New York. John F. Dryden and Rufus S. Lusk, Letter to the Editor, TIME, Aug. 24, 1931, *available at* http://www.time.com/time/magazine/article/0,9171,752963,00.html. The Washington, D.C. branch met with better success, producing a map reflecting raids made by Washington police and prohibition agents between September, 1929, and August, 1930. *Id.* Responding to rumors that Chicago, site of both political parties' conventions in 1932, was going to be dry, the Crusaders considered preparing a map showing the location of speakeasies within a mile of the convention site. Republicans had alleged that the talk of clamping down on speakeasies and bootleggers was meant to make President Hoover look bad and to keep people away from their convention, while Democrats said the reports were intended to keep attendance down at *their* convention. An "unofficial announcement" denied the rumors, and said that instead of placing 165 additional prohibition agents in Chicago during the conventions, 145 agents would be taken out of the city and sent to Detroit or Miami to search for rum runners. *It's All Wrong about Chicago Going Dry; Convention Visitors will Find City Open as Ever*, N.Y. TIMES, May 17, 1932, at 2.

58. LERNER, *supra* note 17, at 156.

59. *Id.* at 153.

60. OKRENT, *supra* note 18, at 208.

61. LERNER, *supra* note 17, at 153.

62. *See* RANDOLPH W. CHILDS, MAKING REPEAL WORK 10 (1947). "A [speakeasy] may be a baronial-appearing home off Fifth Avenue or a dive near the waterfront. One is more expensive than the other and does not poison its patrons." Russell Owen, *From Saloon to Speakeasy—And Now? The Change in the Social Picture Makes us Wonder about our Future Drinking Places*, N.Y. TIMES, Jan. 22, 1933, at SM6.

63. K. AUSTIN KERR, ORGANIZED FOR PROHIBITION: A NEW HISTORY OF THE ANTI-SALOON LEAGUE 25–28 (1985). Many people were becoming seriously debilitated or dying from the foul potions that many clandestine operations were creating out of everything from antifreeze and embalming fluid, to nitrous ether and rubbing alcohol. ERIC BURNS, A SOCIAL HISTORY OF ALCOHOL 217–25 (2004) [hereinafter BURNS]; BEHR, *supra* note 54, at 87. Even in the month before Prohibition went into effect, those who had failed to stockpile a supply of liquor for the holidays turned to various noxious concoctions, resulting in the deaths of more than seventy people in the Connecticut Valley during the Christmas holidays of 1919. Just one of the many varieties of bad booze, wood alcohol, claimed the lives of thirty-four people in New York City in a single four-day period in 1928. BURNS at 224.

64. *Id.* at 217.

65. U.S. Const. amend. XXI.

66. U.S. Const. amend. XXI, § 2.

67. *See* Granholm v. Heald, 544 U.S. 460, 466 (2005) (citing North Dakota v. United States, 495 U.S. 423, 432 (1990)). Thirty-two states issue licenses to private parties within the three tier system. Eighteen "control states" directly control retail and/or wholesale distribution of alcoholic beverages. State Alcohol Control Boards, The Marin Institute, http://www.marininstitute.org/alcohol_policy/state_alcohol_control.htm (last visited Oct. 9, 2010).

68. *See Liquor Topic Rules Session at Albany*, N.Y. TIMES, Jan. 15, 1933, at 2.

69. *See generally* RAYMOND B. FOSDICK & ALBERT L. SCOTT, TOWARD LIQUOR CONTROL; WITH A FOREWORD BY JOHN D. ROCKEFELLER, JR. (1933).

70. *Id.* at 18-19.

71. *Id.*

72. Mrs. John S. Sheppard, *Suggested Plan for Liquor Control for New York State*, N.Y. TIMES, Sept. 27, 1932, at 15. A chart of this plan is reproduced in this issue at page 23.

73. *See, e.g.*, William Morris Houghton, *After Repeal of Prohibition—What?*, THE LITERARY DIGEST, August 12, 1933, at 3.

74. *See* PLAN FOR DISTRIBUTION AND CONTROL OF INTOXICATING LIQUORS IN THE UNITED STATES SUGGESTED BY PIERRE S. DU PONT, SEPTEMBER 1930. Du Pont was a prominent member of AAPA.

75. The AAPA plan would also charge the liquor commission with the authority to issue individuals licenses to purchase alcoholic beverages under three categories: for adults over the age of twenty-one, for young adults age eighteen to twenty-one, and for adults wishing to stock a liquor cabinet or wine cellar for consumption by members of the household and their guests, all liquor to be stored in a special compartment or room with secure lock. Each individual licensee would be required to register with a particular sales outlet, which would limit that person's purchases according to a monthly quota: forty-five ounces of alcohol (equivalent to four ounces of whiskey, three-quarters pint of wine, or two and one-third pints of beer per day), but only thirty-two ounces for individuals between the ages of eighteen and twenty-one.

76. 1934 N.Y. Laws ch. 478.

77. Mrs. John S. Sheppard, principal author of the WONPR plan, was appointed by the governor to the commission that developed the 1933 beer law, and then to the first State Liquor Authority. After repeal, she became Chair of the State Liquor Authority.

78. L.H. Robbins, *Mulrooney States Basic Aims of the Liquor-Control Plan*, N.Y. TIMES, Nov. 19, 1933, at XX3.

79. Sheppard, *After Repeal*, *supra* note 48.

80. Susan Cagann & Rick Van Duzer, *75 Years After Prohibition*, 18 A.B.A. BUS. LAW TODAY 45 (2009).

81. Evan T. Lawson, *The Future of the Three-Tiered System as a Control of Marketing Alcoholic Beverages*, *in* SOCIAL AND ECONOMIC CONTROL OF ALCOHOL: THE 21ST AMENDMENT IN THE 21ST CENTURY 32 (Carole L. Jurkiewicz & Murphy J. Parker eds., 2008).

82. *Id.*

83. 1934 N.Y. Laws ch. 478.

84. *Id.*

85. *Id.*

86. Robbins, *supra* note 78, at XX3.

87. Sheppard, *After Repeal*, *supra* note 48.

88. *Id.*

89. *Id.*

90. *Id.*

91. "[I]f the liquor business in our country is to be well run, it must be run by respectable people, and if respectable people are to engage in it, it must be treated as a respectable business. No business will be deemed respectable if it is hedged about by petty and humiliating restrictions which are not in accord with the spirit of the community and which, therefore, open the way to graft and corruption." *Id.*

92. Robbins, *supra* note 78, at XX3.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. See sidebar to this article.

Barbara S. Hancock is Counsel to the New York State Law Revision Commission.

Promoting Temperance

Medicine

By the mid-eighteenth century, the medical profession had issued strong warnings about the dangers of intemperate consumption of alcohol. One prominent temperance advocate was Dr. Benjamin Rush, surgeon general of the Continental army during the American Revolution and a signer of the Declaration of Independence.[1] His book, AN INQUIRY INTO THE EFFECT OF SPIRITUOUS LIQUOURS ON THE HUMAN BODY AND MIND (1785), challenged the then widely held belief that alcohol was a healthy stimulant.[2] He described the descent of the addict in vivid terms: "In folly it causes him to resemble a calf; in stupidity, an ass; in roaring, a mad bull; in quarreling and fighting, a dog; in cruelty, a tiger; in fetor, a skunk; in filthiness, a hog; and in obscenity, a he-goat."[3] The symptoms of the disease included "certain immoderate actions" and other "extravagant acts."[4] Nineteenth century medical journals recorded cases of drunkards bursting into flames after getting to close to a candle, or even exploding inexplicably.[5] Here in New York, Dr. Eliphalet Nott, President of Union College in Schenectady, was a noted expert on this form of spontaneous combustion.[6]

The Arts

Ten Nights in a Bar Room, a famous temperance[7] novel from 1857[8] describes the toll of the saloon on families and communities. Although the prose is overheated[9] and the plot highly melodramatic,[10] the description of the perils of overconsumption of alcohol and the various types of damage to self, family and society is true enough. The book traces the downfall of a once prosperous and respectable saloonkeeper, his family, and the citizens of "Cedarville," all due to alcohol and the blandishments of a shadowy character who is suspected of being a traveling card sharp. Adapted to become a solo performance piece, the book became a staple on the lecture circuit for at least 50 years, and one version, titled *Hatchetation*, was acted by none other than Carrie Nation.[11] It also featured prominently in the early childhood memories of the Anti-Saloon League's formidable campaigner, Wayne Wheeler, when a village drunk lurched into the family home and acted out the story before mother and children, as they "gasped in alarm… My dreams were long colored by that scene."[12]

Social Science

In a 1901 study, the Committee of Fifty decried the unsanitary, overcrowded, airless conditions "under which thousands of our city toilers live make the 'home' little more than the space necessary for eating and sleeping, to say nothing of comfort, and still less of social enjoyments."[13] In addition to urging that residential housing be vastly improved, the Committee suggested many substitutes for the social and entertainment role that the saloons provided for the working classes. These substitutes included (among others):

libraries, public parks, free public lectures, YMCAs, lunch rooms, coffee houses, public ice-water fountains, singing groups, dancing classes, free concerts, art galleries, history museums, night schools, billiard rooms, and theatres.[14]

A generation later, a commentator musing about what drinking places would look like after the repeal of Prohibition, pointed out that already there had been significant changes:

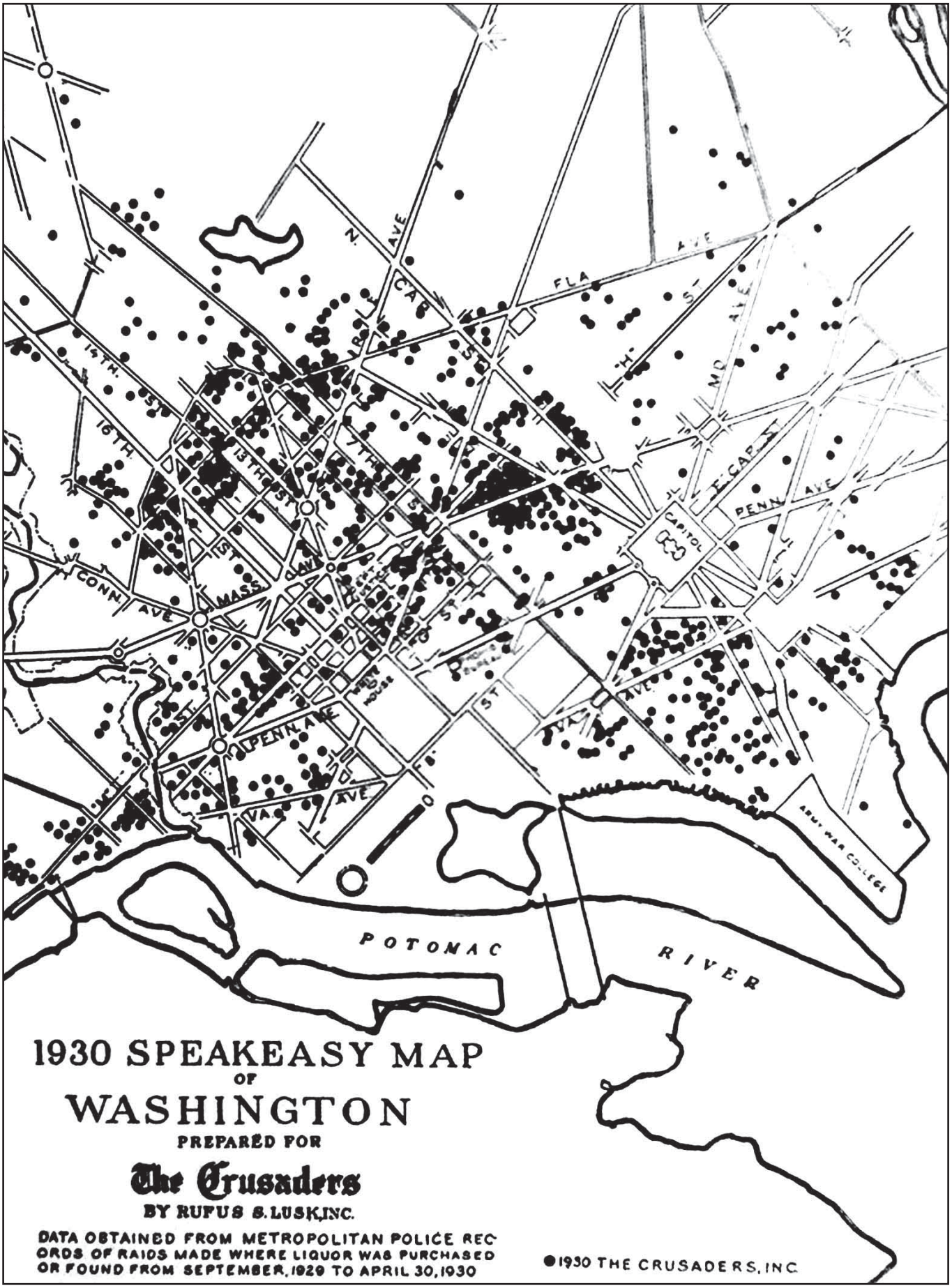
> Whatever it is that takes the place of the legalized drinking places of old, it is certain that it will have competition that the saloon did not have. Life is not so monotonous as it was—at least there are more kinds of monotony. Since prohibition began, in 1919, attendance at motion picture theatres has about tripled… In 1919 radio broadcasting did not exist—now there are perhaps 16,000,000 sets, bringing into…the parlor practically everything in the civilized world…. In 1919 there were 6,771,000 registered passenger automobiles in the United States; in 1932 there were 22,347,000. All but 2,000,000 of this increase in cars can be credited to the urban population, who were the main frequenters of saloons… On Summer Sundays all who can afford the cheapest second-hand car take to the road, and the speed drunkard does things that make the slow old process of drinking one's self to death seem tedious. These changes make it certain that no drinking place can ever occupy the place that the old-fashioned saloon did. There is too much competition.[15]

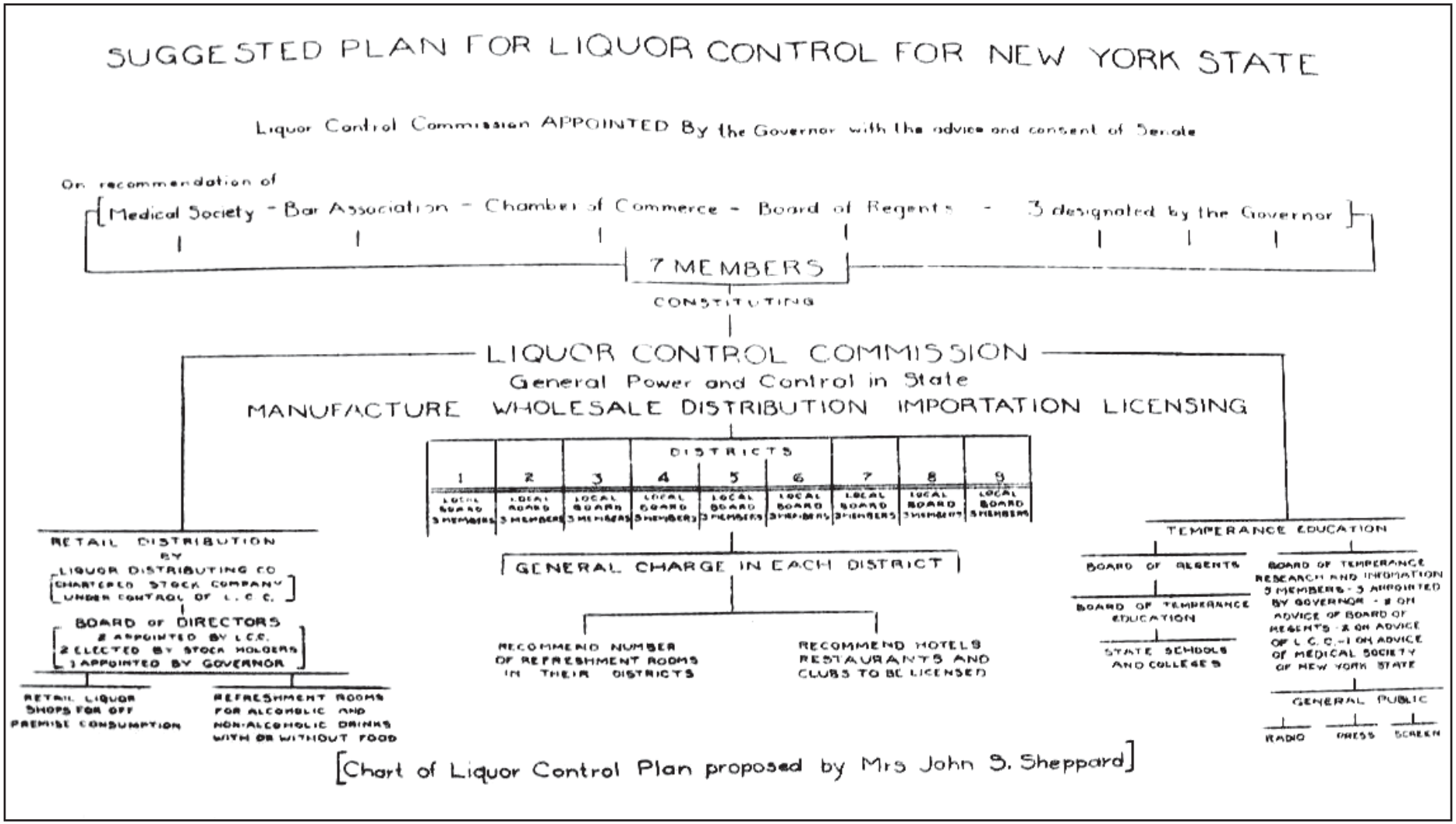
Pledges of Personal Abstinence

After crashing a temperance speech by a famous temperance preacher in the spring of 1840, two drunks returned to their drinking buddies at a tavern in Baltimore to form their own "temperance" society. At the first formal meeting soon thereafter, during another bout of heavy drinking, one of the six members offered to draw up a temperance pledge, as soon as he was sober enough to do so, if the others would agree to sign it. The next evening, the drafter went from house to house to collect signatures (one of the six was still in bed, nursing a hangover from the night before), and soon, the group met and called itself the Washington Temperance Society, or Washingtonians. The group advocated voluntary teetotaling, and, in contrast to much that was going on at the time, did not consider temperance to be a religious issue. The Washingtonians organized chapters throughout the United States, and gathered a substantial following of men who had taken the pledge, before disbanding about 10 years later.[16]

Endnotes

1. Edward Behr, Prohibition: Thirteen Years That Changed America 14 (1996) [hereinafter Behr].
2. *Id.*
3. *Quoted in id.* at 15.
4. These included: "singing, hallooing, roaring, imitating the noises of brute animals, jumping, tearing off clothes, dancing naked, breaking glasses and china." *Id.* at 16.
5. *Id.* at 22.
6. "These causes of death of drunkards by internal fires, kindled often spontaneously in the fumes of alcohol, that escape through the pores of the skin, have become so numerous and so incontrovertible that I presume no person of information will now be found to call the reality of their existence into question." Dr. Eliphalet Nott, *quoted in id.* at 22-23.
7. The anti-liquor crusaders of the mid-nineteenth century deliberately chose to use the word "temperance," rather than "abstinence" to refer to their goal, fearing that the latter word sounded too final, and might scare off potential supporters. Eric Burns, the Spirits of America: A Social History of Alcohol 68 (2004). Temperance "suggested a course that any person could follow, one that was worthy of approbation by all men and women of reasonable nature. The leaders of the alcohol reform organizations, in other words,…had decided to spin the American public." *Id.* Despite their choice of the soothing-sounding word, "temperance," the advocates loathed moderate drinkers, because they made the propaganda look bad. Far better to focus the campaign on a disgusting drunk in a gutter than a gentleman sipping a glass of sherry at his club. *Id.* at 68-9.
8. T. S. Arthur, Ten Nights in a Bar-Room, And What I Saw There (1857).
9. "Ah! upon what dangerous ground was he treading. How many pitfalls awaited his feet—how near they were to the brink of a fearful precipice, down which to fall was certain destruction. How beautiful had been his life-promise! How fair the opening day of his existence! Alas! the clouds were gathering already, and the low rumble of the distant thunder presaged the coming of a fearful tempest. Was there none to warn him of the danger? Alas! all might now come too late, for so few who enter the path in which his steps were treading will hearken to friendly counsel, or heed the solemn warning." *Id.* at 33-4.
10. Typical is the tale of the town's most promising young man, who takes up gambling in secret, goes into debt, runs his father's business into the ground, and drinks to excess, causing his mother to have a nervous breakdown. In one scene, when the card sharp calls him a cheat, the young man attacks the gambler, who draws a knife and stabs the young man to death. His mother, suspecting trouble, bursts into the scene, and falls dead from grief over the body of her son.
11. John Kobler, Ardent Spirits: the Rise and Fall of Prohibition, 153 (1973) [hereinafter Kobler].
12. Behr, supra n. 1, at 52 (1996).
13. Raymond Calkins, Substitutes for the Saloon: an Investigation made for the Committee of Fifty under the Direction of Francis G. Peabody, Elgin R.L. Gould and William M. Sloane 11 (1901).
14. *Id.* at 71-301.
15. Russell Owen, *From Saloon to Speakeasy—And Now? The Change in the Social Picture Makes us Wonder about our Future Drinking Places,* New York Times, January 22, 1933, at SM6.
16. Kobler, *supra* no. 11, at 62-69.


1930 SPEAKEASY MAP
OF
WASHINGTON
PREPARED FOR
The Crusaders
BY RUFUS S. LUSK, INC.
DATA OBTAINED FROM METROPOLITAN POLICE RECORDS OF RAIDS MADE WHERE LIQUOR WAS PURCHASED OR FOUND FROM SEPTEMBER, 1929 TO APRIL 30, 1930
©1930 THE CRUSADERS, INC
POTOMAC
RIVER
N. CAP. ST.
FLA. AVE.
MD. AVE.
E. CAP. ST.
PENN. AVE.
CAPITOL
14TH. ST.
16TH. ST.
13TH. ST.
7TH. ST.
CONN. AVE.
MASS. AVE.
WHITE HOUSE
PENN. AVE.
VA. AVE.
ARMY WAR COLLEGE



[Chart of Liquor Control Plan proposed by Mrs John S. Sheppard]

The Interplay Between Federal and State Law in the Regulation of Alcoholic Beverages: A Primer on Modern Tied-House Law

By Nicholas Bergman

I. Introduction:

Every moment in the life of an alcoholic beverage is heavily regulated. Since the repeal of Prohibition in 1933[1] the production, wholesale distribution, retailing, marketing, and consumption of alcohol have been the subject of federal and, on an even larger scale, state legislation. As Ruth Bader Ginsburg aptly pointed out in 1992:

> [T]he alcohol industry is unique. Both its historic association with corruption and the general belief that cheap and plentiful alcohol is not an unmitigated social good (as opposed, say, to cheap and plentiful home heating oil or shoes) suggest that the alcohol industry requires special oversight and regulation.[2]

A significant portion of industry regulation focuses upon the separation of the "three tiers" of the business of alcoholic beverages: production, wholesale and retail. This is said to arise from the abundance of anti-competitive practices occurring before Prohibition. The term "Tied-House evil" was coined because the retail "house" was frequently "tied" to the manufacturers and wholesalers and therefore beholden to them, leaving the consumer with little choice of available product and fostering price and marketing practices that led to over-consumption.

When it comes to the marketing of alcoholic beverage products the regulatory oversight is as restrictive as, and arguably more complex than, any other area of alcoholic beverage law because it is in marketing that the manufacturer and wholesaler is effectively interfacing with each respective industry tier and the consumer. Alcoholic beverage law prohibits the manufacturer and wholesaler from influencing the retailer by way of a Tied-House, and it is here that I will examine the interplay between federal and state regulation, focusing on New York State.

II. Background

The adoption of the Twenty-First Amendment effectively repealed Prohibition and was the threshold event that gave states virtually complete control of the regulation of alcoholic beverages within their boundaries.[3] The power granted to the states under the Twenty-First Amendment is not absolute but it is extremely broad, and, in most instances, allows states to erect barriers to entry (such as licensing requirements) and to impose certain restrictions on inter-state commerce to maintain market order.[4] States also enacted laws to ensure there was sufficient competition in the marketplace to counter the problem of large companies monopolizing the business (which was attributed to vertical integration within the industry). Simultaneously, due to a host of social concerns, additional laws were enacted to effectuate public policy "promoting temperance and obedience to law,"[5] by limiting availability of licenses, hours of sale, price controls[6] and other means of discouraging over-consumption. It is therefore by way of a mandated three-tier system, whereby manufacturer, wholesaler and retailer are required to be separate,[7] that most states not only regulate and prevent Tied-House arrangements from occurring, but also tax alcohol sales today.

III. The Current Framework for Tied-House Regulation

A. The Federal System

On the federal level, for purposes of Tied-House, the Federal Alcohol Administration Act ("FAAA")[8] and its corresponding regulations[9] delineate between "Industry Members" (manufacturers, importers and wholesalers) and "retailers." Tied-House arrangements whereby an Industry Member has less than 100% ownership and exercises a financial or controlling interest, direct or indirect, over retailer purchasing decisions are prohibited. Federally, a two-pronged test is employed to determine whether a particular practice, occurring in or affecting interstate commerce, violates the law: (1) the inducement, or thing of value, is given by the Industry Member, either directly or indirectly, to the retailer and (2) as a result, a competitor's product is excluded from the retail establishment.[10] It is the finding of "exclusion" that has been the subject of several prominent cases in the past few decades,[11] none more influential than *Fedway Associates, Inc. v. Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms*[12] ("*Fedway*"), discussed below.

i. Inducements

The federal regulations identify numerous unlawful "inducements" which form the basis of a violation, including when an Industry Member: (a) acquires or holds an interest, whether direct or indirect, in a retail license,

with the exception of complete ownership;[13] (b) acquires an interest, whether direct or indirect, in real or personal property owned, occupied or used by the retailer in the conduct of business, again with the same exception of complete ownership of the retailer; (c) furnishes "things of value" to the retailer, such as gifts and services, unless they are specifically authorized by the regulations; (d) pays for advertising, display or distribution services; (e) guarantees loans, (f) extends credit for time of payment beyond thirty (30) days from the date of delivery, and (g) requires minimum quota or "tie-in" sales (i.e., requiring one product be bought to get another). For purposes of this article, I focus on item "c" above, furnishing "things of value."

Under the federal regulations, the following items are exceptions to the rule on unlawful inducements in that an Industry Member may furnish, lend, rent or sell such items to a retailer, for purposes of advertising that Industry Member's brand:

> (a) product displays; (b) point of sale advertising materials and consumer advertising "specialties;" (c) equipment and supplies (with certain limitations on what items may be given and what must be sold); (d) product samples; (e) newspaper cuts; (f) combination packaging; (g) educational seminars (including reasonable hospitality like meals and beverages, but excluding lodging and transportation); (h) consumer tasting at retail establishments; (i) consumer promotions, including coupons, contest prizes, premium offers, refunds, etc.; (j) advertising services (i.e., advertising the names and addresses of two or more unaffiliated retailers selling the supplier's products); (k) stocking, rotation, and pricing service of retail store shelves; (l) participation in retailer association activities; (m) sale of other merchandise; and, (n) outside signs.[14]

Each point of sale and consumer novelty item must bear conspicuous brand advertising in order to be given to the retailer. These items comprise the basic set of tools that Industry Members have to work with in marketing their products to retailers.

ii. Exclusion

The test for exclusion is two-fold: (i) "when a practice by an [I]ndustry [M]ember, whether direct, indirect, or through an affiliate," puts "(or has the potential to put) retailer independence at risk by means of a tie or link between the [I]ndustry [M]ember and the retailer or by any other means of control over the retailer," and (ii) as a result of the practice, the retailer buys less of a competitor's product than it would otherwise.[15]

In 1992, in the above-referenced *Fedway* case, the D.C. Circuit Court of Appeals ruled that exclusion required more than just a decrease in competitor sales.[16] In the case, a New Jersey wholesaler ran a three-month promotion to all New Jersey retailers that included rewards of small appliances and consumer electronics for quantity purchases. The Bureau of Alcohol, Tobacco and Firearms ("ATF"), the predecessor agency to today's Alcohol & Tobacco, Tax & Trade Bureau ("TTB"),[17] took action against the wholesaler's permits to operate on the basis that the promotion excluded competitors' products, which was evident because the competitors' sales had dropped during the relevant time period. In her opinion, Judge Bader Ginsburg reasoned that Congress intended there to be a threshold level of competition to preserve market stability and that a finding of exclusion, without having some more affirmative causal connection or link, would be detrimental to the industry:

> [D]efinition of the "exclusion" criterion must also recognize adequately—as the agency's current definition does not—the value of pro-competitive wholesale promotions. This value derives not only from the traditional benefits of competition in terms of lower prices and improved quality, but also…from the fact that a competitive alcohol market helps deter the formation of a corrupt black market.[18]

Ultimately, the court found that the wholesaler's promotion was a pro-competitive and an acceptable form of discounting, and that it was no different than offering a quantity discount of like items.

In response to *Fedway*, ATF revised its regulations in 1995 to include additional "safe harbor" examples of items of value which may be given, loaned, leased or sold to retailers.[19] The regulations also now provide examples of when retailer independence is at risk and criteria for measuring retailer independence.[20] Bright line examples of activities that are deemed to put retailer independence at risk are:

> (a) "resetting stock on a retailer's premises (other than stock offered for sale by the [I]ndustry [M]ember);" (b) "purchasing or renting display, shelf, storage or warehouse space (i.e., slotting allowance);" (c) ownership "of less than 100 percent interest in a retailer, where such ownership is used to influence the purchases of the retailer;" and, (d) "requiring a retailer to purchase one alcoholic beverage product in order to be allowed to purchase another at the same time" ("tie-in").[21]

Criteria for determining retailer independence are: (a) practices that:

> restrict[] or hamper[] the retailer's free economic choice to decide which products to purchase or the quantity in which to purchase them…; (b) the [I]ndustry [M]ember obligates the retailer to participate in the promotion to obtain the [I]ndustry [M]ember's products; (c) the retailer has a continuing obligation to purchase or otherwise promote the [I]ndustry [M]ember's product; (d) the retailer has a commitment to not terminate its relationship with the [I]ndustry [M]ember with respect to purchase of the [I]ndustry [M]ember's products; (e) the practice involves the [I]ndustry [M]ember in the day-to-day operations of the retailer…[e.g., which brands to purchase, pricing, or manner of displaying products]; [and], (f) the practice is discriminatory in that it is not offered to all retailers in the local market on the same terms without business reasons present to justify the difference in treatment.[22]

B. The New York State system:

New York State's ABC Law ("ABCL") enacted in 1934, was designed to regulate beverage alcohol within state lines.[23] With limited exceptions,[24] and similar to the federal Tied-House principles, the ABCL prohibits manufacturers of alcoholic beverages from being interested, financially or by means of control, either directly or indirectly, in a retailer. With respect to these Tied-House prohibitions, the ABCL and corresponding regulations are currently modeled after the TTB, with one significant difference: the mere giving of the inducement by the Industry Member to a retailer is, in New York, deemed a per se violation.[25] There is no need to establish the federal standard of "exclusion." The additional strictness that Judge Ginsburg feared would lead to anti-competitive or black market activity is dealt with by stepped up enforcement and a tightly monitored system of licensing by the state.[26] Under ABCL 101(1)(c),

> [I]t shall be unlawful for a manufacturer or wholesaler licensed under this chapter to…[m]ake any gift or render any service of any kind whatsoever, directly or indirectly, to any person licensed under this chapter which in the judgment of the liquor authority may tend to influence such licensee to purchase the product of such manufacturer or wholesaler.[27]

The phrase "may tend to influence" embodied in the statute gives the state very broad powers of enforcement based on discretionary interpretation. The State Liquor Authority ("SLA") is the administrative agency charged with enforcing the ABCL.[28] The scope of its authority allows the agency to bring an action against a licensed manufacturer or wholesaler who furnishes the unlawful inducement, and the licensed retailer who accepts it.[29] By contrast, TTB's scope of authority does not include bringing actions against retailers because it does not issue permits to that tier of the industry.

Like their federal counterparts, the New York regulations contain a list of "safe harbors," which includes gifts and services that may be given to retailers without risk of violation.[30] The SLA revised its regulations in 1981, expanding them to include most of the same exceptions in the form of authorized gifts and services that appear on the federal list. At that time the SLA published a Bulletin stating, "these amendments are intended both to conform with recently revised federal regulations and to reflect modern business conditions in the industry."[31] Many states have acted similarly by adopting the list of federal exceptions or creating their own. In New Jersey, for example, most things of value are permissible as long as they are offered and provided in a non-discriminatory manner and adequate records are maintained.[32] While much of the federal Tied-House guidelines are followed under the New York regulatory scheme, there are some differences worthy of note.[33]

IV. Distinctions between the Federal and New York State Regulations on Things of Value

Generally, New York State, and most other states as well, have adopted regulations that are stricter than those imposed by the federal government. The states have the authority to go beyond the federal standard, and the federal regulations acknowledge this: "Nothing…shall operate to exempt any person from the requirements of any State law or regulation."[34]

One example of differences between the federal and New York state regulations involving items of value is product displays, which are commonly defined as "wine racks, bins, barrels, casks, shelving, or similar items the primary function of which is to hold and display consumer products."[35] In 1981, the initial total dollar amount of a display piece that could be given to a retailer in New York State was set by the state at $100 per brand, per retail establishment at any one time, to be adjusted for inflation.[36] The accepted number today is approximately $250, which is $50 less than the $300 authorized under the federal regulations.[37]

For retailer ad specialties, which are relatively nominal advertising items used in a retailer's business (e.g., trays, coasters, mats, menu cards, meal checks, paper napkins, foam scrapers, thermometers, clocks and calendars), there is no federal dollar limitation. New York State, however, imposed a $50 per brand, per retailer annual limitation in 1981, and like product displays, is supposed to be adjusted for inflation.[38] Today the number is approximately $125.

A further distinction exists under New York State law, in that consumer advertising specialties (i.e., novelty items used to advertise brands to consumers) are primarily designed for use at "on-premise" retail establishments like bars and restaurants. However, Industry Members may only give recipe books, matchbooks and paper bags to retail "off-premise" or package stores.[39] The federal regulations do not distinguish between on- and off-premise retailers with respect to these items.

In New York State, the regulations prohibit an Industry Member from giving retailers outside signs (except for malt beverages[40]), and impose a size limitation of no more than 1,200 square inches on inside signage.[41] Outside signage is allowed under the federal regulations, subject to a $400 dollar limitation, and there is no size restriction on signage generally.[42]

Another example is product merchandising, which involves an Industry Member stocking, rotating and resetting its products on the retailer's premises. The federal law permits this activity for any alcoholic beverage—beer, wine or distilled spirits—provided the Industry Member does not touch a competitor's product when doing so.[43] However, in New York State, merchandising is only authorized for malt beverages.[44]

The federal regulations define glassware as equipment, which the industry may not give to the retailer, and must be sold to the retailer at no less than the Industry Member's cost.[45] However, in New York State, as long as glassware is brand-logoed, it may be given to retailers as advertising specialties subject to the current dollar limitation.[46] This is a rare point when the state law is more lenient than the federal law. The reason for this discrepancy is likely due to industry members requesting the agency allow glassware be given without deeming it an unlawful inducement.

Conclusion

Distinctions aside, there are many ways in which the federal and state systems work together. For example, both are designed to prevent discriminatory treatment of retailers by limiting Industry Member conduct. Yet, because of the power over alcoholic beverage regulation given to each state by the Twenty-First Amendment, the state governments have a very effective and autonomous tool for regulating the industry. In New York State, the SLA can find a violation and move against a licensee solely on the basis of an improper inducement, without having to show exclusion, which is a huge difference between state law and federal law. Whether this broad power runs contrary to Congress' intention for the states is not easily addressed by federal law in the face of the Twenty-First Amendment. As a result, the federal government investigates and proceeds against far fewer Industry Members because the burden of proof is so much higher. Conversely, the federal government is left essentially powerless to overturn cases that a state prosecutes even if the violation is minor in the light of federal regulations.

While the lion's share of power over the regulation of alcoholic beverages is in the hands of state governments, it appears that all fifty states were to some degree guided by the groundwork set by the federal government after Prohibition was repealed and the FAAA was enacted. Nevertheless, both systems have their own limitations in that they cannot control every social "good" and "evil" for which they were designed to foster or prevent. While there is a constant dynamic in our society surrounding the lawful sale of alcoholic beverages, these bodies of law have evolved slowly and are still taking shape.[47] At the end of the day, what's good for the industry and the public, as it relates to the marketing of alcoholic beverages, remains a matter of debate.

Endnotes

1. U.S. CONST. amend. XXI.
2. Fedway Assocs., Inc. v. U.S. Treasury, Bureau of Alcohol, Tobacco and Firearms, 976 F.2d 1416, 1423 (D.C. Cir. 1992).
3. U.S. CONST. amend. XXI, § 2 (stating: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.").
4. It is worthwhile noting the term "alcoholic beverages" appears not once but twice in the U.S. Constitution: The first time it is used is in the Eighteenth Amendment, which enacted Prohibition in 1918. The second time is in the Twenty-First Amendment, which repealed Prohibition in 1933. Nowhere else in the Constitution (unless you consider firearms to be a commodity) is there mention of steel, wheat, milk, oil, coffee, gold, silver, or other similar commodities which are arguably far more important in our market economy than alcoholic beverages. None have the same complicated history and, frankly, tortured relationship with societal norms as alcoholic beverages do.
5. *See, e.g.*, N.Y. ALCO. BEV. CONT. LAW § 2 (McKinney 2010).
6. New York State, along with a handful of others, continue to require manufacturers and wholesalers to post monthly prices, to maintain an orderly market. See N.Y ALCO. BEV. CONT. LAW (Section Sign)101-b. *But cf.* Costco Wholesale Corp. v. Hoen, 522 F.3d 874 (9th Cir. 2008) and TFWS, Inc. v. Franchot, 572 F.3d 186 (4th Cir. 2009) where monthly price posting requirements in Washington State and Maryland were challenged as an undue restraint on trade and subsequently overturned in those states.
7. Eighteen states, including Pennsylvania, Ohio and New Hampshire, chose to establish state-run monopolies for the distribution and/or retail sale of wine and/or liquor within their borders, in lieu of establishing a 3-tier system. *See The Control States*, NATIONAL ALCOHOLIC BEVERAGE CONTROL ASSOCIATION, http://www.nabca.org/States/States.aspx# (last visited Oct. 4, 2010). These states are known as "control" states, as opposed to the "private" or "open" states, like New York, New Jersey and Connecticut, where the distribution and sale of alcohol is privatized.
8. Act of August 29, 1935, c.814 (codified as amended in scattered sections of 27 U.S.C. § 205(b) (2006)).
9. 27 C.F.R. §§ 6.1–6.153 (2010).
10. 27 U.S.C. § 205(b).
11. *See* Foremost Sales Promotions, Inc. v. Dir., Bureau of Alcohol, Tobacco and Firearms, 860 F.2d 229 (7th Cir. 1988) (ruling that

paying for advertising in a retailer publication that also advertised special discounts of the manufacturer was not deemed sufficient to find exclusion); National Distrib. Co., Inc. v. U.S. Treasury Dep't, Bureau of Alcohol, Tobacco and Firearms, 626 F.2d 997(D.C. Cir. 1980) (holding that pricing products below wholesale cost to retailers does not constitute, in and of itself, exclusion).

12. *See* Fedway Assocs., Inc. v. U.S. Treasury, Bureau of Alcohol, Tobacco and Firearms, 976 F.2d 1416, 1416 (D.C. Cir. 1992).
13. The federal system allows 100% vertical integration on the theory that one cannot improperly induce oneself.
14. 27 C.F.R. §§ 6.81–6.102.
15. 27 C.F.R. § 6.151(a).
16. *Fedway Assocs., Inc.*, 976 F.2d at 1418–20.
17. In 2002, with the creation of the Department of Homeland Security ("DHS"), ATF was removed from the Department of the Treasury ("DOT") to DHS and also took on "Explosives"; it is now known as the Bureau of Alcohol, Tobacco, Firearms & Explosives and has virtually no more involvement with the regulation of alcoholic beverages unless criminal activity is suspected. In ATF's place, the Alcohol & Tobacco, Tax & Trade Bureau ("TTB") was created under DOT, to continue to enforce the myriad of regulations involving permits, production and quality control, taxation and trade practice regulation of alcoholic beverages.
18. *Fedway Assocs., Inc*., 976 F.2d at 1423.
19. Unfair Trade Practices Under the Federal Alcohol Administration Act, 60 Fed. Reg. 20,402-02, 20,421–422 (April 26, 1995).
20. 27 C.F.R. §§ 6.151–6.153.
21. 27 C.F.R. § 6.152.
22. 27 C.F.R. § 6.153.
23. 1934 N.Y. Laws c.478.
24. As a privilege under their license, New York State breweries, wineries and distilleries may also obtain retail licenses to sell their products for on-premise or off-premise (i.e., take away) consumption. In addition, New York State wineries may establish up to five (5) "satellite" stores for off-premise sales of New York State-labeled wine, other New York State agricultural products and tourism-related items. *See* N.Y. ALCO. BEV. CONT. LAW §§ 51, 52 (McKinney 2010) (pertaining to beer), N.Y. ALCO. BEV. CONT. LAW §§ 76(4), 77(4) (pertaining to wine); N.Y. ALCO. BEV. CONT. LAW § 60(2-c) (pertaining to distilled spirits).
25. *Id.* § 101(1)(c).
26. In 2006, based on complaints of price discrimination by Industry Members among retailers and other unlawful inducements being given, the Attorney General's office together with the help of the State Liquor Authority [hereinafter "SLA"] conducted a statewide investigation of trade practices which culminated in the signing of a Consent Order by Industry Members and retailers imposing additional compliance requirements with respect to Tied-House principles.
27. The law carves out only two exceptions, relating to retailer entertainment and participation in retailer associations. *See id.* § 101(1)(c).
28. Within the Division of Alcoholic Beverage Control, the State Liquor Authority is comprised of three Commissioners appointed by the Governor. Its responsibilities include licensing manufacturers, wholesalers and retailers, brand label registration, trade practice regulation and liquor law enforcement.
29. The corollary provisions prohibiting retailers from being interested in an Industry Members are found at *Id.* § 105(15) for off-premise licensees (except for off-premise beer / wine product licensees or "Grocery Stores") and *Id.* 106(13) for on-premise licensees.
30. N.Y. COMP. CODES R. & REGS. tit. 9, §§ 86.1–86.17 (2010).
31. In 1980, ATF revamped its regulations to include many of the Tied-House provisions that exist today. *See* Unfair Trade Practices Under the Federal Alcohol Administration Act, 45 Fed. Reg. 63242-01 (Sept. 23, 1980). A year later, the SLA published Bulletin 534 regarding changes to its regulations. *See* N.Y.S. Liquor Authority Bulletin 534 (Sept. 11, 1981).
32. N.J. Admin. Code.§ 13:2-24.1–24.12 (2010).
33. Respecting malt beverages, the federal Tied-House law only applies to the extent a state proscribes the conduct. *See* 27 U.S.C. 205(f) (2006).
34. 27 C.F.R. § 6.1 (2010).
35. 27 C.F.R. § 6.83; N.Y. COMP. CODES R. & REGS. tit. 9, § 86.3.
36. N.Y.S. Liquor Authority Bulletin 534.
37. *See* 27 C.F.R. § 6.83.
38. N.Y.S. Liquor Authority Bulletin 534.
39. N.Y. COMP. CODES R. & REGS. tit. 9, § 86.6(b) (pertaining to recipe books and matchbooks); N.Y.S. Liquor Authority Bulletin 440 (February 3, 1969) (pertaining to paper bags).
40. N.Y. COMP. CODES R. & REGS. tit. 9, § 83.2.
41. N.Y. COMP. CODES R. & REGS. tit. 9, § 83.3(c)(4).
42. 27 C.F.R. §§ 6.102, 6.84(b).
43. 27 C.F.R. § 6.99.
44. N.Y. COMP. CODES R. & REGS. tit. 9, § 86.17(a).
45. 27 C.F.R. § 6.88(b).
46. Unlike the federal, the SLA regulations do not include glassware within the definition of "equipment."
47. In 2008, the New York State Legislature directed the Law Revision Commission to undertake a complete review of the ABC Law, which has since been completed. The Commission's findings are published at http://www.lawrevision.state.ny.us/abcls.php. In addition, in 2009, the Governor of New York State issued Executive Order 25, directing the Liquor Authority to undertake a full review of its regulations and rulings. *See* N.Y. Exec. Order 25 (2009).

Nicholas Bergman is a partner at Buchman Law Firm, LLP in the Firm's New York City office. He has practiced in the field of beverage alcohol control law for over 12 years. He attended Kenyon College and earned his Juris Doctor from Case Western Reserve University School of Law. Mr. Bergman also holds a post graduate degree in Wine Marketing from the Office International du Vin in Paris, France.

Variations on a Theme: Direct Shipping Litigation Post-*Granholm*

By Deborah A. Skakel and Elizabeth I. Scher

Introduction

Deborah A. Skakel

While the United States Supreme Court's 2005 landmark decision in *Granholm v. Heald*[1] provided substantive directives and substantial guidance concerning the constitutional issues surrounding direct shipping, *Granholm* also spawned controversial legislative initiatives and further litigation addressing its scope and meaning. This article will review the fundamentals of *Granholm* and discuss the evolution of direct shipping litigation during the past five years—in New York and throughout the country.

Granholm: The First Wave

Granholm addressed the initial, basic direct shipping questions: Does a state law that allows all of its in-state wineries to sell and ship directly to in-state consumers, while prohibiting all out-of-state wineries from doing so, violate the Commerce Clause by discriminating against interstate commerce? If so, is that statute saved by the Twenty-First Amendment? The state statutes in question were those of Michigan and New York, the cases from the Sixth and Second Circuits having been consolidated and granted certiorari.[2]

In holding that the Michigan and New York statutory schemes were unconstitutional and not saved by the Twenty-First Amendment, the Supreme Court ruled: (1) "the three-tier system itself is 'unquestionably legitimate'";[3] (2) small wineries do not produce enough wine to make it economically feasible to operate within the three-tier system;[4] (3) "State policies are protected under the Twenty-First Amendment when they treat liquor produced out of state the same as its domestic equivalent"[5]—contrary to the Michigan and New York statutes, which were "straightforward attempts to discriminate in favor of local producers," violative of the Commerce Clause and not saved by the Twenty-First Amendment;[6] and (5) the discriminatory statutes did not advance "a legitimate local purpose [policing underage drinking and facilitating tax collection] that cannot be adequately served by reasonable nondiscriminatory alternatives."[7]

Elizabeth I. Scher

The Court concluded:

> States have broad power to regulate liquor under § 2 of the Twenty-first Amendment. This power, however, does not allow States to ban, or severely limit, the direct shipment of out-of-state wine while simultaneously authorizing direct shipment by in-state producers. If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms. Without demonstrating the need for discrimination, New York and Michigan have enacted regulations that disadvantage out-of-state wine producers. Under our Commerce Clause jurisprudence, these regulations cannot stand.[8]

In many respects, *Granholm* focused on the most direct of direct shipping scenarios: all in-state producers—but no out-of-state producers—were allowed to sell and ship directly to in-state consumers. As the past five years have demonstrated, several variations on this basic direct shipping theme have played out in the federal courts—leading to sometimes differing results.

The Second Wave: To Retail and At Retail

As explained in *Granholm*, one of the factors resulting in the "emerging and significant business" of direct shipping was the wineries' increasing use of the Internet to sell wine.[9] In *Granholm* and in common usage, "direct shipping" meant the remote sale by a winery to a consumer—i.e., wine purchased online or ordered by mail or phone—combined with the shipment of the purchased product directly to that consumer in a cross-border transaction. Using *Granholm* as a springboard, winery plaintiffs challenged different aspects of "direct shipping" privileges of in-state wineries:

- Statutes allowing in-state—but not out-of-state—wineries to sell and ship directly to in-state retailers (as distinct from in-state consumers)—i.e., providing in-state wineries self-distribution rights.

- Statutes allowing in-state—but not out-of-state—wineries to sell from winery premises directly to a consumer (i.e., to sell "at retail") and to ship such purchased product to the consumer.

Lawsuits based on the out-of-staters' lack of self-distribution rights were largely successful, with the courts noting the similarity to "'the discriminatory character'" of the statutory schemes in *Granholm*.[10] Most recently, and in a new twist, this *Granholm* analysis was applied in the self-distribution privileges context—but to the privileges of a *brewer*.[11] In *Anheuser-Busch, Inc. v. Schnorf*, the court held that, "in light of…*Granholm*, Illinois may not permit in-state brewers to distribute their products directly to retailers while withholding that privilege from out-of-state brewers."[12] However, Anheuser-Busch won the battle, but lost the war:

> [T]he Court denies Plaintiffs' request to remedy the unconstitutionality of Illinois' system by extending the self-distribution privilege to out-of-state brewers. That remedy would be more disruptive to the existing statutory and regulatory scheme than the alternative remedy of withdrawing the self-distribution privilege from in-state brewers. Finally, in recognition of the General Assembly's ultimate authority over Illinois public policy, including a remedy for the constitutional defect identified in this legislation, the Court stays the enforcement of its ruling until March 31, 2011, in order to provide the General Assembly with sufficient time to act on this matter.[13]

Having failed in its effort to gain self-distribution rights for out-of-state brewers, Anheuser-Busch remained unable to proceed with its "'significant and important business transaction'"—the acquisition of the Chicago distributor of Anheuser-Busch products.[14] Thus, the application of the *Granholm* analysis resulted in the withdrawal of in-state brewers' self-distribution rights as well as the continued block of an out-of-state brewer's acquisition of an in-state beer distributor.[15]

The "at retail" cases met with mixed results, largely based on the substantive differences among the underlying statutes in question.

- The First Circuit upheld Maine's statute in *Cherry Hill Vineyard, LLC v. Baldacci*;[16] the statute allowed any winery (wherever located) to sell directly to consumers from the winery premises and prohibited any direct shipments.[17]
- Similarly, the Seventh Circuit upheld Indiana's statute—requiring one face-to-face sale at the winery's premises before direct shipment was allowed and applying to all wineries—in *Baude v. Heath*.[18]
- Arizona's "in person" exception—allowing any winery, wherever located, to ship up to two cases of its wines per year directly to a consumer, but only if the consumer was physically present at the winery when buying the wine—was likewise upheld by the Ninth Circuit in *Black Star Farms LLC v. Oliver*.[19]
- In contrast, the Sixth Circuit struck down the statutory "in person" provisions of Tennessee (*Jelovsek v. Bredesen*[20]) and Kentucky (*Cherry Hill Vineyards, LLC v. Lilly*[21]). The Tennessee at retail privilege for in-state wineries was part of the Grape and Wine Law, which was found to constitute "'economic protectionism.'"[22]

The Third Wave: Challenge to *Granholm*-Based Gallonage Cap Statutes

In the wake of *Granholm*, several state legislatures (including New York's) chose to provide direct sale and shipping rights to similarly situated out-of-state wineries.[23] Within that group of states extending direct shipping rights, some—like Arizona, Massachusetts and Kentucky—did so with respect to small wineries only. Larger wineries which did not qualify for a direct shipping license under these "gallonage cap" provisions argued that, while the statutes might not be discriminatory on their face (larger wineries—whether in-state or out-of-state—were treated the same), there was discrimination in effect because of the adverse impact on the number of larger out-of-state wineries and the amount of their out-of-state product.

The Massachusetts version of a gallonage cap statute did not fare well in the courts.[24] Massachusetts's small winery shipping license (available only to wineries with annual production of 30,000 gallons or less) allowed the small winery licensees not only to sell and direct ship to in-state consumers but also to sell through a wholesaler and sell to a retailer—all three sale and distribution avenues were simultaneously available to small wineries.[25] The large wineries (over 30,000 gallons), however, had to choose *either* to sell and ship directly to consumers *or* to sell through a wholesaler.[26]

The First Circuit found that the statute was discriminatory in effect, finding that the small wineries' ability to combine direct shipping, retailer distribution, and wholesaler distribution "significantly alter[ed] the terms of competition between in-state and out-of-state wineries to the detriment of the out-of-state wineries that produce 98% of the country's wine"[27] and "artificially limit[ed] the playing field in this market in a way that enables Massachusetts's wineries to gain market share against their out-of-state competitors."[28] Further, the Massachusetts small

winery shipper statute was discriminatory in purpose as evidenced by the state legislators' statements[29] and the exclusion from the statute of "wines made from fruits other than grapes."[30] Finally, in addressing whether the Twenty-First Amendment protects facially neutral laws like Massachusetts's (a question not before the *Granholm* court), the First Circuit held:

> [T]he Twenty-first Amendment does not exempt facially neutral state alcohol laws with discriminatory effects from the nondiscrimination rule of the Commerce Clause. Nor, of course, are such laws exempt when they also discriminate by design.

The court further noted:

> We also reject Massachusetts's alternate contention that the Twenty-first Amendment lessens the degree of Commerce Clause scrutiny for facially neutral but discriminatory state alcohol laws to mere rational basis review. The Supreme Court implicitly rejected this argument in *Granholm* when it applied the usual, searching degree of scrutiny to invalidate the facially discriminatory laws at issue.[31]

Three months after the First Circuit's *Family Winemakers* decision, the Ninth Circuit affirmed the district court opinion in *Black Star Farms, LLC v. Oliver*,[32] upholding Arizona's small winery exception, which allowed any winery—wherever located—producing no more than 20,000 gallons annually to ship an unlimited amount of wine directly to consumers.[33] The Ninth Circuit described *Family Winemakers* as "manifestly distinguishable"[34] from *Black Star Farms*:

> The short answer to *Family Winemakers* is twofold. First, the Arizona statute does not force "large" winemakers into a restrictive method of distribution in comparison with "small" winemakers. The restrictive method of distribution—the three-tier distribution system—already existed. The Arizona statute freed all small wineries, whether located in-state or out-of-state, from that restrictive method of distribution. Second, the plaintiffs in that case, unlike the plaintiffs here, had evidence to prove their contentions.[35]

As to the applicability of *Granholm*, the Ninth Circuit agreed with the district court that the statutory exceptions in *Granholm*—unlike those in Arizona's statute—

> [I]n effect allowed only in-state wineries, to the exclusion of *all* out-of-state wineries, to bypass the states' three-tiered distribution system and ship directly to consumers…Finally, we agree with Judge Murguia that "[n]othing in *Granholm* suggests that the Supreme Court was concerned about equalizing the inherent marketing advantage that accrues to in-state wineries because of their close proximity to a state's consumers."[36]

The Fourth Wave: Retail Direct

This fourth variation on the direct shipping litigation theme marked a significant change: not an out-of-state winery (producer / supplier tier), but an out-of-state *retailer* (the third tier in the three-tier system) challenged the ban on direct retail sales and shipments to in-state consumers. New York was the site of the first of these "retail direct" cases—*Arnold's Wines, Inc. v. Boyle*.[37]

The principal component of both the district court and Second Circuit opinions was the application of *Granholm's* analysis to the retail tier. The Second Circuit rejected the out-of-state challenge to the statutory requirement that "all wholesalers and retailers be present in and licensed by the state" as "a frontal attack on the constitutionality of the three-tier system itself"—an argument "directly foreclosed by the *Granholm* Court's express affirmation of the legality of the three-tier system."[38] Further, unlike the challenged winery statutes in *Granholm*, the wholesaler and retailer licensing statutes treat in-state and out-of-state liquor "evenhandedly under the state's three-tier system,…compl[y] with *Granholm*'s nondiscrimination principle"[39] and do not "discriminate against out-of-state products or producers."[40]

The Texas retail direct case—*Wine Country Gift Baskets.com v. Steen*[41]—has essentially reached a result comparable to the Second Circuit's (albeit by means of a more tortured procedural history). In the Fifth Circuit's most recent opinion (filed on July 22, 2010 in place of its January 26, 2010 decision), the Texas provision allowing in-state retailers to make local deliveries within their counties, but barring out-of-state retailers from shipping to Texas, was upheld:

> We view local deliveries as a constitutionally benign incident of an acceptable three-tier system. That view is consistent with the unquestioning reference by the Supreme Court in *Granholm* to a Michigan statute that authorized retailers to make home deliveries under certain conditions. A State's granting this authority to retailers is neither recent nor unique.[42]

Legislation in the Wake—Or in Lieu of—Litigation

The evolution of direct shipping-related litigation claims has resulted in part from post-*Granholm* legislation amending state statutory schemes—out-of-state wineries (such as the plaintiffs in *Black Star Farms*) then challenge the new regime. But legislative initiatives were also responsible for the resolution and discontinuance of several lawsuits that challenged the existing statutes.[43]

"While the number of active direct shipping-related cases has significantly declined as we marked the fifth anniversary of the Granholm *decision in May of this year, the introduction of the CARE Act as well as various state legislative efforts demonstrate that the dust has not yet settled on the issues arising from the interplay between the Commerce Clause and the Twenty-First Amendment."*

In April 2010, the Comprehensive Alcohol Regulatory Effectiveness (CARE) Act of 2010 was introduced in the 111th Congress.[44] According to the Congressional Research Service, the CARE Act:

> Amends the Webb-Kenyon Act [of 1913] to: (1) state that it is the policy of Congress that each state or territory shall continue to have the primary authority to regulate alcoholic beverages; (2) prohibit unjustified discrimination against out-of-state producers of alcoholic beverages in favor of in-state producers; and (3) establish higher evidentiary standards for legal actions challenging the authority of states or territories to regulate alcoholic beverages.[45]

The CARE Act further states that it:

> Amends the Wilson Act [of 1890] to eliminate the requirement that a state or territory regulate the importation of all fermented, distilled, or other intoxicating liquors or liquids to the same extent and in the same manner as such liquors or liquids produced in such state or territory.[46]

The CARE Act has been hotly debated since its introduction earlier this year. The National Beer Wholesalers Association (NBWA) and the Wine & Spirits Wholesalers Association (WSWA)—voicing concern over what they see as the courts' trend toward deregulation of beverage alcohol—strongly support the measure. DISCUS (Distilled Spirits Council of the United States—the suppliers' trade association), the Wine Institute, the Beer Institute and the Brewers Association accuse the NBWA and WSWA of attempting to put suppliers and retailers "at a competitive disadvantage…[by] allow[ing] states to unfairly and arbitrarily enact protectionist laws against out-of-state" beverage alcohol products, "effectively eliminate[ing] federal oversight of [beverage] alcohol."[47] The CARE Act was referred to the House Judiciary Subcommittee on Courts and Competition Policy on June 15, 2010.[48]

Conclusion

While the number of active direct shipping-related cases has significantly declined as we marked the fifth anniversary of the *Granholm* decision in May of this year, the introduction of the CARE Act as well as various state legislative efforts[49] demonstrate that the dust has not yet settled on the issues arising from the interplay between the Commerce Clause and the Twenty-First Amendment.

Endnotes

1. 544 U.S. 460 (2005).
2. Heald v. Engler, No. 00-cv-71438-DT, 2001 U.S. Dist. LEXIS 24826 (E.D. Mich. Sept. 28, 2001), *rev'd*, 342 F.3d 517 (6th Cir. 2003), *aff'd sub nom*. Granholm v. Heald, 544 U.S. 460 (2005); Swedenburg v. Kelly, 232 F. Supp. 2d 135 (S.D.N.Y. 2002), *aff'd in part and rev'd in part*, 358 F.3d 223 (2d Cir. 2004), *rev'd sub nom. Granholm*, 544 U.S. 460.
3. *Granholm*, 544 U.S. at 489. The three-tier system is the basic structure by which beverage alcohol is sold and distributed in New York and the majority of states and under which producers / suppliers (distilleries, wineries and breweries) sell to licensed in-state wholesalers who in turn sell to licensed in-state retailers. *See id.* at 468–70.
4. *Id.* at 467–68.
5. *Id.* at 489.
6. *Id.*
7. *Id.* at 489–93 (internal quotation marks omitted).
8. *Id.* at 493.
9. *Id.* at 467.
10. *See* Costco Wholesale Corp. v. Hoen, 407 F. Supp. 2d 1247, 1251 (W.D. Wash. 2005); *accord* Action Wholesale Liquors v. Okla. Alcoholic Beverage Laws Enforcement Comm'n, 463 F. Supp. 2d 1294, 1301 (W.D. Okla. 2006) (the distinction between the *Granholm* statutes and the Oklahoma statutes—allowing direct sales to consumers versus to package stores and restaurants—was not "legally significant…, given the overriding similarities between the challenged laws").
11. Anheuser-Busch, Inc. v. Schnorf, No. 10-cv-1601, 2010 U.S. Dist. LEXIS 91732 (N.D. Ill. Sept. 3, 2010).
12. *Id.* at *70.
13. *Id.* at *70–71.
14. *Id.* at *2–3.
15. *Id.* at *64.
16. 505 F.3d 28 (1st Cir. 2007).

17. *Id.* at 30–31; *see also* Freeman v. Fischer, 563 F. Supp. 2d 493, 501 (D.N.J. 2008), *appeal argued*, Nos. 08-3268, 08-3302 (3d Cir. Feb. 1, 2010).
18. 538 F.3d 608, 614–15 (7th Cir. 2008), *cert. denied*, 129 S. Ct. 2382 (2009).
19. 600 F.3d 1225, 1234–35 (9th Cir. 2010).
20. 545 F.3d 431, 436–38 (6th Cir. 2008), *reh'g en banc denied*, 2009 No. 07-5443, 2009 U.S. App. LEXIS 10975 (6th Cir. Jan. 26, 2009), *cert. denied*, 130 S. Ct. 199 (2009).
21. 553 F.3d 423, 432–34 (6th Cir. 2008).
22. *Jelovsek*, 545 F.3d at 437.
23. In contrast, New Jersey's legislature eliminated New Jersey's in-state wineries' direct shipping rights. *See Freeman*, 563 F. Supp. 2d at 497.
24. Family Winemakers of Cal. v. Jenkins, No. 06-11682-RWZ, 2008 U.S. Dist. LEXIS 112074 (D. Mass. Nov. 19, 2008), *aff'd*, 592 F.3d 1 (1st Cir. 2010).
25. *Family Winemakers of Cal.*, 592 F.3d at 4.
26. *Id.*
27. *Id.* at 11.
28. *Id.* at 12.
29. *Id.* at 14.
30. *Id.* at 16–17.
31. *Family Winemakers of Cal.*, 592 F.3d at 20–21 (citing *Granholm*, 544 U.S. at 489–90).
32. 600 F.3d 1225 (9th Cir. 2010), *aff'g* 544 F. Supp. 2d 913 (D. Ariz. 2008).
33. *Black Star Farms, LLC*, 600 F.3d at 1227, 1232.
34. *Id.* at 1232.
35. *Id.* at 1233 (alteration in original).
36. *Id.* at 1234 (quoting *Black Star Farms, LLC*, 544 F. Supp. 2d at 920, 925).
37. 515 F. Supp. 2d 401 (S.D.N.Y. 2007), *aff'd*, 571 F.3d 185 (2d Cir. 2009).
38. *Arnold's Wines, Inc.*, 571 F.3d at 190–91.
39. *Id.* at 191.
40. *Id.*
41. Siesta Village Mkt., LLC v. Perry, 530 F. Supp. 2d 848 (N.D. Tex. 2008), *vacated sub nom.* Wine Country Gift Baskets.com v. Steen, 612 F.3d 809 (5th Cir. 2010), *superseded and withdrawn on reconsideration*, No. 08-10146, 2010 WL 2857269 (5th Cir. July 22, 2010). On August 5, 2010, the plaintiffs-appellants filed their second petition for en banc review—this time of the Fifth's Circuit's July 22, 2010 opinion issued in connection with the denial of the first petition for en banc review. The Fifth Circuit denied that petition on August 24, 2010.
42. *Wine Country Gift Bakets.com*, 612 F.3d at 820 (citing *Granholm*, 544 U.S. at 469) (footnote omitted).
43. *See, e.g.*, Hurley v. Minner, No. CIV 05-826-SLR, 2006 WL 2789164 (D. Del. Sept. 26, 2006) (direct to retail claim mooted by legislative action eliminating in-state privilege), *vacated on other grounds* (D. Del. Apr. 12, 2007); Huber Winery v. Wilcher, 488 F. Supp. 2d 592 (W.D. Ky. 2006) (same regarding Kentucky statute); Complaint of Plaintiff, Bushnell v. Ehrlich, No. 1:05-cv-03128-CCB (D. Md. Nov. 18, 2005), *available at* http://www.marylandwine.com/mwa/laws/images/MDcomplaint.pdf (legislative compromise regarding Maryland statutes led to voluntary discontinuance).
44. H.R. 5034, 111th Cong. (2010).
45. Library of Congress, Bill Summary and Status of H.R. 5034: All Information, http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR05034:@@@L&summ2=m&#rel-bill-detail (last visited Oct. 9, 2010).
46. *Id.*
47. Distilled Spirits Council of the U.S., Press Release: Major Alcohol Supplier Trade Associations Oppose Wholesaler Monopoly Protection Bill (HR) 5034 (June 23, 2010), http://www.discus.org/media/press/article.asp?NEWS_ID=594 (last visited Oct. 9, 2010).
48. Library of Congress, Bill Summary and Status of H.R. 5034: All Congressional Actions, http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR05034:@@@X (last visited Oct. 9, 2010).
49. *See, e.g.*, S. 766, 214th Leg., 2010 Sess. (N.J. 2010); A.1702, 214th Leg., 2010 Sess. (N.J. 2010); Washington Privatize State Liquor Stores Act, Proposed State Initiative 1100 (Wash. 2010), *available at* http://www.sos.wa.gov/elections/initiatives/text/i1100.pdf; Washington Revise State Liquor Laws, Proposed State Initiative 1105 (Wash. 2010), *available at* http://www.sos.wa.gov/elections/initiatives/text/i1105.pdf; Anita Kumar, *McDonnell Will Unveil ABC Proposal Sept. 8, Vote postponed until October*, WASH. POST VA. POL. BLOG (Aug. 25, 2010, 11:19 AM), http://voices.washingtonpost.com/virginiapolitics/2010/08/mcdonnell_will_unveil_abc_prop.html.

Deborah A. Skakel is a partner in the Business and Securities Litigation Group of Dickstein Shapiro LLP in the firm's New York City office. Ms. Skakel has substantive experience in the beverage alcohol industry, ranging from litigation and counseling on regulatory and commercial matters to assistance with legislative initiatives on industry issues. She is a magna cum laude graduate of Syracuse University and a graduate of Cornell Law School.

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New York's Post and Hold Regime in a Post-*Costco* World

By Deborah A. Skakel

I. Introduction

New York is one of the few states that has a "post and hold" component as part of its beverage alcohol regulatory scheme. While commonly referred to as "price posting," New York's system—embodied in section 101-b of the N.Y. Alcoholic Beverage Control Law (ABC Law)—mandates that wine and liquor wholesalers not only *post* the prices at which they intend to sell to retailers, but also *hold* those prices for a thirty day period. It is this hold requirement that triggers scrutiny under the federal antitrust laws, giving rise to the tension between the state's right to regulate beverage alcohol and the federal mandate favoring competitive markets.

This article will discuss the history of New York's post and hold statute—from its passage in 1942 to combat the massive price wars occurring after the repeal of Prohibition, through the 1984 Second Circuit decision blessing it, to the Ninth Circuit's more recent and contrary view of price posting and the Law Revision Commission's recommendations to insure the continued longevity of post and hold in this state.

II. Section 101-b's Historical Context and Legislative History

The core of the ABC Law—the establishment of the three-tier system[1]—was adopted in 1934 after the repeal of Prohibition.[2] During the next few years, severe and recurring price wars resulted in uncontrolled and discriminatory markets.[3] In 1942, the predecessor of section 101-b was passed, prohibiting "unlawful discrimination" in price and requiring the posting and holding of wholesalers' prices.[4]

III. How Section 101-b Works: "Post and Hold" vs. "Price Posting"

Under ABC Law section 101-b, manufacturers and wholesalers must file a schedule of prices for wine and liquor with the State Liquor Authority (SLA). Wholesalers must file their schedules by the fifth of the month, which prices are effective the first day of the following month (approximately twenty-five days' notice). Within ten days after the schedules are filed, the SLA must make them available for inspection. (To facilitate transparency, posting is now online at the SLA website.) Wholesalers then have three business days to amend their schedules of prices to retailers to meet the prices and discounts stated in schedules filed by their competitors for the same brands—i.e., amended prices may not be lower and discounts not greater than those to be met. Any amended schedule becomes effective on the first day of the month following the filing date. The posted price must be held for thirty days. ABC Law section 55-b requires price posting for beer every 180 days, which prices must be held for that same time period.[5]

IV. The Second Circuit Upholds the Hold in *Battipaglia*

In *Battipaglia v. New York State Liquor Authority*,[6] the challenge to New York's post and hold regime pitted ABC Law section 101-b and the Twenty-First Amendment[7] against the Sherman Act's prohibition of "contract[s], combination[s] in the form of trust or otherwise, or conspirac[ies], in restraint of trade or commerce."[8] The challengers relied heavily on the United States Supreme Court's then-recent decision in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.* (*Midcal*) in which California's statutes requiring wholesalers to file a schedule of resale prices—fixing the price to be charged by retailers—was struck down as an unconstitutional resale price maintenance scheme.[9]

In affirming the district court's decision, the Second Circuit—in a decision by Judge Henry J. Friendly—held that section 101-b did not conflict with and was therefore not preempted by section 1 of the Sherman Act. Distinguishing the "resale price maintenance scheme of the sort condemned in *Midcal*,"[10] Judge Friendly held:

> Section 101-b thus does not mandate or authorize conduct "that necessarily constitutes a violation of the antitrust laws in all cases." New York wholesalers can fulfill all of their obligations under the statute without either conspiring to fix prices or engaging in "conscious parallel" pricing. So, even more clearly, the New York law does not place "irresistible pressure on a private party to violate the antitrust laws in order to comply" with it. It requires only that, having announced a price independently chosen by him, the wholesaler should stay with it for a month.[11]

Because of his analytical approach, Judge Friendly did not need to resolve the "difference of opinion" between the courts as to whether there was the requisite "agree-

ment" under section 1 of the Sherman Act, which difference he described as follows:

> We must confess to some doubt how the difference of opinion between the federal district courts and the New York Court of Appeals [in its 1984 *Admiral Wine & Liquor Co. v. State Liquor Authority* decision], on the one hand, and the California Court of Appeal, on the other, with respect to the "agreement" issue should be resolved. The position of the former is appealing. Section 1 requires an agreement, state compulsion of individual action is the very antithesis of an agreement, and the argument that an agreement could have been inferred if the wholesalers had voluntarily done what they have been compelled to do is simply too "iffy." Against this, there is some force in the argument that a statute compelling conduct which, in its absence, would permit the inference of an agreement unlawful under § 1 is inconsistent with that section unless saved by [the "state action" doctrine of] *Parker v. Brown*.[12]

Having affirmed the district court's ruling that section 101-b is not preempted by section 1 of the Sherman Act, Judge Friendly noted that the court did not need to address either the *Parker v. Brown* state action immunity doctrine or the Twenty-First Amendment balancing issue. With respect to the two-prong state action immunity test, Judge Friendly nevertheless noted (in dicta) that "[t]here can be no fair question that § 101-b meets the first test" established in *Midcal* that "in order for state activity in the control of the sale of alcoholic beverages to enjoy the benefit of immunity for state regulation of private conduct… the challenged restraint must be one clearly articulated and affirmatively expressed as state policy."[13] Judge Friendly stated that "[t]here can be no fair question that § 101-b meets the first test, as demonstrated by the first subparagraph of the statute…and the preamble…."[14]

With respect to the second test—the state policy "'must "be actively supervised" by the state itself'"[15]—Judge Friendly commented that "[t]here is grave question" as to whether it was satisfied and posited:

> New York, in contrast [to the "clearly forbidden" minimum resale prices at issue in *Midcal*], has sought only to produce orderly market conditions, specifically by preventing price discrimination. Under such a program there is nothing that the state can "actively supervise" except to see that the statutory requirements are obeyed—*and there is no claim that the state has neglected this.*[16]

He then recognized the "contrary conclusion" reached by "the most influential treatise on the subject,"[17] Areeda & Turner's *Antitrust Law*, and asked in a footnote "whether the necessary supervision would be furnished if the SLA were required to monitor the filings and report any evidence of agreement on prices to the legislature."[18]

Finally, Judge Friendly held:

> [I]f we [the Second Circuit] are wrong in thinking that § 101-b is not in conflict with the antitrust laws in the sense required…or a declaration of facial invalidity, here, in contrast to *Midcal*, the state's interest should prevail under the balancing process there prescribed for cases where the procompetition policy of the federal antitrust laws comes in conflict with a state's exercise of the authority reserved to it by § 2 of the Twenty-First Amendment.[19]

This was so because there was no direct conflict between section 101-b and the Sherman Act. Citing to the preamble of the statute (enacted at the time of the repeal of New York's "former system of resale price maintenance"), the Second Circuit held:

> *Promotion of temperance is not the only interest reserved to the states by § 2 of the Twenty-First Amendment. The [New York] Legislature thus at least thought it was promoting price competition. Furthermore it expressly found that "price discrimination and favoritism are contrary to the best interests and welfare of the people of this state"—a policy which is reflected in the federal antitrust laws.* There can be no doubt that requiring wholesalers to post their prices and to observe them for a month is an effective way, perhaps the only really effective way, of enabling the SLA to prevent price discrimination. The provision in § 101-b(4) allowing a wholesaler, within three days after disclosure of the price schedules, to meet any lower price, while not strictly necessary to enforcement of the policy against discrimination, was a reasonable effort by the legislature to prevent the one month adherence provision from severely damaging the competitive position of a wholesaler who had posted prices even slightly above the lowest ones. *Although it can be argued that this operates as a disincentive to reducing prices in the original filings, plaintiffs have not alleged this in their complaint, produced evidence that it has occurred, or shown that it has had deleterious effects.* Since most brands are

> sold to all wholesalers at nearly the same price, as the Robinson-Patman Act generally requires, there is not much possibility of price competition at the wholesale level…. On the other hand, *as was conceded at argument, the ABC Law has not prevented vigorous competition—both intrabrand and interbrand—among wine retailers. Here also, in contrast to Midcal, those charged with administering the statute and the highest court of New York have identified it as embodying an important state policy.* The "weighing" process prescribed by Midcal cannot mean that whenever a state statute has some anticompetitive effect, the federal interest prevails; unless there is some anticompetitive effect, there is no occasion to weigh. *At least upon a record such as this, § 2 of the Twenty-First Amendment dictates deference to the state.*[20]

In his dissent, Judge Winter noted:

> [T]he challenged legislation not only mandates the exchange of price information but also requires adherence to publicly announced prices until thirty days after notice is given of a new price. A requirement of adherence to announced prices has been uniformly held illegal without regard to its reasonableness.[21]

Judge Winter also concluded that § 101-b failed the "active supervision" prong of the *Midcal* test because "New York does nothing whatsoever to establish the actual prices charged, review their reasonableness, monitor market conditions or engage in reexamination of the program."[22] Finally, Judge Winter saw "no room for [the] application" of the Twenty-First Amendment:

> [W]here state legislation merely legislates a cartel of liquor dealers and plays no further role in determining prices and output, its self-evident purpose is not to protect the public from the evils of the demon rum, but to preserve the high standard of living of those who sell it.[23]

V. Twenty-Five Years Later: The Ninth and Fourth Circuit Decisions in *Costco* and *TFWS* Are Not Friendly to the Second Circuit's *Battipaglia* Decision

For nearly a quarter century, *Battipaglia* remained the sole Circuit Court of Appeals decision addressing post and hold, state action immunity, and the Twenty-First Amendment defense. With the Ninth Circuit's 2008 *Costco Wholesale Corp. v. Maleng*[24] and the Fourth Circuit's fourth decision in *TFWS, Inc. v. Franchot*,[25] the Second Circuit stands as the only federal court of appeals upholding a post and hold scheme.

A. *Costco's* Criticism

In *Costco*, the Ninth Circuit found that (1) Washington's post and hold statute conflicted with and was preempted by the Sherman Act; (2) the state failed the active supervision prong of the state action immunity test; and because the state interests did not outweigh the federal interest in promoting competition, the Twenty-First Amendment did not save the post and hold statute from preemption.[26]

The Ninth Circuit's criticized Judge Friendly's *Battipaglia* decision by stating that "Judge Friendly's antitrust analysis strangely failed to account for the New York requirement that posted prices be adhered to by wholesalers"[27] and further noted:

> Indeed, it appears that Judge Winter's view in *Battipaglia* has prevailed in the Second Circuit. *See Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 223–24 n.17 (2d Cir. 2004) (noting that the "agreement" question was reserved in *Battipaglia* and concluding that "since our decision in *Battipaglia*, the Supreme Court has made it clear that an actual 'contract, combination or conspiracy' need not be shown for a state statute to be preempted by the Sherman Act") (citing *324 Liquor*, 479 U.S. at 345–46 n.8, 107 S.Ct. 720).[28]

B. Fourth Circuit's "Notable Exception" Characterization

The Fourth Circuit's second appellate ruling in *TFWS* likewise did not find *Battipaglia* persuasive authority. Noting that the Ninth Circuit in *Miller v. Hedlund*,[29] as well as two district courts[30] had struck down post and hold statutes,[31] the Fourth Circuit commented:

> The only notable exception to these circuit and district court decisions is *Battipaglia v. New York State Liquor Authority*, 745 F.2 166 (2d Cir. 1984), a case in which a divided panel upheld a post-and-hold system for wholesale liquor prices in New York. *Battipaglia* has not been followed elsewhere, and a leading commentator on antitrust law has sided with the dissent. *See* 1 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 217, at 308-09 (2d ed. 2000) ("Given the great danger that agreements to post and adhere will facilitate horizontal collusion, the dissent's position [in *Battipaglia*] is more consistent with" the Supreme Court's hybrid restraint jurisprudence).[32]

The Fourth Circuit's fourth and most recent decision in *TFWS* (*TFWS IV*) (1) "bundled" the post and hold and quantity discount ban statutes; (2) reiterated the earlier finding that the regulatory scheme violated the Sherman Act; and (3) affirmed the district court's finding that Maryland's regulatory scheme was ineffective in furthering its interest in temperance, and therefore that the federal interest under the Sherman Act outweighed the state interest.[33]

VI. Possible Approaches to Address Vulnerable Aspects of Section 101-b

At a basic level and as underscored by the contrary decisions in *Costco* and *TFWS*, there are three potential areas of infirmity in the existing post and hold statute: (1) whether the hold component constitutes an "agreement" under the Sherman Act (a question left open in *Battipaglia*); (2) whether the two-prong state action immunity test is met where the articulated state policy is the promotion of price competition (i.e., prohibiting price discrimination), but where "active state supervision" is questionable; and (3) whether the articulated state interest of prohibiting price discrimination (and thereby promoting price competition)—rather than simply promoting temperance—provides a sufficient predicate for a Twenty-First Amendment defense.

With respect to the "agreement" aspect of the hold, operation of section 101-b(4)—which allows a wholesaler to adjust its price downward to meet any lower price in the monthly price filing—should not be discouraged. The SLA should not impose any conditions on a section 101-b(4) price reduction (such as the equivalent of a good cause showing) beyond what exists in the statute.

To satisfy the *Midcal* state action immunity defense test, it would be prudent to follow Judge Friendly's lead and focus on the anti-price discrimination state interest articulated in the statutory scheme, endeavoring to avoid the quagmire of proof problems in the *Costco* and *TFWS* cases in which temperance was the articulated policy.[34] Reliance on prohibiting price discrimination / promoting price competition does not eliminate entirely proof problems that may arise. Even if one were to obtain the concession that was apparently made at oral argument in *Battipaglia* that "the ABC Law has not *prevented* vigorous competition—intrabrand and interbrand—among wine retailers,"[35] one would still need to establish that the post and hold statute functions to *promote* price competition.

Finally, the arguable weakness in New York's post and hold statutory scheme, which even Judge Friendly recognized, is whether the state policy (which clearly articulated and affirmatively expressed the post and hold restraint) is "actively supervised by the state itself." The logical approach to attempt to remedy this infirmity is to strengthen state supervision. Rather than "monitor[ing] the filings and report[ing] any evidence of agreement on prices to the legislature"[36] (as posited by Judge Friendly), the SLA should instead monitor the filings and commence enforcement proceedings upon finding evidence of non-compliance.

Likewise, mindful of Judge Winter's dissent in *Battipaglia*, the SLA should review the reasonableness of the prices set forth in the price filings, monitor market conditions and engage in reexamination of the program at appropriate intervals. This could be done in part by codifying those provisions of the 2006 and 2007 Consent Orders—which resulted from the Attorney General's investigation into trade practices intended to influence retailers' purchasing decisions—relating to price filing[37] and adding a new provision requiring the SLA to review and inspect the reports that are filed. Provision should be made for the funding for such supervision. Doing so will strengthen the argument that there is no preemption because there is no conflict between the New York statutory scheme and the federal antitrust statutes. It will also bolster the Twenty-First Amendment balancing argument made by Judge Friendly (notably that anti-price discrimination is the express policy of the New York statutory scheme *and* a policy under the federal antitrust laws *and* a recognized state interest under the Twenty-First Amendment).[38]

VII. The Law Revision Commission's Findings and Recommendations Regarding Price Posting

In its September 30, 2009 Report, the Law Revision Commission found that the SLA's "failure to analyze price posting data submitted by wholesalers makes it difficult to evaluate whether the industry is engaging in unlawful price discrimination. Because it does not monitor the information, it is unable to demonstrate that the objectives of the post and hold process are achieved."[39]

Likewise, in its December 15, 2009 Report, the Law Revision Commission cautioned: "The Second Circuit's holding [in *Battipaglia*] should not make the SLA nor the Legislature sanguine about the price posting and hold requirements."[40] The Law Revision Commission noted that the Supreme Court had yet to rule on price posting (despite the split among the federal circuit courts)[41] and recommended: "Hence, in light of the state's expressly articulated policy regarding the promotion of an orderly market and temperance…the SLA should be vigilant in its monitoring of wholesale prices, and the Legislature should provide its total support for the SLA's efforts."[42]

Conclusion

The prevention of price discrimination remains a fundamental purpose of the ABC Law. Likewise, section 101-b remains "perhaps the only really effective way"[43] of enabling the SLA to enforce the prohibition against price discrimination. To insure that the SLA's enforcement of the anti-discrimination policy is in fact "really effective," the SLA—consistent with Judge Friendly's observation

and the Law Revision Commission's recommendation—should boost its supervision and monitoring of not only the posted price schedules, but also the post and hold regime.

Endnotes

1. The "three-tier system" is the basic structure by which beverage alcohol is sold and distributed in New York and the majority of the states and under which manufacturers / suppliers (distillers, wineries and breweries) must sell to a licensed in-state wholesaler who in turn must sell to a licensed in-state retailer. The Supreme Court recently affirmed that this three-tier system is "unquestionably legitimate." Granholm v. Heald, 544 U.S. 460, 489 (2005) (citation omitted) (internal quotation marks omitted).
2. *See* 1934 N.Y. Laws ch. 478.
3. *See* NEW YORK STATE LAW REVISION COMMISSION, REPORT ON THE ALCOHOLIC BEVERAGE CONTROL LAW AND ITS ADMINISTRATION 57–58 (2009) (hereinafter LRC Dec. 15, 2009 Report).
4. 1942 N.Y. Laws ch. 899.
5. There are special annual price postings for wineries, farm wineries, and micro-wineries.
6. Battipaglia v. N.Y. State Liquor Auth., 583 F. Supp. 8 (S.D.N.Y. 1982), *aff'd*, 745 F.2d 166 (2d Cir. 1984).
7. "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. CONST. amend. XXI, § 2.
8. 15 U.S.C. § 1 (2006).
9. 445 U.S. 97 (1980).
10. *Battipaglia*, 745 F.2d at 172.
11. *Id.* at 175.
12. *Id.* at 173.
13. *Id.* at 176 (quoting California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980)).
14. *Id*. The ABC Law section 101-b(1) further notes:

    > It is the declared policy of the state that it is necessary to regulate and control the manufacture, sale, and distribution within the state of alcoholic beverages for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to the law. In order to eliminate the undue stimulation of sales of alcoholic beverages and the practice of manufacturers and wholesalers in granting discounts, rebates, allowances, free goods, and other inducements to selected licensees, which contribute to a disorderly distribution of alcoholic beverages, and which are detrimental to the proper regulation of the liquor industry and contrary to the interests of temperance, it is hereby further declared as the policy of the state that the sale of alcoholic beverages should be subjected to certain restrictions, prohibitions and regulations. The necessity for the enactment of the provisions of this section is, therefore, declared as a matter of legislative determination.

15. *Battipaglia*, 745 F.2d at 176 (quoting *Midcal*, 445 U.S. at 105).
16. *Id.* (emphasis added).
17. *Id.*
18. *Id.* at 176 n.11.
19. *Id.* at 177.
20. *Id.* at 178–79 (emphasis added).
21. *Id.* at 179.
22. *Id.* at 180.
23. *Id.*
24. Costco Wholesale Corp. v. Maleng, 522 F.3d 874 (9th Cir. 2008) (concerning several Washington State statutes including post and hold).
25. TFWS, Inc. v. Franchot, 572 F.3d 186 (4th Cir. 2009) [hereinafter as *TFWS IV*].
26. *Costco*, 522 F.3d at 895, 901 n.22, 903–904.
27. *Id.* at 893 n.15 (noting Judge Winter's "pointed[ ] observ[ation] in dissent").
28. *Id.* at 894 n.16.
29. 813 F.2d 1344 (9th Cir. 1987) (declaring that Oregon's post and hold regime for wine and beer was a hybrid restraint that violated section 1 of the Sherman Act; the state action immunity exception did not apply because of the failure to show active supervision by the state; the case was remanded for a determination as to whether the Twenty-First Amendment protects the challenged post and hold regulations). *Id.* at 1352.
30. *See* Beer & Pop Warehouse v. Jones, 41 F. Supp. 2d 552, 560–62 (M.D. Pa. 1999) (holding that Pennsylvania's post and hold pricing statute for beer was a per se violation of the Sherman Act); Canterbury Liquors & Pantry v. Sullivan, 16 F. Supp. 2d 41, 46–48 (D. Mass. 1998) (holding that Massachusetts's post and hold liquor pricing scheme was a per se violation of § 1).
31. In contrast, the post and hold statutes of Minnesota and Missouri were upheld by those states' respective state courts. *See* Intercont'l Packaging Co. v. Novak, 348 N.W.2d 330 (Minn. 1984); Wine & Spirits Specialty, Inc. v. Daniel, 666 S.W.2d 416 (Mo. 1984).
32. TFWS, Inc. v. Schaefer, 242 F.3d 198, 210 (4th Cir. 2001).
33. TFWS, Inc. v. Franchot, 572 F.3d 186, 193–94, 197 (4th Cir. 2009).
34. *See, e.g.*, *Costco*, 522 F.3d at 903 ("[A]s Costco's expert…indicated, it is impossible to segregate the effects of the post-and-hold scheme from all other policies adopted by Washington to influence alcohol consumption.").
35. Battipaglia v. N.Y. State Liquor Auth., 745 F.2d 166, 179 (2d Cir. 1984) (emphasis added).
36. *Id.* at 176 n.11.
37. *See* LRC Dec. 15, 2009 Report at 67.
38. *Battipaglia*, 745 F.2d at 178.
39. NEW YORK STATE LAW REVISION COMMISSION, REPORT ON THE ALCOHOL BEVERAGE CONTROL LAW AND ITS ADMINISTRATION 34 (Sept. 30, 2009).
40. LRC Dec. 15, 2009 Report at 220.
41. No petition for certiorari was filed in either *Costco* or *TFWS IV*.
42. LRC Dec. 15, 2009 Report at 220–21.
43. *Battipaglia*, 745 F.2d at 178.

Deborah A. Skakel is a partner in the Business and Securities Litigation Group of Dickstein Shapiro LLP in the firm's New York City office. Ms. Skakel has substantive experience in the beverage alcohol industry, ranging from litigation and counseling on regulatory and commercial matters to assistance with legislative initiatives on industry issues. She is a magna cum laude graduate of Syracuse University and a graduate of Cornell Law School.

New York State Alcoholic Beverage Control Law and Quality of Life: The Relationship Between the Law and Communities on the Road to Eudaimonia

By Adrian C. Hunte

Introduction

This article will focus on the privilege of holding a license to manufacture, distribute, and sell beverage alcohol, a legal but highly regulated, highly taxed and enormous revenue raising substance, coupled with alcohol consumption and the right to quiet enjoyment of one's property in a safe and healthful environment.

As distinguished from persons who experience poor quality of life because of unfortunate personal circumstances such as ill health or unemployment, quality of life, as a measure of livability, in such a vibrant and densely populated place as New York City can be inversely proportional. Often, the trendiest, and most successful, nightclubs, bars, lounges, restaurants, and liquor stores are located in mixed-use zoning commercial and residential neighborhoods whose residents are perceived to enjoy the highest standard of living based on assets, income and social status.

In some cases, the more popular the establishment, the more annoying to the communities and more exacerbated are the problems with noise, traffic, parking, congestion, public urination, public alcohol consumption, lack of safety, vandalism, violence, and general disorder. For some residents, such disturbances may cause mere minor bumps in the road, but for others, such commotion may create major sinkholes in their quest for peaceful enjoyment of their community and the well-being, happiness, flourishing, and virtuous life in the blissful state of eudaimonia.

Background

The New York State Legislature enacted the Alcoholic Beverage Control Law (ABC Law) in 1933 to promote temperance in the consumption of alcoholic beverages and to advance "respect for…the law."[1] The New York State Liquor Authority (SLA) is vested with the broad discretionary power to determine whether the "public convenience and advantage" will be promoted by the issuance of licenses to traffic in alcoholic beverages.[2] The State Liquor Authority is granted the power to issue or refuse to issue licenses, and to revoke, cancel or suspend licenses.[3]

In carrying out its objectives, the ABC Law preempts its field by comprehensively regulating virtually all aspects of the sale and distribution of liquor.[4] The control of alcohol involves considerations very different from other unregulated commodities.

"As the New York State Law Revision Commission noted in its 2009 report on the Alcoholic Beverage Control Law and its Administration, while sales of alcoholic beverages generate tremendous tax revenue for the State, inadequate regulation of sales and consumption of alcoholic beverages poses dangers of abuse and excess."

New York State Law Revision Commission Report

As the New York State Law Revision Commission noted in its 2009 report on the Alcoholic Beverage Control Law and its Administration, while sales of alcoholic beverages generate tremendous tax revenue for the State, inadequate regulation of sales and consumption of alcoholic beverages poses dangers of abuse and excess.[5] The Commission stated:

> Alcohol beverage regulation must ensure that the public's health, safety and welfare are not jeopardized, while recognizing the significant state revenue received from the collection of associated sales and excise taxes. The dangers and hardships of alcohol abuse and over-consumption present both direct and indirect health and economic consequences for all members of society….[6]

Statutory Provisions

Under Alcoholic Beverage Control Law section 63(1), "[a]ny person may make an application to the appropriate board for a license to sell liquor at retail not to be consumed on the premises where sold" and section 63(6) states that "[d]eterminations under this section shall be made in accordance with public convenience and advantage."[7]

Under Alcoholic Beverage Control Law section 64(1), notwithstanding the provisions of subdivision two of section seventeen, (which gives the SLA the authority to limit in its discretion the number of licenses of each class to be issued within the state or any political subdivision thereof, and in connection therewith to prohibit the acceptance of applications for such class or classes of licenses which have been so limited), "any person may make an application to the appropriate board for a license to sell liquor at retail to be consumed on the premises where sold, and such license shall be issued to all applicants except for good cause shown."[8] The ABC Law does not define "public convenience and advantage," nor "for good cause shown," nor "in the public interest."[9] This lack of guidance is generating a body of law.

"Two of the most important statutory provisions of the ABC Law for prospective licensees are what are commonly called the '200 Foot Rule' and the '500 Foot Rule.'"

There are cities, towns and townships in the state of New York that prohibit the sale of alcoholic beverages —these are known as "dry towns," "dry cities," or "dry townships."

New York specifically allows cities and counties to exercise a local option by public referendum every few years whether to go dry.[10] However, prohibiting alcohol sales may actually reduce public safety, because if they wish to drink, residents of dry counties may have to drive farther from their homes to consume alcohol, thus increasing impaired driving exposure.

In 2007, referendums were placed on the ballots of two "dry" and two "moist" towns, asking the voters to allow the towns to become "wet."[11] Potter, which was previously dry, voted to go wet. Mina, which was moist, voted to go wet.[12] Bovina, which was previously dry, voted to become moist. Franklin, which was moist, voted to stay moist.[13]

After this latest vote, there remain ten towns in the state of New York that are completely "dry." The "dry" towns in the state are: Caneadea in Allegany County, Clymer and Harmony in Chautauqua County, Lapeer in Cortland County, Orwell in Oswego County, Fremont and Jasper in Steuben County, Neversink in Sullivan County, Berkshire in Tioga County and Argyle in Washington County. The town of West Almond does not allow off-premises consumption, while the towns of Freedom, Hartford, Franklin, Seneca, Caton, Rathbone, Newark Valley, Butler, Rose, Pike, Wethersfield, and Middlesex do not allow on-premises consumption. The towns of Essex, Bovina, Gorham, Richford, Orangeville and Barrington do not allow on-premises consumption except in year-round hotels.

The Arsenal

Two of the most important statutory provisions of the ABC Law for prospective licensees are what are commonly called the "200 Foot Rule"[14] and the "500 Foot Rule."[15] The "200 Foot Rule" disqualifies any location from obtaining an on-premises consumption license to sell liquor or an off-premises consumption liquor store license, if its entrance is located within 200 feet on the same street or avenue of a building used exclusively as a school, church or other house of worship. Exceptions to this rule are extremely limited. For instance, premises around the corner from a school, church, or house of worship would not be disqualified since they are not on the same "street or avenue" as the premises sought to be licensed. If the school buildings and houses of worship are used for any non-worship or non-school purpose, then the preclusion will not apply. There are also stringent rules as to how one measures the 200 feet and which exits or entrances are, or are not, affected.

In New York City, especially, through input by local community groups, the "500 Foot Rule" has intensified the battle over the siting of new restaurants, nightclubs and discotheques in residential neighborhoods. The discord sets in rivalry the rights of establishment owners to open wherever zoning laws may permit, against the opposition of local residents who dread the adverse impact of pre-dawn crowds, traffic and noise.

The fray is being fought over a 1993 amendment to the ABC Law, known as the Padavan Law, so named after one of its sponsors, Senator Frank Padavan.[16] The "500-Foot Rule" was enacted to address or prevent oversaturation of licensed premises, and was prompted by conditions in two New York City neighborhoods, namely, Bell Boulevard in the Bayside section of Queens, and Katonah Avenue in the Northwest Bronx. The law, for the first time, gave to local communities an opportunity to have their views considered on certain liquor license applications submitted to the SLA.[17]

Public Interest Considerations

The statute, as amended by Chapter 670 of the Laws of 1993, lists the factors to be considered by the SLA in determining the public interest. In addition, Chapter 720 of the Laws of 1993 restrains the SLA from granting an on-premises liquor license to any establishment located within 500 feet of three or more existing licensed premises, except if the SLA finds, after consultation with the local community board, that the granting of such license would be in the public interest. The statute requires the SLA to conduct a public hearing in "500 foot" cases and to state the reasons for its findings.

The relevant sections of the ABC Law were amended in 1993 to bolster the SLA's ability to consider the impact

issuance of a proposed liquor license would have on local communities. In a memorandum in support of the bill, another sponsor, then Assemblyman G. Oliver Koppell, wrote that the amendment was "necessary to assure that quality of life impacts are fully incorporated into the responsible state decision-making apparatus."[18]

The law requires the SLA to conduct an analysis of community impact when dealing with a contested application. The catalyst for the change was the 1980 New York State Court of Appeals case *Circus Disco v. State Liquor Authority*, which held in a 5-2 decision that the SLA did not have the statutory right to deny a license because of potentially adverse community impacts from noise, parking and traffic that may be generated by an establishment otherwise permitted by zoning.[19] The majority announced that such quality of life issues are for the consideration of zoning authorities, not the SLA. Although the applicant was seeking to open what was described as the largest discotheque in New York City at the time, accommodating more than 1,400 people, in a mixed-use neighborhood containing a substantial residential population, the court said that a "more explicit indication of legislative intent… would be required" before the SLA could consider community concerns in licensing determinations.[20]

The 1993 legislation clarified that adverse community impact is a legitimate issue in licensing proceedings. Initially, the SLA ignored community complaints about the oversaturation of bars, clubs and discotheques. However, in 1996, lower Manhattan's SoHo community sued the SLA in a proceeding under Article 78 of the Civil Practice Law and Rules (CPLR), after the agency granted a liquor license to a discotheque with a several hundred patron capacity.[21] The SLA granted the license despite the existence of more than twenty bars within 500 feet of the club, and the fact that the application was opposed by the local community board, hundreds of residents, community groups, art galleries, other businesses and by local elected officials.[22] In granting the license, the SLA issued a one-sentence determination that the license was in the public interest because the proposed establishment would generate employment and tax revenues. Neighborhood groups and residents filed an Article 78 proceeding seeking a reversal of the agency's determination.[23] In a 1997 decision, Justice Sheila Abdus-Salaam of the Supreme Court, New York County, ruled in favor of the community, declaring that the "one-sentence general conclusion that a liquor license will generate employment and tax revenues does not constitute 'reasons' why this particular license at this particular location is in the 'public interest.'"[24] The court annulled the license and found that the SLA's failure to specify reasons was an error of law, arbitrary and capricious and an abuse of discretion.[25]

The court criticized the SLA for not engaging in a balancing of the possible benefit to the public from providing more jobs and taxes, as opposed to the possible detriment to the community by adding another licensed premises to an area already saturated with such establishments. Nor did the SLA, the court said, consider the grounds for the community opposition, including reports from traffic and acoustics experts, showing that a club with dancing would increase noise levels in adjacent residential apartments to levels exceeding the City's Noise Code allowances, and would generate unduly large amounts of traffic on a narrow street. If the SLA's interpretation of "public interest" was correct, Justice Abdus-Salaam warned, then the 500 foot law would become "wholly eviscerated and rendered a dead letter."[26] The legislature enacted the law, the Justice said, to alleviate the problems caused by the oversaturation of neighborhoods by late night bars and clubs. "The Authority is duty bound to enforce the statute consistent with legislative intent—and not to enter into a strained, tortured and irrational interpretation to pursue its own administrative and extra-legislative fiscal policy," the Justice concluded.[27]

"The relevant sections of the ABC Law were amended in 1993 to bolster the SLA's ability to consider the impact issuance of a proposed liquor license would have on local communities."

In another Supreme Court case in New York County, a community organization in the Tribeca area of Manhattan collaborated with the SLA by intervening in an Article 78 proceeding brought by a nightclub's owners seeking to overturn the SLA's denial of its application for an alcohol license.[28] The club owner was seeking a liquor license for an 800-patron dance club that shared a common wall with a large highrise residential condominium and was located near other residential buildings. In this matter, the SLA concluded that approval of the application would not be in the public interest in view of the maximum occupancy of the premises, its hours of operation, the number of liquor licenses already issued in the area, the anticipated traffic congestion and the concerns expressed by the residents.[29] In its Article 78 proceeding, the club owner asserted that there was insufficient evidence before the SLA to establish that any of the statutory factors under the ABC Law could serve to deny the license application and that the agency's determination was based upon speculation, factual errors and community pressure.[30]

In his decision, New York State Supreme Court Justice Franklin Weissberg agreed with the SLA and the community intervenors, reasoning that:

> The size and nature of the operation will inevitably cause street noise and traffic that will adversely impact upon this increasingly residential neighborhood. It was certainly rational for the Authority to conclude that the magnitude, hours and nature of the proposed operation made

> it sufficiently likely that the club would disrupt the lives of the many nearby residents so as to warrant the denial of the application.

The Justice added:

> It is hardly speculative to conclude that it is likely that lines of people will form waiting to enter the club, that lines of cars will be created dropping parties off or waiting for them to exit, that taxis will hover in anticipation of customers and customers will stand outside the premises hailing taxis, and that patrons of the club will make their presence known as they leave and head towards their cars, all of which will occur as late as three-thirty in the morning. Even if these customers are not rowdy, they will necessarily disrupt the peace and quiet the neighborhood residents are entitled to enjoy.

Justice Weissberg concluded that the Legislature, in the 1993 amendents to the ABC Law, "made it clear that the impact upon the community should be of paramount concern to the Authority with respect to the issuance of section 64 liquor licenses."

In another case, the Appellate Division, First Department, weighed in on the debate over the Padavan Law when it was called upon to decide the ancillary issue of whether the transfer of an existing license to a new owner triggered the public hearing requirements of the statute.[31] This Article 78 proceeding, brought by a community association, was transferred by the Supreme Court directly to the Appellate Division on the ground that it presented a question of substantial evidence under CPLR 7804(g).[32] Although the Appellate Division disagreed that the petition raised such a question, it nevertheless retained jurisdiction to decide all of the issues. The SLA argued that the public hearing requirements were inapplicable in this matter because it involved the transfer of a license, rather than the issuance of a new license. The court rejected this argument, ruling that ABC Law section sixty-four is not limited by its language to the issuance of new licenses.[33] The court said that the law "makes no exception for licenses issued pursuant to either renewals or transfers."[34] The court explained that it could not "discern any logical reason why the public should not have the same right to a hearing on the impact of the transfer of a license from one proprietor to another as it has on the impact of a license for previously unlicensed premises."[35] Even though it may be conducted on the same physical premises, the proposed transferee's business, the court said, "may have a decidedly different impact on the neighborhood and may compel a different finding as to the public interest."[36] The court annulled the license and remanded the matter back to the SLA for further proceedings consistent with the Padavan Law.[37]

In more recent licensing proceedings, at least in "500 foot rule" cases, the SLA is taking a closer look at the quality of life factors set forth in the Padavan Law when those issues are raised by local community boards and neighborhood groups and residents.

Recent Developments

In 2010, Governor David Paterson signed into law a bill that Assemblyspeaker Sheldon Silver and Senator Daniel Squadron co-sponsored to reverse a court decision that had weakened the "500 foot rule."[38] The court ruling weakened the law by limiting its application to instances where all three on-premises establishments were of the same type.[39] The court's decision would have meant that a bar, a nightclub and restaurant serving liquor, all within 500 feet of one another, would not have triggered the "500 foot rule." Assemblyman Robin Schimminger introduced legislation to amend the ABC Law, in relation to making the provisions governing the various on-premises liquor licenses consistent with respect to public interest factors that may be considered by the State Liquor Authority when evaluating the merits of a license application.[40] As of May 4, 2010, the bill had been reported as referred to Codes. In his Memorandum in Support of the Legislation, Mr. Schimminger stated:

> The purpose of the bill is to make consistent the factors that shall be considered by the SLA when determining whether public convenience and advantage, and the public interest will be promoted by the granting of any of the on-premises liquor licenses provided for in Article 5 of the Alcoholic Beverage Control (ABC) Law.
>
> Sections 1 through 4 of the bill would amend ABC Law Sections 64(6-a), 64-a, 64-b and 64-c to establish a consistent standard with respect to the factors that shall be considered by the SLA when determining whether public convenience and advantage, and the public interest will be promoted by the grant of a specific on-premises liquor license to a particular applicant. The existing ABC Law § 64(6-a) sets forth certain factors that the SLA can consider when evaluating the merits of an application for an on-premises restaurant liquor license. However, the ABC Law does not explicitly state that such factors may be considered for on-premises liquor licenses at taverns (§ 64-a), bottle clubs (§ 64-b), or restaurant-brewers (§ 64-c).[41]

In late January 2009, after one of the lengthiest and nastiest neighborhood alcohol licensing fights, the SoHo restaurant Ginx, Inc., doing business as Lola, closed its doors after protracted litigation that had started in 2004,

and filed for Chapter 11 bankruptcy.[42] The SLA had finally awarded Lola its license on July 17, 2008. Charges of racial overtones spurred the restaurant owners to file a civil rights action against the SLA and the SoHo Alliance in federal district court,[43] with an appeal to the Second Circuit Court of Appeals filed July 22, 2010.[44]

In 2008, in the second Article 78 proceeding filed by SoHo Alliance against the SLA and Lola's owners, New York State Supreme Court Justice Marilyn Schafer stated:

> [T]he Court notes that this protracted dispute has generated considerable acrimony with both sides accusing the other of bad faith. While these accusations, even if they were significant, are irrelevant to the narrow inquiry before us, there appears to be here neither villains nor victims, but rather an irreconcilable land use disagreement inevitable in a densely populated urban environment…. The Court cannot conclude anything other than that the Authority has failed to comply with the First Department Order and statutory requirements. The Authority has acted in an arbitrary and capricious manner by granting an on-premises liquor license without detailing its reasons why and how it would be in the public interest to do so.[45]

The court annulled and vacated the SLA's determination, dated March 2, 2005, granting the license and ordered the matter remanded to the SLA for *de novo* review of Lola's application.[46]

In 2004, Lola filed an application for a liquor license for the premises located at 5-15 Watts Street.[47] This location was within 500 feet of over thirty other existing premises licensed to serve liquor.[48] The application was approved over objections from the Community Board and various community residents and organizations.[49]

Petitioner, SoHo Alliance, filed an Article 78 proceeding challenging the Authority's approval of Lola's application. The court granted the petition, on Nov. 17, 2005, which found that the Authority acted in an arbitrary and capricious manner granting an on-premises liquor license without detailing its reasons why and how it would be in the public interest to do so.[50] Lola appealed.[51] The Appellate Division, First Department reversed on August 31, 2006, finding that, although the Authority had failed to comply with its statutory obligation to articulate its reasons, this was an insufficient basis for annulling the determination.[52] The matter was remanded to the Authority to properly state its reasons, without prejudice to further Article 78 litigation challenging those reasons.[53]

On October 2, 2006, the Authority, which had not appealed, moved the First Department to modify its decision and direct a *de novo* review of Lola's application.[54] The Authority stated that two of the three Commissioners who had voted to approve Lola's application as well as the Chairman had been replaced.[55] The Authority as it was presently constituted was unable to articulate the reasons the former members had in mind.[56] In addition the Authority stated it now had a better understanding of the standard required for approval and might reach a different result.[57] The motion was denied without opinion.[58]

The Authority issued its report on April 12, 2007, reiterating its change in membership and statutory interpretation:

> It is the interpretation of the current Full Board that the 500 foot rule creates a presumption that an application should not be approved. To overcome that presumption, the record must support a finding that issuance of the license is in the public interest. The Members of the Authority concede that prior determinations by this agency could be read as providing for the issuance of a license unless it was against public interest.[59]

The report concluded:

> While there are a significant number of licensed establishments in the area, this establishment, unlike the nightclubs which were the subject of complaints by those in opposition, will be a bona fide restaurant with no live music or dancing. Therefore, based upon the above, it appears that the Authority found that it would not be contrary to public interest to approve the application.[60]

The SLA approved the license on July 17, 2008.[61]

Conclusion

The New York State Liquor Authority faces a formidable task in trying to achieve balance, with the ever-evolving and apparently irreconcilable differences between zoning, land use, alcohol licensing, and quality of life, so there will be no real villains or victims. There is a growing body of both statutory and case law to give much needed guidance.

Endnotes

1. N.Y. ALCO. BEV. CONT. LAW § 2 (McKinney 2000).
2. *Id.*
3. *Id.* § 17.
4. Lansdown Entm't Corp. v. N.Y. City Dep't of Consumer Affairs, 543 N.E.2d 725, 726 (N.Y. 1989) (citing People v. De Jesus, 430 N.E.2d 1260, 1260 (N.Y. 1981)).
5. NEW YORK STATE LAW REVISION COMMISSION, ALCOHOLIC BEVERAGE CONTROL LAW AND ITS ADMINISTRATION 4 (2009).
6. *Id.*

7. §§ 63(1); 63(6).
8. § 64(1).
9. *See*, § 3.
10. §§ 140–147.
11. State of New York Liquor Authority, Divisional Order #824 Memorandum to Bureau Heads and Zone Offices RE: 2007 Local Option Election Results, (Dec. 19, 2007).
12. *Id.*
13. *Id.*
14. "No retail license for on-premises consumption shall be granted for any premises which shall be…on the same street or avenue and within two hundred feet of a building occupied exclusively as a school, church, synagogue or other place of worship." N.Y. ALCO. BEV. CONT. LAW § 64 (7)(a).
15. "No retail license for on-premises consumption shall be granted for any premises which shall be…(b) in a city, town or village having a population of twenty thousand or more within five hundred feet of three or more existing premises licensed and operating pursuant to the provisions of this section." § 64(b).

    Alcoholic Beverage Control Law § 64 (7) (f) provides a discretionary exception to this rule as follows:

    > [T]he authority may issue a retail license for on-premises consumption for a premises which shall be within five hundred feet of three or more existing premises licensed and operating pursuant to the provisions of this section if, after consultation with the municipality or community board, it determines that granting such license would be in the public interest.

    The subdivision goes on to state that the Authority is to "conduct a hearing, upon notice to the applicant and the municipality or community board, and shall state and file in its office its reasons therefor[e]." *Id.*
16. SoHo Cmty. Council v. N.Y. State Liquor Auth., 661 N.Y.S.2d 694, 695 (Sup. Ct. 1997).
17. The Authority may consider a number of factors in determining "whether public convenience and advantage and the public interest will be promoted by the granting of licenses and permits for the sale of alcoholic beverages at a particular unlicensed location." § 64 (6-a) (a)-(f).

    These factors include, as follows:

    > (a) The number, classes and character of licenses in proximity to the location and in the particular municipality or subdivision thereof.
    >
    > (b) Evidence that all necessary licenses and permits have been obtained from the state and all other governing bodies.
    >
    > (c) Effect of the grant of the license on vehicular traffic and parking in proximity to the location.
    >
    > (d) The existing noise level at the location and any increase in noise level that would be generated by the proposed premises.
    >
    > (e) The history of liquor violations and reported criminal activity at the proposed premises.
    >
    > (f) Any other factors specified by law or regulation that are relevant to determine the public convenience and advantage and public interest of the community. *Id.*
18. 1993 Legis. Ann. 515 (Memorandum of Assemblyman G. Oliver Koppell).
19. 409 N.E.2d 963 (N.Y. 1980).
20. *Id.* at 971.
21. *SoHo Cmty. Council*, 661 N.Y.S.2d at 695.
22. *Id.*
23. *Id.*
24. *Id.* at 699.
25. *Id.*
26. *Id.*
27. *Id.*
28. Bowery Room Corp. v. N. Y. State Liquor Auth., No. 115502/99, 2000 WL 433558, at *5 (N.Y. Sup. Ct.).
29. *Id.* at *1.
30. *Id.* at *2.
31. Cleveland Place Neighborhood Ass'n v. N.Y. State Liquor Auth., 709 N.Y.S.2d 12 (App. Div. 2000).
32. *Id.* at 14.
33. *Id.* at 15.
34. *Id.*
35. *Id.* at 15–16.
36. *Id.* at 16.
37. *Id.*
38. Michael Mandelkern, *SLA Upgrades Better for All Parties*, DOWNTOWN EXPRESS, July 9–15, 2009, at 7.
39. *621 Events, LLC, v. N.Y. State Liquor Auth.*, No. 5702-08, 5 (N.Y. Sup. Ct. Alb. County October 17, 2008).
40. A. 08519A, 233rd Sess. (N.Y. 2010).
41. *Id.*
42. Amended Complaint at Exhibit 2, *Ginx, Inc. v. SoHo Alliance*, 2009 WL 4995046 (S.D.N.Y. October 26, 2009) (No. 09 Civ. 6977(CM)).
43. *Ginx, Inc. v. SoHo Alliance*, No. 09 Civ. 6977, 2010 WL 3431157, at *10–11 (S.D.N.Y. August 19, 2010) (discussing equal protection claim).
44. *Ginx, Inc. v. N. Y. State Liquor Auth.*, No.10-2966 (2d Cir. 2010).
45. *SoHo Alliance v. N. Y. State Liquor Auth.*, No. 0106400/2007, at 6 (N.Y. Sup. Ct. N.Y. County April 21, 2008).
46. *Id.* at 7.
47. *Id.* at 2.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at 2–3.
53. *Id.* at 3.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 4–5.
61. *Ginx, Inc. v. SoHo Alliance*, No. 09 Civ. 6977, 2010 WL 3431157, at *6 (S.D.N.Y. August 19, 2010).

Adrian C. Hunte is a principal with the law firm of Hunte Law Group, P.C., providing business and legal services to the beverage alcohol industry. Ms. Hunte is a former General Counsel to the New York State Liquor Authority. She attended New York University, graduating with honors from the University of Massachusetts/Amherst. Ms. Hunte received her Juris Doctor degree from the Howard University School of Law, where she was a member of the Editorial Board of the *Law Review*. ahunte@huntelaw.com; (914) 526-1000.

Economic Development of the Hospitality Industry Under the Watchful Eye of the ABC Law

By Scott Wexler

Owning and operating a business that sells alcoholic beverages is different than selling any other product. The casual observer is generally familiar with Prohibition and knows that for some period of time the sale of alcohol was not permitted in the United States but he or she cannot possibly appreciate the degree to which the alcohol beverage business is regulated.

Those more familiar with the alcohol beverage industry and its regulatory scheme are seemingly comfortable with its many restrictions and limitations on the ordinary rules of commerce. Perhaps that's due to our years of indoctrination in the system regulating alcoholic beverages or perhaps it is our understanding of the history of the control of the product. Beverage alcohol products are socially sensitive. Alcohol is the only product that is the subject of two amendments to the Constitution of the United States. Furthermore, the policy of allowing the sale and distribution of alcoholic beverages, subject to general and specific limitations and restrictions, is enumerated in the opening paragraph of the foundation of the modern-day provisions of the state's Alcoholic Beverage Control Law (ABC Law):

> It is hereby declared as the policy of the state that it is necessary to regulate and control the manufacture, sale and distribution within the state of alcoholic beverages for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to law. It is hereby declared that such policy will best be carried out by empowering the liquor authority of the state to determine whether public convenience and advantage will be promoted by the issuance of licenses to traffic in alcoholic beverages, the increase or decrease in the number thereof and the location of premises licensed thereby, subject only to the right of judicial review hereinafter provided for. It is the purpose of this chapter to carry out that policy in the public interest. The restrictions, regulations and provisions contained in this chapter are enacted by the legislature for the protection, health, welfare and safety of the people of the state.[1]

While this section of the law was written in 1933, it forms the basis of the many current limitations on the operation of an alcoholic beverage business in New York. In operation today, the beverage alcohol industry is subject to restrictions in virtually every facet of production and distribution. The vast majority of these provisions, while restrictive, provide guidelines for operating an alcoholic beverage business. The restrictions include:

- Hours of sale
- Age of seller
- Age of purchaser
- Credit terms between wholesalers and retailers
- Sale price (discounts, terms, posting—used to include consumer prices)
- Prohibited persons from being licensed
- Advertising
- Size of containers

As much as these restrictions and limitations (and the many others not listed) provide barriers to normal commercial activities, the industry has evolved over the years and learned to work within these rules. There are a number of provisions, some of which have been more recently inserted into the law, that go well beyond the establishment of limitations and restrictions. These provisions serve as substantial barriers to economic development and growth and impose restrictions on alcoholic beverage businesses that are most often impossible to overcome.

This tension between the Alcoholic Beverage Control Law and economic development has existed throughout the history of alcoholic beverage control; however, it has varied over the years. The foundation of New York's Alcoholic Beverage Control Law is the 21st Amendment to the U.S. Constitution; therefore, most alcohol policy discussions begin with the repeal of Prohibition, but the friction between economic development and alcohol regulation precedes Prohibition.

The New York's Law Revision Commission recently recounted the historical background of the Alcoholic Beverage Control law in its preliminary report on the law and its administration. The report demonstrates that efforts to curb the unrestricted use of alcohol in the United States began well before the birth of our nation and continued throughout the eighteenth and nineteenth centuries.[2] The pre-Prohibition era restrictions on the alcoholic beverage industry were imposed as a result of social and religious concerns; however, their enactment presented impediments to economic development. The Law Revision Commission's report noted that by the late 1880s, there were 12,000–15,000

saloons in Manhattan; therefore while economic development was affected by these restrictions, there does not appear to have been any real impact as a result.[3]

The Temperance Movement's success in adoption of the Eighteenth Amendment to the U.S. Constitution was short-lived and the post-Prohibition era began on December 5, 1933 upon ratification of the Twenty-First Amendment to the US Constitution. Prohibition was brought about largely by abuses in the pre-Prohibition years in distribution, sale, and consumption of alcoholic beverages. Preventing a return to those abuses was the major goal of the laws enacted to regulate the alcoholic beverage industry following repeal. The federal laws include provisions to ensure the collection of government revenue, prevent unscrupulous individuals from entering the business, and prevent unfair trade practices.[4]

While New York State's Alcoholic Beverage Control Law, following the repeal of Prohibition, contained restrictions such as those listed above, few of the original provisions of the ABC Law impeded economic development. Two provisions of the 1934 statute have served as a barrier—the law governing the proximity of a licensed premise to a church or school and the law preventing alcohol beverage suppliers from having an interest in a retail license.

A "200 foot rule" governs the location of retail liquor and wine licensed premises in proximity to schools and places of worship in New York State. Virtually identical language applies to licensed restaurants, taverns, cabarets, restaurant-brewers and package stores:

> No retail license for on-premise consumption [no special on-premises license; no retail license to sell liquor and/or wine for off premises consumption] shall be granted for any premises which are located on the same street or avenue and within 200 feet of a building occupied exclusively as a school, church, synagogue or other place of worship….[5]

While rooted in the post-Prohibition culture, this restriction remains in place today often functioning as a bar to development.

Last year, the Division of Alcoholic Beverage Control denied an application to operate an on-premise establishment in an area specifically targeted for economic development in the City of Troy, New York because it was located across the street from a building occupied by the Salvation Army. In spite of the fact that three other on-premise licensed premises were operating within 200 feet of the building, the Division determined that the Salvation Army is a church and, therefore, the premise was not eligible for licensing. The applicant appealed the denial to the Members of the Authority who considered the issue during two separate meetings. After examining the full record of activity in the building and its uses, the Liquor Authority ruled 2–1 that the Salvation Army building was not used exclusively as a church and approved the application.[6]

Several sections of the ABC Law prohibit interlocking interests across industry tiers. The restrictions were intended to prevent the return of a major abuse of pre-Prohibition era—the "tied houses" and "exclusive outlets" effectively controlled by individual brands. The law bans outright supplier interests in businesses that sell alcoholic beverages at retail[7] and imposes strict rules on the interactions between suppliers and retailers. The rules proscribe the manner in which suppliers provide credit to retailers,[8] offer gifts and services to retailers,[9] and establish prices for sale to retailers[10] amongst others. These provisions facilitate the business relationships between suppliers and retailers by providing the ground rules for their interactions.

The ban on supplier interests in retail establishments has caused difficulties for economic development as corporate interests, especially multinational concerns, have become more common. The desire to accommodate economic development projects has caused the law to be amended to provide exceptions to the outright ban on supplier interests in retail establishments, including permitting:

- A resort hotel owned by a distiller in the Adirondack ski country;
- Interest held by a supplier in an office building in a city of over a half million population in which a licensed premise is located;
- Manufacturer or wholesaler interest in a retail location that offers predominantly interactive computer and video entertainment; and
- New York City's Rhiga Royal Hotel which is part-owned by a manufacturer.[11]

The most recent exception to the outright ban is Chapter 390 of the Laws of 2010 which provides an exception to this law to allow the operator of several on-premise retail establishments to own a restaurant-brewer. This amendment was enacted to facilitate the economic development in the City of Schenectady. The legislature has responded to almost every one of these potential barriers by enacting permissive amendments, so the outright ban on supplier interests in retail establishments has served to complicate economic development, not prevent it.

With the exception of the "200-foot rule" and the prohibition on interlocking interests during the first thirty years following the repeal of Prohibition, meeting the food requirement in the statute was the principal licensing challenge. The difficulty that liquor licensees had meeting the food standard led to a high-profile scandal as applicants and licensees took all steps imaginable to secure and protect their liquor licenses. The resulting "Rockefeller" reforms of 1964 created a new "Special On-Premise" license with a minimal food standard.[12]

Over the next thirty years, the distinctions between the types of licenses disappeared as the Authority treated all applicants similarly, regardless of the type of on-premises establishment they sought to operate.[13] Coupled with the

removal of the moratorium on liquor licenses, another reform brought about by Gov. Rockefeller's Moreland Act Commission investigation, there was little in the Alcoholic Beverage Control Law to stand in the way of economic development. The mood of the era was to reduce barriers to business. In its 1981 *Recommendations for Reorganizing the New York State Liquor Authority and Amending the Alcoholic Beverage Control Law*, the New York State Senate Committee on Investigations and Taxation recognized the tremendous economic contributions of the alcoholic beverage industry and called for studying the extent to which the law imposes limits on a free market economy in alcoholic beverages.[14]

During this era it was for the State Liquor Authority (SLA) to decide whether granting a license was in the public interest and the Authority was principally concerned about licensing eligibility—who was the real party in interest and were they eligible to be licensed.[15] There were no restrictions on development other than the "200-foot rule" and the restrictions on interlocking interests discussed above. Neighborhood opposition was not sufficient grounds for the Liquor Authority to deny a liquor license application.[16] As a result, many liquor license applications were granted over the years notwithstanding the impact they would have on the community.

This changed with the adoption of new licensing restrictions in 1993. Chapter 183 of the Laws of 1993 prohibits the SLA from issuing an on-premise liquor license when there are three or more existing on-premises licensees within 500 feet of the proposed premises.[17] The law was amended later in the year to allow the Liquor Authority to grant the license if it finds it is in the public interest.[18] Chapter 670 of the Laws of 1993 provides the Authority with the discretion to consider quality of life issues when determining whether to grant a liquor license.[19] The intent of these laws was to reverse the history of the past 30 years—to protect, defend, and empower local communities from the onslaught of licensed liquor establishments. Providing residents with a tool to combat economic development that was inconsistent with the quality of life in their neighborhoods was the core purpose of these initiatives and they were successful to some extent.[20]

Chapter 183, the so-called "500-foot rule" established a statutory presumption against granting a new on-premise liquor license, or so State Senator Frank Padavan, the bill's sponsor, thought. Senator Padavan told the State Senate Investigation Committee's September 2006 public hearing on the State Liquor Authority that the law intended for the SLA to deny license applications but provided for an economic development exception. According to Senator Padavan, the Liquor Authority ignored the law's intent citing the jobs created and taxes paid as grounds for granting licenses under the economic development exception, forcing residents to bring a lawsuit challenging the SLA's decisions.[21] Susan Howard, a representative of the Lower East Side Alliance, also expressed this concern at the hearing. Howard claimed that the SLA confused "business" with "economic development" and disputed the claims that locating clusters of licensed establishments was responsible for the resurgence of her lower Manhattan neighborhood.[22] In *SoHo Cmty. Council v. N.Y. State Liquor Auth.*, the court agreed with the residents, holding that employment and tax revenue was not sufficient to justify the determination that granting the license was in the public interest.[23]

Senator Padavan claimed at the 2006 Senate hearing that, in spite of this court decision, the State Liquor Authority continued to issue liquor licenses in a manner that allowed for clusters of establishments contrary to the original intent of the law.[24] In 2004, the court ruled in *Flatiron Cmty. Ass'n v. N.Y. State Liquor Auth.* that the SLA acted arbitrarily by granting a license subject to the 500-foot rule without making a determination that issuing the license is in the public interest or explaining the decision to grant the license in light of the community opposition.[25] And the Ad Hoc Citywide Coalition Against Nightlife Proliferation reported to the Senate Investigations Committee at the hearing that there is still a need for protection from the effects of over-saturation of licensed liquor establishments.[26]

The State Liquor Authority acknowledged the growing complaints about its administration of the "500-foot rule" and imposed a temporary moratorium on the issuance of on-premises liquor licenses in Manhattan for bars, nightclubs and cabarets subject to the "500-foot rule" on September 6, 2006. According to SLA Chairman Daniel Boyle's testimony to the Senate Investigation Committee, this had the effect of calling a time-out on the granting of these liquor licenses for a four-month period while the Liquor Authority determined how to administer the law going forward.[27] Chairman Boyle explained how the Authority solicits and responds to community input and reported that a number of community boards had recognized their responsiveness.[28] He also announced the formation of a task force to "analyze the SLA licensing policies and procedures and the on-premise application in order to refine the licensing process and to distinguish between licenses issued for restaurants and those issued for bars, nightclubs and cabarets."[29] The Chairman reported that Commissioner Noreen Healey would head up the task force, that its members would include representatives of the community, industry, and government and that the Task Force would report by December 31, 2006 in order for its recommendations to be implemented when the moratorium on licenses expired.[30]

Industry advocates, while concerned about the quality of life issues, objected to the extent of which the 1993 amendments to the law interfere with economic development. Robert Bookman, counsel to the New York Nightlife Association, claimed that since enactment of these laws, the growth of business has been anemic, a hostile climate for business development has been fostered, and economic development has been suffocated. Bookman told the Committee "the real crisis is the slow killing of this important industry, one that will have a major impact on jobs, taxes and tourism if it continues unabated."[31] The Nightlife Association asserted the position that localities (in this case the City of New York) use their authority within the zoning law to

manage economic development and rejected the premise of the 1993 amendments or any similar statutory or regulatory restriction on the location of licensed premises.[32] The New York State Restaurant Association's New York City Chapter took a similar view. According to Chapter President E. Charles Hunt, the Association is concerned about the impact of these laws on New York City's restaurant industry. He supported the Nightlife Association's position that local zoning laws were the appropriate method of determining the suitability of a location for a licensed premise.[33]

Not all industry advocates shared this perspective. The Empire State Restaurant and Tavern Association, a group that I have represented since 1985, sought a balance between the interests of business and community. The Association worked with legislators to craft the 1993 amendments to the law after reaching the conclusion that the reforms adopted in light of the Moreland Commission Report in 1964 had gutted the Liquor Authority's power to live up to its legal responsibilities. The association agreed that restrictions on the co-location of establishments were needed and supported the "500-foot rule" once legislators agreed to create the economic development exception cited above. We, too, thought the presumption was against granting licenses and expressed this regularly within the legislative dialogue over ABC Law changes since 1993.

As important as the 500-foot law is, Chapter 670 of the laws of 1993 is an even more useful tool if the Liquor Authority recognized its existence.[34] This law was specifically drafted to address court decisions that prohibited the SLA from denying license applications on the quality of life grounds when the number of establishments does not meet the "500-foot rule" standard for over-saturation yet the Liquor Authority inexplicably ignores this law.[35] As noted in the New York State Law Revision Commission's Final Report, "such a result makes little sense and certainly conflicts with the plain meaning in the language of the respective provisions."[36] The Commission was still awaiting a citation for a court case that the Authority's Counsel claimed restrained the provisions of this section to the "500-foot rule" when the report went to print last year.[37]

The testimony at the Senate hearing demonstrated how the struggle between the law and development had evolved over the thirteen years since enactment of the 1993 amendments. The Senate Investigations Committee report on the findings from its hearings concluded that there are questions about whether the appropriate balance is being struck between business and public interests. Citing the original intent of the 1993 amendments, the report expressed concern about loopholes in the law that continues to allow the clustering of on-premises establishments and raised the possibility of eliminating the economic development exception to the "500-foot rule."[38]

The State Assembly held a similar hearing earlier that year and focused on many of the same issues. According to the Committee's September 2006 Legislative Report the Committee "heard testimony from all the stakeholders, including community residents and on-premises licensees, and will weigh various options that will attempt to improve the quality of life in the affected neighborhoods, particularly Lower Manhattan, while continuing to encourage appropriate economic development in the same neighborhoods."[39] The Committee advanced, and the Assembly subsequently passed, Bill A-10191 which eliminated the "public interest" exception in the law, replacing it with an option for the local legislative body to grant exceptions.[40] This bill was not passed by the State Senate and so it did not become law.

A nearly identical discussion involving many of the same individuals took place during the deliberations of the Liquor Authority's Task Force on On-Premise Licensure. The meetings produced a number of administrative changes that were implemented by the Authority to improve the ability for community interests to be considered during the licensing process. However, most of the changes sought by members of the community or the government representatives infringed on economic development, which were unacceptable to the business representatives on the task force. Although a consensus on broad policy recommendations did not emerge from the Task Force's deliberations, the Members of the Authority received positive feedback from the community and government officials—some of their most vocal critics—for the steps they had taken and planned to take to reverse the perceived lack of concern for local input in the licensing process.

Little has changed in the past few years to reduce the tension, although the line where economic development is thwarted by the Alcoholic Beverage Control Law continues to be a moving target. The SLA began taking a hard line on licensing matters with the temporary moratorium in 2006 and rarely issued a license over the objection of a locality during the remainder of Chairman Boyle's term. A state Supreme Court decision in 2008 threatened to undermine the "500-foot rule's" intent by interpreting the law to require the SLA to count each type of license separately so that a license for a bar could not be denied because there were three existing restaurant liquor licenses within 500 feet of the proposed premises, and for a time it did—exempting from the scope of the law many premises that had been covered under the Authority's previous interpretation.[41] The change did not last long as legislation was advanced and enacted to restore the "500-foot rule" to its original meaning.[42]

The road ahead looks like a continued effort by the legislature and the State Liquor Authority to seek the appropriate balance between business and public interests—to continually re-calibrate the degree of tension between the law and economic development. The legislature is expected to consider the Law Revision Commission's recommendation for changes to the law next year. Its final report recommends that the Alcoholic Beverage Control Law's objective should be to promote the health, safety, and welfare, allowing economic growth to the extent that it does not impede with the primary objective.[43] Numerous legislators have

introduced bills addressing this issue, including proposals to revise the procedures followed in a 500-foot hearing, change the method of measuring the distances under the 200 and 500 foot rules, and provide greater community notice of pending liquor license applications, amongst others.[44] And even the SLA's Task Force on On-Premises Licensure called for enhancing the Authority's ability to fairly license New York businesses by balancing the interests of business with those of the greater community.[45]

This discussion has been ongoing since before the original enactment of the modern-day ABC Law in 1934 and it is certain to continue in the years ahead. We can expect a robust discussion over how and where to draw the line, but with all of the voices calling for change, it's likely the resultant policy will serve to increase the tension between the Alcoholic Beverage Control Law and economic development…at least until the public mood changes again.

Endnotes

1. N.Y. Alco. Bev. Cont. Law § 2 (McKinney 2000).
2. N.Y. State Law Revision Comm'n, Preliminary Report on the Alcoholic Beverage Control Law and its Administration 5–7 (2008), *available at* http://www.lawrevision.state.ny.us/PreliminaryReportrv90208.pdf.
3. *Id.*
4. *See* New York State ABC Law Handbook For On and Off Premises Liquor, Wine and Beer Retailers, A Bit of History (1991) [hereinafter Handbook].
5. N.Y. Alco. Bev. Cont. Law §§64(7)(a); 64-a(7)(i); 64-c(11)(a)(i); 64-d(8)(a); 105(3) (2000 & Supp. 2010).
6. Tom Caprood, *SLA Clears Way for Mekas Lounge to Open*, Troy Record, Oct. 9, 2009 at 1, *available at* http://www.troyrecord.com/articles/2009/10/09/news/doc4aceefc5bfbfb584529046.txt.
7. N.Y. Alco. Bev. Cont. Law §§ 101(1), 105(16) (2000 & Supp. 2010).
8. §§ 101-aa,101-aaa (2000 & Supp. 2010).
9. § 101(1)(c).
10. § 101-b.
11. § 101.
12. Handbook, *supra* note 4, at 210.
13. *Id.*
14. N.Y. State Senate Comm. on Investigations and Taxation, Recommendations for Reorganizing the New York State Liquor Authority and Amending the Alcoholic Beverage Control Law 7, 13 (June 25, 1981).
15. *See* Thomas J. Bepko, Jr., *N.Y. State Liquor Authority, Licensing and Post-Licensing Disclosure: The State Liquor Authority Initially Determines and Continually Monitors Licensee Eligibility and the Real Parties in Interest on the License,* N.Y. State Bar Ass'n (1993).
16. Zito v. State Liquor Auth., 448 N.Y.S.2d 309, 310 (App. Div. 1982).
17. *See* 1993 N.Y. Laws ch. 183.
18. *See* 1993 N.Y. Laws ch. 720.
19. *See* 1993 N.Y. Laws ch. 670.
20. S. 03103A, 216th Sess. (N.Y. 1993); A. 05084A, 216th Sess. (N.Y. 1993); S. 03725A, 216th Sess. (N.Y. 1993); A. 06158A, 216th Sess. (N.Y. 1993) (Memorandum in Support).
21. *New York State Senate Committee on Investigations and Government Operations, Examining New York State's Liquor Laws, Regulations and Enforcement*, 229th Sess.11–13 (2006) [hereinafter Public Hearing].
22. *Id.* at 195–203.
23. 661 N.Y.S.2d 694, 696 (N.Y. Sup. Ct. 1997).
24. Public Hearing, *supra* note 21, at 13–15.
25. 784 N.Y.S.2d 823, 827 (N.Y. Sup. Ct. 2004).
26. Public Hearing, *supra* note 21, addendum.
27. *Id.* at 24–25.
28. *Id.* at 32–36.
29. *Id.* at 25–26.
30. *Id.* at 26.
31. *Id.* at 90–91.
32. *Id.* at 131–32.
33. *Id.* at 111–12, 115.
34. *See* 1993 N.Y. Laws ch. 670.
35. S. 03725A, 216th Sess. (N.Y. 1993); A. 06158A, 216th Sess. (N.Y. 1993) (Memorandum in Support).
36. N.Y. State Law Revision Comm'n, Final Report on the Alcoholic Beverage Control Law and its Administration 29 (2009) [hereinafter Final Report], *available at* http://www.lawrevision.state.ny.us/FinalReportPartOne.pdf.
37. *Id.*
38. N.Y. State Senate Committee on Investigations and Government Operations, A Report on the On-Premise Drinking In New York State: A Reexamination of New York's Liquor Laws 7, 10 (Dec. 2006).
39. *See* N.Y. State Assembly Committee on Economic Development, Report on Public Hearings on Alcoholic Beverage Control Enforcement Issues (2006), *available at* http://assembly.state.ny.us/comm/Econ/20060905/.
40. A-10191, 229th Sess. (N.Y. 2006).
41. 621 Events LLC v. N.Y. State Liquor Auth., No. 5702-08, 5 (Sup. Ct. Albany County Oct. 17, 2008).
42. 2009 N.Y. Laws ch. 163.
43. Final Report, *supra* note 36, at 11.
44. A. 01960, 232rd Sess. (N.Y. 2009); S. 03124, 232rd Sess. (N.Y. 2009); A. 02624, 232rd Sess. (N.Y. 2009); S. 04141, 232rd Sess. (N.Y. 2009); A. 02625, 232rd Sess. (N.Y. 2009); S. 05295, 232rd Sess. (N.Y. 2009); A. 02840A, 232rd Sess. (N.Y. 2009); S. 02912, 232rd Sess. (N.Y. 2009); A. 03743A, 232rd Sess. (N.Y. 2009); A. 03827A, 232rd Sess. (N.Y. 2009); A. 03828, 232rd Sess. (N.Y. 2009); A. 03829, 232rd Sess. (N.Y. 2009); A. 04606, 232rd Sess. (N.Y. 2009); S. 06300, 232rd Sess. (N.Y. 2009): A. 06062, 232rd Sess. (N.Y. 2009); A. 06283, 232rd Sess. (N.Y. 2009); S. 05186, 232rd Sess. (N.Y. 2009); A. 07364C, 232rd Sess. (N.Y. 2009); S. 03775C, 232rd Sess. (N.Y. 2009); A. 10856, 233rd Sess. (N.Y. 2010); S. 07159, 233rd Sess. (N.Y. 2010); A. 11559A, 233rd Sess. (N.Y. 2010); S. 08311A, 233rd Sess. (N.Y. 2010); S. 00339, 232rd Sess. (N.Y. 2009); S. 02372, 232rd Sess. (N.Y. 2009); S. 02375, 232rd Sess. (N.Y. 2009); S. 02761, 232rd Sess. (N.Y. 2009); S. 05508A, 232rd Sess. (N.Y. 2009); S. 06451, 233rd Sess. (N.Y. 2010).
45. Letter from Noreen Healey, Commissioner, N.Y. State Liquor Auth., to Daniel B. Boyle, Chairman N.Y. State Liquor Auth. (Dec. 8, 2006) (presenting the report and recommendations of the N.Y. State Liquor Authority Taskforce for the Review of On-Premise Licensure), *available* at http://www.abc.state.ny.us/system/files/Taskforce-Report-122106.pdf.

Scott Wexler is an associate at Ostroff, Hiffa & Associates, a New York Government Relations and Communications firm, and has served as Executive Director of the Empire State Restaurant and Tavern Association since 1985. He developed "The ABC's of the ABC Law," the first-ever training program for on-premise alcohol beverage licensees, and he's been a member of the State Liquor Authority's Taskforce for the Review of On-Premise Licensure and Governor Paterson's Small Business Task Force.

New York's Farm and Micro Distilleries, Wineries, and Breweries: The Tension Between Economic Development and the Three-Tier System

By J. Stephen Casscles and Andrew B. Wilson

J. Stephen Casscles

Since 1976, with the passage of the New York Farm Winery License Law, there has been a growing tension within the Alcoholic Beverage Control Law (ABC Law) between provisions that encourage the production and marketing of spirits, wine, and beer by New York producers under the banner of economic development and the original underlying intent of the ABC Law which was to strictly control the production, marketing, sale and consumption of alcoholic beverages for social and health-related purposes.

Much of the current ABC Law was first drafted in the wake of the repeal of "The Great Experiment"—Prohibition—in 1933. Prohibition, the 18th Amendment to the U.S. Constitution, and enabling statutes such as the Volstead Act had driven the alcoholic beverage industry underground. Development of a new ABC Law occurred immediately after the enactment of the 21st Amendment to the United States Constitution which repealed the 18th Amendment. New York, being a "wet state," was the ninth of thirty-six States to vote for passage of the 21st Amendment on June 27, 1933.[1] The 21st Amendment went into effect on December 5, 1933, and the State of New York enacted its ABC Law on May 10, 1934, which became effective on July 1, 1934.[2]

As is well described in Leon Adams' *The Wines of America*, and as the first section of the ABC Law states, this was to be a law to "control" the production, distribution, and use of alcoholic beverages—lumping wine and hard liquors together and discouraging establishment of wineries by charging exorbitant licensing and filing fees.[3] In the same vein, section 2 of the ABC Law sets out the States' policy and purpose of the ABC Law. This section states in part "[i]t is hereby declared as the policy of the state that it is necessary to regulate and control the manufacture, sale and distribution within the state of alcoholic beverages for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to law."[4] Further, that the State shall "determine whether public convenience and advantage will be promoted by the issuance of licenses to traffic in alcoholic beverages, the increase or decrease in the number thereof and the location of premises licensed thereby."[5] Furthermore,"[t]he restrictions, regulations and provisions contained in this chapter are enacted by the legislature for the protection, health, welfare and safety of the people of the state."[6]

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The effect of this policy was that the State Liquor Authority (SLA) originally issued only 1,700 licenses to sell all the liquor and wine sold in New York. Demand caused the value of those licenses to skyrocket. This prompted licensees to form a strong interest group to block legislation to expand the number of licenses or to allow wine or liquor to be sold outside of single-purpose stores. Such action effectively stifled the development of wineries for some time as they lacked an effective way to distribute their product. From the tone of section 2 of the ABC Law , it is clear that the production, distribution, and sale of alcoholic beverages would be likened to any present day effort to legalize and control the production, distribution, and sale of marijuana, cocaine, or other controlled substances used for recreational purposes. To properly read the ABC Law in the context of its original drafters, substitute the word "alcohol" with the term "marijuana" or "cocaine" to set the tone of how the production, distribution, and sale of the regulated product was to be regulated.

Today the social context has shifted: the consumption of "alcohol" can mean the consumption of a light and approachable, but not too pretentious, chardonnay at a restaurant or at home. One must remember, however, that the ABC Law was enacted immediately after Prohibition in 1934 to control alcohol abuse and criminal involvement in alcohol trades. During Prohibition, and even after its repeal, the distribution of alcoholic beverages tended to be high alcohol spirits or beer. The production, distribution, and sale of such beverages were clearly controlled by organized crime syndicates whose leaders are still renowned and used by Hollywood today in crime movies and film noir.

The underground "commercial" production and distribution of alcoholic beverages was controlled by legendary crime figures such as Legs Diamond, the Bernstein brothers of Detroit's Purple Gang, Thomas "Snake" Kinney and Tom Egan of St. Louis's Egan's Rats, and the infamous Chicagoans Al Capone and "Bugs" Moran. These, and other, crime syndicates fought the Federal Government, and each other for control of the illegal and highly lucrative alcohol trade. These "alcohol wars" spawned widespread public violence such as the 1929 St. Valentine's Day Massacre, and engendered a general disrespect and flagrant disregard for the law.[7]

Please note, however, the underground commercial production and distribution of alcoholic beverages did not include alcoholic beverages that were commonly produced in the home by recent Italian, Hungarian, Polish and other central European immigrants whose moderate consumption of wine and beer was part of their daily life. Even under the 18th Amendment to the United States Constitution, which prohibited the *transport* of alcoholic beverages between state lines, by enabling laws there was an exception for 200 gallons of "non-intoxicating cider and fruit juice" per household each year.[8] The definition of "intoxication" as described in the Volstead Act allowed for beer under 0.5% alcohol by volume—at least until the introduction of 3.2% beer in March 1933 under the Cullen-Harrison Act—and all wine.[9] Thus, while many wineries were put out of business by Prohibition, by retooling to produce grape juice and adding to its labels "Caution—Do not add yeast or admit air or the contents will ferment," several vintners survived those dry years.

To purge monopolistic organized crime, also known as the "rackets," from the alcohol trade and to inhibit their future development, New York's ABC Law, as was the case for many other states, created the three-tier system. Separate licenses were needed for the manufacture, wholesale, and retail sale of alcoholic beverages to the public. Under this regulatory system, a licensee who manufactured alcohol could not wholesale or sell such beverages at retail, effectively breaking up existing vertical monopolies that organized crime had on the production, distribution, and sale of alcoholic beverages. Again, from the perspective of 1934, New York was regulating a product that had more similarities with today's distribution and consumption patterns of controlled substances by criminal elements. Hence, the three-tiered system was established to create firewalls between those who produced alcohol, those who distributed alcohol, and those who sold alcohol for both on and off-premises consumption.

For over forty years, this three-tiered system that regulated production, distribution, and sale of alcoholic beverages remained static. However, with the enactment of the Farm Winery Law in 1976, things began to change.[10] The farm winery movement was a national movement that started to occur after World War II, when returning veterans, and those who lived in Europe after the World War, wanted to encourage the local production of wine for consumption with food. Individuals such as Philip Wagner, Mark and Dene Miller, Dr. Konstantin Frank, and wine importer and writer Frank Schoomaker, some of whom had lived in Europe during and after the war, and some who founded the American Wine Society, wanted to emulate European ways of living, including the local production and sale of wines.

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The earliest Farm Winery Act, called the Limited Winery Act, was passed in Pennsylvania in 1968 and provided a model for other states.[11] Other early winery acts were passed in Indiana in 1971 and New York in 1976. Many states soon followed including Maryland, Virginia, Minnesota, Maine, Michigan, and Nebraska. Under New York's 1976 Farm Winery Act, currently codified in section 76-a of the ABC Law, the farm winery, which grew grapes or other agricultural products, could not only produce wine under such license, but also act as its own distributor and a point of sale for its products from its own establishment.[12] A 1978 amendment permitted using grapes from other New York vineyards which eventually was broadened to include grapes from out of state. Under this law, a permit holder could manufacture wine, act as its own distributor, transport wine, sell sealed containers of wine for off-premises consumption, sell wine for on-premises consumption, and directly ship wine to premises licensed to sell for on-premise and off-premise consumption both in New York and across the country.

The declaration of legislative findings and intent to Chapter 275 of the Laws of 1976 is sharply contrasted to the 1930s' "control" laws.[13] It marked a shift towards encouraging economic development and stated that New York needed to "conserve and protect and to encourage the development and improvement of its agricultural lands." This purpose of this chapter was:

> [E]ncourage the development and improvement of its agricultural lands for the production of food and other agricultural products. These policies are served by measures designed to facilitate entry for domestic agricultural products *into the markets of the state*. Agriculture in certain

> parts of the state is under *economic restraint* due to low priced imported products and commodity surplus conditions in other states and foreign countries.[14]

Further, "fruit farmers in the state have been *limited in marketing* their produce by the high costs of licenses to manufacture and sell alcoholic beverages."[15] Additionally, "[s]uch costs, which in *turn lead to higher prices for wines and cider* produced in New York state, effectively prohibit farmers of limited means and objectives from marketing their production as fermented wines or ciders…."[16] Lastly, "the purpose of this statute [is] to remove these restraints *in order to improve marketability and competitive stance* of indigenous wines and ciders for the benefit of both farmers and consumers…."[17]

The enactment and expansion of the Farm Winery Act was the first substantial revision to New York's three-tier system. It was one of the first examples where the ABC Law was altered to encourage economic development. The law was altered in response to a market that was changing faster than wineries could keep up. Large wineries in the Finger Lakes, such as the Taylor Wine Company, were reacting to the substantial decline in interest in sweet wines and increasing desire for dry table wines. This trend began in the late 1960s, and was exacerbated in the 70s and 80s. In the wake of this market shift, Taylor Wine and others cancelled or substantially reduced their grape contracts with growers across New York. Right before the 1975 harvest, all but a fraction of the contracts to buy the grape crop were cancelled as grape juice was imported from California. The growers, who had almost exclusively relied on the sale of their crop to one of the three or four major producers of wine and grape juice in the State, had nowhere to sell their crop—leaving thousands of tons rotting on the vine. The crisis was mitigated only through gubernatorial action in 1976 as Governor Hugh Carey stepped in to declare a statewide "wine month," and sponsored the 1976 Farm Winery Act.[18]

After the enactment of the Farm Winery Act, visionaries such as Bill Wagner, Hermann Wiemer, Mark and Dene Miller, Art Hunt, Tom Wickham, Ben Feder, and William Wetmore, who were all grape growers, established their own new bonded farm wineries and formed regional growers associations so that they could create a market for their own crops that Taylor Wine Company and other large wineries such as Great Western, Gold Seal, and Widmer could no longer accept. However, wineries and vintners were not safe from the woes of the market. For example, according to the 1984 N.Y.S. Senate Task Force Report, *Tending the Vineyards*, between 1977 and 1981 the expense, per acre, to cultivate grapes had risen from $625 to $1,026, a 64% increase, while simultaneously the price paid per ton of then-popular Concord grapes had fallen 17% from $224/ton to $185.[19] In 1984, contracts for 15,000 tons of Concord, Catwba, and Ives grapes and 300-400 tons of Delaware, Seyval Blanc, and deChaunac grapes were again cancelled, further damaging an already fragile upstate economy in New York.[20] In 1985, the industry bottomed and processed a mere 48,077 tons, as compared with 1974 numbers of 100,752 tons.[21]

Over the years, the New York Farm Winery Act was expanded to give such licensees expanded powers to produce, market, and sell their products, and most importantly to offer wine tastings on-premises so that consumers could taste wines before purchasing. This expansion of a farm winery's powers began the true integration of promoting agriculture and tourism—or what is now called agritourism. It links winery sales to lodging, restaurants, and other leisure activities. One of the largest expansions occurred in 1993. Under Chapter 490 of the Laws of 1993, the three-tier system for farm wineries was altered to authorize and encourage wineries to become outlets for the retail sale of New York wines produced by other wineries and farm wineries.[22] As stated in section 1 of the chapter, the intent of the law was to "allow[New York] grape and wine industry to become more productive and profitable."[23] In the wake of this, farm wineries expanded their ability to act more like wholesalers which could solicit orders from other wineries, act as brokers in the purchase and sale of New York-produced wines, maintain a warehouse for other wines, and cooperatively deliver or transport other New York-produced wines. With the enactment of Chapter 490, farm wineries were not only able to produce, distribute, and sell wine for on- or off-premise consumption for their own manufactured wine products, but act in the capacity of a distributor, warehouse, transporter, and seller of wines produced by other farm wineries. Then, Chapter 210 of the Laws of 2005 authorized interstate shipment of wine.[24] Laws such as these helped to maintain the cultivation of grapes as a sizable portion of crops cultivated in New York. According to the Department of Agriculture and Markets, in 2005, the New York grape crop was valued at $34.3 million, placing New York third in grape production behind only California and Washington.

Despite imperfect crops and, some say, the failure of New York to allow for sales of wine in grocery stores, the Farm Winery Act opened the door to allow for new wineries. As time went on, New York went from seventeen licensed wineries in 1976 to seventy-six in 1983 to 100 in 1995 to the 222 farm wineries, 63 wineries, one microwinery, and forty-three satellite wineries that exist today. The expansion in the number of smaller wineries has enhanced other economic development activities such as the expansion of tourism, *i.e.*, lodging accommodations, restaurants, increased patronage of other local tourist attractions, and state-sponsored "wine trails," in rural parts of New York that was then, and continues to this day, to be economically distressed. The industry has expanded to such an extent that the Stonebridge Research Group stated that New York's grape and wine industry contributed

$3.76 billion to the state economy and attracted nearly 5 million tourists in 2008—numbers which continue to grow.[25]

As the number and success of farm wineries continued to expand, other sectors of New York's agricultural community began to take notice and worked to emulate this success. This led to movements to create similar producer licensing laws like the Farm Winery laws to allow distilleries and breweries to not only produce spirits and beer, but to distribute products, offer tastings of their products, and sell products on-site for off-premises consumption. These laws worked synergistically with farm winery laws as a number of farm wineries have distillery licenses to produce spirits that are used in the production of dessert wines such as port and sherry.

Similar to the piecemeal expansion of the farm winery laws, brewery licensing laws began to be amended to encourage the formation of more micro-breweries. In 1993, Chapter 535 was enacted to reduce the cost of obtaining a brewery license for those facilities that produced less than 60,000 barrels of beer from $3,125 to $250.[26] The licensing scheme was addressed again with Chapter 85 of the Laws of 2002 which slightly raised the fees to $4,000 for breweries over 60,000 barrels and $320 for those under 60,000.[27] The logic being that this new law would encourage new entrepreneurs to establish breweries and hopefully increase the purchase of locally produced grains and hops to manufacture beer and to increase the tourism trade. The law was further expanded to allow for contemporaneous brewing and sale of alcoholic beverages at restaurants, also known as a "restaurant-brewer," with Chapter 538 of the Laws of 1997.[28] Another change helpful to breweries, which paralleled changes for farm wineries and wineries, included Chapter 439 of the Laws of 2007 which allowed for a permit "to serve small samples of beer or malt beverages he or she produces at establishments licensed under this section fifty-four or fifty-four-a of this article."[29] This brew pub license codified in section 64-c of the ABC Law allows an owner to operate five restaurant breweries and has aided the expansion of this niche.[30]

Through these laws, by 2007 there were 73 breweries in New York, according to the Law Revision Commission's (LRC) work discussed below.[31] However, the market share for craft beers in New York remained a mere 3.7% of the state's consumption.[32] Some craft brewers point to an aspect of the three-tier system, the laws concerning sales between wholesalers and brewers which require written agreements to be terminated only for "good cause."[33] While this protects large brands from having a supply suddenly cut off, small brewers argue that with a production of less than 300,000 barrels, which amounts to less than 3% of a wholesaler's sales, they should be afforded greater flexibility. S.5614-A / A.488-B came to the forefront of the issue, although it was never enacted into law, by taking the side of the small craft brewers and affording them the flexibility to be able to buy themselves out of contracts, which had previously been prohibited by law.[34] However, there remain implications to the Contract Clause of the United States Constitution which will not be discussed in detail here, but the avid reader is encouraged to visit of the LRC's Report on December 15, 2009.[35]

After wineries and breweries were allowed to pierce the veil of the three-tier system, distilleries that produce high alcohol spirits were the next producer to do so. The wall that separated those who produced, distributed, and sold spirits cracked further with the enactment of several laws. In 2001, Chapter 272 amended the ABC Law allowing for liquor tastings, in a manner similar to wine and beer tastings, to be conducted in retail establishments.[36] Chapter 580 of the Laws of 2002 created a new class of distiller's license, class A-1, which cost a mere $250, down from $12,000 for other distiller class licenses for those that produced no more than 35,000 gallons of liquor per year.[37] The types of distillery licenses were expanded over time to include rectifying plants and other small distillery sales and distribution operations.[38] These allowed distilleries to operate similarly to a farm winery in that they could operate a tasting room, restaurant, and shop on their premises. However, although the licensing scheme follows those of farm wineries fairly closely, there remain some incongruities that have been criticized—such as the fact that there are six types of licenses seemingly without needful distinctions between them.[39] Also, there is a limitation that farm distilleries have not had the same expansion of farm wineries in that they remain limited to selling directly to consumers only those products made with New York raw materials. Despite these limitations, by 2009 there were twelve farm distilleries.

The most notable and trend-setting law changes have surrounded wine production and sale. Chapter 639 of the Laws of 2004 and Chapter 613 of the Laws of 2008 authorized farm wineries to conduct up to five off-site tastings and sell wines at charitable events so long as there is 15 days' advance notice to the SLA.[40] Wine trails have also been codified in section 343-k of the Highway Law through several laws such as Chapter 460 of the Laws of 2002 (Ontario Trail) and Chapter 432 of the Laws of 2007 (Northern Fork Trail on Long Island).[41] Similarly, Chapter 248 of the Laws of 2004 established Farm, Apple, and Cuisine Trails which wineries could, and do, participate in.[42] Thus, the State Legislature enacted these laws to promote economic development both on the farm and in ancillary business. Bills have been introduced to further expand winery participation in New York society and tourism. Along with the expansion of wine trails through bills such as S.2400-A / A.5579-A, which expands the Lake Ontario Wine Trail, there are also proposals to allow for the sale of wines at farm stands—S.704 / A.3454.[43] This bill would authorize roadside farm markets to sell wine from up to two farms, special or micro-wineries located within twenty

miles.[44] These laws and bills aid primarily rural areas that have experienced the loss of high-paying manufacturing jobs and population shifts to the Southern and Western parts of the country.

The next wave of bills that is being considered by the New York State Legislature goes to the core of the meaning of the ABC Law. That is: should the purposive meaning of the ABC Law, which now pursuant to section 2 of the ABC Law is dedicated to "regulate and control the manufacture, sale and distribution within the state of alcoholic beverages for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to law," also include goals such as promoting "economic development" and "job opportunities"? These goals have already been integrated in no uncertain terms in a piecemeal fashion, but in these dire economic times, the systemic changes to the ABC Law should also encompass job-creation opportunities related to manufacturing alcoholic beverages. Further, the movement to expand the ability to sell alcoholic beverages in different forums, such as grocery stores, in the interests of economic growth and increased revenue collections for the State of New York may occur.

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The LRC's work on the ABC Law has followed this shift in policy concern and made a number of parallel recommendations relating to the ABC Law. The LRC highlights the change in the state's approach to the alcohol industry which has trended towards fostering local beverage industry development as a significant opportunity for economic development and increased government revenue. Thus, the focus legislatively and by the SLA should be with an eye towards economic development and away from mere control.

In furtherance of this goal, the LRC discusses the significant economic advantages which could be achieved without adverse impact on health and safety goals. Changes include an express policy purpose of "supporting economic growth" and a general reorganization of the law to clarify provisions such as those relating to tastings and licensing. For example, those sections related to tastings, codified currently in, among other scattered sections, sections 76(2)(a), 76-c(2)(a), 76-c(4), and 76-d(2) of the ABC Law, have been criticized as being too limiting and an administrative hassle (as stated above, the law permits five tasting per license, although multiple licenses may be obtained) without any clear purpose.[45] Such reorganization would allow businesses to operate with better ease and not inadvertently run afoul of provisions or forgo an economic opportunity. Also, among the many suggestions in the December 15, 2009 report are the creation of guidelines for categorizing merchandise allowed to be sold contemporaneously with off-premises licensees, as there is currently confusion of what may and may not be sold, and allowing farm wineries to sell wine-making equipment. Lastly, the report mentions allowing home wine-making centers, which under federal law any adult may produce up to 100 gallons of wine per year for personal use.[46] The report also added that "allowing an existing farm winery to host a home winemaking center would add an additional business opportunity for the winery."[47] Along these lines, S.3495 / A.2303 was introduced, which would "facilitate the ability of home wine makers to pool their resources & share equipment and storage facilities to produce quality wine for home consumption as is currently allowed for under federal regulations."[48]

As one may see, the legislature is responding to the needs highlighted in this article and by the LRC. S.6184 / A.926 is one example of this trend to expand the underlying purposes and goals of the ABC Law.[49] This bill amends section 2 of the ABC Law which, as stated above, outlines the policy of state and purpose of the chapter. Section 2 states, in part, "it is necessary to regulate and control the manufacture, sale and distribution within the state of alcoholic beverages for the purpose of fostering and promoting temperance in their consumption and respect for and obedience of the law."[50] Under S. 6184-A / A.926, the ABC's policy of state and purpose of the chapter would better reflect the needs of the state and the evolution of an industry. The policy would be expanded to include the language: "It is declared as the policy of this state to promote economic development and job opportunities by promoting the expansion and profitability of the beer, wine and liquor production industries in this state. Promoting such beer, wine and liquor production industries will foster growth in this state's tourism industry; promote conservation, production and enhancement of state agricultural lands; and make the state's economy more self-reliant in the production of food and food related products."

A lot has happened since 1934. There has been movement away from demonizing alcohol and an expansion of interest in more sophisticated food presentations at home and in restaurants. There is increased interest in more quality dining experiences and a growing interest in consumption of quality beers, wines, and spirits. In today's economy, the economic aspects of entertainment, dining and shopping are much more prominent than they were in 1934. While there is government support for the New York Wine and Grape Foundation and programs such as the Grow New York Program, Pride of New York Program, Food and Agriculture Industry Development, and Farmland Viability Program, the necessary economic parallel clearly stated and structured in the ABC Law is

lacking. Hence, the ABC law should be revised to reflect today's economic realities and the need to promote economic growth and job creation in all sectors of the economy so long as the overarching concerns of public health and safety remain paramount. The integral shift from viewing wine as a dangerous substance akin to controlled substances towards viewing wine, beer, and spirits as a sophisticated facet of the New York, and indeed the United States, economy requires stated policy support and a restructuring of the ABC Law itself—in tandem with continued support from outside programming and additions to other sections of law, such as the tax code—to facilitate the cultural and economic growth of New York wines.

Endnotes

1. 1933 N.Y. Laws ch. 143.
2. 1934 N.Y. Laws ch. 478.
3. *See* N.Y. ALCO. BEV. CONT. LAW § 1 (MCKINNEY 2000); LEON DAVID ADAM, THE WINES OF AMERICA (1990).
4. § 2.
5. *Id.*
6. *Id.*
7. *See generally* WILLIAM J. HELMER & ARTHUR J. BILEK, THE ST. VALENTINE'S DAY MASSACRE: THE UNTOLD STORY OF THE GANGLAND BLOODBATH THAT BROUGHT DOWN AL CAPONE (2006).
8. *SEE* RICHARD MENDELSON, FROM DEMON TO DARLING: A LEGAL HISTORY OF WINE IN AMERICA 71–73(2009).
9. *See* JIM LEITZEL, REGULATING VICE: MISGUIDED PROHIBITIONS AND REALISTIC CONTROLS 109 (2008).
10. 1976 N.Y. Laws ch. 275.
11. *See* 2 THOMAS PINNEY, A HISTORY OF WINE IN AMERICA: FROM PROHIBITION TO THE PRESENT 264–66 (2005).
12. N.Y. ALCO. BEV. CONT. LAW § 76-a (MCKINNEY 2000).
13. 1976 N.Y. Laws ch. 275.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. SEYMOUR P. LACHMAN & ROBERT POLNER, THE MAN WHO SAVED NEW YORK: HUGH CAREY AND THE GREAT FISCAL CRISIS OF 1975, at 188 (2010).
19. *See* NEW YORK STATE SENATE TASK FORCE ON CRITICAL PROBLEMS, TENDING THE VINEYARDS: RENEWED (1984).
20. *Id.*
21. *Id.*
22. 1993 N.Y. Laws ch. 490.
23. *Id.* at § 1.
24. *See* 2005 N.Y. Laws ch. 210.
25. *See generally* STONEBRIDGE RESEARCH GROUP, THE U.S. WINE INDUSTRY (JAN. 2008), *available at* http://www.stonebridgeresearch.com/us_wine_industry.
26. 1993 N.Y. Laws ch. 535.
27. 2002 N.Y. Laws ch. 85.
28. 1997 N.Y. Laws ch. 538.
29. 2007 N.Y. Laws ch. 439.
30. N.Y. ALCO. BEV. CONT. LAW § 64-c (McKinney 2000).
31. *See* NEW YORK STATE LAW REVISION COMM., REPORT ON THE ALCOHOLIC BEVERAGE CONTROL LAW AND ITS ADMINISTRATION 254(Dec. 2009), *available at* http://www.lawrevision.state.ny.us/reports/12-15-09%20Report%20on%20ABC%20Law.pdf [hereinafter REPORT ON THE ALCOHOLIC BEVERAGE CONTROL LAW].
32. *Id.*
33. *Id.*
34. S.05614-B, 232nd Sess. (N.Y. 2009); A. 00488-C, 232nd Sess. (N.Y. 2009).
35. REPORT ON THE ALCOHOLIC BEVERAGE CONTROL LAW, *supra* note 31, at 253.
36. 2001 N.Y. Laws ch. 272.
37. 2002 N.Y. Laws ch. 580.
38. See 1996 N.Y. Laws ch. 479; 2007 N.Y. Laws ch. 564; 2008 N.Y. Laws ch. 571.
39. N.Y. ALCO. BEV. CONT. LAW § 61 (McKinney 2000).
40. *See* 2004 N.Y. Laws ch. 63; 2008 N.Y. Laws ch. 613.
41. *See* 2002 N.Y. Laws ch. 460; 2007 N.Y. Laws ch. 432.
42. 2004 N.Y. Laws ch. 248.
43. S. 0704S, 232nd Sess. (N.Y. 2009); A. 3454A, 232nd Sess. (N.Y. 2009).
44. *Id.*
45. N.Y. ALCO. BEV. CONT. LAW §§ 76(2)(a), 76-c(2)(a), 76-c(4), 76-d(2) (McKinney 2000).
46. *See* 27 C.F.R. 24.75 (2006); REPORT ON THE ALCOHOLIC BEVERAGE CONTROL LAW, *supra* note 31, at 251.
47. REPORT ON THE ALCOHOLIC BEVERAGE CONTROL LAW, *supra* note 31, at 251.
48. *See* S. 3495S, 232nd Sess. (N.Y. 2009); A. 2303A, 232nd Sess. (N.Y. 2009).
49. S. 06184S, 232nd Sess. (N.Y. 2009); A. 926A, 232nd Sess. (N.Y. 2009).
50. N.Y. ALCO. BEV. CONT. LAW § 2.

J. Stephen Casscles is a Counsel to NYS Senate Deputy Majority Leader Jeffrey D. Klein, and is primarily responsible for Senator Klein's legislative agenda. Stephen is also Chairman of the Athens Comprehensive Planning Committee which is responsible for drafting the Town and Village of Athens Comprehensive Plan and preparing zoning code changes to implement that plan. He is also the wine-maker at Hudson-Chatham Winery in the Hudson Valley.

Andrew Wilson graduated with his J.D. in 2010 from Albany Law School. He currently holds a fellowship in the New York State Senate and is assigned to the Deputy Majority Leader, Senator Jeffrey D. Klein.

Underage Drinking: What Can Be Done About It?

By Romana Lavalas

First and foremost, a necessary question is: "Why should we care about underage drinking?" "What's the big deal?" "Everyone drinks underage; it's a rite of passage." These are phrases commonly used when people discuss the subject of underage drinking. These attitudes toward drinking are embedded in American culture. This is not surprising given that just a short time ago, police in many communities would arrive at an underage drinking party, have teens throw out their beer, and either send or give teens a ride home.

Despite society's increasing concerns regarding drinking and driving, attitudes toward underage drinking have remained largely unchanged. Statistics clearly support more attention being given to underage drinking and its consequences. Crashes are the leading cause of death for people between the ages of fifteen to twenty years old.[1] Though alcohol consumption is prohibited to this group, "[i]n 2008, 31 percent of the young drivers (15 to 20 years old) who were killed in crashes had blood alcohol concentrations (BAC) of .01 grams per deciliter (g / dL) or higher; and 25 percent had a BAC of .08 or higher."[2] Further:

> [T]he severity of a crash increases with alcohol involvement. In 2008, 2 percent of the 15- to 20-year-old drivers involved in property-damage-only crashes had been drinking, 4 percent of those involved in crashes resulting in injury had been drinking, and 22 percent of those involved in fatal crashes had been drinking.[3]

While we tend to dwell on the risk of driving while intoxicated as a major consequence of underage drinking, other negative effects of drinking underage are just as significant. The National Advisory Council on Alcohol Abuse and Alcoholism created a task force on college drinking which analyzed the annual consequences of binge and underage drinking on college campuses. Their results were startling. Drinking on college campuses affects almost every aspect of college life.

- **Death:** 1,825 college students between the ages of 18 and 24 die from alcohol-related unintentional injuries, including motor vehicle crashes.[4]
- **Injury:** 599,000 students between the ages of 18 and 24 are unintentionally injured under the influence of alcohol. [5]
- **Assault:** 696,000 students between the ages of 18 and 24 are assaulted by another student who has been drinking.[6]
- **Sexual Abuse:** 97,000 students between the ages of 18 and 24 are victims of alcohol-related sexual assault or date rape.[7]
- **Unsafe Sex:** 400,000 students between the ages of 18 and 24 had unprotected sex and more than 100,000 students between the ages of 18 and 24 report having been too intoxicated to know if they consented to having sex.[8]
- **Academic Problems:** About 25 percent of college students report academic consequences of their drinking including missing class, falling behind, doing poorly on exams or papers, and receiving lower grades overall.[9]
- **Health Problems/Suicide Attempts:** More than 150,000 students develop an alcohol-related health problem, and between 1.2 and 1.5 percent of students indicate that they tried to commit suicide within the past year due to drinking or drug use.[10]
- **Drunk Driving:** 3,360,000 students between the ages of 18 and 24 drive under the influence of alcohol.[11]
- **Vandalism:** About 11 percent of college student drinkers report that they have damaged property while under the influence of alcohol.[12]
- **Property Damage:** More than 25 percent of administrators from schools with relatively low drinking levels and over 50 percent from schools with high drinking levels say their campuses have a "moderate" or "major" problem with alcohol-related property damage.[13]
- **Police Involvement:** About 5 percent of 4-year college students are involved with the police or campus security as a result of their drinking, and 110,000 students between the ages of 18 and 24 are arrested for an alcohol-related violation such as public drunkenness or driving under the influence.[14]
- **Alcohol Abuse and Dependence:** 31 percent of college students met criteria for a diagnosis of alcohol abuse and 6 percent for a diagnosis of alcohol

dependence in the past 12 months, according to questionnaire-based self-reports about their drinking.[15]

Current Laws

Despite the very obvious problems in this area, the current laws that *directly* address underage drinking are rather anemic.

Alcohol Beverage Control Law

The main tool that police and prosecutors have to combat underage drinking is section 65-c of the Alcohol Beverage Control Law (ABC Law) which prohibits the underage possession of alcohol with the intent to consume it.[16] There is an exception in the law for students who are in a course licensed by the state education department that requires alcohol tasting during class for instructional purposes.[17] For example, students in a wine tasting course at a culinary school. Additionally, there is an exception to the law prohibiting underage possession, for minors whose parent or guardian serves them alcohol.[18]

Section 65-c specifically states that a minor cannot be considered arrested for this offense, but may be summoned to court to be "examined" for the offense.[19] If the charge of section 65-c violation is sustained, the court may impose a fine up to fifty dollars, mandate attendance at an alcohol awareness course, and / or community service not exceeding thirty hours.[20] Finally, section 65-c(4) of the ABC Law specifically states that a determination under this section is not a criminal conviction and cannot disqualify a person from holding public office, public employment, nor act as a forfeiture of any right or privilege.[21]

Section 65-c starts off seeking to hold underage possessors of alcohol accountable by summoning them to court to be "examined." To a minor, such language may sound intimidating, but the very next phrase eliminates any hope of intimidation when the statute states that a police officer is not authorized to arrest an underage person who possesses alcohol with intent to consume it.[22] Moreover, the statute further undermines its impact by explaining in detail that a "determination" is not a criminal conviction and is basically devoid of any true adverse effects. Section 65-c of the ABC Law begins as a statute, but ends as a virtual apology.

A lesser known provision, section 65(b) of the ABC Law, prohibits minors from using any forms of identification with fraudulent proof of a person's age, including any fake identification, or any identification not actually his or her own for the purpose of procuring or attempting to procure alcohol.[23] A person violating this section of the law is guilty of a violation.[24] A first time violation of the section results in a fine, not to exceed fifty dollars, and / or community service up to thirty hours, and / or attendance at an alcohol awareness program.[25] A second violation of this section results in a fine between $50.00 and $300.00 dollars, and / or up to thirty hours of community service. In this instance, the court *must* order the completion of an alcohol awareness course.[26] A third or successive violation of this section results in a fine between $50.00 and $750.00 dollars, and / or community service of up to thirty hours.[27] In addition, the court *must* order the offender to complete an alcohol evaluation by a provider certified by the New York State Office of Alcoholism and Substance Abuse Services (OASAS). If treatment is recommended, an offender *may* choose to participate in treatment.[28] However, any attempt at addressing a possible substance abuse issue is futile because section 65-b does not mandate treatment if it is recommended and an offender may get a second opinion with regard to such treatment recommendation.[29]

Additionally, a court may suspend a person's driver's license or privilege to obtain a license if it is determined that a driver's license was used to illegally purchase or attempt to illegally purchase alcohol pursuant to 65-b.[30] Finally, while a determination of "guilt" can be found under section 65-b (unlike 65-c), here, too, the legislature specifically states that such a finding may not disqualify a person from holding public office, employment or serve as a forfeiture of any other right or privilege.[31] These statements, similar to 65-c, minimize the statute's effectiveness. While section 65-b of the ABC Law is a slightly stronger statute than section 65-c, it maintains its own significant weaknesses.

Vehicle and Traffic Law

The Vehicle and Traffic Law is often used to combat underage drinking through its prohibition of the use of fake identifications. Section 509.6 of the Vehicle and Traffic Law (VTL) states, "[n]o licensee shall voluntarily permit any other person to use his license, nor shall any person at any time possess or use any forged, fictitious or illegally obtained license, or use any license belonging to another person."[32] A conviction under this section is a traffic infraction punishable by a minimum fine of $75.00 and a maximum of $300.00, or by imprisonment for up to fifteen days in jail.[33]

Section 1192-a of the VTL, also known as the "Zero Tolerance" law makes it unlawful for drivers under the age of twenty-one to have a blood alcohol content of at least .02 of one percent but not more than .07 of one percent.[34] It is a non-criminal offense that provides for a Department of Motor Vehicles (DMV) administrative hearing. A violation of this section leads to a suspension of driving privileges and the payment of a DMV civil penalty.[35]

New York's Driving While Intoxicated Laws (DWI), though not specifically targeted at underage offenders, affect them nevertheless. Convictions for Driving While Intoxicated[36] for underage offenders may result in a fine of not less than $500.00 nor more than $1,000.00, a sentence of a conditional discharge, probation and / or a sentence

of imprisonment for up to one year in jail and the installation of an interlock device.[37] A conviction for DWI carries a license revocation period of one year for the underage offender.[38]

As a whole New York State's DWI laws do an effective job of penalizing underage offenders who operate motor vehicles while intoxicated. The STOP DWI Program's structure allows each county to customize how the program operates to suit the needs of its particular community.[39] Unfortunately, STOP DWI's flexibility may also allow for a lack of uniformity in how each county handles its underage offender cases. Since each county may customize how cases are adjudicated to meets the needs of its own community, the potential exists for a lack of uniformity and predictability in how underage offender cases are handled across the state.

Penal Law

The following statutes do not reference underage drinking, but have been used to combat the use of false identifications to purchase alcohol. Criminal Impersonation in the second degree, section 190.25 of the New York Penal Law, makes it a misdemeanor to impersonate another and commit an act as the assumed character in order to obtain a benefit or defraud another.[40] For example, a minor who presents her older sister's driver's license to purchase alcohol may be guilty of Criminal Impersonation in the second degree.

> A person is guilty of forgery in the second degree when, with intent to defraud, deceive or injure another, he falsely makes, completes or alters a written instrument which is or purports to be, or which is calculated to become or to represent if completed:… 3) A written instrument officially issued or created by a public office, public servant or governmental instrumentality.[41]

An example of forgery would be when a person alters his date of birth on his driver's permit to reflect that he is of age to purchase alcohol or when a person alters the bar code on her driver's license to scan that she is of age to purchase alcohol when the permit is run through a card reader. Here, the "written instrument" is the operator's permit or the driver's license. Forgery in the second degree is a class "D" felony.

Related to Forgery is Criminal Possession of a Forged Instrument in the second degree.

> A person is guilty of criminal possession of a forged instrument in the second degree when, with knowledge that it is forged and with intent to defraud, deceive or injure another, he utters or possesses any forged instrument of a kind specified in section 170.10. Criminal possession of a forged instrument in the second degree is a class D felony.[42]

For example, if an underage person had a false military identification card, purporting to make him twenty-one, he would be guilty of Criminal Possession of a Forged Instrument in the second degree. For the above three statutes, their only failing is that they are not more widely used by law enforcement to target those who would abuse their license privileges to obtain alcohol illegally.

Section 260.20 of the Penal Law, Unlawfully Dealing with a Child in the first degree, is used to prosecute those who provide minors alcohol, but it is also used to prosecute underage offenders who themselves serve their peers alcohol. As in the ABC Law, there is an exception for parents or guardians who serve their own children alcohol, as well as an exception for students in a course licensed by the state education department that requires alcohol tasting during class for instructional purposes.[43] While this statute has been an effective tool to target underage drinking when minors are directly served or sold alcohol, it is significantly less helpful in more ambiguous social host situations.

Like Unlawfully Dealing with a Child, Endangering the Welfare of a Child, section 260.10 of the Penal Law, is used to prosecute underage people who serve younger minors alcohol. A person endangers the welfare of a child when "[h]e knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old or directs or authorizes such child to engage in an occupation involving a substantial risk of danger to his life or health."[44] This situation is typified by an underage host, who is at least seventeen years-old but less than twenty-one, serving alcohol at his party to someone who is sixteen-years-old or under. The drawback here is that once the sixteen-year-old turns seventeen, the seventeen-year-old host is no longer in violation of the statute. Consequently, hosts whose ages are between seventeen to twenty, and who serve alcohol to peers who are also between seventeen to twenty, escape the consequences of this particular statute.

What Can Be Done About It?

Strengthen Existing Laws

Despite the very obvious problems underage drinking can cause, the laws specifically targeted to address underage drinking do not go far enough. It is time for lawmakers to give these laws the teeth they need to take a bite out of the underage drinking problem in New York State.

An initial suggestion is to make section 65-c of the ABC Law, prohibiting the underage possession of alcohol, a true violation. Doing this would give the statute the certainty it lacks. As it stands now, section 65-c is neither a criminal offense nor a completely civil offense, but a

strange hybrid. When the charge started gaining momentum by the use of police agencies in Onondaga County, some judges dismissed any section 65-c charge because the statute specifically stated that it was not a criminal offense. There needs to be a clear jurisdiction over the charge.

An underage offender charged by section 65-c is not considered arrested. The offender is to be "examined" by the court and a "determination" is made. For years it was unclear whether courts should hold a trial, which would trigger the need for a prosecutor and a verdict, or whether a court merely conducts its own inquiry to reach a determination. Finally, case law began to answer these questions when a court held that the burden of proof in a section 65-c case is that of proof beyond a reasonable doubt.[45] More recently, a published Attorney General opinion suggested that violation of section 65-c is a criminal offense subject to prosecution by the office of the district attorney.[46]

Moreover, making 65-c a true violation would give judges the ability to actually carry out the penalties they impose for violating the statute. For example, let us assume that a twenty year-old offender has been "examined" by the court and determined to be culpable for possession of alcohol. Let us also assume that the offender is fined fifty dollars and ordered to complete ten hours of community service. Finally, let us assume that the offender never pays the fine, never completes the community service, and never returns to court. Under the current constraints, the judge's hands are tied. The court cannot issue a warrant for the minor's failure to appear because that remedy is not available for this "civil" offense. Neither can the judge sanction the offender for failing to complete the community service hours or pay the fine because the court's requirements are not terms of any true "sentence." Given the current statute, since there is no adjudication of the charge, it remains open, but "in limbo." And there it will remain, creating an unreasonable backlog on the court's docket with the other section 65-c cases where offenders failed to either initially appear in court or return to court.

As the example above illustrates, under section 65-c, a judge's mandate to an offender after making a "determination" of culpability is tantamount to a mere suggestion. Some may suggest that the court simply dismiss the charge if the offender does not appear in court or fails to return to court, but to do so only serves to confirm the notion that most teens have about drinking, that it is "no big deal." Others would suggest that the courts dismiss these charges after an offender turns twenty-one. That certainly is plausible if the offender was on the verge of turning twenty-one, but for an offender who is seventeen, it is not at all likely that a court would want to hold a case open that long. Moreover, it creates an inequity for those offenders who do appear in court to take responsibility for their actions.

Making section 65-c a violation gives the statute certainty in definition and sentence as well as predictability and finality regarding its adjudication. Additionally, it gives the court the weight necessary to carry out its mandates. Finally, making section 65-c a true violation can begin to intimate the seriousness of the underage drinking problem.

A small but significant opportunity to affect underage drinking presents itself in the in the area of a minor's driving privileges. Section 509.6 of the VTL prohibits a licensee from permitting another person to use his or her license, but it also prohibits the possession of a "forged, fictitious or illegally obtained license…."[47] If minors convicted of this offense were subject to a license suspension, just as they are when convicted under section 65-b of the ABC Law (prohibiting the use of false identification when attempting to purchase alcohol), they would begin to feel the weight of consequences and behavior would likely change.

The reality is that when a seventeen-year-old has a fake I.D., it is not so he or she can vote sooner; minors use fake I.D.'s to obtain alcohol illegally. Anything that affects a minor's ability to drive has a huge impact because many young people consider obtaining a driver's license a significant sign of freedom and independence from parental control. Attaching a suspension to this infraction goes a long way to reinforce to young motorists that driving is a privilege and not a right—and that the misuse of that privilege has far-reaching consequences.

Create Effective Social Host Laws

An additional area where underage drinking laws can be strengthened is with regard to the "social host." The ABC Law provides for criminal liability for commercial and retail establishments (not private parties) that provide alcohol to minors under its "prohibited sales" statute. Section 65 of the ABC Law provides that:

> No person shall sell, deliver or give away or cause or permit or procure to be sold, delivered or given away any alcoholic beverages to 1) Any person, actually or apparently, under the age of twenty-one years; 2) Any visibly intoxicated person; 3) Any habitual drunkard known to be such to the person authorized to dispense any alcoholic beverages.[48]

The ABC Law makes it virtually impossible for a commercial seller of alcohol to in any way provide alcohol to a minor and escape criminal liability. For the social host, on the other hand, the law is easy to circumvent.

New York State does not have a specific "social host" statute; however, section 260.20(2) of the Penal Law, Unlawfully Dealing with a Child in the first degree (a class A misdemeanor), is typically used to prosecute private parties who provide alcohol to minors. Specifi-

cally, the law states that "a person is guilty of unlawfully dealing with a child in the first degree when he *gives*, or *sells* or *causes to be given or sold* any alcoholic beverage as defined by section three of the alcoholic beverage control law, to a person less than twenty-one years old…."[49] An exception exists for parents or guardians who serve their own children alcohol. Admittedly, the terms "gives" and "sells" seem to have obvious meanings. However, the phrase "causes to be given or sold" is left undefined. The statute does not appear to contemplate any other manner by which a minor could obtain alcohol; and therein lies the problem.

Here, an eighteen-year-old who gives his underage guest a beer from the refrigerator is clearly violating the statute. But the eighteen-year-old who invites other minors to a party he is hosting, and provides coolers with both alcoholic and non-alcoholic beverage options, may not be in violation of section 260.20. If the eighteen year-old is arrested for Unlawfully Dealing with a Child, his defense might be, "I did not sell any alcohol, nor did I give it away; my guests merely helped themselves."[50] A prosecutor would likely argue that the eighteen year-old "caused" the alcohol "to be given," by making it available at the party in the first place, but the statute does not make that clear. And while a conviction under section 260.20 might be sustained under the facts just mentioned, a conviction would not likely stand if instead the eighteen-year-old hosted a party where the underage guests brought their own alcohol. If a person organizes a party and invites underage people for the purpose of, or with the knowledge that underage drinking is likely to occur, does this conduct qualify as "causing alcohol to be given" for the purposes of section 260.20? Since "causes to be given or sold" is undefined, the answer is unknown and case law has been no help.

The examples above demonstrate a very obvious gap in the Penal Law. It simply does not address the social host who organizes a party and knowingly permits or willfully ignores underage people becoming intoxicated in his or her presence. Section 260.20(2) of the Penal Law could be strengthened by adopting the language of section 65 of the ABC Law above. The proposed language would read as follows: "A person is guilty of unlawfully dealing with a child in the first degree when: *he sells, delivers or gives away or causes or permits or procures to be sold, delivered or given away any alcoholic beverages* to a person less than twenty-one years old…." Under this proposed statute, a social host who organizes a B.Y.O.B. ("bring your own beer") party may be criminally prosecuted. Critics may argue that to use the section 65 definition is too expansive and that under the proposed statute, even a guest at an underage party could be charged with a misdemeanor rather than the host. While that is certainly a possibility, it is highly unlikely. When the police arrive at a party where at least twenty underage people are present they typically search for the host of the event and charge *that* person with a misdemeanor. In most cases, the resident of the dwelling or renter of the apartment is charged. Any guests, if detained, are usually charged with possession of alcohol with the intent to consume.

Alternatively, instead of rewriting section 260.20(2) of the Penal Law, municipalities may opt to create their own version of a social host law. While many versions of social host laws focus on where an event is held, a different suggestion is to focus on who holds the event, i.e., the host, as it is the host's behavior the law seeks to punish. An effective social host law should do the following: 1) identify who is considered a host, 2) impose a reasonable duty to prevent alcohol consumption by minors, 3) identify reasonable measures a host can take to prevent alcohol consumption by minors, and 4) identify any exceptions to the statute as well as any penalty for failing to comply with statute. A proposed social host law might look like this:

> It shall be unlawful for any person who hosts, organizes or plans, or participates in the hosting, planning or organizing of a gathering to knowingly allow minors to consume alcohol or fail to take reasonable measures to prevent the consumption of alcohol by minors once discovered. Reasonable measures include but are not limited to: 1) actively supervising minors at a gathering, 2) regulating access to alcoholic beverages including the quantity and type of beverages present, 3) verifying the ages of people at the gathering, 4) immediately demanding that a minor cease consumption, discard any beverage(s) and (safely) depart the gathering, 5) reporting the underage consumption to either law enforcement or to a person with a greater degree of authority over the minor.[51]

Here, "knowingly" should mean being "aware of or having reason to be aware of the consumption of alcohol by a minor."[52] Municipalities would likely exempt parents and guardians who serve their own children alcohol from the law. Also, the governing body of the city, town, village or county would need to determine what level offense violators would face and the penalties for such violation. No one proposal will address every social host scenario, but creating an effective social host law is a good place to start the discussion.

Alcohol Education

Parents engaging their children and teens in discussions about alcohol, as well setting clear boundaries about alcohol and drug use, is by far one of the most effective mechanisms available to combat underage drinking.[53] School education programs that avoid scare tactics and focus on addressing peer pressure and "teaching resistance skills" have also been known to work.[54]

Alcohol education programs that include prosecutors and law enforcement have also been effective. In Onondaga County, the STOP DWI Program has partnered with the Onondaga County District Attorney's Office, local law enforcement and a local provider of alcohol education and training (Traffic Safety Research, Inc.) to sponsor "Project Responsibility." Project Responsibility is a four-hour alcohol education class designed to educate offenders charged with misdemeanor and violation offenses involving alcohol, about the possible consequences of their actions relative to the consumption and provision of alcohol to minors. Internal anonymous surveys of class participants indicated that their participation in Project Responsibility would change their behavior towards alcohol in the future.

Conclusion

This article does not seek to exhaust every possible solution to the underage drinking problem. Instead, it seeks to offer a few practical suggestions as to how current laws can be strengthened to more effectively address the problem. What we do know is that teens and young adults will not stop drinking underage if they never connect their actions with real consequences for their illegal behavior. Toughening our underage drinking laws ensures that the consequences for such behavior are both real and concrete.[55]

Endnotes

1. *See* NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., FATAL CRASHES INVOLVING YOUNG DRIVERS (2009), *available at* http://www-nrd.nhtsa.dot.gov/Pubs/811218.PDF.
2. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., YOUNG DRIVERS, 3 (2008), *available at* http://www-nrd.nhtsa.dot.gov/Pubs/811169.pdf.
3. *Id.*
4. TASK FORCE ON COLL. DRINKING, NAT'L INST. ON ALCOHOL ABUSE & ALCOHOLISM, A SNAPSHOT OF ANNUAL HIGH-RISK COLLEGE DRINKING CONSEQUENCES (2010), http://www.collegedrinkingprevention.gov/StatsSummaries/snapshot.aspx.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. N.Y. ALCO. BEV. CONT. LAW § 65-c (McKinney 2000).
17. § 65-c(2)(a).
18. § 65-c(2)(b).
19. § 65-c(3).
20. *Id.*
21. § 65-c(4).
22. §§ 65c(3)–(4).
23. § 65-b(2)(a).
24. § 65-b(3).
25. § 65-b(3)(b).
26. *Id.*
27. § 65-b(3)(c).
28. *Id.*
29. § 65-b(3)(v).
30. § 65-b(6) *see also* N.Y. VEH. & TRAF. LAW §§ 510.2(b)(ix), 510.2(b)(x), 510.2(b)(xi) (McKinney 2005).
31. N.Y. ALCO. BEV. CONT. LAW § 65-b(5).
32. N.Y. VEH. & TRAF. LAW § 506.6.
33. § 509.11.
34. § 1192-a.
35. §§ 1192-a, 1193.2a(2), 1194-a(2).
36. New York State's DWI Laws are extensive. For the purpose of simplicity, DWI in this instance refers to N.Y. VEH. & TRAF. LAW §§ 1192.2, 1192.3.
37. § 1193.1(b); N.Y. PENAL LAW § 65.05(1) (McKinney 2008).
38. N.Y. VEH. & TRAF. LAW § 1193.2(a)(6).
39. § 1197.
40. N.Y. PENAL LAW § 190.25(1).
41. § 170.10(3).
42. § 170.25.
43. § 260.20(2).
44. § 260.10(1).
45. People v. Cutten, 703 N.Y.S.2d 655, 658 (Co. Ct. 1999).
46. 2005 N.Y. Op. Atty. Gen. No. 14, 2005 WL 1304445 (N.Y.A.G.).
47. N.Y. VEH. & TRAF. LAW § 509.6 (McKinney 2005).
48. N.Y. ALCO. BEV. CONT. LAW § 65 (McKinney 2000).
49. N.Y. PENAL LAW §260.20(2) (emphasis added).
50. I credit Timothy Hunt of *I'm Smart of Central New York* for this example.
51. The bases used for the social host law proposed in this article are two other social host proposals: Nassau County, N.Y. Proposed Social Host Ordinance, Local Law No. 13-2007 § 4 and Onondaga County, N.Y. Proposed Social Host Ordinance Local Law No. 2-2009 § 4.
52. *Id.*
53. NATIONAL INSTITUTE ON ALCOHOL ABUSE AND ALCOHOLISM, ALERT NO. 67, UNDERAGE DRINKING, JANUARY 2006, *available at* http://pubs.niaaa.nih.gov/publications/aa67/aa67.htm.
54. *Id.*
55. For information on *Project Responsibility*, see www.ongovda.net/section/programs/stop_dwi/.

Romana Lavalas is an Assistant District Attorney in the Onondaga County District Attorney's Office. She is a prosecutor in the Driving While Intoxicated Unit. Her duties include prosecuting vehicular crimes and cases involving the provision of alcohol to minors/underage drinking cases.

New York's Local Social Host Laws

By Sarah L. Harrington

Underage drinking has had society's attention for decades, resulting in various campaigns and legislative solutions, ranging from raising the drinking age[1] to placing either civil or criminal responsibility for the problem on the youth[2] and on those who could be deemed to facilitate the conduct.[3] Whether underage drinking is an inevitable right of passage for all high school and college-aged minors or whether it is preventable is an ongoing debate. Recent publicity has revealed the most recent facilitators of underage drinking: the parents or guardians. In a particularly high-profile case, in June of 2010, two Harvard Medical School doctors hosted a high school graduation party for their daughter.[4] Police responded to the party after receiving complaints about the noise level and found some of the underage guests had been drinking.[5] This story and others like it have been reported on a national level.[6] The media response has raised awareness of this phenomenon, sparking debate and action.

One of the legislative solutions aimed to address the problem of underage drinking in an individual's residence is the "social host law,"[7] which imposes criminal penalties upon individuals in control of a residence who know or should know that guests in the home who are under the age of twenty-one are consuming alcohol.

The enactments of social host laws have provoked considerable debate. Proponents argue that adults' hosting of teenage drinking parties is encouraging drinking behavior and teaching children disrespect for authority.[8] Opponents assert that adults who host teenage drinking parties are providing supervision and control of such drinking, which they contend is inevitable with children of high school and college ages.[9]

This article will examine the main provisions of local social host laws passed in New York State. The necessity of these local laws will be examined in light of attempts to enforce existing statewide penal law upon defendants alleged to have engaged in the same conduct at which the local social host laws are aimed. Finally, early issues encountered in the enforcement of these laws will be examined.

Many states have passed social host laws.[10] While the New York State Legislature has proposed a statewide social host law, such a measure has yet to be passed by both houses.[11] Local municipalities in the State have, however, taken matters into their own hands. At the time of this writing, at least the following counties in New York State have adopted social host laws: Dutchess, Greene, Monroe, Montgomery, Nassau, Ontario, Suffolk, Westchester, Ulster, and Washington.[12] Many cities, towns and villages have also adopted their own measures.[13]

For the purposes of this article, focus will be on the social host laws that have been adopted by the counties in New York. Many of the city, town and village codes are duplicative of the counties' provisions. Something all of the local social host laws have in common, however, is the municipalities' concern over, and desire to prevent, the issue of underage drinking and all of the secondary effects that result therefrom.

The local social host laws impose criminal penalties for permitting underage drinking at private residences. In a few cases the laws also include penalties for permitting drug use by minors.[14] The goal is deterrence as opposed to compensation. Violation of the laws is punishable as either a violation or a criminal misdemeanor and fines between two hundred and fifty dollars and one thousand dollars are imposed or, in some cases, imprisonment up to one year.[15] The counties of Ontario and Washington also require "successful completion of a court-approved alcohol and drug awareness program" for any violation of the counties' social host laws.[16]

Some of the laws prohibit knowingly allowing drinking by minors in any circumstance,[17] whereas others limit the prohibition to those occasions where an "open house party" is taking place, defined as "a social gathering or otherwise, at a residence or other private property with minors present."[18] The term "social gathering" is not further defined by these counties. Ontario and Washington Counties utilize the term "social gathering" alone as an alternative to the somewhat vague "open house party" standard, defining it as "a party or gathering at a residence or other private premises of two or more persons, at least one of whom is not related by blood to the others in attendance and is a minor."[19] Ontario and Washington, therefore, avoid the most likely unintended consequence of criminalizing conduct at something as innocuous, for example, as a family holiday gathering.[20]

It is not a defense that the defendant charged with violating one of these laws did not purchase or otherwise actively provide the alcoholic beverages. Nor is it a defense that the defendant did not know that the minors were drinking.[21] Thus, in 2009, police were called to a residence when a fight erupted while underage drinkers were in attendance at a house party near Hofstra University.[22]

The occupants were charged under the county of Nassau's social host law even though the hosts claimed that the party's guests provided their own alcohol.[23]

The age of those persons subject to the law varies by county. The county of Westchester, like the provisions of subdivision 2 of section 260.20 of the New York Penal Law, subjects those over the age of twenty-one to its social host law;[24] the counties of Dutchess, Monroe, Nassau, and Suffolk subject those over the age of eighteen;[25] the counties of Ontario and Washington subject those over the age of sixteen;[26] and the counties of Greene, Montgomery, and Ulster do not specify an age over which a person may be found guilty of the social host liability provisions.[27]

Those laws which either do not specify an age or which designate an age under twenty-one do create the anomaly wherein an eighteen-year-old minor or even a sixteen-year-old minor may be held liable for the consumption of alcohol by other minors who may even be older than the host him / herself. One nineteen-year-old defendant who was charged with violation of Nassau's social host law attempted to highlight the fact that a teenage host was not the traditionally cited target of the social host laws and that it was parent-hosts that the legislature intended to deter.[28] The District Court in Nassau County dismissed this contention, observing that "while it may strike some as far wiser to have the Social Host Law apply only to people who are 21 or older, or only to people who do not live with their parents," the legislature had enacted unambiguous language applying the social host law to individuals eighteen years or older.[29]

The individual subject to the law need not necessarily be the homeowner or tenant of the residence.[30] That person need only be an individual in "control" of the residence.[31] Greene, Montgomery and Ulster Counties define "control" as "having the authority and ability to regulate, direct or dominate."[32] Ontario and Washington Counties define "control" as "the actual or apparent authority and ability to regulate, direct or dominate private premises, including, but not limited to the control exercised by tenants, lessees, owners and / or landlords who have notice of underage drinking on their property."[33] Westchester County defines "control" as "possesses authority to regulate, direct, restrain, superintend, control or govern the conduct of other individuals on or within that residence, and includes, but is not limited to, a possessory right."[34]

In Dutchess, Monroe, Nassau and Suffolk Counties, the social host laws do not further define the concept of "control" where the defendant is not the defendant or owner of the premises. This omission, however, has already been addressed by the Nassau County District Court, with a judicial construction for determining such control that is in line with some of the definitions quoted above.[35] The Defendant in *People v. Tobaly*, the son of the homeowners, stated to the police officers that he was left "in control" of the premises in his parents' absence.[36] The Court found that this statement was insufficient to establish control of the premises for the purposes of the local law and indicated that control would only be established upon a showing that the defendant has the right "to dispose of, alter or otherwise impair the rights of the [homeowner] to use and enjoy the premises."[37] The concept of "apparent authority" found in the Ontario and Washington Counties' definitions, however, could have caused a different result in the *Tobaly* case based upon the defendant's representations to the police officers regarding his "control" over the premises.

To sustain a violation the host need only have knowingly allowed consumption[38] or in some cases if the host "should have known" that the minors were consuming alcoholic beverages.[39] It is an element of this state of mind that the defendant knew or should have known that the individuals consuming alcohol were in fact under twenty-one years old.[40]

Many of the social host laws also hold the host liable for failing to engage in "corrective action" upon discovering the minor's consumption of alcohol.[41] For example, the Nassau County Social Host Law provides that:

> It shall be unlawful for any [host] to…fail to take reasonable corrective action upon learning of the consumption of alcohol or alcoholic beverages by any minor on such premises. Reasonable corrective action shall include, but not be limited to: 1) making a prompt demand that such minor either forfeit and refrain from further consumption of the alcoholic beverages or depart from the premises; and 2) if such minor does not comply with such request, either promptly reporting such underage consumption of alcohol i) to the local law enforcement agency or ii) to any other person having a greater degree of authority over the conduct of such minor.[42]

The social host laws of the Counties of Ontario and Washington provide that corrective action shall also include the verification of age of guests to a social gathering by inspection of identification,[43] much as the requirements imposed upon licensees under the Alcoholic Beverage Control Law.[44] By making it a violation of the laws to fail to engage in corrective action, an information charging violation of the law would have to affirmatively plead such failure.[45] Thus, corrective action is not a defense but is an element of the offense itself.

The most common exceptions in the social host laws mirror the exceptions set forth in section 65-c of the Alcoholic Beverage Control Law, prohibiting possession of an alcoholic beverage by a minor,[46] and include those instances in which a parent is present and / or who provides

alcohol or gives express permission for the consumption of alcohol by his or her child under the age of twenty-one[47] or a person provides alcohol to a student during class for instructional purposes as part of a state-approved curriculum.[48] Other exceptions include consumption of alcohol for religious purposes,[49] and in those counties where drugs are encompassed in the social host laws, the possession of a valid prescription.[50]

The legislative intents of many of the local social host laws note that "[a]lthough the New York State Legislature has acted to proscribe the unlawful giving, selling, and possessing of alcohol in relation to minors, it has not regulated the situation where a person over the age of eighteen knowingly permits the consumption of alcohol by a minor or in his or her home."[51] The local laws specify the effect of the particular counties' social host provisions on other laws,[52] many of them specifically citing section 260.10 of the Penal Law, "endangering the welfare of a child,"[53] and section 260.20 of the Penal Law, "unlawfully dealing with a child in the first degree"[54] as applicable despite imposition of the social host prohibitions.

The issue of state preemption of the local social host laws was, on February 15, 2006, addressed by the Attorney General's Office by issuance of an informal opinion in response to an inquiry by the Town of Ramapo.[55] The opinion concluded that the proposed local law was not preempted by state law.[56] Furthermore, the proposed statewide social host law would also have, if passed, permitted more stringent local versions of the prohibition to exist.[57]

More specific to underage drinking is subdivision 2 of section 260.20 of the New York Penal Law, which defines the crime of "[u]nlawfully dealing with a child in the first degree," a class A misdemeanor, as when a person: "gives or sells or causes to be given or sold any alcoholic beverage…to a person less than twenty-one years old."[58]

The crime of unlawfully dealing with a child in the first degree appears at first glance that it may criminalize the very conduct which the local social host laws seek to prohibit. The local governments did deem this section of the New York State Penal Law insufficient, however, to address the societal problem of underage drinking that takes place in the residences of persons over a specified age with that individual's permission or acquiescence.

Courts interpreting the subdivision 2 of section 260.20 of the Penal Law and the section from which it derived, former subdivision 3 of section 484 of the Penal Law, have examined whether the law applies to the supply of alcohol as an act of hospitality in a private home and whether the law applies when the defendant was simply aware of the minor's consumption of alcohol but did not provide or serve the alcohol thereto.

Examining the predecessor to section 260.20 of the Penal Law, the New York Court of Appeals in *People v. Martell* held that there could be no conviction on evidence that at various times the defendant had permitted children under the age of eighteen to congregate in her home and there gave them alcoholic beverages to drink.[59] Invoking principles of statutory construction, the court accepted defendant's contention that it was not the legislative intention to make criminal the service of alcohol to youth in the home of the person who served them, based on the title of the section, "permitting children to attend certain resorts" and the other subdivisions of that section, which related to commercial activities with children.[60]

Upon enactment of the revised Penal Law in 1965, the language of the former subdivision 3 of section 484 was retained but the new section was entitled "unlawfully dealing with a child."[61] Based upon this revision, which omitted part of the basis of the Court's reasoning in *Martell*, the Third Department has reexamined section 260.20's applicability to the provision of alcohol to minors in a defendant's home.[62] In *People v. Himmel*, the court did not find the defendant therein exempt from prosecution under section 260.20(2) although the alleged provision of alcohol to minors took place within the defendant's home.[63] The Court of Appeals has yet to speak to this interpretation but based upon the likelihood of state legislative action or, in its absence, the plethora of local laws in a broadening geographic scope within the State available to address the targeted social issue of the social host, it may not be so required.

Even with the Third Department's interpretation of section 260.20 of the Penal Law, the statute may still not address the scenario of the social host. This is because, although subdivision 2 of section 260.20 of the Penal Law may apply to the provision of alcohol to minors in the home, the subdivision does not apply to the scenario where the defendant did not provide alcohol to the minors but knew that the minors were consuming alcohol in the home; or in other words, the defendant "passively acquiesced" in the minor's illegal consumption of alcohol.

The difference between subdivision 2 of section 260.20 of the Penal Law and the local social host laws lies most notably in the language of section 260.20 "gives or sells or causes to be given or sold."[64] The language of a social host prohibition is, for example, as follows: "It shall be unlawful for any person over the age of eighteen, who owns, rents or otherwise controls a 'residence'…or 'dwelling'… to *knowingly allow* the consumption of alcohol or alcoholic beverages, by any minor on such premises."[65] The State Penal Law section addresses the defendant's provision or sale of alcohol to the minor;[66] whereas, the local law addresses the defendant's knowledge that the minor is consuming alcohol.[67] The former requires something more than passive acquiescence in the consumption of alcohol by the minor.[68]

Recently, in *People v. Heil*, the language of section 260.20 of the Penal Law was examined by the City Court of the City of Rye in relation to a "house party" scenario wherein thirteen youths under the age of twenty-one, including the defendant's daughter, were consuming alcoholic beverages in the home of the defendant.[69] The court examined the meaning of "causes to be given," addressing the inquiry of whether that language encompassed "passive acquiescence" when the defendant knew of under-age drinking.[70] The Court found that:

> Hosting a party does not produce the result of alcohol being sold or given to a minor. Knowing and observing an act, such as the consumption of alcohol by minors, cannot be said to effect or produce that act since, by definition an act must occur before it is observed or known. Furthermore, the statute does not prohibit drinking by minors in a home; it prohibits the sale or giving of alcohol to minors, or causing alcohol to be sold or given to minors. The acts charged must result in the sale or giving of alcohol to minors, not merely its consumption.[71]

Furthermore, comparing section 260.20(2) to section 65 of the Alcoholic Beverage Control Law, the court concluded that the omission of the phrase "permit" from section 260.20 of the Penal Law indicated "an intentional omission of knowing passive acquiescence from its prohibition."[72]

The State Legislature has acknowledged that "[m]aking alcoholic beverages available to a child can lead to charges of unlawfully dealing with a child under the Penal Law, but such charges are rarely brought unless the intoxication leads to physical injury or the circumstances involved are otherwise extreme."[73] This observation was made in the Memorandum in Support of legislation proposing the adoption of a statewide version of a social host law to be found in a new section of the Penal Law entitled "unlawfully permitting the consumption of alcoholic beverages by a person less than twenty-one years old."[74] Although the supporting Memorandum did not explicitly address the distinction between providing alcohol and passive allowance of underage drinking, the proposed language did.

Senate Bill Number 7577-A was passed by the Senate in 2008 but the corresponding Assembly version, Assembly Bill Number 10813-A, did not move forward.[75] The proposed language was as follows:

> A person is guilty of unlawfully permitting the consumption of alcoholic beverages by a person less than twenty-one years old when:
>
> 1. (a) He or she is over the age of eighteen and owns, rents or controls a private residence and knowingly permits the consumption of alcoholic beverages by a person who is less than twenty-one years old who is present at a party, gathering or event at the private residence of such person, or
>
> (b) He or she permits the consumption of alcoholic beverages by a person who is less than twenty-one years old when he or she should reasonably know that such illegal consumption by a person who is less than twenty-one years old could occur at a party, gathering or event at the private residence of such person.[76]

It is apparent from the language of the proposed legislation that the State Legislature contemplated a defendant's guilt would be based upon a *mens rea* that encompasses either actual knowledge or negligence using a reasonable person standard. The local laws are split in their manner of addressing the state of mind of the defendant in relation to the level of knowledge of the minor's consumption of alcohol. Greene, Monroe, Suffolk, and Westchester Counties require the defendant have actual knowledge of the minors' consumption of alcohol.[77] Dutchess, Montgomery, Nassau, Ontario, Ulster, and Washington Counties base a finding of guilt upon proof that the defendant "knew or had reason to know" that the minors were consuming alcohol.[78]

The "should have known" *mens rea* may prove problematic in enforcement. While its applicability in the context of a keg party attended by underage guests can be imagined, it is more difficult to consider whether the very nature of adolescence should cause an adult to "know" that a minor will sample the alcohol at, for example, a smaller gathering where alcohol is available for the adult guests. It is likely that "hosts" in the latter scenario will be saved by lack of strict enforcement.

Law enforcement officials have expressed concern over the ease of enforcing the social host laws. An article in *Newsday* reported that only approximately nine arrests under the Suffolk County law take place in the span of a year.[79] One reason given for the enforcement issues encountered by the police agency in Suffolk was that "the Fourth Amendment [does] not permit police to go into a home unless they're invited in, except under certain circumstances, such as when someone may be hurt."[80] Thus, many of the reports of incidents resulting in arrest for violation of one of the social host laws involve an injury or other some other violation of law.[81] These circumstances cause one to question the effectiveness of social host laws to counter one of the deficiencies found in existing state Penal Law—the difficulty in enforcing the charge of unlawfully dealing with a child under the Penal

Law in the context of underage drinkers in a residence, as noted by the State Legislature: "such charges are rarely brought unless the intoxication leads to physical injury or the circumstances involved are otherwise extreme."[82] It appears the same may be true for social host laws.

Case law examining wherein a defendant was charged with violation of the relatively new local social host laws is of course sparse at this point. The few published cases that have had the opportunity to examine such charges (all from Nassau County) have revealed at the outset the challenges faced by law enforcement in properly alleging violation of these laws.[83] Facial insufficiency is emerging as a common challenge to the accusatory instruments that set forth the charges of violation of the social host laws.[84]

The information is required to include non-hearsay allegations, which if true, establish the violation, including, with some variation by county, the following elements:

> (1) that the Defendant is over the age [specified in the specific social host law, if any]; (2) that the Defendant either owned, rented or otherwise controlled a private residence; (3) that the Defendant knowingly allowed the consumption of alcohol or alcoholic beverages by minors on the subject premises; or (4) failed to take reasonable corrective action upon learning of such consumption.[85]

It appears the police authorities have failed, by non-hearsay allegations, to sufficiently set forth the age of the defendant,[86] that the premises are a private residence,[87] defendant's control of the premises,[88] the age of the guests,[89] defendant's knowledge of the guests' age,[90] that underage guests consumed alcohol,[91] defendant's knowledge of the guests' consumption of alcohol[92] or that defendant failed to take corrective action.[93]

Law enforcement, other counties and municipalities in the state considering adopting their own versions of a social host law and State Legislators should take these early lessons into consideration for purposes of the future manifestations of these social host laws.

Endnotes

1. Chapter 274 of laws of 1985 (raising the drinking age from nineteen to twenty-one).
2. N.Y. Alco. Bev. Cont. Law § 65-b(2)(a) (McKinney 2000) (prohibiting an underage person from "present[ing] or offer[ing] to any licensee [under the Alcoholic Beverage Control Law]…any written evidence of age that is false, fraudulent, or not actually his own, for the purpose of purchasing or attempting to purchase any alcoholic beverage."); N.Y. Alco. Bev. Cont. Law § 65-c (prohibiting an underage person from possessing an alcoholic beverage with the intent to consume it).
3. N.Y. Penal Law § 260.20(2) (McKinney 2008) (prohibiting a person from giving, selling or causing to be given or sold any alcoholic beverage to a person under the age of twenty-one); N.Y. Alco. Bev. Cont. Law § 65(1) (prohibiting selling, delivering, or giving away, or causing or permitting or procuring to be sold, delivered, or given away "any alcoholic beverage to…[a]ny person, actually or apparently, under the age of twenty-one years."); N.Y. Alco. Bev. Cont. Law § 65-a (prohibiting the misrepresentation of the age of a person under the age of twenty-one "for the purpose of inducing the sale of any alcoholic beverage."); N.Y. Gen. Oblig. Law § 11-100(1) (McKinney 2010) (placing civil liability upon a person who knowingly causes the "intoxication or impairment of ability of any person under the age of twenty-one years" by furnishing or procuring alcoholic beverages if as a result a third person is injured due to such minor's intoxication).
4. Cleopatra Andreadis, *Harvard Docs: 'We Agreed to a No-Alcohol Party,'* ABC News (June 8, 2010), http://abcnews.go.com/TheLaw/harvard-professors-arrested-graduation-party-busted-alcohol/story?id=10857073.
5. *Id.*
6. *Id.*
7. The verbiage "social host law" has also been utilized to describe laws that provide for compensatory civil recourse for victims of underage drinking. N.Y. Gen. Oblig. Law § 11-100.
8. *See generally* Editorial, *Should Parents Be Jailed When Kids Drink?*, N.Y. Times: Room For Debate Blog (June 17, 2010), http://roomfordebate.blogs.nytimes.com/2010/06/17/should-parents-be-jailed-when-kids-drink/ (setting forth the varying opinions of college professors, scholars and sociologists).
9. *Id.*
10. Ala. Code § 13A-11-10.1 (2010); Alaska Stat. § 04.16.057 (2010); Ariz. Rev. Stat. Ann. § 4-241 (2010); Conn. Gen. Stat. Ann. § 30-89a (2010); Fla. Stat. § 856.015 (West 2010); Haw. Rev. Stat. § 712-1250.5 (2010); 235 Ill. Comp. Stat. § 5/6-16 (2010); Me. Rev. Stat. Ann. tit. 28-A, § 2081 (2010); Md. Code Ann., Crim. Law §10-117 (West 2010); Mass. Gen. Laws ch. 138, § 34 (2010); Mich. Comp. Laws § 750.141a (2010); Mo. Rev. Stat. § 311.310 (2010); N.H. Rev. Stat. Ann. § 644:18 (2010); N.J. Stat. Ann. § 2C:33-17 (West 2010); Ohio Rev. Code Ann. § 4301.69 (West 2010); Okla. Stat. tit. 37, § 8.2 (2010); Or. Rev. Stat. § 471.410 (2010); 18 Pa. Cons. Stat. Ann. § 6310.1 (West 2010); R.I. Gen. Laws § 3-8-11.1 (2010); S.C. Code Ann. §§ 45-2-40, 63-19-2440, 63-19-2450 (2010); Wash. Rev. Code § 66.44.270 (2010); Wis. Stat. § 125.07 (2010); Wyo. Stat. Ann. § 6-4-406 (LexisNexis 2010).
11. S. 7577-A, 231st Sess. (N.Y. 2008); A. 10813-A, 231st Sess. (N.Y. 2008).
12. Dutchess County, N.Y., Loc. L. No. 2-2008; Greene County, N.Y., Loc. L. No. 1 -2007; Monroe County, N.Y., Loc. L. No. 7-2008; Montgomery County, N.Y., Loc. L. No. 2-2007; Nassau County, N.Y., Loc. L. No. 13-2007; Ontario County, N.Y., Loc. L. No. 1-2009, *amended by* Loc. L. No. 4-2009; Suffolk County, N.Y., Loc. L. No. 35-2007; Ulster County, N.Y., Loc. L. No. 2-2008; Washington County, N.Y., Loc. L. No. 1-2009; Westchester County, N.Y., Loc. L. No. 10-2008.
13. Glen Cove, N.Y., Code § 79-2(E) (2010); Long Beach City, N.Y., Code of Ordinances § 17-2A (2010); Amityville Village, New York, L.L. No. 23-2009; Carmel Town, New York, L.L. No. 6-2006; Cazenovia Village, New York, L.L. No. 3-2010; Cohoes City, New York, L.L. No. 6-2007; Gloversville City, New York, L.L. No. 4-2006; Hudson Falls Village, New York, L.L. No. 2-2007; Johnstown Village, New York, L.L. No. 1-2007; Johnstown Town, New York, L.L. No. 4-2007; Kent Town, New York, L.L. No. 2-2007; Little Falls City, New York, L.L. No. 2-2007; Mayfield Town, New York, L.L. No. 3-2007; Mayfield Village, New York, L.L. No. 2-2007; Niskayuna Town, New York, L.L. No. 7-2007; Northville Village, New York, L.L. No. 1-2007; Patterson Town, New York, L.L. No. 6-2006; Philipstown Town, New York, L.L. 8-2007; Putnam Valley Town, New York, L.L. No. 7-2007; Rockville Village, New York, L.L. No. 8-2007, as amended by L.L. No. 7-2010; Scotia Village, New York, L.L. No. 6-2007; Southeast Town, L.L. No. 13-2006; Stillwater Town, New York, L.L. No. 2-2007; Troy City, New York, L.L. No. 6-2007.

14. Montgomery County, N.Y., Loc. L. 2-2007 § 1(c); Ontario County, N.Y., Loc. L. 4-2009 § 4; Ulster County, N.Y., Loc. L. No. 2-2008 § 3; Washington County, N.Y., Loc. L. No. 1-2009, § 4.

15. MONROE COUNTY, N.Y. CODE § 378-5 (2010) (first offense is a violation punishable by maximum fine of two hundred fifty dollars; second offense is a violation punishable by fine between two hundred fifty and five hundred dollars; third and subsequent offenses are misdemeanors punishable by maximum fine of one thousand dollars and / or maximum one year imprisonment); NASSAU COUNTY, N.Y., MISCELLANEOUS LOC. LAWS tit. 64, § 5 (2010) (first offense is a misdemeanor punishable by fine of two hundred fifty dollars; second offense is a misdemeanor punishable by fine of five hundred dollars; third and subsequent offenses are misdemeanors punishable by fine of one thousand dollars and / or maximum one year imprisonment); SUFFOLK COUNTY, N.Y., CODE § 214-15 (2010) (first offense is a violation punishable by maximum fine of two hundred fifty dollars; second offense is a violation punishable by minimum fine of five hundred dollars; third and subsequent offenses are misdemeanors punishable by maximum fine of one thousand dollars and / or maximum one year imprisonment); WESTCHESTER COUNTY, N.Y., CODE § 704.05 (2010) (first offense is a violation punishable by fine of two hundred fifty dollars; second offense is a violation punishable by fine of five hundred dollars; third and subsequent offenses are misdemeanors punishable by fine of one thousand dollars and / or maximum one year imprisonment); Dutchess County, N.Y., Loc. L. No. 2-2008, §4 (first offense is a violation punishable by maximum fine of two hundred fifty dollars; second offense is a violation punishable by minimum fine of five hundred dollars; third and subsequent offenses are misdemeanors punishable by maximum fine of one thousand dollars and / or maximum one year imprisonment); Greene County, N.Y., Loc. L. No. 1-2007, § 6 (first offense is a violation punishable by maximum fine of two hundred fifty dollars and / or fifteen days imprisonment; second offense within one year is a violation punishable by maximum fine of five hundred dollars and / or fifteen days imprisonment; third offense within one year is violation punishable by maximum fine of seven hundred and fifty dollars and / or fifteen days imprisonment); Montgomery County, N.Y, Loc. L. 2-2007 § 1(f) (any offense is a violation punishable by maximum fine of two hundred fifty dollars and / or fifteen days imprisonment); Ontario County, N.Y., Loc. L. No. 4-2009, § 6 (first offense is a violation punishable by fine of two hundred fifty dollars and / or maximum fifteen days imprisonment; second offense is a misdemeanor punishable by fine of five hundred dollars and / or maximum sixty days imprisonment; third and subsequent offenses are misdemeanors punishable by fine of one thousand dollars and / or maximum one year imprisonment; in addition); Ulster County, N.Y., Loc. L. No. 2-2008 § 6 (any offense is a violation punishable by maximum fine of two hundred fifty dollars and / or fifteen days imprisonment); Washington County, N.Y., Loc. L. No. 1-2009, § 6 (first offense is a misdemeanor punishable by fine of two hundred fifty dollars and / or maximum fifteen days imprisonment; second offense is a misdemeanor punishable by fine of five hundred dollars and / or minimum twenty days imprisonment; third and subsequent offenses are misdemeanors punishable by fine of one thousand dollars and / or maximum one year imprisonment).

16. Ontario County, N.Y., Loc. L. No. 4-2009 § 6; Washington County, N.Y., Loc. L. No. 1-2009, § 6.

17. MONROE COUNTY, N.Y., CODE § 378-4(A); NASSAU COUNTY, N.Y., MISCELLANEOUS LOC. L. tit. 64, § 4(a); SUFFOLK COUNTY, N.Y., CODE § 214-14(A); WESTCHESTER COUNTY, N.Y., CODE § 704.04; Dutchess County, N.Y., Loc. L. No. 2-2008 § 3(A).

18. Greene County, N.Y., Loc. L. No. 1-2007, §§ 2–3; Montgomery County, N.Y., Loc. L. 2-2007 § 1(b)–(c); Ulster County, N.Y., Loc. L. No. 2-2008 §§ 2–3.

19. Ontario County, N.Y. Loc. L. 4-2009, §§ 3(F), 4; Washington County, N.Y., Loc. L. No. 1-2009, §§ 3(f), 4.

20. Although parents who provide alcohol or give express permission for their children to consume alcohol are exempted from the social host laws, *see infra* note 47, there is no exception for other family members who could be host to underage guests.

21. *See, e.g.*, Matthew Chayes, *Au Pair Pleads Not Guilty*, NEWSDAY, Apr. 15, 2009, at A23 (reporting a woman charged with violation of Nassau County's social host law although she stated she did not know the teens were drinking in the yard of the residence).

22. Matthew Chayes & Sophia Chang, *Hofstra Students Among Those Charges at House Party*, NEWSDAY, May 10, 2009, *available at* http://www.newsday.com/news/hofstra-students-among-those-charged-at-house-party-1.1232094 (last visited Sept. 24, 2010).

23. *Id.*

24. N.Y. PENAL LAW § 260.20(2) (McKinney 2008); WESTCHESTER COUNTY, N.Y., CODE § 704.04 (a) (2010); *see also* People v. Houis, 766 N.Y.S.2d 520 (City Ct. 2003); People v. Kaufman, 504 N.Y.S.2d 361 (City Ct. 1986); *contra* People v. Jackson, 487 N.Y.S.2d 270 (Co. Ct. 1985).

25. Monroe County, N.Y., Code, § 378-4(A) (2010); NASSAU COUNTY, N.Y., MISCELLANEOUS LOC. L. TIT. 64, § 4(a) (2010); Suffolk County, N.Y. Code § 214-14(A) (2010); Dutchess County, N.Y., Loc. L. No. 2-2008 § 3(A).

26. Ontario County, N.Y., Loc. L. No. 4-2009 § 4; Washington County, N.Y., Loc. L. No. 1-2009, § 4.

27. Greene County, N.Y., Loc. L. No. 1-2007, § 3; Montgomery County, N.Y., Loc. L. No. 2-2007 § 1(c); Ulster County, N.Y., Loc. L. No. 2-2008 § 3.

28. People v. Reale, No. NA 012982/09, 2010 WL 60139, at *1 (Nassau County Dist. Ct. Jan. 2, 2010).

29. *Id.* at *2.

30. *See, e.g.*, Chayes, *supra* note 21 (reporting a woman, who was arrested for violation of Nassau County's social host law, was au pair for one of the teens living in the house and the parents / homeowners who were not home, were not charged).

31. MONROE COUNTY, N.Y., CODE § 378-4(A) (2010); NASSAU COUNTY, N.Y., MISCELLANEOUS LOC. L. tit. 64, §4(a) (2010); SUFFOLK COUNTY, N.Y., CODE § 214-14 (2010); WESTCHESTER COUNTY, N.Y., CODE §§ 704.03(d), .704.04 (2010); Dutchess County, N.Y., Loc. L. No. 2-2008 § 3(A); Greene County, N.Y., Loc. L. No. 1-2007, §§ 2–3; Montgomery County, N.Y., Loc. L. 2-2007 §§ 1(b)–(c); Ontario County, N.Y., Loc. L. No. 4-2009, §§ 3(G), 4 Ulster County, N.Y., Loc. L. No. 2-2008 §§ 2–3; Washington County, N.Y., Loc. L. No. 1-2009, §§ 3(g), 4.

32. Greene County, N.Y., Loc. L. No. 1-2007, § 2; Montgomery County, N.Y., Loc. L. 2-2007 § 1(b); Ulster County, N.Y., Loc. L. No. 2-2008 § 2.

33. Ontario County, N.Y., Loc. L. No. 4-2009 § 3(G); Washington County, N.Y., Loc. L. No. 1-2009, §§ 3(g).

34. Westchester County, N.Y., Code § 704.03(d).

35. People v. Tobaly, No. 14911/09, 2010 WL 2471463, at *2 (Nassau County Dist. Ct. March 22, 2010). The same Court declined to so construct the term "control" when the issue was before it approximately seven months earlier. *Reale*, 2010 WL 60139, at *2.

36. *Tobaly*, 2010 WL 2471463, at *2.

37. *Id.* at *2.

38. MONROE COUNTY, N.Y., CODE §§ 378-3–4(A) (2010) (defining "knowingly" as "aware"); SUFFOLK COUNTY, N.Y., CODE §§ 214-13–14 (2010) (defining "knowingly" as "aware"); WESTCHESTER COUNTY, N.Y., CODE §§ 704.03(e), 704.04 (defining "knowingly" as "aware"); Greene County, N.Y., Loc. L. No. 1-2007, § 3 ("knows").

39. NASSAU COUNTY, N.Y., MISCELLANEOUS LOC. L. tit. 64, §§ 3(c), 4(a) (2010) (defining "knowingly" as "aware of, or having reason to be aware of"); Dutchess County, N.Y., Loc. L. No. 2-2008, §§ 2(C), 3(A) (defining "knowingly" as "aware of, or having reason to be aware

of"); Montgomery County, N.Y., Loc. L. 2-2007, § 1(c) ("knows or has reason to know"); Ontario County, N.Y., Loc. L. No. 4-2009, §§ 3(C), 4 (defining "knowingly" as "aware of, or having reason to be aware of"); Ulster County, N.Y., Loc. L. No. 2-2008 § 3 ("knows or has reason to know"); Washington County, N.Y., Loc. L. No. 1-2009, §§ 3(c), 4 (defining "knowingly" as "aware of, or having reason to be aware of").

40. *Tobaly*, 2010 WL 2471463, at *2.

41. MONROE COUNTY, N.Y., CODE § 378-4(A); NASSAU COUNTY, N.Y., MISCELLANEOUS LOC. L. tit. 64, §4(a); SUFFOLK COUNTY, N.Y., CODE § 214-14(A); WESTCHESTER COUNTY, N.Y., CODE §§ 704.03(e), 704.04; Ontario County, N.Y., Loc. L. No. 4-2009 § 4; Washington County, N.Y., Loc. L. No. 1-2009, § 4. The counties of Dutchess, Greene, Montgomery and Ulster do not provide for corrective action.

42. NASSAU COUNTY, N.Y., MISCELLANEOUS LOC. L. TIT. 64, §4(a).

43. Ontario County, N.Y., Loc. L. No. 4-2009 § 4(A); Washington County, N.Y., Loc. L. No. 1-2009, § 4.

44. N.Y. ALCO. BEV. CONT. LAW § 65 (McKinney 2000).

45. *See Tobaly*, 2010 WL 2471463, at *3.

46. N.Y. Alco. Bev. Cont. Law § 65-c(2).

47. Monroe County, N.Y., Code § 378-4(B)(1); NASSAU COUNTY, N.Y., MISCELLANEOUS LOC. L. TIT. 64, §4(b)(i); Suffolk County, N.Y. Code § 214-14(B)(1); Westchester County, N.Y., Code § 704.04(b)(i); Dutchess County, N.Y., Loc. L. No. 2-2008, § 3(B)(1); Greene County, N.Y., Loc. L. No. 1-2007, § 4; Montgomery County, N.Y., Loc. L. 2-2007 § 1(d)(1); Ontario County, N.Y. Loc. L. No. 4-2009, § 5(A); Ulster County, N.Y., Loc. L. No. 2-2008 § 4(A); Washington County, N.Y., Loc. L. No. 1-2009, § 5(a).

48. WESTCHESTER COUNTY, N.Y., CODE § 704.04(b)(iii); Dutchess County, N.Y., Loc. L. No. 2-2008, § 3(B)(3); Greene County, N.Y., Loc. L. No. 1-2007, § 4; Montgomery County, N.Y., Loc. L. 2-2007 § 1(d)(1); Ontario County, N.Y., Loc. L. No. 4-2009, § 5(A); Ulster County, N.Y., Loc. L. No. 2-2008 § 4(A); Washington County, N.Y., Loc. L. No. 1-2009, § 5(a).

49. MONROE COUNTY, N.Y., CODE § 378-4(B)(2); NASSAU COUNTY, N.Y., MISCELLANEOUS LOC. L. tit. 64, §4(b)(ii); SUFFOLK COUNTY, N.Y., CODE § 214-14(B)(2); WESTCHESTER COUNTY, N.Y., CODE § 704.04(b)(ii); Dutchess County, N.Y., Loc. L. No. 2-2008, § 3(B)(2); Ontario County, N.Y., Loc. L. No. 4-2009, § 5(c); Washington County, N.Y., Loc. L. No. 1-2009, § 5(c).

50. Montgomery County, N.Y., Loc. L. 2-2007 § 1(d)(2); Ontario County, N.Y., Loc. L. No. 4-2009, § 5(B); Ulster County, N.Y., Loc. L. No. 2-2008 § 4(B); Washington County, N.Y., Loc. L. No. 1-2009, § 5(b).

51. NASSAU COUNTY, N.Y., MISCELLANEOUS LOC. L. tit. 64, §2; WESTCHESTER COUNTY, N.Y., CODE § 704.02; Dutchess County, N.Y., Loc. L. No. 2-2008, § 1 Ontario County, N.Y., Loc. L. No. 4-2009, § 2; Washington County, N.Y., Loc. L. No. 1-2009, § 2.

52. MONROE COUNTY, N.Y., CODE § 378-6; NASSAU COUNTY, N.Y. MISCELLANEOUS LOC. L. tit. 64, §6; SUFFOLK COUNTY, N.Y., CODE § 214-16; WESTCHESTER COUNTY, N.Y., CODE § 704.06; Dutchess County, N.Y. Loc. L. No. 2-2008, § 5; Greene County, N.Y., Loc. L. No. 1-2007, § 5; Montgomery County, N.Y., Loc. L. 2-2007 § 1(e); Ontario County, N.Y., Loc. L. No. 4-2009 § 7; Ulster County, N.Y., Loc. L. No. 2-2008 § 5; Washington County, N.Y., Loc. L. No. 1-2009, § 7.

53. N.Y. PENAL LAW § 260.10 (McKinney 2008).

54. N.Y. PENAL LAW § 260.20.

55. 2006 N.Y. Op. Att'y Gen. No. 2, 2006 WL 469905 (N.Y.A.G.).

56. *Id.*

57. S. 7577-A, 231st Sess. (N.Y. 2008); A. 10813-A, 231st Sess. (N.Y. 2008) (subdivision 5 of the proposed penal law sections states that "[t]he provisions of this section shall not be deemed to preempt any local government from enacting and enforcing any local law or ordinance which contains stricter restrictions than the provisions of this section.").

58. N.Y. PENAL LAW § 260.20(2).

59. People v. Martell, 16 N.Y.2d 245, 247 (1965); *see also* People v. Foreman, 268 N.Y.S.2d 691, 691(Just. Ct. 1968) (dismissing the information under the prior version of the Penal Law § 260.20(2) but noting that "[i]f the alleged act had been committed after September 1, 1967," the effective date of the revised Penal Law, "then the information would have been sufficient."); People v. Armstrong, 203 N.Y.S.2d 552, 552 (Co. Ct. 1960) (interpreting a provision of the New York Alcoholic Beverage Control Law, prohibiting the giving of alcohol to minors, as inapplicable to the giving of alcohol to a minor in a private residence); *contra* People v. Arriaga, 257 N.Y.S.2d 66, 66 (City Ct. 1965) (holding under the prior version of section 260.20(2) of the Penal Law, an information could stand upon allegations that in his own apartment defendant gave alcoholic beverages to minors, based on the conclusion that the substance of the subdivision "must prevail over the title").

60. *Martell*, 16 N.Y.2d at 247.

61. 1965 N.Y. Laws ch. 1030. The revision also incorporated an exception for parent or guardian. 1965 N.Y. Laws ch. 1030. The section was subsequently amended by including the exception for an instructor providing alcohol to underage students as part of an approved curriculum, and then by splitting three subdivisions of the former single degree crime into the crime of unlawfully dealing with a child in the second degree and renaming section 260.20 "unlawfully dealing with a child in the first degree." 1986 N.Y. Laws ch. 107; 1992 N.Y. Laws ch. 362. Finally, passed but not yet effective as of the date of this writing, the section was amended by creating an affirmative defense if the defendant "had not been… convicted of a violation of…section [260.20] or section 260.21… within the preceding five years, and such defendant, subsequent to the commencement of the present prosecution, has completed an alcohol training awareness program." 2010 N.Y. Laws c. 435, § 5.

62. People v. Himmel, 686 N.Y.S.2d 504, 506–07 (App. Div. 1999).

63. *Id.*

64. N.Y. PENAL LAW § 260.20(2).

65. Dutchess County, N.Y., Loc. L. No. 2-2008, § 3(A).

66. N.Y. PENAL LAW § 260.20(2).

67. Dutchess County, N.Y., Loc. L. No. 2-2008, § 3(A).

68. N.Y. PENAL LAW § 260.20(2).

69. People v. Heil, 900 N.Y.S.2d 624, 626 (City Ct. 2010).

70. *Id.* at 626–27.

71. *Id.* at 624.

72. *Id.*

73. Sen. Charles Fuschillo, Memorandum in Support of S. 7577-A, 231st Sess. (N.Y. 2008).

74. S. 7577-A, 231st Sess. (N.Y. 2008); A. 10813-A, 231st Sess. (N.Y. 2008).

75. *Id.*

76. *Id.*

77. *See supra* note 38.

78. *See supra* note 39.

79. Stacy Altherr, *Heroin on LI: Charges Up 30% This Year,* NEWSDAY, Aug. 14, 2010, at A11.

80. *Id.*

81. *See, e.g.*, Michael Amon, *Cops: Man Apparently Drowned at Plainview Pool*, NEWSDAY, July 25, 2010, *available at* http://www.newsday.com/long-island/nassau/cops-man-apparently-drowned-at-plainview-pool-1.2138598 (last visited Oct. 2, 2010) (reporting arrest for violation of Nassau County's social host law after police

responded to home where man drowned); Andrew Strickler, *Baldwin Partygoers Face Assault, Social-Host Charges*, NEWSDAY, May 16, 2009 at A1 (reporting nineteen-year-old charged with violation of Nassau County's social host law after police respond to call regarding an assault); Chayes, *supra* note 21 (reporting woman charged with violation of Nassau County's social host law after police respond to 911 call and found boy passed-out in driveway); Matthew Chayes & Susana Enriquez, *Cops: Woman Let Teens Drink at Home*, NEWSDAY, Apr. 12, 2009, at A15 (reporting woman charged with violation of Nassau County's social host law after police pursued a suspect in an unrelated case into the home); Bill Mason, *Fine in First Social Hosting Case*, NEWSDAY, Sept. 17, 2008, at A21 (reporting parent charged with violation of Nassau County's social host law after neighbors called the police to report a fight); Jimmy Vielkind, *3 Arrests Made in July 4 Underage Drinking, Rape*, TIMES UNION (Albany, NY), Aug. 13, 2008, at D8 (reporting apartment resident charged under Cohoes' social host law after report of rape); Kieran Crowley, *Ma N'ale'd for Serving Teenagers*, N.Y. POST, Aug. 7, 2007, at 10 (reporting mother charged under Nassau County's social host law after police respond to 911 call about large crowd of teens fighting in the street).

82. Fuschillo, *supra* note 73.

83. *See* People v. Velasquez, No. 2010NA007392, 2010 WL 3036991 (Nassau County Dist. Ct. Aug. 4, 2010); People v. Tobaly, No. 14911/09, 2010 WL 2471463, at *2 (Nassau County Dist. Ct. March 22, 2010); People v. Reale, No. NA 012982/09, 2010 WL 60139, at *1 (Nassau County Dist. Ct. Jan. 2, 2010); People v. Anderson, No. 2009NA013032, 2009 WL 3130180 (Nassau County Dist Ct. Oct. 1, 2009).

84. *Velasquez*, 2010 WL 3036991, at *1; *Tobaly*, 2010 WL 2471463, at *1; *Reale*, 2010 WL 60139 at *1; *Anderson*, 2009 WL 3130180, at *1.

85. *Velasquez*, 2010 WL 3036991, at *2; *Tobaly*, 2010 WL 2471463, at *1; *Anderson*, 2009 WL 3130180, at *1.

86. *Tobaly*, 2010 WL 2471463, at *2 (observing that the information ignored the age of the defendant but noting that the defect was easily curable by amendment); *Reale*, 2010 WL 60139, at *3; *Anderson*, 2009 WL 3130180, at *3.

87. *Reale*, 2010 WL 60139, at *3; *Anderson*, 2009 WL 3130180, at *4.

88. *Velasquez*, 2010 WL 3036991, at *3 (finding defendant's identification of the premises as his "residence" insufficient to demonstrate defendant's ownership, lease or control thereof and indicating that inclusion of a deed or lease for the premises or other documentary proof would cure this defect); *Reale*, 2010 WL 60139, at *3; *Anderson*, 2009 WL 3130180, at *4.

89. *Tobaly*, 2010 WL 2471463, at *2; *Reale*, 2010 WL 60139, at *3.

90. *Tobaly*, 2010 WL 2471463, at *2 (noting failure to allege defendant's knowledge of the age of the guests).

91. *Anderson*, 2009 WL 3130180, at *4.

92. *Id.*

93. *Id.*

Sarah L. Harrington is an attorney with the New York State Legislative Bill Drafting Commission.

Imposing Civil Liability Upon Commercial Providers of Alcoholic Beverages: New York's Statutory Scheme

By Michael J. Hutter

I. Introduction

It is an unfortunate and lamentable truism that serious injuries and death occur daily as a result of an intoxicated person's conduct. As a means to deter such conduct and provide compensation for those injured by such conduct, can civil liability be imposed upon the person or entity providing the alcoholic beverages to the intoxicated person? This article will, after a discussion of the common law approach to this issue, essentially one of no civil liability, review the emergence of the potential for civil liability in certain circumstances imposed by statute in the United States, and examine the present state of civil liability in New York for commercial providers of alcoholic beverage, with an emphasis upon New York's Dram Shop Act. In doing so, it will note the various issues the Legislature confronted in drafting the Act, such as what types of transactions can give rise to liability, the establishment of liability, the injured parties who can avail themselves of the provided for statutory cause of action, and the damages recoverable. The overall emphasis will be the legislative compromises made as to how far a civil liability statute should go in protecting persons injured by intoxicated persons without imposing ruinous or punitive liability upon commercial alcohol providers. Lastly, the article will comment upon whether changes to New York's statutory scheme would be appropriate in view of present thinking about the problems of excessive alcohol consumption.

II. Evolution of Civil Liability

A. Common Law

At common law, the rule in New York and the vast majority of states is that a provider of alcoholic beverages is not liable to a person for personal injuries sustained by the person resulting from tortious conduct of an intoxicated person who was served by that provider,[1] nor is the provider liable to an intoxicated person who has because of his or her intoxicated condition injured himself or herself.[2] The courts deemed it irrelevant whether the provider was a commercial seller of alcoholic beverages, such as a bar, restaurant, liquor store, supermarket, convenience store, or one who merely furnished the alcohol, such as one who hosts a social gathering and serves alcohol without any monetary charge.[3] This common law rule was based largely on the premise that the consumption of the alcohol, rather than its sale or furnishing, was the proximate cause of any injuries resulting from the intoxication of the individual who consumed it.[4] Also advanced in support of the rule were the views that selling alcohol to an able-bodied person should not be a tort because the alcohol vending business is legitimate and the person to whom the alcohol is provided is deemed to be responsible, and that a person should not be able to relieve himself or herself from responsibility for his or her acts.[5]

As a result, absent statutory intervention, any person injured by an intoxicated individual, including the intoxicated individual, had no cause of action against the entity or person that provided the intoxicated person with alcohol. While many states, including New York, had enacted statutes that made it illegal to furnish alcohol to specified classes of people,[6] the courts consistently held that a violation of such statutes did not give rise to an implied right of action under which recovery for injuries incurred as a result of the criminal conduct could be sought.[7] Expressed differently, the courts were of the view that the mere sale of alcohol in violation of a criminal statute resulted in no legal injury. This conclusion was premised upon the view that recognizing a civil remedy would be the creation of an enforcement mechanism which the legislative silence as to such a mechanism strongly suggested the legislature desired criminal sanctions to be the exclusive remedy for a violation of the statute.[8]

B. Emergence of Statutory Liability

With the rise of the temperance movement that was sweeping the country in the mid-nineteenth century, state legislatures enacted statutes that abrogated the common law rule and provided for civil liability but only against the commercial alcohol seller.[9] Additionally, these statutes permitted the wife or widow and children of the intoxicated person to sue the dram shop for the economic loss they sustained due to the death or injury of their husband and father.[10] These statutory enactments were generally called "Dram Shop Acts" as dram shop was the term used at the time to describe a drinking establishment where alcohol would be sold in measured quantities of less than a gallon.[11] The object of these acts was to correct the evils resulting from excessive drinking "such as impoverishment of families, injuries to others, and the creation of public burdens."[12]

New York first enacted a Dram Shop Act in 1873, entitled "An Act to Suppress Intemperance, Pauperism,

and Crime."[13] The Act provided for a private right of action against a seller of alcohol for injuries caused by the consumer's intoxication, even though the underlying sale was legal and the seller had no knowledge of the intoxication or could not foresee any injury.[14] The Court of Appeals upheld the Act's constitutionality in *Bertholf v. O'Reilly*.[15]

C. Present Statute of Civil Liability in the United States

Thirty-eight states have Dram Shop Acts addressing when liability may be imposed upon those who are in the business of selling alcohol.[16] However, there is no uniformity as various approaches have been taken by the states to dram shop liability.[17] Dram shop liability can exist when there is merely a sale, when the sale is to an intoxicated person, when the sale is to a visibly intoxicated person, or when the sale is to a minor who at the time of the sale is intoxicated, visibly intoxicated or is not intoxicated.[18] Additionally, the acts differ as to who is barred from recovery,[19] the level of proof regarding causation,[20] and the damages recoverable.[21]

Two states, Nevada and South Dakota, have enacted legislation which precludes the imposition of civil liability upon one who serves or sells alcohol that might arise from the tortious conduct of a person who consumed the alcohol.[22] In essence, these statutes grant immunity to commercial providers of alcohol from civil liability.[23]

Ten states have failed to enact Dram Shop Acts, relying instead on the courts of their states to decide whether dram shop-type-liability should be imposed.[24] Five of those states—Hawaii, Oklahoma, South Carolina, Washington and West Virginia—allow for the imposition of civil liability when a commercial seller of alcohol makes a sale of alcohol that is statutorily prohibited, *e.g.*, sale to minor, intoxicated person.[25] The other five states—Delaware, Kansas, Maryland, Nebraska and Virginia—continue to follow the common law rule of no civil liability.[26] The fact that each of these five states has legislation barring sales to minors and intoxicated persons was not deemed a dispositive factor.[27]

While forty-three states expose commercial sellers of alcohol to civil liability, either statutorily or under the common law, it is significant to note that only a small minority of states recognize the potential for civil liability imposed upon social hosts for injuries to third-parties caused by guests when the hosts had served alcohol or had permitted them to consume alcohol.[28] Liability has been recognized both at common law and statutorily.[29] Such limited recognition of civil liability for social hosts stands starkly alongside the prevalence of statutes and local ordinances in many states and municipalities which impose criminal penalties upon social hosts for providing alcohol or permitting alcoholic consumption by minors and in other specified circumstances.[30]

The many different approaches among the states regarding the imposition of civil liability upon commercial sellers of alcohol have led to calls for uniform state legislation.[31] There have also been calls for the imposition of civil liability upon social hosts,[32] which have generated contrary views regarding the wisdom thereof.[33]

III. New York's Statutory Scheme

A. Dram Shop Act

New York's Dram Shop Act is codified in Section 11-101 of the General Obligations Law. Derived from the initial 1873 legislation;[34] it has been amended and relocated many times.[35] In its current form, the Act provides a cause of action for injuries caused by "any intoxicated person" against a person who "unlawfully sell[s]" alcoholic beverages to or "unlawfully assist[s]" in procuring alcoholic beverages for "such intoxicated persons."[36]

A most significant aspect of the Act is that it applies only to the commercial sale of alcohol when that sale is "unlawful."[37] That term is defined in section 65 of the Alcoholic Beverage Control Law.[38] As the courts have explained, section 11-101 establishes a cause of action for violation of section 65 but a violation of § 65 does not give rise to an implied cause of action.[39] In essence, then, the Dram Shop consists of two separate statutory provisions as these statutory provisions must be read together.[40]

The Dram Shop Act is remedial in nature and serves the dual purposes of deterring sellers of alcohol from selling to intoxicated persons and of compensating individuals injured as the result of an unlawful sale of alcohol.[41] Although the Act is remedial in nature, the Act is to be strictly construed as it is penal in character and in derogation of common law.[42] As a result, efforts to expand the scope of liability beyond the literal language of the Act have been consistently rejected by the Courts.[43] As viewed by the courts, in the absence of another statute imposing civil liability upon the provider of alcohol, the Dram Shop Act is the exclusive source of civil liability against the provider.[44]

Since the enactment of the Dram Shop Act, the courts have fleshed out the major issues in the prosecution of its statutory cause of action based upon the perceived underlying legislative intent. These issues are addressed now.[45]

1. Need for a Commercial Sale

The Dram Shop Act applies only to the sales of alcohol for profit.[46] As noted by the Court of Appeals: "The act appears to have uniformly required an alcohol sale as the prerequisite for liability."[47] The nature of the establishment selling the alcohol is irrelevant.[48] Parties liable under the act include the person who actually sold the alcohol, the owner of the establishment employing that person and any person assisting in the sale.[49] However, the sale must be made directly to the person who by reason of his or her intoxication causes the injury to the third-party.[50]

The fact that the intoxicated person obtained the alcohol from the purchaser is insufficient to impose liability upon the seller.[51]

2. Unlawful Sale of Alcohol

Liability arises only in the event of an "unlawful" sale in violation of section of the Alcoholic Beverage Control Law, as previously discussed.[52] A mere sale of alcohol to a person who is over the age of eighteen and not visibly intoxicated does not give rise to a cause of action as that sale is not "unlawful."[53]

a. Sale to a Visibly Intoxicated Person

A sale to "[a]ny visibly intoxicated person" is an unlawful sale.[54] The "visibly intoxicated" standard is designed to "ensure that alcoholic beverage licensees have sufficient notice of a customer's condition before they can be subject to a potential loss of their license or to civil liability…for injuries subsequently caused by the intoxicated person."[55] Thus, proof of intoxication, established by one's blood alcohol content or by the fact that one has consumed a certain amount of alcohol, is not enough to sustain the statutory cause of action.[56] It must be shown that the person is intoxicated and such intoxication is visible.

For purposes of the statute, a person is "visibly intoxicated" when "a reasonable person would conclude, based on observation of the [person's] appearance and conduct, that the person is intoxicated."[57] While direct proof of intoxication is not necessary, evidence that the person exhibited indicia of intoxication is required.[58] As the Appellate Division, Third Department has stated, there must be at a minimum a "factual showing of observation or physically described manifestation of the effect of drinking on [the customer]."[59] Thus, the usual tell-tale signs of intoxication can suffice to establish "visible intoxication."[60]

Expert opinion may also be used to establish the requisite "visible intoxication."[61] Such expert testimony may consist of retrograde extrapolation or relation-back testimony where the expert opines, based upon the intoxicated person's blood-alcohol content at the time of the incident in issue, that the person's blood-alcohol content at an earlier time when the person was sold alcohol would have been "x" and with that specified content would have been visibly intoxicated when last served.[62] The Court of Appeals has cautioned that such expert testimony requires the expert to be qualified to provide it and that there be a legally sufficient basis for the opinion.[63] The latter would require a foundation that the expert's opinion was reached through the use of generally accepted principles and methodologies.[64]

A mere claim by the seller that the customer's intoxication was not visible to the seller or that the seller did not observe the customer will not defeat liability.[65] This result follows because the standard applied in determining whether the customer is visibly intoxicated is an objective one.[66]

b. Sale to Minor

It is also unlawful to sell to "[a]ny person actually or apparently under the age of twenty-one years."[67] If the purchaser is underage, it is irrelevant that the purchaser appeared to be of age as the provision proscribes sales to any person "actually" underage.[68] As the provision also proscribes sales to any person "apparently" underage, it can be argued that a sale to one over the legal age could nonetheless be illegal if the purchaser's appearance would indicate to a reasonable person that the person was underage.[69] However, one court has held that such a construction of the statute should be avoided as it would produce absurd results.[70] This conclusion is an appropriate one as it makes little sense to, for example, prohibit the sale of alcohol "to a person producing a passport with his age of over [twenty-one] thereon."[71] The Legislature could certainly not have intended such result.

While the Dram Shop Act does not explicitly so provide, the Court of Appeals has held that liability can be imposed only when the person is known or reasonably believed by the seller to be underage.[72] Thus, when the seller is shown proof of age and the seller compares the photograph to the customer and reasonably concludes the customer is the person depicted in the identification, liability cannot be imposed.[73] Conversely, when the seller acts unreasonably in relying upon a produced photograph identification card or simply relies upon oral claims that the buyer is overage, liability can be imposed.[74]

The fact that the minor was not intoxicated at the time of the sale is irrelevant, a conclusion compelled by section 65 of the Alcoholic Beverage Control Law's prohibition of sales to either a minor or visibly intoxicated person.[75] However, there must be proof that the minor was intoxicated at the time of the incident in issue.[76]

c. Sale to Habitual Drunkard

Another statutorily recognized illegal sale is a sale to "[a]ny habitual drunkard known to be such to the person authorized to dispense any alcoholic beverage."[77] A few other states proscribe sales to such a person.[78] While it may be good policy to prohibit sales to an alcoholic, as a practical matter it is difficult to establish that the seller actually knew the customer was an alcoholic and had been so diagnosed.[79]

3. Causation

The Dram Shop Act requires further proof that the party charged with a violation of the Act, by unlawfully selling or unlawfully assisting in procuring alcohol for the intoxicated person, caused or contributed to that person's intoxication.[80] It is not necessary to show that the intoxication was due solely to the alcohol sold or procured by the party charged.[81] All that is required is that the sale or

procurement contributed to the intoxication "in any appreciable degree."[82]

It is also necessary that there be some reasonable connection between the intoxication and the plaintiff's injuries.[83] In that regard, the courts have noted that "[p]roximate cause in the convention common law negligence action is not required."[84]

4. Nature of Liability

A violation of the Dram Shop act establishes absolute liability upon the party charged without regard to principles of negligence.[85] Thus, a plaintiff will prevail on the cause of action created by the statute by proof that plaintiff was injured by an intoxicated person to whom the defendant had unlawfully sold or assisted in the procuring of alcohol which caused or contributed to the person's intoxication, and that there is some reasonable connection between the sale or procuring and plaintiff's injuries.[86] A defendant's claim that defendant did not know the sale was unlawful or that defendant acted reasonably in the circumstances is legally irrelevant as a violation of the statute necessitates a finding of liability.[87]

5. Proper Plaintiff

The Dram Shop Act affords its cause of action to two classes of persons "injured by reason of the intoxication" of another person. Initially, the Act permits a third-party who sustains personal injuries or property damage as a result of the customer's intoxication to prosecute its statutory cause of action;[88] and where the third-party is killed, the cause of action is vested by the Act in the third-party's executor or administrator.[89] The Act also allows any person who relied upon the injured third-party or the intoxicated person for support, such as a spouse, child or parent, to maintain the cause of action but only for the loss of support occasioned by the violation of the statute.[90] This support claim is not limited to only those persons having a legal right to support.[91]

While persons dependent upon the intoxicated persons can maintain a cause of action, it is well-settled that the act does not create a cause of action in favor of a person or the person's estate whose intoxication resulted from the unlawful sale of alcohol.[92] Nor may an injured person who actively causes or procures the intoxication of the intoxicated person pursue the cause of action.[93] Merely providing one or more drinks to the person or being the person's drinking companion is, however, insufficient to preclude the injured person from pursuing the cause of action;[94] but an injured person who contributes money toward the purchase of alcohol will be precluded because such conduct is considered to be an unlawful "procuring."[95]

6. Damages

The Dram Shop Act also permits the recovery of "exemplary" damages in addition to the "actual" damages sustained by an injured person, as discussed in the preceding part. Exemplary or punitive damages would be recoverable subject to the same requirements applicable to the recovery of such damages in tort actions generally.[96] Punitive damages in New York are available to vindicate a public right only where the actions of the alleged tortfeasor constitutes either gross recklessness or intentional, wanton or malicious conduct aimed at the public generally, or were activated by evil or reprehensible motives.[97]

It must also be noted that there can be no recovery for loss of consortium under the Act.[98] While the Act specifies that persons injured may recover for "means of support or otherwise," the courts have held that the term "or otherwise" does not include recovery for loss of consortium when such damages are not recoverable at common law.[99]

B. General Obligation Law §11-100

In 1983, the Legislature supplemented the Dram Shop Act by imposing civil liability upon any provider, including a commercial provider, unlawfully furnishing alcoholic beverages to minors, or unlawfully assisting in procuring alcoholic beverages for them, which "knowingly causes" such [minor person's] intoxication" and causes injury to another person.[100] As with the Dram Shop Act, whether the furnishing of alcohol is "unlawful" is determined by reference to section 65 of the Alcoholic Beverage Control Law.[101]

This statutory provision, which is "intended to parallel those [provisions] contained in New York's Dram Shop Act," creates dram shop-type liability without the necessity of a commercial sale.[102] Thus, liability can be imposed without a sale so long as the alcohol is furnished to a minor. Where there is also an allegation of a commercial sale, an action can be maintained against a commercial sale under both section 11-100(1) and the Dram Shop Act.[103]

Section 11-100(1) of the General Obligations Law requires that "the individual who by reason of intoxication causes injury must be the very person to whom defendant furnished the alcoholic beverages, or for whom they were procured."[104] While furnishing alcoholic beverage to minors will be established by proof that the defendant handed the alcoholic beverage to an underage person, such proof is not the only way this requirement can be established. Rather, the Court of Appeals has instructed that other proof may suffice, such as proof the provider was complicit in a plan or scheme to provide alcoholic beverages to minors.[105] However, liability may not be imposed merely because a person knew that underage persons were consuming alcoholic beverages[106] or where underage persons are drinking alcoholic beverages upon a person's premises without the persons' knowledge or permission.[107]

Additionally, liability can be imposed under section 11-100(1) of the General Obligations Law only when the provider knowingly causes intoxication by the furnish-

ing alcoholic beverages to or assisting in the procurement of alcoholic beverages for persons known or reasonably believed to be underage.[108] This requirement is identical to the Dram Shop Act's knowledge requirement.[109]

Other issues arising in the prosecution of an action under section 11-100(1) of the General Obligations Law are fully explored elsewhere.[110]

IV. Conclusion

New York's statutory scheme for the imposition of civil liability upon commercial providers of alcoholic beverages, as implemented by the courts, is both adequate and equitable, especially in the absence of any showing that the scheme is not achieving its stated goals of compensation or deterrence.[111] While to some there may be a need to amend current law to impose civil liability upon a commercial provider, or a social host, who provides alcohol to another person regardless of whether that person is visibly intoxicated or underage, resulting in that person's intoxication which leads to a third-party being injured as a result of that intoxication, such legislative action seems inadvisable even in these times of increased alcohol consumption. To the extent such legislation is proposed, it should only be enacted upon a strong factual showing, developed through legislative hearings of its need and fairness to providers of alcoholic beverages.

Endnotes

1. D'Amico v. Christie, 518 N.E.2d 896, 898 (1987); Wellcome v. Student Coop. of Stony Brook, 509 N.Y.S.2d 816, 817 (App. Div. 1986); BLACK, INTOXICATING LIQUORS § 281 (1892); Note, *Special Project: Social Host Liability for the Negligent Acts of Intoxicated Guests*, 70 CORNELL L. REV. 1058, 1063 (1985); 70 A.L.R.3d 582 (1980), 75 A.L.R.2d 833 (1961) (collecting cases). One commentator has observed that this rule was expressed as early as 1793. *See* Suzette Nanovic, *Comparative Negligence and Dram Shop Laws: Does* Buckley v. Priolo *Sound Last Call For Holding New Jersey Liquor Vendors Liable For The Torts of Intoxicated Persons?*, 62 NOTRE DAME L. REV. 238, 238 n. 1 (1987) (citing Ashley v. Harrison, 1 Peake 149, 3 Rev. Rep. 686 (K.B. 1793)).
2. *See, e.g.*, Sheehy v. Big Flats Cmty. Day, Inc., 541 N.E.2d 18, 22 (1989); Dodge v. Victory Mkt., 606 N.Y.S.2d 345, 348 (App. Div. 1993); Julia Harden, *Dramshop Liability: Should the Intoxicated Person Recover for His Own Injuries?*, 48 OHIO ST. L.J. 227, 228 (1987).
3. *See, e.g.*, *D'Amico*, 518 N.E.2d at 898; LEE S. KREINDLER ET. AL., NEW YORK LAW OF TORTS § 12:34; Lee A. Coppock, *Social Host Immunity: A New Paradigm to Foster Responsibility*, 38 CAP. U. L. REV. 19, 23 (2009).
4. *See, e.g.*, Allen v. County of Westchester, 492 N.Y.S.2d 772, 773 (App. Div. 1985); Edgar v. Kajet, 375 N.Y.S.2d 548, 549 (Sup. Ct. 1975), *aff'd*, 389 N.Y.S.2d 631 (App. Div. 1976); Robert G. Franks, Note, *Common Law Liability of Liquor Vendors*, 31 MONT. L. REV. 241, 242–43 (1970); James M. Goldberg, *One for the Road: Liquor Liability Broadens*, A.B.A. J., at 86, June, 1987.
5. *See* William Prosser, HANDBOOK ON THE LAW OF TORTS § 32 (4th ed. 1971).
6. *See* Hugh R. McGough, *Dram Shop Acts*, 1967 A.B.A. Sec. Ins. Negl. & Comp. L. Proc. 448, 448–50. In 1855, New York prohibited all alcohol sales except for "mechanical, medicinal, or chemical purposes" (1855 N.Y. Laws ch. 231, § 1, 2) but in 1857 eliminated these restrictions but made it unlawful to sell to any "Indians," "minors," "habitual drunkards" and "intoxicated persons." (1857 N.Y. Laws ch. 628, §§ 15, 18, 19, 20, 28). Presently, New York bans the furnishing of alcohol to persons under the age of twenty-one, visibly intoxicated persons, and habitual drunkards. N.Y. ALCO. BEV. CONT. LAW § 65(1–3) (McKinney 2000).
7. *See, e.g.*, Sherman v. Robinson, 606 N.E.2d 1365, 1369 (1992); Moyer v. Lo Jim Café, 240 N.Y.S.2d 277, 279 (App. Div. 1963), *aff'd*, 240 N.Y.S.2d 277 (1964); Mills v. City of Overland Park, 837 P.2d 370, 374-375 (Kan. 1992); Brett T. Votava, Note, *Missouri Dram Shop Liability: Last Call For Third Party Liability?*, 69 UMKC L. REV. 587, 593 (2001) (citing 15 WILLIAM M. MCKINNEY ET. AL., RULING CASE LAW § 195 (1929)).
8. *Sherman*, 606 N.E.2d at 1369.
9. *See* Richard Smith, *A Comparative Analysis of Dramshop Liability and a Proposal for Uniform Legislation*, 25 J. CORP. L. 553, 555–56 (2000); Goldberg, *supra* note 4, at 86; McGough, *supra* note 6, at 449–50; Richard B. Ogilvie, *History and Appraisal of the Illinois Dram Shop Act*, 1958 U. ILL. L.F. 175, 176.
10. *See* McGough, *supra* note 6, at 449.
11. *Id.*; Black's Law Dictionary 444 (5th ed. 1979) (defining a dram shop as "[a] drinking establishment where liquors are sold to be drunk on the premises; a bar or saloon").
12. Note, *Dram Shop Act—Persons Entitled to Recover—Drinking in Company of Person Who Becomes Intoxicated Will Not Defeat Recovery*, 31 ALB. L. REV. 167, 168 (1967) (citing HOWARD C. JOYCE, THE LAW RELATIVE TO INTOXICATING LIQUOR 476 (1910).
13. 1873 N.Y. Laws ch. 646.
14. *See* Volans v. Owen, 74 N.Y. 526 (1878).
15. 74 N.Y. 509 (1878).
16. *See* Votava, *supra* note 7, at 598–604.
17. *See* NORMAN J. SINGER ET AL., SUTHERLAND STATUTORY CONSTRUCTION § 573.3 (6th ed 2000) (discussing the differences); LINDAHL, 1 MODERN TORT LIABILITY: LAW AND LITIGATION § 3:18 (2d ed 2008); Smith, *supra* note 9, at 557–74; Votava, *supra* note 7, at 598–603.
18. SINGER, *supra* note 17, at § 573.3.
19. *Id.*
20. *Id.*
21. *Id.*
22. NEV. REV. STAT. § 41.1305 (1995); S.D. CODIFIED LAWS § 35-11-1 (West 1985).
23. Votava, *supra* note 7, at 603.
24. *Id.* at 596.
25. *Id.* at 596–97.
26. *Id.* at 597–98.
27. *Id.*
28. *See* Coppock, *supra* note 3, at 28–34; Richard M. Scherer, Jr., *Grab a Drink and Pass the Blame: An Argument Against Social Host Liability*, DEF. COUNS. J. 238, 240–44 (Apr. 2010); 62 A.L.R.4th 16 (collecting cases).
29. Coppock, *supra* note 3, at 28–34.
30. *See* Sarah L. Harrington, *New York's Social Host Laws*, 12.1 N.Y.S.B.A. Gov't L. & Pol'y J. 62 (Fall 2010).
31. *See, e.g.*, Smith, *supra* note 9, at 574–79.
32. *See, e.g.*, Coppock, *supra* note 3, at 40.
33. *See, e.g.*, Scherer *supra* note 28, at 244–50.
34. *See* text at *supra* note 3.
35. *See* Manfredonia v. Am. Airlines, 416 N.Y.S.2d 286, 288 (App. Div. 1979); Harry Burgess, *Liability Under the New York Dram Shop Act*, 8 SYR. L. REV. 252, 253–54 (1956).

36. N.Y. GEN. OBLIG. LAW § 11-101(1) (2010). The subdivision reads in full:

> Any person who shall be injured in person, property, means of support, or otherwise by any intoxicated person, or by reason of the intoxication of any person, whether resulting in his death or not, shall have a right of action against any person who shall, by unlawfully selling to or unlawfully assisting in procuring liquor for such intoxicated person, have caused or contributed to such intoxication; and in any such action such person shall have a right to recover actual and exemplary damages.

37. *Id.*

38. This section provides in pertinent part:

> No person shall sell, deliver or give away or cause or permit or procure to be sold, delivered or given away any alcoholic beverages to 1. Any person actually or apparently, under the age of twenty-one years; 2. Any visibly intoxicated person; 3. Any habitual drunkard known to be such to the person authorized to dispense any alcoholic beverages. § 65.

39. *See* Moyer v. Lo Jim Café, 240 N.Y.S.2d 277, 279 (App. Div. 1963).

40. *Manfredonia*, 416 N.Y.S.2d 286 at 288; Mitchell v. The Shoals, Inc., 271 N.Y.S.2d 137, 139 (App. Div. 1966), *aff'd*, 227 N.E.2d 21 (1967); *see also* 4 WARREN'S NEGLIGENCE IN THE NEW YORK COURTS § 95.04[2].

41. *See* Bartlett v. Grande, 481 N.Y.S.2d 566, 567 (App. Div. 1984).

42. D'Amico v. Christie, 518 N.E.2d 896, 898 (1987); Wilcox v. Conti, 20 N.Y.S.2d 106, 107 (Sup. Ct. 1940); McNally v. Addis, 317 N.Y.S.2d 157, 176 (Sup. Ct. 1970).

43. *See, e.g.*, *Mitchell*, 271 N.Y.S.2d 137, 140 (individual whose intoxication resulted from the unlawful sale may not recover under statute); *D'Amico*, 518 N.E.2d at 900–01 (liability may not be imposed under statute against social host or employer); Sherman v. Robinson, 606 N.E.2d 1365, 1368–69 (1992) (commercial seller is not liable under statute for injuries resulting from an indirect sale of alcohol for a minor).

44. *See* John R. Ashmead, Comment, *Putting a Cork on Social Host Liability: New York Rejects A Trend:* D'Amico v. Christie, 55 BROOK. L. REV. 995, 1000 (1989); *see also* Robert J. Bohner, *Some Practical Aspects of Dram Shop Litigation*, 51 N.Y. St. B. J. 286, 288–89 (1979) (advocating for recognition of common law action co-existing with Dram Shop Act).

45. For further discussion of these issues see, KREINDLER, *supra* note 3, at § 9:27; WARREN'S NEGLIGENCE, *supra* note 40, at § 95.04; N.Y. PATTERN JURY INSTRUCTIONS 2:28, cmt. I (3d ed. 2010).

46. *D'Amico*, 518 N.E.2d at 898; Custer v. Salty Dog, Inc., 566 N.Y.S.2d 348, 348 (App. Div. 1991).

47. *D'Amico*, 518 N.E.2d at 899.

48. *See, e.g.*, Adamy v. Ziriakus, 704 N.E.2d 216 (1998) (restaurant); Oursler v. Brennan, 884 N.Y.S.2d 534 (App. Div. 2009) (bowling alley); Schmidt v. Policella, 842 N.Y.S.2d 537 (App. Div. 2007) (convenience store); Bartkowiak v. St. Adalbert's R. C. Church Soc'y., 340 N.Y.S.2d 137 (App. Div. 1973).

49. *See* Bregartner v. Southland Corp., 683 N.Y.S.2d 286, 288 (App. Div. 1999) (noting that persons using their money to purchase alcohol for another and contributing money to the purchase of alcohol are "assisting in procuring" alcohol); KREINDLER, *supra* note 3, at § 12:35.

50. Sherman v. Robinson, 606 N.E.2d 1365, 1368 (1992); Zoccasi v. Hoffman, 700 N.Y.S.2d 350, 351 (App. Div. 1999); Fox v. Clare Rose Beverage, Inc., 629 N.Y.S.2d 658, 659 (App. Div. 1999); Dalrymple v. Southland Corp., 609 N.Y.S.2d 284, 285 (App. Div. 1994).

51. *See* Ahigiam v. Davis, 774 N.Y.S.2d 845, 846 (App. Div. 2004).

52. *See* text *supra* notes 37–40.

53. *See, e.g.*, Sorensen v. Denny Nash, Inc., 671 N.Y.S.2d 559, 560 (App. Div. 1998); McNally v. Addis, 317 N.Y.S.2d 157, 176 (Sup. Ct. 1970).

54. N.Y. ALCO. BEV. CONT. LAW § 65(2) (McKinney 2000).

55. Governor's Approval Memo., 1986 N.Y. Sess. Laws 3194 (McKinney); *see*, Romano v. Stanley, 684 N.E.2d 19, 21 (1997).

56. Senn v. Scudieri, 567 N.Y.S.2d 665, 668 (App. Div. 1991); Burnell v. LaFountain, 180 N.Y.S.2d 52, 56–57 (App. Div. 1958).

57. *See* N.Y. PATTERN JURY INSTRUCTIONS, *supra* note 45, at 2:28. This is, of course, an objective standard of visible introduction which is consistent with the approach in other states. See, Miller v. Ochampaugh, 477 N.W.2d 105, 108–09 (Mich. Ct. App. 1991); Paulson v. Lapa, Inc., 450 N.W.2d 374, 379 (Minn. Ct. App. 1990).

58. *See* Adamy v. Ziriakus, 704 N.E.2d 216, 218 (1998); Fishman v. Beach, 625 N.Y.S.2d 730, 731–732 (App. Div. 1995) (evidence consisting of plaintiff's observations of customer's physical condition sufficient).

59. *Burnell*, 180 N.Y.S.2d 52, 56–57.

60. *See, e.g.*, Ryan v. Big Z Corp., 619 N.Y.S.2d 838, 839–40 (App. Div. 1994) (noting that proof consisting of lay witnesses' observations concerning customer while at defendant's bar, including slurred speech, loud voice, decreased inhibitions, is sufficient proof that customer visibly intoxicated to create a question of fact); Heavlin v. Gush, 602 N.Y.S.2d 721, 722 (App. Div. 1993) (overall demeanor, disruptive behavior, harassment of patrons sufficient to establish "visibly intoxicated" element); Russell v. Olkowski, 535 N.Y.S.2d 187, 188 (App. Div. 1988) (proof of behavior sufficient); Aleski v. Freilich, 164 N.Y.S.2d 151, 152 (Sup. Ct. 1957) (boisterous, profane and argumentative behavior sufficient); Tyrrell v. Quigley, 60 N.Y.S.2d 821, 822 (Sup. Ct. 1946) (obstreperous and boisterous conduct sufficient); Michael J. Hopkins, Driving the Dram Shop Case, 44 TRIAL 38 (Feb. 2008).

61. *See Adamy*, 704 N.E.2d at 219; Romano v. Stanley, 684 N.E.2d 19, 22 (1997); Roy v. Volonino, 694 N.Y.S.2d 399, 400 (App. Div. 1999); Marconi v. Reilly, 678 N.Y.S.2d 785, 786–87 (App. Div. 1998).

62. *See Adamy*, 704 N.E.2d at 402; *see generally* FAIGMAN, ET AL., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY §41:6 (2009); Lawrence E. Wines, *Understanding DUI Scientific Evidence*, ASPARTONE, 2010 WL 1976216 (May 2010).

63. *Romano*, 684 N.E.2d at 22.

64. *See* People v. Wesley, 633 N.E.2d 451, 454 (1994) (noting that New York follows the Frye standard for expert testimony). While no New York court has squarely addressed admissibility of expert testimony based upon retrograde extrapolation when challenged under Frye (in *Adamy*, there was no objection to the testimony), the courts in other states have done so with mixed results. *See* Wines, *supra* note 62 (collecting cases).

65. *See* N.Y. PATTERN JURY INSTRUCTIONS, *supra* note 45, at 2:28.

66. *Id.*

67. N.Y. ALCO. BEV. CONT. LAW § 65(2) (McKinney 2000).

68. *In re* Barnett v. O'Connell, 111 N.Y.S.2d 166, 167 (App. Div. 1952); *but see* People v. Malinauskas, 110 N.Y.S.2d 314, 315–16 (N.Y.C. Mag. Ct. 1952).

69. *See* People v. Victor, 47 N.Y.S.2d 914 (N.Y.C. Mag. Ct. 1944) (interpreting a Penal Law provision that make it a crime for the owner of a skating rink to admit "any child actually or apparently under the age of sixteen years").

70. *See Malinauskas*, 110 N.Y.S.2d at 315–16.

71. *Id.*

72. *See* Sherman v. Robinson, 606 N.E.2d 1365, 1368 (1992).

73. *See In re* Genesee Farms v. N. Y. State Liq. Auth., 624 N.Y.S.2d 75, 76 (App. Div. 1995) (citing N.Y. ALCO. BEV.CONT. LAW § 65(4)); *cf.* Johnson v. Verona Oil, Inc., 827 N.Y.S.2d 747, 749–50 (App. Div. 2007). In *Johnson*, the Third Department cited to its own decision in

In re Tap Rest. Corp. v. N.Y. State Liq. Auth., wherein the court noted the affirmative defense of reasonable reliance upon photographic identification in a license revocation proceeding provided in N.Y. ALCO. BEV.CONT. LAW § 65(4). 827 N.Y.S.2d 747, 750, *citing* 625 N.Y.S.2d 340, 342 (App. Div. 1995).

74. *See* People v. Werner, 66 N.E. 667, 668 (N.Y. 1903) (noting that false statements of age do not excuse sale to underage buyer); *Tap Rest. Corp.*, 625 N.Y.S.2d 340 at 342 (discussing differences in appearances between appearance of buyer and person depicted in produced photographic identification).

75. *See, e.g.*, Johnson v. Plotkin, 577 N.Y.S.2d 329, 332 (App. Div. 1991); Powers v. Niagara Mohawk Power Corp., 516 N.Y.S.2d 811, 814 (App. Div. 1987).

76. *See, e.g.*, Bregartner v. Southland Corp., 683 N.Y.S.2d 286, 288; Aminov v. E. 50th St. Rest. Corp., 649 N.Y.S.2d 452, 452 (App. Div. 1996); *see also Plotkin*, 577 N.Y.S.2d at 331 (blood alcohol content of .26% is some evidence of intoxication).

77. N.Y. ALCO. BEV. CONT. LAW § 65(3). Presumably, a "habitual drunkard" would be a clinically diagnosed alcoholic.

78. Smith, *supra* note 9, at 562.

79. *Id.*

80. *See, e.g.*, Cole v. O'Tooles of Utica, Inc., 643 N.Y.S.2d 283, 285 (App. Div. 1996); KREINDLER, *supra* note 3, at § 12:35.

81. *See, e.g.*, Lawson v. Eggleston, 52 N.Y.S. 181, 183–84 (App. Div. 1898); Harris v. Hurlburt, 373 N.Y.S.2d 480, 483 (Sup. Ct. 1975).

82. *See* N.Y. PATTERN JURY INSTRUCTIONS, *supra* note 45, at 2:28.

83. *See, e.g.*, Kaufman v. Quickway, Inc., 931 N.E.2d 516, 517 (N.Y. 2010); Schmidt v. Policella, 842 N.Y.S.2d 537, 539 (App. Div. 2007); McNeill v. Rugby Joe's, Inc., 751 N.Y.S.2d 241, 242 (App. Div. 2002); N.Y. PATTERN JURY INSTRUCTIONS, *supra* note 45, at 2:28.

84. Johnson v. Plotkin, 577 N.Y.S.2d 329, 332 (App. Div. 1991) (quoting Bartkowiak v. St. Adalbert's Roman Catholic Church Soc'y, 340 N.Y.S.137, 142 (App. Div. 1973).

85. *See, e.g.*, Bertholf v. O'Reilly, 74 N.Y. 509, 525 (1878); Moyer v. Lo Jim Café, 240 N.Y.S.2d 277, 279 (App. Div. 1963); McNally v. Addis, 317 N.Y.S.2d 157, 164–65 (Sup. Ct. 1970); N.Y. PATTERN JURY INSTRUCTIONS, *supra* note 45, at 2:28.

86. *See* N.Y. PATTERN JURY INSTRUCTIONS, *supra* note 45, at 2:28; KREINDLER, *supra* note 3, at § 9:27.

87. N.Y. PATTERN JURY INSTRUCTIONS, *supra* note 45, at 2:28.

88. *See, e.g.*, Sherman v. Robinson, 606 N.E.2d 1365, 1368 (1992).

89. *See* N.Y. GEN. OBLIG. LAW § 11-101(2) (McKinney 2010); Scheu v. Heigh-Frest Corp., 517 N.Y.S.2d 798, 800–01 (App. Div. 1987).

90. *See* WARREN'S NEGLIGENCE, *supra* note 40, at § 95.04(2)(d); N.Y. PATTERN JURY INSTRUCTIONS, *supra* note 45, at 2:28.

91. *See* Valicenti v. Valenze, 499 N.E.2d 870, 871–72 (N.Y. 1986); Rutledge v. Rockwells of Bedford, 613 N.Y.S.2d 179, 181–82 (App. Div. 1994) (stepchild).

92. *See, e.g.*, Sheehy v. Big Flats Cmty. Day, Inc., 541 N.E.2d 18, 21 (N.Y. 1989); Dodge v. Victory Mkt., 606 N.Y.S.2d 345, 348–49 (App. Div. 1993).

93. *See, e.g.*, Mitchell v. The Shoals, Inc., 227 N.E.2d 21, 23 (1967); Powers v. Niagara Mohawk Power Corp., 516 N.Y.S.2d 811, 814–15 (App. Div. 1987).

94. *Mitchell*, 227 N.E.2d at 23–24.

95. *See Powers*, 516 N.Y.S.2d at 814–15. The court also noted that while the injured person would not be able to assert the cause of action, persons who received support from the injured person could sue for their loss of support. *Id.* at 813.

96. *See, e.g.*, McCauley v. Carmel Lanes Inc., 577 N.Y.S.2d 546, 547–48 (App. Div. 1991); McCulloch v. Standish, 563 N.Y.S.2d 294, 294–95 (App. Div. 1990).

97. *See* 36 N.Y. Jur.2d Damages § 184 (2005).

98. *See, e.g.*, Valicenti v. Valenze, 499 N.E.2d 870, 871–72 (N.Y. 1986); Dunphy v. J & I Sports Enters., Inc., 748 N.Y.S.2d 595, 597 (App. Div. 2002).

99. *Valicenti*, 499 N.E.2d at 871.

100. N.Y. GEN. OBLIG. LAW § 11-100(1) (McKinney 2010); *see also* Sheehy v. Big Flats Cmty. Day, Inc., 541 N.E.2d 18, 21–22 (N.Y. 1989). Section 11-100(1) reads in full:

> Any person who shall be injured in person, property, means of support or otherwise, by reason of the intoxication of impairment of ability of any person under the age of twenty-one years, whether resulting in his death or not, shall have a right of action to recover actual damages against any person who knowingly causes such intoxication or impairment of ability by unlawfully furnishing to or unlawfully assisting in procuring alcoholic beverages for such person with knowledge or reasonable cause to believe that such person was under the age of twenty-one years. § 11-100(1).

101. *See* Sherman v. Robinson, 606 N.E.2d 1365, 1367 (N.Y. 1992).

102. Letter from Sen. William Smith, 1983 N.Y. Sess. Laws ch. 641 (McKinney); *see also Sherman*, 606 N.E.2d at 1367.

103. *See* McCauley v. Carmel Lanes Inc., 577 N.Y.S.2d 546, 547–48 (App. Div. 1991).

104. *Sherman*, 606 N.E.2d at 1367; *see also* Reickert v. Misciagna, 590 N.Y.S.2d 100, 103 (App. Div. 1992); Etu v. Cumberland Farms, Inc., 538 N.Y.S.2d 657, 660 (App. Div. 1989).

105. *See* Rust v. Reyer, 693 N.E.2d 1074, 1076 (N.Y. 1998).

106. MacGilvray v. Denino, 540 N.Y.S.2d 449, 451 (App. Div. 1989).

107. Lane v. Barker, 660 N.Y.S.2d 194, 195 (App. Div. 1989).

108. *Sherman*, 606 N.E.2d at 1367–68.

109. *Id.*

110. *See* KREINDLER, *supra* note 3 at § 12.36.

111. *See* Lan Liang ET AL., *Precaution, Compensation, and Threats of Sanction: The Case of Alcohol Servers*, 24 INT'L. REV. L. & ECON. 49 (2004).

Michael J. Hutter is a Professor of Law, Albany Law School. Professor Hutter has been a member of the New York State Law Revision Commission since 1997. He served as the Executive Director of the Law Revision Commission from 1979 to 1983.

Going Up River: Lawyer Discipline, Lawyer Assistance and the Legal Profession's Response to Lawyer Alcoholism

By Barbara F. Smith

Introduction

Upon the formation of the Commission on Alcohol and Substance Abuse in the Legal Profession in 1999, then-Chief Judge Judith S. Kaye offered a folk parable about two men fishing alongside a stream, when an infant floated past them. The first jumped in, rescued the child and handed him to the second fisherman, who placed the child safely on the grass. This scenario was repeated several times, until a group of babies came floating downstream. The first fisherman grabbed as many as he could, but the second walked away. "Hey," the first fisherman shouted, "aren't you going to help me save these children?" The second replied, "You save them, I'm going upstream to see who's throwing them into the river!"

This article will address a topic related to this journal's overall theme of regulation of beverage alcohol by considering how the legal profession regulates its members' professional conduct as affected by beverage alcohol. Similar goals may be attributed to those involved in the disciplinary function—with duties to the clients, the profession and the public; and to those involved in lawyer assistance whose vision to help the lawyers affected by disease inures to the benefit of clients, the profession and the public. But their paths to achieving those goals are necessarily different, yet not necessarily discordant.

The regulation of the impact of alcohol on attorney conduct parallels the rise of bar association committees and programs on "lawyer impairment," "lawyer alcohol abuse," "lawyer alcohol and drug abuse," "lawyers helping lawyers," and "lawyer assistance." These names for committees or programs accomplishing much the same purpose indicate the evolution of their development and scope. And the creation of the Lawyer Assistance Trust marks yet another milestone. But we get ahead of the story.

The Continuum of Regulation

Law Graduates

The first hurdle in career-long oversight of professional conduct begins with the character and fitness process. The Appellate Division in each Judicial Department determines whether applicants for admission possess the "character and general fitness requisite for an attorney and counselor-at-law."[1] Pertinent here is the requirement that applicants report conduct evincing drug or alcohol abuse or addiction, including any open bottle, DWI, or underage drinking charges.

Decisions regarding admission are made on a case-by-case basis; however, a history of alcohol-related incidents prior to application for admission to the bar is not necessarily fatal. Committees and related staff will consider the relative seriousness of the conduct, its recentness, any record of treatment and / or rehabilitation, etc. Monitoring by a Lawyer Assistance Program, discussed below, would also be a factor to be weighed.

Lawyer Conduct

Pursuant to authority granted by section 90(2) of the New York Judiciary Law, the courts adopt the rules governing professional conduct[2] and the disciplinary process for dealing with violations.[3]

Rule 8.4 proscribes lawyer misconduct adversely reflecting on the lawyer's honesty, trustworthiness or fitness as a lawyer, or engaging in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.[4]

Lawyers who know that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer are required to report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.[5] Lawyers are not required to disclose information otherwise protected by Rule 1.6,[6] or information gained while participating in a bona fide lawyer assistance program.[7]

None of the Rules of Professional Conduct refers to a lawyer's use of alcohol [or substance abuse] specifically, but the consequences of such use may reflect on the lawyer's fitness as a lawyer, within Rule 8.3.[8] The Appellate Division, First Department's 1982 decision in *Matter of Corbett* appears to be the first where an attorney who suffered from alcoholism and was found guilty of misconduct was permitted to continue in the practice of law under supervision. The court noted the attorney's recovering status and the fact that none of the charges involved "moral turpitude or misappropriation of funds."[9]

Personal Conduct

If an attorney has an alcohol-related criminal conviction, such as driving drunk, the attorney is subject to automatic discipline pursuant to section 90(2) of the Judiciary Law.[10] Generally, for a first-time misdemeanor or lesser offense conviction (*e.g.*, Driving While Ability Impaired, a traffic infraction), absent any aggravating circumstances (*e.g.* accident, resisting arrest, prior alcohol related offense, etc.), the attorney is not likely to lose his / her license and the court will either issue a public censure or refer the matter to the disciplinary committee for the imposition of a private sanction. In appropriate cases, the attorney may be referred for monitoring, if he / she is not already working with a lawyer assistance program.[11] In misdemeanor cases where there are aggravating circumstances, the court may impose a period of suspension. In appropriate cases, monitoring may be ordered or made a condition of reinstatement.[12] For conviction of a felony, the attorney ceases to be an attorney by operation of law at the moment of plea or verdict. In such cases the disciplinary committee will move to strike the name of the attorney from the rolls, a ministerial act confirming the earlier fact of automatic disbarment.[13]

In the Fifth Judicial District, grievance committee staff members have suggested to the Onondaga County District Attorney's office that they report all lawyer prosecutions to the grievance committee, especially for DWI and drug offenses, at the arrest stage. The committee noted:

> Although the Rules, new and old, require attorneys to report knowledge of misconduct by other attorneys, the obligation of prosecutors to do so is still a matter of interpretation…since the rules require the DA's to go forward with prosecutions only upon evidence constituting probable cause, that same standard equals knowledge that raises the obligation to report.[14]

The earlier reporting may provide an "added incentive for evaluation and treatment at earlier stages."

In the Tenth Judicial District, the grievance committee staff takes a similar approach, having requested the District Attorney's office to inform them any time an attorney is arrested, so they can track the matter.

For non-conviction alcohol-related matters, the treatment of each case is dependent on facts and circumstances. Over the last fifteen years, there has been a trend to greater awareness and sensitivity on the part of disciplinary committees, staff and the Courts in dealing with the impaired attorney, especially in alcohol-related matters. This may be attributed to more information of the nature and breadth of the problem being available as well as the heightened awareness of lawyer assistance resources.[15]

Alcoholism or Alcohol Abuse?: What It Is—as an Indication of Unfitness to Practice

The American Psychiatric Association publishes a *Diagnostic and Statistical Manual of Mental Disorders*, currently in its fourth edition and often referred to by the shorthand *DSM-IV*. The DSM-IV criteria for alcohol abuse are:

> (a) maladaptive pattern of alcohol abuse leading to clinically significant impairment or distress, as manifested by one or more of the following, occurring within a 12-month period:
>
> 1.) Recurrent alcohol use resulting in failure to fulfill major role obligations at work, school, or home (e.g., repeated absences or poor work performance related to substance use; substance-related absences, suspensions or expulsions from school; or neglect of children or household).
>
> 2.) Recurrent alcohol use in situations in which it is physically hazardous (e.g., driving an automobile or operating a machine).
>
> 3.) Recurrent alcohol-related legal problems (e.g., arrests for alcohol-related disorderly conduct).
>
> 4.) Continued alcohol use despite persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of the alcohol (e.g., arguments with spouse about consequences of intoxication or physical fights).
>
> These symptoms must never have met the criteria for alcohol dependence.[16]

The DSM-IV criteria for alcohol dependence are:

> (a) maladaptive pattern of alcohol use, leading to clinically significant impairment or distress, as manifested by three or more of the following seven criteria, occurring at any time in the same 12-month period:
>
> 1. Tolerance, as defined by either of the following:
>
> - A need for markedly increased amounts of alcohol to achieve intoxication or desired effect.
>
> - Markedly diminished effect with continued use of the same amount of alcohol.

2. Withdrawal, as defined by either of the following:
    - The characteristic withdrawal syndrome for the alcohol.
    - Alcohol is taken to relieve or avoid withdrawal symptoms.
3. Alcohol is often taken in larger amounts or over a longer period than was intended.
4. There is a persistent desire or there are unsuccessful efforts to cut down or control alcohol use.
5. A great deal of time is spent in activities necessary to obtain alcohol, use alcohol or recover from its effects.
6. Important social, occupational, or recreational activities are given up or reduced because of alcohol use.
7. Alcohol use is continued despite knowledge of having a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated by the alcohol.[17]

How much drinking is too much?[18] How many lawyers are we talking about? Statistics on the numbers of attorneys who may abuse or be dependent on alcohol vary,[19] with many cited articles having been written in the 1990s and based on lawyer populations outside of New York State. According to G. Andrew Benjamin, et al., as many as "18-25% of lawyers may be affected by alcoholism."[20]

As with the general population, alcoholism is a chronic problem in the legal community.

As the Alcoholics Anonymous community might put it, "alcoholism is an equal opportunity disease," crossing social, economic, and educational barriers. Although the disease of alcoholism is chronic and progressive, it may be successfully arrested and treated—although no "cure" exists, recovery is possible. Denial is a common attribute of those with the disease; lawyers appearing before disciplinary staff do not necessarily offer their alcohol abuse or dependence as a mitigating factor, and some disciplinary staff do not routinely question respondents concerning possible mitigating factors such as their alcohol abuse or dependence. This catch-22 effect is another reason why accurate statistics on the severity of the problem are difficult to gauge.

In an effort to address the problem of lawyer alcoholism (and substance abuse) the Second, Third and Fourth Departments of the Appellate Division have adopted "diversion to monitoring" rules.[21] Pursuant to these rules, an attorney whose misconduct (which would not result in suspension or disbarment if found guilty) is sufficiently related to alcohol or substance abuse or dependency may be diverted to a monitoring program sponsored by an approved Lawyer Assistance Program. During the monitoring period, the attorney would undergo random testing for alcohol / drug use and would be required to participate in appropriate treatment. If the attorney successfully completes the monitoring period (often two years), the charges may be dismissed.

Statistics on the numbers of New York attorneys seeking to participate in the diversion program are not available, and it is difficult to estimate how many lawyers involved in the disciplinary process in New York have an alcohol-based problem.[22]

However, the Illinois Attorney Registration and Disciplinary Commission recently circulated its 2007 Annual Report, which includes a study of "demographic data for lawyers disciplined with identified impairments during a ten-year period (1998–2007)."[23] According to that Report, the statistics reflect "only those cases in which an impairment was raised by the lawyer or otherwise known by staff counsel. It is likely that many cases involving impaired lawyers are never so identified."[24] During the ten-year period (1998–2007), 17.7% of attorneys sanctioned had impairments caused by alcohol.[25] Cases of alcohol and depression accounted for another 8%; and alcohol and other drugs, an additional 13%.[26] Of 215 lawyers with identified impairments disciplined between 2003 and 2007, "86% of impaired lawyers were sole practitioners or practiced in a firm of 2–10 lawyers at the time of the misconduct."[27] Tracy Kepler, Senior Counsel for the Commission, characterized the findings as "surely underinclusive," and noted that "it appears that Illinois may be alone (among states) in its record keeping on statistics of impairment."

Reporting Requirements

The requirement for lawyers to report another lawyer's misconduct was described above—but to what entity is that report to be made? Ethics Opinion 822 of the New York State Bar Association's Committee on Professional Ethics addresses the question to whom lawyers, who are not members of lawyer assistance or lawyer helping lawyer committees,[28] are obliged to report lawyer misconduct.[29] It concludes that, "while lawyers are to be encouraged to refer to a LAP lawyers who are abusing alcohol or other substances or who face mental health issues, such a referral would not satisfy the ethical reporting requirement."[30] Rule 8.3 requires reporting to a "tribunal or other authority empowered to investigate or act upon such violation."[31] Opinion 822 continues:

> [T]he phrase "investigate or act" suggests that the "authority" must be a court of competent jurisdiction or a body having enforceable subpoena powers. Thus, a violation in the course of litigation could be reported to the tribunal before which the action is pending. In both a litigation and a non-litigation context, the report could be filed with a grievance or disciplinary committee operating under the powers granted to them by the Appellate Division of the State Supreme Court pursuant to Section 90 of the Judiciary Law and court rules. The report could be filed with the grievance committee in the Appellate Department in the Department where the lawyer is admitted or where the prohibited conduct occurred.[32]

Background of Lawyer Assistance in New York State and the U.S.

The history of the lawyer assistance movement necessarily is linked to the creation and expansion of the Alcoholics Anonymous movement in the United States. Alcoholics Anonymous—"AA"—as it is known, began 1935 in Ohio, with the meeting of two alcoholics—Bill W. and Dr. Bob S.[33] Dr. Bob, responding to Bill's concept that "alcoholism was a malady of mind, emotions and body,"[34] had not known alcoholism to be a disease; but responding to Bill's ideas, he got sober. Four years later, the three founding groups, in Akron, Cleveland and New York, had approximately 100 sober alcoholic members.[35]

In 1939, the basic textbook, *Alcoholics Anonymous*, commonly referred to as the "Big Book," was published, explaining AA's philosophy and methods, the core of which was the now well-known Twelve Steps of recovery.[36] Thanks to the circulation of the Big Book, publication of articles about AA, and the proliferation of AA groups, by 1950, 100,000 recovered alcoholics could be found. Seventy-five years after AA's founding, in 2010, the AA General Services Office reports more than 1.2 million AA members in the United States, participating in more than 56,000 groups; and, worldwide, membership totaling more than 2.1 million, in more than 115,000 groups. By sharing their "experience, strength and hope," this fellowship of individuals has as its purpose "to stay sober and to help other alcoholics achieve sobriety."[37]

The early history of "lawyer assistance" in the United States is largely the story of individual attorneys, themselves in recovery, who brought the message to other lawyers needing help. These charismatic leaders played a vital role in the founding of Lawyer Helping Lawyer Committees, which first developed in New York State's metropolitan areas where sufficient lawyers in recovery supported their founding. By 1976, New York and Canadian attorneys in recovery met in Niagara Falls, Canada at an event that has since become known as International Lawyers in Alcoholics Anonymous (ILAA); they continue to hold annual meetings throughout the U.S. and Canada. In 1978, Ray O'K, an attorney from Westchester County, was appointed by the State Bar President as Chair of a Special Committee created to address the problem of lawyer alcoholism and drug abuse. He wrote to the presidents of the sixty-two county bar associations to inform them of the existence and work of the new Committee, and he encouraged the bar associations to form local Lawyer Helping Lawyer Committees.[38]

In the late 1980s, as the Special Committee's visibility increased, and the numbers of lawyers seeking assistance continued to grow, the Committee petitioned the State Bar to hire an individual to direct the program and provide initial assessments and referrals for treatment. Ray Lopez, the first NYSBA Lawyer Assistance Program Director, came on board in 1990, and a major early success for the Program and Committee was the enactment of section 499 of the Judiciary Law, which grants confidentiality to communications between Lawyer Assistance Committee members or its agents and lawyers or other persons. In 1999, the Association of the Bar of the City of New York created its own Lawyer Assistance Program and hired Eileen Travis as its Director. The Nassau County Bar Association has had part-time LAP Directors for the last two decades; the current Director is Peter Schweitzer. In 2005, Patricia Spataro became the staff Director of the NYSBA Lawyer Assistance Program.

Institutionally latest on the scene is the New York Lawyer Assistance Trust, created in 2001 as an initiative of the Unified Court System, following the recommendation of the Commission on Alcohol and Substance Abuse in the Legal Profession. The Trust [or "NYLAT"] mission is to bring statewide resources and awareness to the prevention and treatment of alcohol and substance abuse among members of the legal profession. Its mission has been expanded to include addressing mental health issues as well.[39] Responsibility for the administration and management of the Trust lies with a twenty one-member board of trustees appointed by the Chief Judge, and the Trust works to enhance the efforts of the bar associations' LAPs and committees. With the advent of the Trust and its grant program, additional part-time mental health professionals have been added to enhance LAP staffs. Full contact information for Lawyer Assistance Programs and Lawyer Helping Lawyer Committees may be found at the end of this article.

As of 2010, there are numerous Lawyer Helping Lawyer Committees[40] throughout the State, performing outreach and personal visits with attorneys as appropriate, informing them of the availability of resources for help.

Most recently, the New York State Bar Association adopted a Model Law Firm policy addressing alcohol, substance abuse and mental health issues, which marks another recognition by the organized bar that the problems exist and that there are resources for addressing them.[41] Individual firms are encouraged to adopt the model policy or adapt it to the firm's culture.

The Model Policy on Impairment has three fundamental goals: (1) to protect clients; (2) to foster a culture and environment that encourages attorneys to seek help and to provide structure necessary to address those circumstances where an attorney's judgment is impaired; and (3) to recognize that it is far more cost effective to treat and rehabilitate afflicted attorneys than it is to deny that such problems exist or to simply fire the afflicted attorney, destroying careers, wasting years of experience and potentially jeopardizing the best interests of the firm's clients.[42]

Lawyer Assistance Programs are now found in all 50 states, and the American Bar Association has a standing Commission on Lawyer Assistance Programs (CoLAP). CoLAP has the mandate to educate the legal profession concerning alcoholism, chemical dependencies, stress, depression and other emotional health issues, and to assist and support all bar associations and lawyer assistance programs in developing and maintaining methods of providing effective solutions for recovery.

The disciplinary implications for lawyers abusing "beverage alcohol" cannot be predicted, as much depends on the particular circumstances.[43] Education—along with individual success stories—will be the key to the continuing evolution of the legal profession's response to the problems addressed by Lawyer Assistance Programs.

Contact Information for Lawyer Assistance Program Staff and Committee Chairs

NYSBA LAP Director—Patricia Spataro (800) 255-0569; Lawrence Zimmerman, Committee Chair (518) 429-4242

NYC Bar LAP Director—Eileen Travis (212) 302-5787; Gary Reing, Committee Chair (914) 245-7609

Nassau County Bar LAP Director—Peter Schweitzer (516) 747-4070

Brooklyn Bar LHL Committee—Sarah Krauss (718) 637-7561

Bronx County Bar Committee—William Peterman (718) 515-6000

Broome County Bar LAP Committee—Tom Schimmerling (607) 435-6225

Capital District LHL Committee—William Better (518) 758-1511

Bar Association of Erie County—LHL Committee Katherine Bifaro (716) 852-1777

Committee to Assist Lawyers with Depression—Daniel Lukasik (716) 852-1888

Dutchess County Bar LAC Committee—Lee Klein (845) 454-9200

Jamestown Bar Association—Peter Yoars (716) 338-0413

Jefferson County Bar LHL Committee—David Antonucci (315) 788-7300

Monroe County LCL Committee—Terry E (585) 233-3598

Nassau County LAP Committee (888) 408-6222 (helpline); Annabel Bazante (516) 776-7030

Oneida County Bar LAC Committee—Tim Foley (315) 369-3544

Onondaga County Bar LHL Committee—Bill Morgan (315) 476-2945

Queens County Bar LAC Committee—Robert Carlsen (718) 366-0058

Richmond County Bar—Jonathan Behrins (718) 442-4500

Rockland County Bar LHL Committee—Benjamin Selig (845) 942-2222 or Barry Sturz (845) 369-3000

Saratoga County LAC Committee—Richard Zahnleuter (518) 280-1974 or Neil Weiner (518) 348-7900

Schenectady County Bar LAP Committee—Vincent Reilly (518) 285-8425

Suffolk County Bar LAC Committee—Rosemarie Bruno (631) 979-3481 or (631) 697-2499 (helpline)

Tompkins County Bar LHL Committee—Richard Wallace (607) 272-2102

Westchester County Bar LHL Committee—Charles Goldberger (914) 949-6400

Endnotes

1. N.Y. JUDICIARY LAW § 90(1)(a) (McKinney 2010).
2. N.Y. COMP. CODES R. & REGS. tit. 22, § 1200 (2010) (The New York Rules of Professional Conduct became effective on April 1, 2009, superseding the New York Code of Professional Responsibility) (hereinafter N.Y. PROF'L R.).
3. For department-specific information regarding the disciplinary process, see N.Y. COMP. CODES R. & REGS. TIT. 22, §§ 603 (First Department), 691 (Second Department), 806 (Third Department), 1022.17 (Fourth Department).
4. N.Y. PROF'L R. 8.4(b),(h).
5. N.Y. PROF'L R. 8.3(a) (Reporting Professional Misconduct).
6. N.Y. PROF'L R. 1.6.
7. N.Y. PROF'L R. 8.3(c).
8. N.Y. PROF'L R. 8.3.
9. Matter of Corbett, 450 N.Y.S.2d 802, 803 (N.Y. App. Div. 1982).
10. *See* N.Y. JUDICIARY LAW § 90(4)(c) (McKinney 2010) (requiring attorneys convicted of a crime in a court of record to inform the Appellate Division within thirty days of such conviction—failure to so file is deemed professional misconduct, provided the Appellate Division may grant an extension to file upon good cause shown).
11. *See infra* p. 79 and note 21 (describing the diversion to monitoring program).
12. In some circumstances, the suspension may be stayed when monitoring is in place and the attorney is complying with the terms of the monitoring agreement.
13. N.Y. JUDICIARY LAW § 90(4)); E-mail Interviews with Robert P. Guido, Special Counsel for Grievance Matters, New York Supreme Court Appellate Division, Second Judicial Department (August 19, 2010 and September 13, 2010).
14. E-mail Interview with Anthony J. Gigliotti, Principal Counsel, Attorney Grievance Committee, Fifth Judicial District (September 13, 2010).
15. E-mail Interviews with Robert P. Guido, *supra* note 13.
16. *See* AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 198–99 (4th ed. 2000). The *DSM-IV* further elaborates on alcohol abuse and should be read in conjunction with the criteria set forth for substance abuse. *Id* at 214.
17. *Id.* at 197; *see id* at 213 (elaborating on alcohol dependence).
18. "It makes a difference both *how much* you drink on any day and *how often* you have a 'heavy drinking day'—that is, more than 4 drinks in a day for men or more than 3 drinks for women… [t]he more drinks in a day and the more heavy drinking days over time, the greater the chances for problems." THE NATIONAL INST. ON ALCOHOL ABUSE AND ALCOHOLISM, RETHINKING DRINKING: ALCOHOL AND YOUR HEALTH 4 (2010), *available at* http://pubs.niaaa.nih.gov/publications/Rethinking Drinking/ Rethinking_Drinking.pdf (emphasis added).
19. One defense lawyer who represents lawyers involved in professional misconduct cases laments that many lawyers are understandably reticent about disclosing alcohol or substance abuse. As a result, in that lawyer's opinion, many disciplinary prosecutors, hearing panels and courts do not appreciate the full impact of substance abuse in the profession.
20. G. Andrew H. Benjamin et al., *Comprehensive Lawyer Assistance Programs: Justification and Model*, 16 LAW & PSYCHOL. REV. 113, 113–14 (1992) (reporting that one-third of practicing attorneys suffer from depression, alcohol or cocaine abuse).
21. Diversion rules have been adopted in the Second Department, see N.Y. COMP. CODES R. & REGS. tit. 22, § 1022.20(d)(3) (2010); *see also* N.Y. COMP. CODES R. & REGS. tit. 22, 691.4(m) (for Third Department), 806.4 (for the Fourth Department). The First Department has not adopted such rules, but has addressed similar circumstances informally and on a case-by-case basis.
22. The New York Fund for Client Protection reimburses clients for losses caused by dishonest conduct of certain lawyers; since their establishment, their payouts have involved misconduct by less than one-third of one percent of the bar's membership. In its calendar year 2007 annual report, the Fund states that "[T]he apparent causes of misconduct by these lawyers are often traced to alcohol or drug abuse and gambling. Other causes are economic pressures, mental illness, marital, professional and medical problems." THE LAWYERS' FUND FOR CLIENT PROTECTION OF THE STATE OF NEW YORK, ANNUAL REPORT OF THE BOARD OF TRUSTEES FOR CALENDAR YEAR 2007, at 16 (2009).
23. ILL. ATTORNEY REGISTRATION AND DISCIPLINARY COMM'N (ARDC), ANNUAL REPORT 4 (2007), *available at* https://www.iardc.org/AnnualReport2007.pdf.
24. *Id.* at 28.
25. *Id.*
26. *See id.*, Chart 29B *Impairments Identified for Attorneys Sanctioned between 1998–2007*. The Full text of Chart 29B follows this article.
27. *See id.* at 20, Chart 29C.
28. Lawyer Assistance Program (LAP) services are confidential pursuant to N.Y. JUDICIARY LAW § 499 (McKinney 2010), which provides:

    > (1) Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privilege may be waived only by the person, firm or corporation which has furnished information to the committee. (2) Immunity from liability. Any person, firm or corporation in good faith providing information to, or in any other way participating in the affairs of, any of the committees referred to in subdivision one of this section shall be immune from civil liability that might otherwise result by reason of such conduct. For the purpose of any proceeding, the good faith of any such person, firm or corporation shall be presumed.

29. NYSBA Comm. on Prof'l Ethics, Formal Opinion 822 (2008).
30. *Id.*
31. N.Y. PROF'L R. 8.3(a).
32. NYSBA Comm. on Prof'l Ethics, Formal Opinion 822.
33. Bill W. is Bill Wilson, and Dr. Bob is Bob Smith. The custom in AA is to refer to the individual by their first name and first initial of the last name, to preserve anonymity.
34. As learned from Dr. William Silkworth of Towns Hospital in New York, where Bill had been a patient
35. For more information, visit www.aa.org, a website maintained by the General Services Office.
36. *See The Twelve Steps of Alcoholics Anonymous*, ALCOHOLICS ANONYMOUS WORLD SERVICES (last visited Oct. 10, 2010), *available at* http://www.aa.org/en_pdfs/smf-121_en.pdf. The Twelve Steps are:

    1. We admitted we were powerless over alcohol—that our lives had become unmanageable.

    2. Came to believe that a Power greater than ourselves could restore us to sanity.

    3. Made a decision to turn our will and our lives over to the care of God *as we understood Him*.

    4. Made a searching and fearless moral inventory of ourselves.

    5. Admitted to God, to ourselves, and to another human being the exact nature of our wrongs.

6. Were entirely ready to have God remove all these defects of character.

7. Humbly asked Him to remove our shortcomings.

8. Made a list of all persons we had harmed, and became willing to make amends to them all.

9. Made direct amends to such people wherever possible, except when to do so would injure them or others.

10. Continued to take personal inventory and when we were wrong promptly admitted it.

11. Sought through prayer and meditation to improve our conscious contact with God *as we understood Him*, praying only for knowledge of His will for us and the power to carry that out.

12. Having had a spiritual awakening as the result of these steps, we tried to carry this message to alcoholics, and to practice these principles in all our affairs.

37. *See* THE A.A. GRAPEVINE, INC., www.aagrapevine.org.

38. Certainly, local groups of attorneys meeting in AA format preceded these bar association committees, but the formation of the bar association Lawyer Helping Lawyer Committees marked an important step in the recognition of the problem and the visibility of resources for lawyers seeking help.

39. Since the focus of this *Journal* is regulation of beverage alcohol, the text of this article focuses primarily on that aspect of lawyer assistance services. Readers interested in learning more about the mental health aspects of the LAP efforts should visit www.nylat.org or the websites of the New York State and New York City Bar Associations.

40. In addition to the statewide Lawyer Assistance Committee (LAC) of the New York State Bar Association, and the New York City Bar's LAC, local committees may be found in: the Bronx; Brooklyn; Queens, Richmond, the Capital District; Broome County; Dutchess County; Erie County; Jamestown (Chautauqua County), Jefferson County, Monroe County, Nassau County, Oneida County, Onondaga County, Rockland County, Saratoga County, Schenectady County, Suffolk County, Tompkins County and Westchester County. Contact information follows the text of this article.

41. Copies of the Model Policy are available at www.nysba.org/lap or by calling 800/255-0569.

42. *See* NEW YORK STATE BAR ASS'N, LAWYER ASSISTANCE COMM. MODEL POLICY (2010), *available at* http://www.nysba.org/AM/Template.cfm?Section=Lawyer_Assistance_Program_LAP_&Template=/CM/ContentDisplay.cfm&ContentID=40704.

43. See, Leigh Jones, *Dazed and Confused: Disciplinary Actions for Substance-Abusing Attorneys Vary Widely*, 33 Nat'l L.J. 1 (2010).

Barbara F. Smith is Director of the New York Lawyer Assistance Trust, a court system initiative bringing statewide resources and awareness to the prevention and treatment of alcoholism, substance abuse and mental health issues among members of the legal profession.

Chart 29B: Impairments Identified for Attorneys Sanctioned Between 1998-2007

	1998-2002		2003-2007		1998-2007	
Impairments of Lawyers Sanctioned	519		676		1,195	
Substances:						
Alcohol	30	24.2%	30	14%	60	17.7%
Cocaine	7	5.6%	7	3/2%	14	4.2%
Other drugs	4	3.2%	23	11%	27	8%
Mental Illness:						
Depression	45	36.3%	73	34%	118	35%
Bipolar Disorder	8	6.5%	5	2.3%	13	3.8%
Schizophrenia	2	1.6%	3	1.4%	5	1.5%
Other						
Gambling	5	4%	10	4.6%	15	4.4%
Sexual Disorder	5	4%	4	1.8%	9	2.7%
Combinations:						
Alcohol & Depression	5	4%	22	102%	27	8%
Alcohol & Other Drugs	9	7.3%	35	16.2%	44	13%
Alcohol & Gambling	1	1%				
Depression & Drugs	2	1.6%	2	1%	4	1.2%
Gambling & Drugs	1	1%	1	1%	2	1%

Source: Ill. Attorney Registration and Disciplinary Comm'n (ARDC), Annual Report 28 (2007).

"Sober Homes": Residential Treatment or Private Housing?

By Sara Osborne and Robert Kent

I. Introduction:

Sara Osborne

This article examines communal housing—also known as "sober homes," "recovery homes," "recovery houses," "halfway houses," or "substance abuse houses"—for persons recovering from chemical dependence[1] who may also be homeless or temporarily displaced. It is widely recognized that homelessness may result from substance use disorders and substance use disorders may be precipitated or aggravated by homelessness. However, when searching for the most cost effective means to mitigate homelessness and also facilitate recovery, it is not always clear whether to start with health or housing, or whether federal, state or local governments, or private entities should be the primary facilitators.

From a treatment perspective, the regulatory purview of the New York State Office of Alcoholism and Substance Abuse Services (OASAS),[2] this article asks how, or to what extent, state-regulated clinical treatment can intersect with programs targeting homelessness among the general population in order to prevent relapse and maintain recovery for persons with substance use disorders. The question is most pressing in regions of the state where demand for both state-certified residential treatment and affordable short-term housing exceeds availability. Long Island is one such region.

In February 2010, in *Human Res. Research and Mgmnt. Group, Inc., v. Cnty. of Suffolk,*[3] a federal judge declared unconstitutional a Suffolk county local law seeking to regulate private properties in which recovering addicts were residing by requiring, *inter alia,* an application process, fees, and full-time OASAS staffing.[4] Part III of this article summarizes this case as an example of how regional demographics, statutory limitations, and social stigmatization of substance abusers can create a crisis of both health and housing. Local concerns about the proliferation of under-regulated communal residences of questionable quality resulted in jurisdictional disputes between government agencies including OASAS, civil rights litigation, the formation of several local advocacy groups attempting to grapple with the issue, a study and report from the Welfare to Work Commission of the Suffolk County Legislature, and a Suffolk county resolution authorizing a request for qualifications of responsible sober home operators in anticipation of some form of local oversight.[5]

Robert Kent

In this context, Parts II, IV, V and VI provide a general overview of OASAS statutory authority, public/private collaborative efforts that increase housing options, applicable statutory provisions, and obstacles to satisfactory solutions. Part VII suggests several means to overcome these obstacles and incentivize development and regulation of more effective recovery housing.

II. NYS Office of Alcoholism and Substance Abuse Services (OASAS)

The Commissioner of OASAS[6] is authorized and directed to assure consistent high quality treatment services for persons with substance use disorders and/or problem gambling[7] and to certify providers of services to advance this mandate.[8] Over 1,400 certified providers deliver services which include prevention education and counseling, outpatient services including medication assisted treatment, and a continuum of residential treatment modalities from intensive residential rehabilitation, with twenty-four hour supervision, to community residential services and supportive living, where treatments such as life skills counseling promote eventual transition to independent living.[9]

The OASAS continuum of treatment is predicated on addiction as a chronic bio-psycho-social disease with a lifelong recovery.[10] Because of its chronic nature, the potential for relapse is very high, particularly in early recovery, and therefore immersion in a stable, sober environment is recognized as critical in order to maintain and strengthen a hard won and fragile recovery. OASAS estimates that one in seven state residents (2.5 million) suffer from substance use disorder or problem gambling.[11] In addition, the number of persons needing treatment with co-occurring mental health and/or multiple substance use disorders is increasing and includes homeless families and veterans returning from war zones with special needs related to physical and psychological trauma as well as addiction to multiple substances.

Providers of OASAS treatment services must, pursuant to section 32.05(a)(1) of the Mental Hygiene, obtain

and maintain an OASAS certification to operate.[12] Providers not certified by OASAS may be asked to cease and desist unlawful treatment, or face prosecution by the NYS Attorney General. Violation of the Mental Hygiene Law is a crime (a misdemeanor) that can incur penalties including fine or imprisonment.

The distribution of certified treatment, as determined by periodic OASAS regional needs assessments, indicates a shortage of residential services statewide, but population-dense areas such as Suffolk and Nassau counties are particularly underserved.[13] In order to access available residential or outpatient services, recovering addicts must sometimes temporarily relocate. Persons who relocate to access outpatient services will find affordable, short-term, recovery-supporting housing in the private market also scarce. Currently, OASAS has no statutory authority to regulate housing that is not certified as residential treatment; such oversight is reserved for local municipalities unless specifically preempted by the state or federal governments.[14] OASAS oversight of non-certified residences would exceed the current OASAS jurisdictional reach and conflict with the jurisdiction of other federal, state and local authorities.

III. The Problem: An Example

In the late 1990s Lake Grove and Crossings, two large OASAS providers of outpatient services on Long Island, cultivated reciprocal relationships with multiple rental properties wherein tenants, many of whom were receiving public assistance, were required to attend outpatient treatment at Lake Grove and Crossings as a condition of their housing. Human Resource Research and Management Group (a/k/a Homeworks), a property management company, operated the "sober homes" affiliated with Lake Grove; "sober homes" for Crossings were closely linked to corporate principals. This arrangement guaranteed landlords a rental income but not enough to adequately maintain the properties. Community residents and Suffolk County officials became concerned about the number of sober homes (possibly exceeding 500), substandard conditions and unsupervised residents, and demanded that OASAS assume regulation of these houses.[15]

Although some sober homes were affiliated with Lake Grove and Crossings, others on Long Island were sponsored by Oxford House, Inc., a national not-for-profit organization that provides initial rent for peer-managed houses whose residents agree to retain their sobriety as a condition of living in the house and sharing expenses.[16] Oxford House facilitates housing for recovering persons, but does not provide any treatment services.

In order to clarify jurisdictional distinctions, OASAS has identified criteria by which the agency, providers, and municipalities can distinguish between residential treatment requiring an OASAS operating certificate, and housing alone.[17] Such criteria includes, but is not limited to: 1) promotion of the residence as a component of an authorized or certified chemical dependence service provider; 2) referral or mandate that residents attend an authorized or certified chemical dependence service(s) as a condition of continued stay in the residence; 3) integration and coordination of the residence's services with an authorized or certified chemical dependence service(s).

Based on those criteria, OASAS asserted that the nature of the relationships Lake Grove and Crossings had established with their affiliated "sober homes" constituted uncertified residential treatment; therefore, OASAS issued cease and desist orders to Homeworks and Crossings' landlords, and initiated proceedings to revoke the outpatient operating certificates of both Lake Grove and Crossings. Both providers ultimately closed and patients were redirected to treatment at other OASAS certified providers.[18] Some landlords began, but never completed, the OASAS certification application process to become residential treatment programs.

In 2003, Suffolk County responded to local concerns by enacting Local Law 19-2003, a site selection procedure for "substance abuse houses." Homeworks and Oxford House sought, and were granted, a stay of the local law during which time they brought a federal discrimination suit against the county. In February, 2010, Joseph F. Bianco, US District Judge for the Eastern District of N.Y., declared the law facially invalid pursuant to the Federal Fair Housing Act because the Suffolk County law discriminated against a group of disabled individuals and subjected them to housing burdens that did not apply to others.[19]

Concurrent with this court action, legislation seeking to bring "sober homes" under the regulatory oversight of OASAS was also introduced in the New York State Legislature; this bill passed both houses of the Legislature but was vetoed by Governor Pataki in 2006 as being, *inter alia*, too costly for the state.[20]

IV. Obstacles to Locating State-Certified Treatment and Private Recovery Housing

Local Zoning

It is difficult to locate OASAS-certified community residential treatment programs in an area like Long Island with high property values and population density. Certified providers, primarily not-for-profit corporations, must comply with applicable local zoning laws that regulate the location of community residential facilities through zoning districts (i.e., single family, multi-family), or by permit or variance. Local zoning laws can hinder the siting of community residences for the mentally disabled so, for site selection purposes, section 41.34 of the Mental Hygiene Law preempts local zoning ordinances for the Office of Mental Health (OMH) and Office for People with Developmental Disabilities (OPWDD), the other two Offices of the New York State Department of Mental Health.[21]

The statute, however, does not extend the preemption to OASAS programs. This makes establishing certified programs for treatment of chemical dependence, particularly residential programs, even more difficult.

Litigation has failed to rectify this unequal treatment of services certified by the three Mental Hygiene offices. In 1991 Daytop Village, a large OASAS-certified provider, argued in *Incorporated Vill. of Nyack v. Daytop Vill., Inc.*[22] that Article 19 of the Mental Hygiene Law implemented a comprehensive statewide policy for substance abuse treatment, and therefore it could be implied that the state intended to pre-empt local zoning because such laws could obstruct the implementation of state policy. Although the Appellate Division agreed, the Court of Appeals reversed the decision, citing the absence of OASAS in section 41.34 of the Mental Hygiene Law and the absence of a specifically articulated preemption in Article 19 of the Mental Hygiene Law. The court concluded that the state had indeed intended to exclude chemical dependence treatment facilities from the benefit of a statutory preemption.[23] OASAS' subsequent efforts to amend section 41.34 of the Mental Hygiene Law to clearly extend the statutory preemption to OASAS have been unsuccessful.[24]

Social Stigma of Addiction: "Not in My Backyard"

Although substance use disorder is prevalent throughout all sectors of society and treatment and recovery increasingly receive favorable media attention,[25] the social stigma that attaches to addiction continues to be egregious enough to require the protection of federal law to protect the confidentiality of persons receiving treatment for substance use disorders.[26] Chemical dependence is considered a disability in some circumstances under the Americans with Disabilities Act, the Rehab Act of 1973, the Social Security Act, and the federal Fair Housing Amendments of 1988.[27] Statutory protections clearly anticipate the very real potential for discriminatory abuse directed at persons recovering from substance use disorders.

In fact, addiction treatment programs may be denied site permits when public officials succumb to unfounded fears and demonstrate discriminatory behavior. Without the preemption benefit of section 41.34 of the Mental Hygiene Law, addiction treatment providers who believe they have been denied building permits due to discriminatory zoning decisions may be compelled to resort to costly litigation in order to provide services to a community where need has been identified.[28]

In 2001, Regional Economic Community Action Program, Inc. (RECAP), an OASAS-certified provider of outpatient services, sued the city of Middletown, N.Y., its mayor, and planning board under the Fair Housing Act, Americans with Disabilities Act, and section 504 of the Rehab Act for alleged discrimination when the city denied a special-use permit for construction of two halfway houses.[29] Summary judgments for the city were overturned by a Court of Appeals Circuit Judge who held that recovering alcoholics who would have been residents of the proposed halfway houses were disabled for purposes of ADA, FHA and Rehabilitation Act, and that whether or not the reasons given by the city for denying the permit were pretextual was an issue of fact that precluded summary judgment.

Although the RECAP halfway houses were eventually built (completed in 2007), the litigation delayed construction and increased the total cost of the project. Cases like this, however, are unusual; most, if not all, treatment providers rarely sue local governments because of the high cost of litigation and because it is inconsistent with their goal of integrating into a community.

Independent property managers or organizations like Oxford House, Inc. that facilitate sober home-type residential facilities face the same obstacles arising out of the stigma of addiction. In addition to the recent Suffolk County case, Oxford House, Inc. has been the plaintiff in numerous successful challenges nationwide to local zoning laws based on federal civil rights statutes.

Oxford House cases have also clarified jurisdictional boundaries by distinguishing residential treatment from mere housing.[30] For example, in *Oxford House, Inc. v. Town of Babylon*[31] the town alleged its zoning laws precluded housing for a group of former addicts in a single family dwelling because the residents were unrelated. The court found that because former addicts required the support of a family-like group living arrangement to facilitate recovery, they were more likely to live with unrelated persons similarly disabled than with persons without such disabilities. Therefore, the zoning ordinance had a greater and disparate impact on persons with disabilities than it did on non-disabled persons. Case law has also established that Oxford House residents are not roomers or boarders because they rent an entire house, not individual rooms, and do not hire a house manager.[32]

Economics

Regardless of recovering persons' rights to live communally in public or private housing, the largest obstacle for tenants, landlords and property management is making such housing economically sustainable. Many persons, displaced because they had to relocate in order to access treatment,[33] may be recipients of limited public assistance or are marginally or sporadically employable for a variety of reasons.

New York State supplements federal supplemental security income (SSI) benefits for living expenses of persons eligible for Medicaid in the form of a supplemental needs allowance or as residents of a congregate care facility. Congregate care Level II facilities include Department of Health (DOH) certified residences for adults, OMH or

OPWDD-certified community residences, and OASAS-certified residential treatment programs. Congregate care payments may be almost 10 times more than the supplemental needs allowance.[34] Recovering addicts or alcoholics, however, are not eligible for SSI benefits unless they can show they are primarily disabled by another mental or physical disability. Even then, if they are eligible, claimants must participate in certified treatment to continue receiving benefits. The scarcity of treatment means persons may need to relocate to find providers, and if they are receiving outpatient services, they will need temporary housing. This can be a Catch-22 that leaves many addicts homeless and without the treatment they need.[35]

V. Homelessness and Substance Abuse: Civil Rights

As discussed above, cases challenging discriminatory local zoning ordinances have looked to state and federal civil rights statutes for their legal authority. The following summarizes statutes implicated in advocating housing for recovering addicts:

New York State Constitution: New York's Constitution includes a duty to care for the needy. The Constitution states, "[t]he aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine."[36] Although "the needy" is not defined, OASAS statutes and regulations do not permit providers to deny admission based on a patient's inability to pay.[37] "Courts, recognizing the separation of powers, are reluctant to define for the legislature the form and extent of benefits that must be provided,[38] but the state legislature can be said to have chosen to meet this mandate for inhabitants of NY state who are recovering from substance use disorders by, inter alia, the statutory creation of 13 state-operated addiction treatment centers (ATC) and providing that such persons "…shall be admitted to a chemical dependence program, service or treatment facility…" and that admission shall not be contingent on an expectation of reimbursement for such service."[39] Nearly 60% of admissions to ATCs are uninsured individuals; nearly 40% are homeless individuals compared to 20% in community-based rehabilitation programs.

Section 504 of the Rehabilitation Act of 1973: Section 504 of the Rehabilitation Act of 1973 prohibits discrimination against the disabled by any program or activity receiving federal financial assistance. Such programs also must provide reasonable accommodations to persons with disabilities if doing so does not alter the fundamental nature of a program. Since section 504 treats all substance abusers as disabled, theoretically even active drug abusers may not be excluded from federally funded public housing if their drug abuse does not present a "direct threat."[40]

Federal Fair Housing Amendments: Public and private housing is subject to the Federal Fair Housing Amendments Act of 1988 (FHAA) banning housing discrimination "to any buyer or renter because of a handicap."[41] FHAA also requires "reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [a handicapped] person equal opportunity to use and enjoy a dwelling."[42]

The Americans with Disabilities Act of 1990: The Americans with Disabilities Act (ADA) does not consider alcoholism (chemical dependence) as a *per se* disability, nor address housing directly. However, persons who have completed treatment for addiction can look to ADA's Title II prohibition against discrimination in public accommodation. The ADA requires public entities to administer their programs in the most integrated setting appropriate to the needs of qualified individuals with disabilities and, like section 504 and FHAA, to make reasonable modifications to programs unless such modifications would fundamentally alter the nature of the entity's programs.[43] In *Olmstead v. L.C.*, the United States Supreme Court said that under Title II of the ADA relating to public services, to avoid discrimination states are required to place persons with mental disabilities in community settings rather than in institutions when the "State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities."[44]

VI. Collaborative Initiatives: "Permanent Supportive Housing" (PSH)[45]

OASAS and homeless housing advocates know that disability rights, local zoning issues, and social stigma are ongoing battles on behalf of recovering addicts. However, to establish a foundation for long-term recovery these people need immediate options for safe, affordable permanent housing and stable employment at a living wage. For this reason, since the early 1990s OASAS has encouraged a consortium of private housing providers, municipalities, and certified treatment programs to become "sponsors" of housing primarily through three public housing programs: (1) Shelter Plus Care Homeless grant programs are collaborative efforts with HUD Homeless Assistance programs;[46] (2) New York / New York III Homeless Initiative in New York City is a collaboration with other state and New York City agencies; and (3) Upstate Permanent Supportive Housing Initiative (PSH) is a collaboration with county governments.

PSH, unlike OASAS clinical treatment, has roots in a public health philosophy known as "Harm Reduction" that aims to reduce the physical, social, and economic harms to individuals and communities from addictive behaviors. Harm reduction is generally considered con-

trary to the disease model of addiction because it does not demand immediate and total abstinence. For example, some programs known as "housing first" may place active addicts in permanent housing prior to treatment. The OASAS continuum of treatment currently focuses on addressing the nature of an individual's chronic disease before accessing additional social services.

Proponents of both the disease model and the harm reduction model generally agree to disagree and defer to the best interests of persons needing services. For example, in 2007 OASAS formed a Bureau of Housing within its Prevention and Recovery Services Division. This bureau is charged with promoting PSH through the three programs named above and a new Re-Entry Permanent Supportive Housing Initiative to meet the anticipated demand for housing by parolees returning to their communities as a result of the Paterson Drug Law Reforms.[47] Consistent with the *Olmstead* decision, PSH programs supplement rent subsidized housing with a variety of services that facilitate a disabled person's ability to live, if he or she so chooses, in community integrated housing.[48]

Due to the bio-psycho-social nature of addiction, on May 14, 2009, Governor David Paterson issued an executive order calling on commissioners of twenty New York state agencies to come together in the Addictions Collaborative to Improve Outcomes for New York (ACTION), an integrated public / private sector approach to addressing the negative impacts of addiction, including homelessness (currently chaired by the commissioner of OASAS).[49] Collaboration between public and private sectors is critical because the demographic affected by addiction and homelessness is diverse and changing.[50] Multiple agencies with jurisdiction over public health, public safety, education, addiction treatment, criminal justice, social services, child welfare, community development, and housing are simultaneously focused on different aspects of the same problem.[51]

For example, the NY / NY III Homeless Initiative is unique in that it provides sponsors with operating funds from five state agencies (OMH, OASAS, the Office of Temporary and Disability Assistance (OTDA), Office of Children and Family Services (OCFS), Department of Health-AIDS Institute (DOH)) and three New York City agencies (Department of Health and Mental Hygiene, Administration for Children's Services, HIV-Aids Services Administration). More than eighty percent of persons referred to NY / NY III housing units have been living in DHS Homeless Shelters. Significantly, the New York City Human Resources Administration (HRA) Program Evaluation, an integral part of the NY / NY III Oversight Committee, reported a six-month retention rate of ninety-six percent for participants living in OASAS-funded PSH apartments.[52]

Similar indications of success from PSH outcome studies have shown reductions in time spent homeless, and housing retention rates of seventy-five to eighty-five percent for some of the most severely disabled tenants.[53] Since the formation of the OASAS Housing Bureau the number of sponsor agencies and the number of PSH units has increased: In 2007, OASAS supported 856 apartment units of permanent housing in thirteen communities; in 2009-10, the number of apartments will have increased by forty-nine percent (1,276 units) and the number of communities increased by seventy percent (22). This represents Permanent Supportive Housing programs, including: (a) twenty-five Shelter Plus Care programs (898 units); (b) eleven New York / New York III programs (325 units); and (c) seven Upstate PSH programs (53 units).[54]

An ultimate goal of PSH is employment for residents sufficient to assume 100% of lease costs because many program participants rely on some form of public assistance. Since over 80% of recovering addict-participants in PSH do not have co-occurring mental or physical conditions, they are not eligible for SSI subsidies. However, if the concept of "enhanced community residences," an adaptation of the PSH model, were to become part of the OASAS-certified continuum of treatment, then congregate care funds would be available to eligible residents and programs could receive state aid for facilities and operating expenses. None of this can happen, however, unless communities where the need is great will encourage such programs and welcome them into their communities.

VII. Summary and Recommendations

In the wake of the *Homeworks* decision, the Suffolk County Welfare to Work Commission conducted a study and issued a report on May 24, 2010.[55] Because the tenants in sober homes are recovering addicts, and because local code enforcement is understaffed and cannot adequately perform its enforcement function relative to substandard properties, the Commission again called on the state (OASAS) to assume regulatory oversight of approximately 600 privately owned houses, possibly including full time staffing. Home rule in New York State gives local governments taxing authority to provide adequate public services for their citizens rather than burdening all state taxpayers with remedies to local problems, particularly problems that have been exacerbated by unlawful discrimination and longstanding resistance to state-certified residential treatment.

OASAS is directed by statute to develop and certify providers of programs for prevention, treatment, recovery, and rehabilitation services. OASAS cannot deem landlords certified providers unless they have voluntarily completed a thorough application process that includes, *inter alia*, review of fiscal viability, corporate structure, and a local needs assessment; non-certified providers risk violation of state law. Neither the state nor any local govern-

ment is likely to purchase hundreds of private properties or perhaps, in the interest of public health, acquire them by eminent domain. Throughout the state, wherever there is a shortage of certified residential treatment or affordable temporary housing, the scenario on Long Island repeats itself.

In 2007, OASAS received a budget appropriation of $26 million to provide 100 additional OASAS-certified community residential slots in Nassau and Suffolk counties. To date, the awards have been announced but none of the construction has begun due to some of the obstacles discussed in this article. Although the state cannot give funds to private property owners to improve income properties unless they are part of a government program such as OASAS treatment, the Commission report suggests that "if there are barriers to creating these 'Community Residence' beds, OASAS should apply these funds to upgrading sober homes on Long Island."[56]

"OASAS and the Commission agree that recovering addicts need multiple support services to become stable citizens and that providing adequate services will involve significant commitment of federal, state and local funds."

OASAS and the Commission agree that recovering addicts need multiple support services to become stable citizens and that providing adequate services will involve significant commitment of federal, state and local funds. OASAS' authority to regulate treatment does not currently extend to regulating private housing, but federal and state housing programs are available for local collaboration. Nevertheless, OASAS initiated a Recovery Home Workgroup made up of Long Island advocates for homeless and disabled, businesses and other state agencies to develop guidelines for public and private sponsors of housing for recovering residents.

If, given sufficient increases in staff and funding, OASAS could certify more residential treatment facilities including "enhanced community residences," then many of the concerns raised by the Commission would be addressed. Instead, OASAS is facing reductions in funds for existing certified treatment programs and expansion of residential treatment. OASAS Housing Bureau is also concerned that, because of rising rental rates, soon federal, state and local funds may not be sufficient to adequately subsidize current or new PSH programs.

OASAS proposes that some or all of the following could alleviate the current situation and minimize future exacerbation:

#1 **Amend section § 41.34 of the Mental Hygiene Law and establish more OASAS certified community residential treatment.** The original reason for the statute's disparity was a concern that siting chemical dependence community residences would create the density obstacle to siting community residences certified by the other mental hygiene offices. Recent case law, however, argues that this statute, as written, may be discriminatory on its face against persons with certain types of disabilities.

#2 **Eliminate economic incentives for property owners to take advantage of the vacuum created by the combined lack of residential treatment and an excess of outpatients needing housing by means of better local enforcement and local public assistance programs.** Current local public assistance for room and board for persons in this type of housing is approximately $238 per month.[57] Some landlords, taking advantage of this rate will, and have, placed up to 30 residents in a house with four bedrooms, enriching the landlord at the expense of residents' health and safety. Some landlords operate "sober homes" as a business, maximizing their income by cutting expenses, or "contracting" with residents to require them to attend a specific OASAS outpatient treatment program in exchange for their housing. These tenants don't have recourse to landlord / tenant laws because the landlords do not consider them tenants. These situations could be alleviated by:

a. **Amending or enforcing local zoning laws or landlord/tenant laws**. Pass local laws prohibiting placement of homeless persons or persons on public assistance in facilities that do not meet building codes, thereby forcing landlords to upgrade buildings in order to have tenants with housing subsidies;

b. **Amend the SSI laws.** Return the statute to pre-1996 provisions where addiction is considered a disability on its own. Currently, recovering addicts are denied benefits if, for example, their inability to concentrate or persist in tasks cannot be ascribed to another mental or physical condition;

c. **Increase local public assistance funding for landlords who provide appropriate housing.** Increase subsidies to a level that will pay sufficient rents to encourage good housing providers to develop good housing, ideally as part of a local sober housing network. Develop a statewide "preferred provider" list of private housing options that is state and federally recognized; then increase housing rates for persons living in those preferred houses

and encourage local governments to only pay for individuals to live in these homes.

#3 **Promote voluntary regulation of sober housing through local or regional networks.** The most appropriate way to establish reasonable standards for housing outside of OASAS certification process is to encourage the development of local or regional "Recovery Housing Networks" that will establish appropriate standards, have the means to accredit housing that meets these standards, and maintain periodic reviews to maintain accreditation. There is precedent for this in other states.[58]

#4 **Institute progressive public assistance benefits to reward recovery.** Require insurance coverage for addiction treatment, making treatment possible from the outset. Structure public benefit programs so an initial lower cash benefit can be progressively increased as recovery is sustained.

Endnotes

1. "Substance use disorder" is replacing "chemical dependence" in common usage. *See* AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 191–205 (4th ed. 2000). "Substance use disorder" arises from "substance dependence" combined with "substance abuse." *Id.* In this article, "addiction," "chemical dependence," and "substance use disorder" are used interchangeably.
2. OASAS is one of three offices in the NYS Department of Mental Hygiene. The remaining offices are the Office of Mental Health (OMH) and Office for People with Developmental Disabilities (OPWDD) (formerly Office of Mental Retardation and Developmental Disabilities (OMRDD)). *See* The Alcoholism and Substance Abuse Act, 1972 N.Y. Laws ch. 251; 1977 N.Y. Laws ch. 978, § 13; 1992 N.Y. Laws ch. 223.
3. Human Res. Research and Mgmt. Group, Inc. v. Cnty. of Suffolk, 687 F.Supp.2d 237, 268–69 (E.D.N.Y. 2010) [hereinafter referred to in the texts as the *Homeworks* decision].
4. SUFFOLK COUNTY CODE § 450; Suffolk County, N.Y. Loc. L. 19-2003 (enacted over the veto of the county executive who believed that the law violated the Federal Fair Housing Act (42 U.S.C. § 3601 (2008)).
5. *See* RECOVERY FOR WHOM? THE URGENT NEED FOR SAFE AND EFFECTIVE SOBER HOMES IN SUFFOLK COUNTY: A REPORT TO THE SUFFOLK COUNTY LEGISLATURE BY THE WELFARE TO WORK COMMISSION OF THE SUFFOLK COUNTY LEGISLATURE (May 2010), *available at* http://legis.suffolkcountyny.gov/clerk/cmeet/hh/2010/agenda-hh-060310.pdf [hereinafter RECOVERY FOR WHOM?]; Suffolk County, N.Y., Resolution 1758-2010, (Aug. 10, 2010). Such organizations included: LICAN (Long Island-CAN), LIRA (Long Island Recovery Association), the Recovery Home Workgroup (initiated by OASAS).
6. Karen Carpenter-Palumbo has been the OASAS Commissioner since 2007.
7. N.Y. MENTAL HYG. LAW § 19.02 (McKinney 2002). For purposes of this article, discussion is limited to drug/alcohol recovery.
8. § 32.05(a)(1).
9. OASAS operates 12 state-owned residential facilities; all other certified programs are operated by independent not-for-profit or profit-making corporations regulated pursuant to N.Y. COMP. CODES R. & REGS. tit.14, § 800.1 (2002).
10. N.Y. MENTAL HYG. LAW § 1.03(13), (16) (noting that alcoholism is a chronic illness in which the ingestion of alcohol becomes compulsive to a degree that interferes with the health, social or economic functioning of an individual or society).
11. NEW YORK STATE OFFICE OF ALCOHOLISM AND SUBSTANCE ABUSE SERVS., STATEWIDE COMPREHENSIVE PLAN 2009–2013, at 9 (2009), *available at* http://www.oasas.state.ny.us/pio/documents/5YrPlan2009-2013.pdf.
12. N.Y. MENTAL HYG. LAW § 32.05(a)(1).
13. *See* NASSAU CNTY. DEP'T. OF MENTAL HEALTH, CHEMICAL DEPENDENCY, AND DEVELOPMENTAL DISABILITIES SERVS., 2010 LOCAL SERVS. PLAN FOR MENTAL HYGIENE SERVS. (MAR. 2010) [hereinafter 2010 LOCAL SERVS. PLAN]. In the Long Island region, there is a need for 1764 intensive residential and residential youth programs with only 373 beds currently available; indicates a need in Nassau County for 393 community residential beds, with only 42 currently available; indicates a need in Suffolk County for 452 community residential beds, with only 102 currently available.
14. *See* N.Y. Const. art. IX; N.Y. MUN. HOME RULE § 40 (McKinney 2010).
15. Carol Paquette, *Reigning in Rentals of 'Sober Houses,'* N.Y. TIMES, Dec. 8, 1996, at A4.
16. *See* OXFORD HOUSE, INC., http://www.oxfordhouse.org/userfiles/file/.
17. New York State Office of Alcoholism and Substance Abuse Servs., Local Services Bulletin 2003–01, *available at* http://www.oasas.state.ny.us/mis/bulletins/lsb2003-01.cfm.
18. Lake Grove voluntarily surrendered its operating certificate; Crossings' operating certificate was revoked by due process of law, per N.Y. COMP. CODES R. & REGS. tit.14, § 831 (2002).
19. Human Res.Research and Mgmt. Group, Inc. v. Cnty. of Suffolk, 687 F.Supp.2d 237, 268–69 (E.D.N.Y. 2010).
20. *See* A. 761 A., 232nd Sess. (N.Y. 2009) (as re-introduced by Assemblywoman Ginny Fields). Veto messsage #418, 2006.
21. N.Y. MENTAL HYG. LAW § 41.34 (McKinney 2002).
22. 583 N.E.2d 928.
23. *Id.* at 583.
24. A. 11157A, 231st Sess. (N.Y. 2008); A. 7037A, 232nd Sess. (N.Y. 2009).
25. For example, *see* NEW YORK STATE OFFICE OF ALCOHOLISM AND SUBSTANCE ABUSE SERVS., *Your Story Matters Campaign*, http://www.iamrecovery.com; NATIONAL RECOVERY MONTH, http://www.recoverymonth.gov/.
26. 42 CFR pt. 2 (2009). Federal law prohibits disclosure by a treatment provider of any patient identifying information without a patient's explicit written consent or a court order.
27. *See* 29 U.S.C. § 701 (2008); 42 U.S.C. § 12101 (2008).
28. *See* 2010 LOCAL SERVS. PLAN, *supra* note 13.
29. *See* Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown, 281 F.3d 333, 351 (2nd Cir. 2002).
30. For example, Oxford House, Inc. v. City of Albany, 819 F. Supp. 1168, 1175–76 (N.D.N.Y. 1993); Cherry Hill Township v. Oxford House, Inc., 621 A.2d 952, 962 (N.J. App. 1993) (finding that an Oxford House was substantially different from a halfway house).
31. 819 F. Supp. 1179, 1183 (E.D.N.Y. 1993) (the town did not exempt an Oxford House with five residents from the town's limit of four unrelated persons in a building, constituting a failure to make reasonable accommodations pursuant to the Fair Housing Act).
32. United States v. Borough of Audubon, 797 F. Supp. 353, 355 (D.N.J. 1991) ("Oxford Houses…are simply residential dwellings that are rented by a group of individuals who are recovering from alcoholism or drug addiction.").

33. As was the case in *Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown*, many residents of New York City move to Long Island for outpatient treatment because the demand exceeds availability in New York City; as indicated in note 13, demand for residential treatment exceeds availability on Long Island.

34. *See* SOCIAL SECURITY ONLINE, http://www.ssa.gov/pubs/11146.html.

35. The Contract with America Advancement Act of 1996 prohibited all subsequent awards of SSI benefits for substance abuse-related disabilities. PL 104-121, 110 Stat. 850. Prior to 1996, substance abuse on its own had been considered a disabling condition for purposes of SSI benefit eligibility.

36. N.Y. Const. art. XVII § 1.

37. N.Y. MENTAL HYG. LAW § 41.25(c) (McKinney 2002).

38. *See Palmieri v. Cuomo*, 566 N.Y.S.2d 14 (App. Div. 1991). Plaintiffs sought to require defendants to provide homeless drug abusers medically appropriate emergency housing that included immediate drug treatment. The court said that the state was not required to do so regardless of the social policy behind the creation of OASAS (Mental Hygiene Law §19.010) without specific constitutional or statutory language, exclusive of statutory statements of legislative policy intent.

39. Mental Hygiene Law § 19.17 (Manhattan ATC was closed in 2008; § 19.17(f) was amended by 58/2009 S1-Pt.K); Mental Hygiene Law § 22.07.

40. "Direct threat" is defined as: "A significant risk to the health of safety of others that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary services." 56 Fed. Reg. 35694, 35701 (July 26, 1991).

41. 42 U.S.C. § 3604(f)(1) (2008).

42. § 3604(f)(3)(B).

43. 28 CFR § 35.130(b)(7), § 35.130(d) (2009).

44. 527 U.S. 581 (1999).

45. Permanent housing is understood as residency longer than 24 months.

46. The McKinney Act fostered various homeless service programs generally involving state and local governments and requiring recipients of federal funds to match those funds from other sources. Pub. L. No. 100-77, 101 Stat. 482 (1987). Shelter Plus Care provides rental housing assistance plus supportive services to disabled homeless and their families, primarily those who are seriously mentally ill, have chronic drug and alcohol addictions or both, or have AIDS.

47. 2009 N.Y. Laws ch. 56.

48. NEW YORK STATE OFFICE OF ALCOHOLISM AND SUBSTANCE ABUSE SERVS., ADDICTION, HOMELESSNESS AND PERMANENT SUPPORTIVE HOUSING: HOW NEW YORK SUPPORTS INDIVIDUALS, FAMILIES AND COMMUNITIES IN RECOVERY 40 (2010), *available at* http://www.oasas.state.ny.us/publications/pdf/Addiction%20Homelessness%20and%20Permanet%20Supportive%20Housing%20Monograph.pdf [hereinafter HOW NEW YORK SUPPORTS INDIVIDUALS, FAMILIES AND COMMUNITIES IN RECOVERY].

49. N.Y. Executive Order No. 16, May 14, 2009.

50. *See* HOW NEW YORK SUPPORTS INDIVIDUALS, FAMILIES AND COMMUNITIES IN RECOVERY, *supra* note 48, at 39. Compared to 50 years ago, numbers of homeless children now exceed homeless single adults and homelessness may be a condition that now spans 3 or 4 generations in a family.

51. Including, but not limited to: the NYS Division of Housing and Community Renewal (DHCR); NYS Office of Temporary and Disability Assistance (OTDA) regarding homeless single adults and families; NYS Office of Children and Families Services (OCFS) (regarding homeless and runaway youth under the age of 18); NYS Division of Parole (regarding a re-entry stabilization program); the AIDS Institute. At the local level, county Departments of Social Services programs and services to homeless single adults and homeless families, county youth boards (regarding homeless and runaway youth under the age of 18); the Veterans Administration programs for transitional housing for homeless veterans with substance abuse problems; New York City's Departments of Homeless Services (DHS), Health and Mental Hygiene (DOHMH), Human Resources Administration (HRA) and Housing and Preservation Department (HPD); the U.S. Department of Housing and Urban Development's Community Development Division—which manages Continuum of Care Homeless grant programs that are the primary federal source of homeless funding.

52. *See* HOW NEW YORK SUPPORTS INDIVIDUALS, FAMILIES AND COMMUNITIES IN RECOVERY, *supra* note 48, at 45.

53. *See id.* 41.

54. *See id.* at 18.

55. *See* RECOVERY FOR WHOM?, *supra* note 5.

56. *See id.* at 33.

57. New York State Cmty. Action Ass'n. Cash Assistance 3 (2009), *available at* http://nyscaatest.nyscaaonline.org/HelpingHands2009/pdfs/Cash_Assistance.pdf.

58. For such precedent, *see* The Sober Living Network, http://soberhousing.net/ (California); Georgia Ass'n of Recovery Residences, http://garronline.org/ (Georgia).

Sara Osborne is a Senior Attorney at New York State Office of Alcoholism and Substance Abuse Services. She received a B.A. in American Studies, Syracuse University, and her J.D. from Albany Law School.

Robert Kent is General Counsel to the New York State Office of Alcoholism and Substance Abuse Services. He consulted in the preparation in this article. He received his J.D. from Syracuse University College of Law

"DMV and ABC?"

By Theresa L. Egan

When I was asked to write an article about the Department of Motor Vehicles' (DMV) role in alcohol beverage control (ABC), my initial reaction was that it would be a very short article since historically the State Liquor Authority (SLA) was entrusted with administering the Alcoholic Beverage Control Law (ABC Law)[1] and DMV had no role. The Department of Taxation and Finance (Tax), the Office of Alcohol and Substance Abuse Services (OASAS), and Department of Health (DOH) have logical connections, so I struggled with DMV's role. The ABC Law reads in relevant part that "it is necessary to regulate and control the manufacture, sale and distribution within the state of alcoholic beverages…for the protection of the health, welfare and safety of the people of this state."[2] Where does DMV fit in?

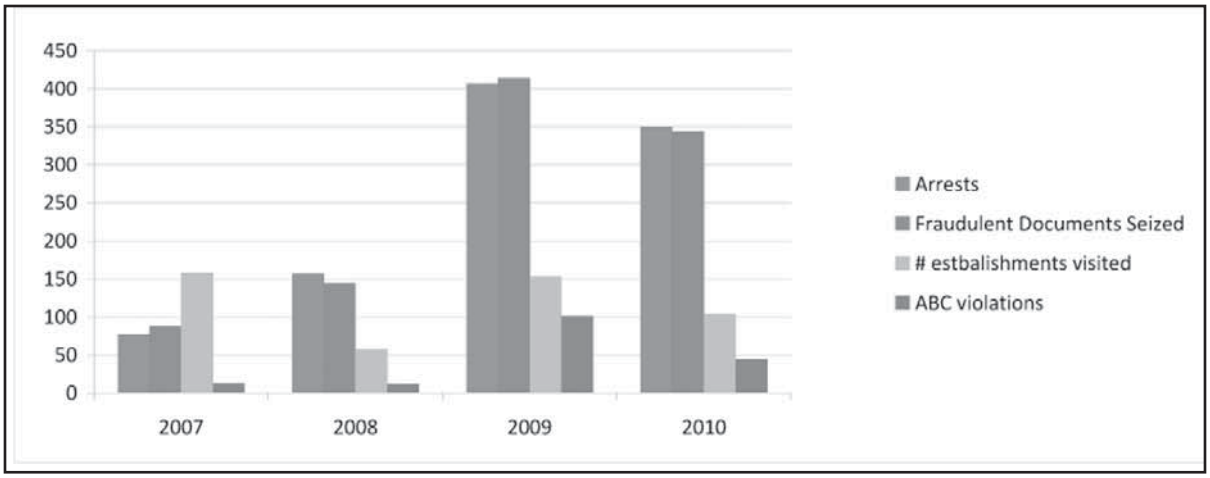
Contrary to the belief that I think many people hold, DMV does much more than issue licenses, registrations and titles. While the DMV administers the state's Vehicle and Traffic Law (VTL), it also: promotes driver and vehicle safety; provides consumer protection; adjudicates non-criminal violations in various parts of the state; administers a financial security program to ensure all New York registered vehicles are insured; conducts federally mandated statewide emissions inspection program to reduce emissions from vehicles; receives consumer complaints regarding dealers, repair shops and inspection stations; conducts administrative hearings and assesses penalties; oversees the Drinking Driver Program (DDP); and reviews the unique **S**pecial **T**raffic **O**ptions **P**rogram for **D**riving **W**hile **I**ntoxicated (STOP-DWI),[3] just to name a few. With all that DMV does, I found a place where DMV fits in with ABC.

The DMV, together with other agencies, recognizes that underage drinking exists throughout New York State and requires innovative enforcement and educational strategies if we are going to eradicate this problem. To regulate and control the sale of alcohol, especially related to this demographic, and to protect the health, welfare and safety of the people of this state, it is imperative that the sale of alcohol to minors be eliminated. OASAS has found that "[a]lcohol remains the most commonly used drug among adolescents, and underage drinking is a leading public health and social problem throughout the state and nation."[4] An OASAS report further finds that 35% of youths ages twelve to twenty during the years 2004-2006 used alcohol within the past thirty days and 25% of the same group had engaged in binge drinking within the same time frame.[5]

Underage drinking is typically facilitated through the use of counterfeit or altered identification documents that are used at a various alcohol points of sale. In one response to this problem, the DMV, through its Division of Field Investigation (DFI),[6] initiated "Operation Prevent" in 2006. "Operation Prevent" has become a model enforcement program, having won first place in the Law Enforcement Challenge in 2009 and 2010,[7] focusing on the detection of underage drinking at the source by engaging in targeted sweeps of establishments serving alcohol to minors. Multi-agency teams, usually consisting of representatives from DMV, the SLA and local law enforcement, identify establishments suspected of serving alcohol to minors. The team will use information from last drink location reports[8] from DWI arrests involving individuals under twenty-one years old as well as feedback from local STOP-DWI coordinators to identify target locations for underage drinking activity. Most of the operations are conducted during the school year, in college areas, with a number of alcohol servicing establishments in a defined area. However, in the past year other venues have been targeted, such as popular concerts. Enforcement activity usually consists of two- to three-person teams entering an establishment undercover then observing sales and subsequently checking the age of those patrons served. The goals of "Operation Prevent" are: (1) to "detect and stop" underage drinking at the point of sale; and (2) to deter the use of counterfeit or altered State-issued identification.[9]

In addition to enforcement, the teams have been assisting with education. Investigators from DMV and SLA have participated in educational seminars sponsored by different bar and tavern owner associations to educate bartenders on age identification. DMV and SLA also provide the bartenders and establishment owners with basic tools that can be used to verify identification documents and to detect alterations made to identity documents, such as licenses. Such tools include pocket magnifiers (which detect alterations to out-of-state licenses), educational brochures and 3M verifiers (which detect alterations to NYS licenses).

Working in conjunction with the SLA, "Operation Prevent," together with the educational opportunities provided by bar owners and bartenders, allow both the SLA and DMV to further their particular missions of controlling the sale of alcohol to protect the health and safety of New Yorkers. The chart below depicts the activity of Operation Prevent for the past four years:[10]



In addition to the obvious benefit of preventing underage persons from consuming alcohol (and keeping them from possibly driving while intoxicated), the DMV has found that inclusion of representatives from different agencies, together with state and local law enforcement, has reinvigorated underage drinking awareness and renewed state and local law enforcement's efforts to attack this problem.

As set forth in the ABC Law and referenced above, it is necessary to control the "sale" of alcoholic beverages "for the protection of the health, welfare and safety of the people of this state." In the event that a patron is "over sold" or "over served," and he chooses to get into a vehicle and drive in an impaired or intoxicated condition, the DMV does clearly have a role. Over the years, there has been an intense effort to remove impaired / intoxicated drivers from this state's and our national highways. Campaigns such as "Over the Limit. Under Arrest," "Friends Don't Let Friends Drive Drunk," and "Zero Tolerance" are familiar to us all and have proven to change driving behaviors for many. Statutorily, New York has been a leader in adopting legislation to combat drunk driving. In 1981, in New York, the STOP-DWI program was created as the first fully "self-sustaining" program of its kind and remains unique in the country.[11] In 1982, the legal drinking age in New York was raised to nineteen[12] and in 1985, raised again to twenty-one.[13] In 1988, a repeat suspension pending prosecution law was implemented.[14] Since 1995, courts have been required to suspend driving privileges pending prosecution for persons whose blood alcohol content (BAC) exceeds the "legal limit."[15] In 1996, the Zero Tolerance Law for underage youth was enacted[16] and in 2003, the .08 BAC was adopted as the legal limit.[17] In 2006, New York's aggravated DWI law passed for BAC's at or above .18[18] and in 2007, legislation was enacted creating the crimes of aggravated vehicular assault[19] and aggravated vehicular homicide.[20] Most recently, in December of 2009, Leandra's Law was enacted which establishes a felony charge for anyone driving with a BAC of .08 or above with a child under age sixteen in the vehicle.[21] Leandra's Law also requires that persons convicted of having violating VLT sections 1192(2) or 1192(3) offenses, misdemeanor or felony, on or after November 18, 2009 and sentenced on or after August 15, 2010 be sentenced to, among other things, having an ignition interlock installed on any vehicle they "own or operate" for a minimum period of six months.[22] As of June 2010, New York is one of thirteen other "first offender states" requiring mandatory ignition interlocks.[23] The National Highway Traffic Safety Administration noted that "[s]ubstantial research shows that breath alcohol interlocks reduce the occurrence of DWI arrests for selected groups of offenders compared to similar DWI offenders without interlocks during the time the interlock is on the offender's vehicle."[24] While New York has adopted necessary legislation to continue the battle against drunk driving, alcohol ignition interlocks are now another tool in the arsenal to keep our highways safe and further promotes health and safety of New Yorkers.[25]

Despite the numerous and significant attempts over the last thirty years to eliminate the drunk driver from our highways, we have a long way to go. Alcohol-related fatalities have declined from 979 fatalities in 1981 to 381 in 2008.[26] However, "the alcohol-related fatal crash rate has been on an upward trend, increasing from 24% in 2004 to 31% in 2008."[27] In addition, over the last several years, approximately 64,000 motorists are ticketed annually for impaired driving.[28] Research reveals that approximately 75% of those ticketed are first time offenders and the other 25% are repeat offenders—these rates have remained fairly constant over time.[29] The data indicate that despite the efforts expended by numerous agencies, law enforcement, not-for-profit groups and more, we may be reducing alcohol related fatalities but there are still nearly 45,000 "new" people being ticketed for impaired driving each year.

Alcohol beverage control requires the effort, persistence, cooperation and coordination of all agencies, law enforcement and others—from the manufacture of alcohol to the sale and distribution—the tasks are not relegated only to the SLA. To keep our children safe, to keep our highways free of intoxicated drivers, "for the protection

of the health, welfare, and safety of the people of th[is] state,"[30] we all have a role, including DMV.

Endnotes

1. "It is hereby declared as the policy of the state that it is necessary to regulate and control the manufacture, sale and distribution within the state of alcoholic beverages…It is hereby declared that such policy will best be carried out by empowering the liquor authority of the state…" N.Y. ALCO. BEV. CONT. LAW § 2 (McKinney 2000).
2. *Id.*
3. N.Y. VEH. & TRAF. LAW § 1197 (McKinney 2005) ("[w]here a county establishes a special traffic options program…pursuant to this section, it shall receive fines and forfeitures collected" within that county relating to driving while intoxicated convictions).
4. N.Y. OFFICE OF ALCOHOLISM & SUBSTANCE ABUSE SERVICES, ADVISORY COUNCIL ON UNDERAGE ALCOHOL CONSUMPTION: ANNUAL REPORT 2 (2009), *available at* http://www.oasas.state.ny.us/prevention/documents/UDAdCouncilAR2009.pdf.
5. *Id.* at 8.
6. The DMV has a Division of Field Investigation (DFI) which consists of, among others, ninety-eight investigators with peace officer status and full arrest authority.
7. The Law Enforcement Challenge Program annually recognizes outstanding performance by New York's law enforcement community and other partners in the area of traffic safety. This program provides an excellent opportunity for agencies to receive recognition as a leader in highway safety enforcement and education and is sponsored by the New York State Governor's Traffic Safety Committee (GTSC), the National Highway Traffic Safety Administration (NHTSA), the International Association of Chiefs of Police (IACP) and the National Sheriffs' Association.
8. Law enforcement officers statewide ask drivers stopped on suspicion of drunken driving where they had their last drink. That data is then sent to the NY Division of Criminal Justice Services (DCJS) and can be accessed to focus on establishments reported.
9. N.Y. STATE GOVERNOR'S TRAFFIC SAFETY COMMITTEE, N.Y. STATE 2007 HIGHWAY SAFETY ANNUAL REPORT 10 (2007), *available at* http://www.nysgtsc.state.ny.us/annualRpt/GTSC2007AnnualReportFULL.pdf.
10. N.Y. DMV DFI, Operation Prevent 2007-2010 Arrest Data (on file with author).
11. N.Y. VEH. & TRAF. LAW § 1197 (McKinney 2005); NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, A REVIEW OF NEW YORK STATE'S STOP-DWI PROGRAM 11 (2005), [hereinafter NHTSA 2005 REPORT], *available at* http://www.nhtsa.gov/people/injury/alcohol/NYStopDWIProgram/images/NYStopDWI.pdf.
12. NHTSA 2005 REPORT, *supra* note 11, at 18.
13. *Id.*; N.Y. VEH. & TRAF. LAW § 1192-a.
14. § 1193(2)(e).
15. § 1193(2)(e)(7).
16. § 1192-a.
17. § 1192(2).
18. § 1192(2-a).
19. N.Y. PENAL LAW § 120.04-a (McKinney 2008).
20. § 125.14.
21. N.Y. VEH. & TRAF. LAW §§ 1192(2-a), 1193(1).
22. .NY. VEH. & TRAF. LAW §§ 1193(1)(b)–(c), 1198.
23. MOTHERS AGAINST DRUNK DRIVING, IGNITION INTERLOCKS, EVERY STATE, FOR EVERY CONVICTED DRIVER 6–7 (2010), http://www.madd.org/laws/law-overview/Draft-Ignition_Interlocks_Overview.pdf (Alaska, Arizona, Arkansas, Colorado, Illinois, Louisiana, New Mexico, New York, Nebraska Oregon, Utah and Washington).
24. National Highway Traffic Safety Administration, Reducing Impaired-Driving Recidivism Using Advanced Vehicle-Based Alcohol Detection Systems: A Report to Congress VI (2007), *available at* http://www.nhtsa.gov/DOT/NHTSA/Traffic%20Injury%20Control/Articles/Associated%20Files/810876.pdf.
25. *See* The Traffic Injury Research Foundation, Executive Summary: The Implementation of Alcohol Interlocks for First Offenders, A Case Study (2010), *available at* http://www.tirf.ca/publications/PDF_publications/CC_2010_Executive_Summary_web.pdf.
26. N.Y. State Governor's Traffic Safety Comm., 2009 Highway Safety Annual Report ii (2009), *available at* http://www.nysgtsc.state.ny.us/annualRpt/2009-annualReport.pdf.
27. The Institute for Traffic Safety Management and Research, Impaired Driving in New York State: Study on How Frequently Motorists Drink and Drive 1 (2009), *available at* http://www.nysgtsc.state.ny.us/ITSMRProjectReporttoGTSC09.pdf.
28. *Id.*
29. *Id.* at 2.
30. N.Y. Alco. Bev. Cont. Law § 2 (McKinney 2000).

Theresa L. Egan was appointed Deputy Commissioner for Safety, Consumer Protection and Clean Air in the Department of Motor Vehicles on April 12, 2007. She oversees driver and vehicle safety programs, emissions programs, and the Governor's Traffic Safety Committee. Prior to joining the Department of Motor Vehicles, Ms. Egan was the Town Supervisor for the Town of Bethlehem, New York taking office in 2004. She holds a Juris Doctor from Albany Law School and a Bachelor of Arts from the State University of New York at Albany.

Citations for Special Achievements in Public Service June 16th, 2010

The 2011 Committee on Attorneys in Public Service hosted its Citations for Special Achievements in Public Service on June 16th at the Bar Center in Albany. Lisa Burianek, Deputy Bureau Chief of the Environmental Protection Bureau in the Department of Law, and the Committee on Pattern Jury Instructions, chaired by Judge Leon D. Lazer, were the honorees.

Citation winner Lisa Burianek and her family

Hon. Leon Lazer and
Hon. Peter S. Loomis, ALJ, CAPS Chair

In nominating Judge Leon Lazer and the Committee on Pattern Jury Instructions, Judge Eugene Pigott of the Court of Appeals referred to the Committee as "a virtual hall of fame of New York lawyers and jurists." He stated, "I would venture to guess that there is not a trial lawyer or a judge who has not benefited from the work of this committee since its inception in 1962. In December 2009, the committee published the third edition of its work. Committee members are all volunteers and work without compensation to develop more than 2000 pages of carefully researched charges and commentary on the laws of the State of New York. The third edition provides a comprehensive yet comprehensible guide to the general principles governing civil trials and the law in every area where jury may be asked to make the ultimate decision."

Lisa Burianek and Peter Loomis

Lisa Burianek, Deputy Bureau Chief of the Department of Law's Environmental Protection Bureau, was jointly nominated by three individuals in that field who have worked closely with her. Alison Crocker, Deputy Commissioner and general counsel at DEC, John Banta, General Counsel at the Adirondack Park Agency (APA), and Glen Bruening, Assistant Counsel to the Governor for Energy and the Environment, joined in the nomination.

For 20 years, Lisa served DEC and APA with dedication and distinction. An example cited in her nomination letter was her defense of the Department, the Agency and the Governor in a section 1983 action brought under the Americans with Disabilities Act, which sought to open constitutionally protected "forever wild" forest preserve lands to motor vehicle use by people with disabilities. With Lisa's guidance, the case was settled in a manner which not only protected the sanctity of the constitutionally protected forest preserve and the Adirondack Park State Land Master Plan, but also greatly expanded access to outdoor recreational programs by people with disabilities, as directed by the Americans with Disabilities Act. As a result of this settlement, the Department has become a national, if not international, leader in providing access by people with disabilities to outdoor recreational programs.

Susan Arbetter of WCNY Syracuse and Steve Greenberg of Siena Research Institute

Siena College Research Institute's Steven Greenberg and Political Reporter and TV host Susan Arbetter of WCNY Syracuse public television led a lively presentation on "New York State: A Political Odyssey."

The Awards Committee is headed by Anthony Cartusciello and Donna Hintz.

Message from the Chair *(continued from page 2)*

consistent high quality of nominations submitted to CAPS for both the Excellence Award and Special Achievement Citation each year makes the Subcommittee's choices extremely difficult. There are without question significant numbers of attorneys in New York who demonstrate extraordinary achievement in their public service careers every day. Through its Excellence awards and Special Achievement Citations CAPS is able to inform the public of some of those whose efforts demonstrate this commitment to service, honor and integrity.

Finally, I want to extend my thanks to everyone who contributed to this issue of the *Journal*, focusing on Regulation of Beverage Alcohol, including, as always, Editor-in-Chief Rose Mary Bailly, guest editors for this issue Vincent O'Brien and Keven Danow, new student editor Robert Barrows and, of course, our article contributors, all nationally and statewide known experts in the field.

Editor's Foreword *(continued from page 3)*

Alcoholic Beverages: New York's Statutory Scheme. Barbara Smith, in *Going Up River: Lawyer Discipline, Lawyer Assistance and the Legal Profession's Response to Lawyer Alcoholism*, examines New York's program for helping members of the legal profession who face problems with alcoholism, substance abuse and mental health. Sara Osborne and Robert Kent, in *"Sober Homes": Residential Treatment or Private Housing?*, discuss the issues facing development of communal residences for individuals recovering from substance abuse. In *"DMV and ABC?,"* Terri Egan takes a look at the role the department of motor vehicles plays in the regulation of beverage alcohol.

I am very grateful to the authors and the Board of Editors for agreeing to devote this issue to the regulation of beverage alcohol in New York State, a topic near and dear to my heart. I would like to especially thank our Executive Editor for 2010-2011, Robert Barrows, Albany Law School, Class of 2011, for his professionalism and enthusiasm. He and his Albany Law School colleagues, Robert Axisa, Ian Group, Valerie Lubanko, Jason Reigert, Matthew Robinson-Loffler, and Michael Telfer, all members of the Class of 2011, worked very hard to help create this issue.

We are again indebted to the staff of the New York State Bar Association, Pat Wood, Lyn Curtis and Wendy Harbour, for their expertise and enduring patience. And last, and always, my thanks to Patty Salkin for her inspiration and willingness to indulge me in this topic.

Finally, I take full responsibility for any flaws, mistakes, oversights or shortcomings in these pages. Your comments and suggestions are always welcome at rbail@albanylaw.edu or at Government Law Center, 80 New Scotland Avenue, Albany, New York 12208.

NYSBA Committee on Attorneys in Public Service

Chair
Peter S. Loomis
58 Victoria Way
Albany, NY 12209
psloomisesq@gmail.com

Members

Matthew D. Babcock
P.O. Box 332
Latham, NY 12110
counsel05@aol.com

Michael K. Barrett
Division of Criminal Justice Services
4 Tower Place
Albany, NY 12203
Michael.Barrett@dcjs.state.ny.us

Catherine M. Bennett
New York State Division of Tax Appeals
500 Federal Street, 4th Floor
Troy, NY 12180-2894
cbennett@nysdta.org

Andrew D. Bing
New York State Dept. of Law
Appeals and Opinions Bureau
The Capitol
Albany, NY 12224
andrew.bing@ag.ny.gov

Terryl Brown,
Exec. Vice President and General Counsel
New York Power Authority
123 Main Street
White Plains, NY 10601
terryl.brown@nypa.gov

Anthony T. Cartusciello
Office of the State Comptroller
59 Maiden Ln., 30th Floor
New York, NY 10038
acartusciello@osc.state.ny.us

Catherine A. Christian
Office of the Special Narcotics Prosecutor
80 Centre Street, 6th Floor
New York, NY 10013
cchristian@specnarc.org

Suzanne M. Dugan,
Special Counsel for Ethics
Office of the New York State Comptroller
110 State Street
Albany, NY 12236
sdugan@osc.state.ny.us

Theresa L. Egan
NYS DMV
6 Empire State Plaza, Room 510
Albany, NY 12228
terri.egan@dmv.state.ny.us

Spencer Fisher
NYC Law Dept. Div. of Legal Counsel
100 Church Street, 6th Floor
New York, NY 10007
sfisher@law.nyc.gov

Robert J. Freeman
NYS Commission on Open Government
99 Washington Avenue
One Commerce Plaza
Albany, NY 12231
robert.freeman@dos.state.ny.us

Robert W. Gibbon
New York State Association of Counties
540 Broadway, 5th Floor
Albany, NY 12203
rgibbon@nysac.org

Donna M. Giliberto
New York State Dept. of Public Service
3 Empire State Plaza
Albany, NY 12223
donna_giliberto@dps.state.ny.us

Jackie L. Gross
Nassau County
1 West Street
Mineola, NY 11501
jackiegrossesq@aol.com

Lisa F. Grumet
New York City Law Dept.
100 Church Street, 6th Floor
New York, NY 10007-2601
lgrumet@aol.com

Jonathan E. Gunther
NYS Thruway Authority, Legal Dept.
200 Southern Blvd
Albany, NY 12209
jegunther@gmail.com

Donna K. Hintz
New York State Dept. of Transportation
Division of Legal Affairs
50 Wolf Road, 6th Floor
Albany, NY 12232
dhintz@dot.state.ny.us

James F. Horan
New York State Health Department
433 River Street, 5th Floor, South
Troy, NY 12180-2299
jfh01@health.state.ny.us

Hon. Rachel Kretser
Albany City Court—Criminal Division
1 Morton Avenue
Albany, NY 12202
rkretser@courts.state.ny.us

Jeffrey P. Laner
Battery Park City Authority
One World Financial Center, 24th Floor
New York, NY 10281
jlaner@nyc.rr.com

Elizabeth H. Liebschutz
NYS Department of Public Service
Three Empire State Plaza
Albany, NY 12223-1350
elizabeth_liebschutz@dps.state.ny.us

Lisa S. Lim
80 Chambers Street
New York, NY 10007
lisapresent@gmail.com

John A. Mancini
New York State Conference of Mayors
119 Washington Ave
Albany, NY 12210
jmancini@nycom.org

Joan Leary Matthews
NYS Dept. of Environmental Conservation
Office of Hearings & Mediation Services
625 Broadway, 14th Floor
Albany, NY 12233-1550
jlmatthe@gw.dec.state.ny.us

Kevin M. McArdle
Lewis County Court House
7660 State Street, Rm. # 305
Lowville, NY 13367
kmcardle@courts.state.ny.us

James T. McClymonds
NYS Dept. of Environmental Conservation
Office of Hearings and Mediation Service
625 Broadway, 1st Floor
Albany, NY 12233-1550
jtmcclym@gw.dec.state.ny.us

Lori A. Mithen-DeMasi
Assoc. of Towns of the State of New York
150 State Street, Suite 201
Albany, NY 12207-1626
lmithen@nytowns.org

Quinn M. Morris
NYS School Boards Association
24 Century Hill Drive, Suite 200
Latham, NY 12100-2125
QuinnMarieMorris@gmail.com

Anne W. Murphy
NYC Office of Administrative Tax Appeals
One Centre Street, Room 2430
New York, NY 10014
amurphy@oata.nyc.gov

Justina Cintron Perino
17 Arthur Drive
Cohoes, NY 12047
jcperino@gmail.com

Natasha Esther Phillip
New York State Department of State
99 Washington Avenue, Suite 1120
Albany, NY 12231
natasha.phillip@dos.state.ny.us

Jeanette L. Quick
Office of the Comptroller of the Currency
340 Madison Avenue, 5th Floor
New York, NY 10017
jeanetteq@gmail.com

Christina L. Roberts-Ryba
Office of the Attorney General
The Capitol
Albany, NY 12224
chrissyleann@yahoo.com

Patricia E. Salkin
Government Law Center
Albany Law School
80 New Scotland Avenue
Albany, NY 12208-3494
psalk@albanylaw.edu

Barbara F. Smith
Lawyer Assistance Trust
54 State Street, Suite 802
Albany, NY 12207-2524
bfsmith@courts.state.ny.us

CAPS Announces New Blog for and by Public Service Attorneys

NYSBA's Committee on Attorneys in Public Service ("CAPS") is proud to announce a new blog highlighting interesting cases, legal trends and commentary from around New York State, and beyond, for attorneys practicing law in the public sector context. The CAPS blog addresses legal issues ranging from government practice and public service law, social justice, professional competence and civility in the legal profession generally.

Entries on the CAPS Blog are generally authored by CAPS members, with selected guest bloggers providing articles from time to time as well. Comments and tips may be sent to caps@nysba.org.

To view the CAPS Blog, you can visit http://nysbar.com/blogs/CAPS. You can bookmark the site, or subscribe to the RSS feed for easy monitoring of regular updates by clicking on the RSS icon on the home page of the CAPS blog.

"I am excited that during my tenure as the Chair of the Committee on Attorneys in Public Service our Technology Subcommittee, headed by Jackie Gross and Christina Roberts-Ryba, with assistance from Barbara Beauchamp of the Bar Center, have developed a CAPs blog.

This tool promises to be a wonderful way to communicate to attorneys in public service items of interest that they might well otherwise miss. Blogs are most useful and attract the most interest when they are current and updated on a regular basis, and our subcommittee is committed to making the CAPS blog among the Bar Association's best!

Thanks to the subcommittee for this great contribution!"

—Peter S. Loomis
CAPS Chair

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