FLORIDA DRAM SHOP LAWS: THE SHIELD FOR COMMERCIAL ESTABLISHMENTS THAT CUTS THROUGH VICTIMS OF DRUNK DRIVERS' RIGHTS TO REDRESS LIKE A SWORD

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Too Close to Home

It was 11 p.m. on a Thursday evening in 1983, and Joni Carey still was not home. Tom Carey, her husband of six months, was not worried. Joni was a buyer at Maas Brothers and had called earlier to let Tom know that she would be late, but he was not expecting her to be this late. Suddenly, the phone rang. It was the hospital calling, telling Tom to drive over, as there had been an accident. Confused and afraid, Tom rushed to Tampa General Hospital. He was unable to get any answers upon arrival, and nervously probed anyone who would speak to him, but no one seemed to have any information, and no one wanted to look Tom in the eye. Finally, a doctor approached looking somber and took Tom into a private room. The doctor said, "you must abandon all hope that your wife will survive." Tom's life changed in that instant. Joni had been driving home from work on Interstate 275 when she was struck

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head-on by a drunk driver who had swerved into oncoming traffic. By the time the family had recovered enough to consider filing suit on behalf of Joni's estate, Florida Statutes Section 768.125 had been enacted, effectively barring liability against the commercial establishment that had overserved the defendant. With no viable avenue for redress, the family was left with only their grief. Since that fateful day, Tom Carey has dedicated his career to representing injured victims of drunk driving accidents as a way to honor Joni. Mr. Carey successfully lobbied to pass the open container laws in Florida and continues to advocate for the repeal of Section 768.125. [1]

I. INTRODUCTION: THE STARK REALITY OF DRUNK DRIVING

In the year 2020, 11,654 people in the United States were killed in motor vehicle collisions involving alcohol-impaired drivers, amounting to approximately thirty-two people killed every day, or around one person every forty-five minutes.[2] In the state of Florida alone, there were 871 fatalities caused by impaired drivers, which accounted for twenty-six percent of all accident-related fatalities in the State.[3] This ranked Florida third in the nation for the number of deaths caused by drunk or impaired driving.[4] The National Highway Traffic Safety Administration ("NHTSA") calculated the national economic cost of alcohol-impaired crashes at $68.9 billion in 2019, and when post-accident quality-of-life was factored into these considerations, this number leapt to $348 billion.[5]

In light of these grim statistics, the Florida "dram shop" legislation, passed in the regular session in 1980, presents a conundrum. In the early 1980s, there were competing societal

1. Interview with Thomas Carey, Esq., Founding Partner, Carey Leisure Carney, in Clearwater, Fla. (Apr. 24, 2023).

2. *Impaired Driving Facts*, CDC, https://www.cdc.gov/impaired-driving/facts/ (last visited Jan. 22, 2025). By the time of the publication of this Article, the number of drunk driving fatalities increased to over 13,000 by 2022. *Drunk Driving*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., https://www.nhtsa.gov/risky-driving/drunk-driving (last visited Mar. 30, 2025).

3. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., TRAFFIC SAFETY FACTS 2020: A COMPILATION OF MOTOR VEHICLE CRASH DATA 188 (2022).

4. *See id.* at 188–89.

5. LAWRENCE BLINCOE ET AL., NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., THE ECONOMIC AND SOCIETAL IMPACT OF MOTOR VEHICLE CRASHES, 2019 (REVISED) 3–4 (2023).

pressures surrounding the regulation of alcohol sales from lobbying efforts by the alcoholic beverage industry and the Presidential Commission on Drunk Driving, whose goal was to reduce society's tolerance toward drunk driving.[6] In response, several states that did not already have dram shop legislation enacted laws to curb the instances of drunk driving, holding commercial establishments accountable for accidents caused by overserving patrons, although the liabilities imposed varied drastically from state to state.[7] While dram shop laws in most other states serve as a sword against the negligent service of alcohol, Florida's Section 768.125, in defining "[l]iability for injury or damage resulting from intoxication," creates a shield, protecting the majority of wrongdoers in cases involving alcohol-impaired drivers.[8] In fact, Section 768.125 has been referred to as an "anti-dram shop" statute by critics of the legislation.[9] The Statute provides:

> A person who sells or furnishes alcoholic beverages to a person of lawful drinking age shall not thereby become liable for injury or damage caused by or resulting from the intoxication of such person, except that a person who willfully and unlawfully sells or furnishes alcoholic beverages to a person who is not of lawful drinking age or who knowingly serves a person habitually addicted to the use of any or all alcoholic beverages may become liable for injury or damage caused by or resulting from the intoxication of such minor or person.[10]

This statute essentially resets the status of liability for commercial vendors back to where Florida common law began by protecting commercial alcohol vendors and eliminating drunk driving victims' primary opportunity for redress.

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6. Patricia A. Morgan, *Power, Politics and Public Health: The Political Power of the Alcohol Beverage Industry*, 9 J. PUB. HEALTH POL'Y 177, 179, 192 (1988); *see also* Lucinda Burwell, Comment, *A Sobering New Approach to Liquor Vendor Liability in Florida*, 13 FLA. ST. U. L. REV. 827, 827 (1985).

7. Burwell, *supra* note 6, at 830, 832.

8. FLA. STAT. § 768.125 (1980). In defining "[l]iability for injury or damage resulting from intoxication," the statute states that commercial establishments are not liable for the actions of alcohol-impaired drivers, except when they fall into one of two exceptions provided. Burwell, *supra* note 6, at 833.

9. Hugo L. Garcia, *Florida's Anti-Dram Shop Liability Act: Is It Time to Extend Liability to Social and Commercial Hosts?*, 29 ST. THOMAS L. REV. 95, 95 (2016).

10. § 768.125.

To address this issue in a holistic manner, Part II of this Article will begin by offering a historical perspective of how the underlying common law behind the statute developed, and how the alcohol industry simultaneously gained its political capital in the United States. Part III will discuss Florida's original common law approach to protecting commercial alcohol vendors from liability, and the state's response to the changing national attitude toward extending liability to establishments for drunk driving accidents. Part IV will discuss Section 768.125's evolution, from the enactment of Section 562.11 to the enactment of Section 768.125 itself, to the confusion of applying the newly enacted legislation and the resulting constitutional challenges. Part V will provide a discussion of the enactment of Section 561.702 to demonstrate the Florida legislature's attempt to provide a band-aid for the many issues brought about by the passage of Section 768.125. Part VI will set out a comparison of Florida's dram shop legislation to that in Washington, D.C., which will provide a deeper perspective of the shortcomings of Section 768.125. Part VII will argue by analogy that Section 768.125 should be amended, as the statute violates the Equal Protection Clause of the Florida Constitution. Finally, Part VIII will offer suggestions for reform of Section 768.125, and a retooling of Florida's safe alcohol service scheme.

II. HISTORICAL CONTEXT

In order to understand the circumstances that brought about the passage of Florida Statute Section 768.125 it is important to first understand the historical context and outside forces which led to the development of the statute. Overall, this Part will provide perspective on how the statute was formed and the challenges that it presents with application. This Part will begin with an analysis of America's complicated history with alcohol, from the landing of the Mayflower through prohibition, then provide the concurrent actions of the alcohol industry, and how these actions earned the industry its political capital.

A. America's Complicated History with Alcohol

The United States has had a highly contentious and emotionally charged relationship with liquor legislation, dating back to the colonial period. When boarding the Mayflower in 1620,

the Puritans loaded the ship with more beer than water, as the fermented beverage would keep better during the long journey and would not be affected by pollutants.[11] Alcohol continued to perform an important role in the New World, serving as a safe, enjoyable social lubricant that provided settlers with entertainment, energy, and an effective analgesic.[12] As time passed, however, the prevailing sentiments toward alcohol began to change.

Drinking became a pervasive pastime in colonial America leading up to the Revolutionary War. As W.J. Rorabaugh expressed in his historical commentary, *The Alcohol Republic*, "[f]rom sophisticated Andover to frontier Illinois, from Ohio to Georgia, in lumbercamps and on satin settees, in log taverns and at fashionable New York hotels, the American greeting was, 'Come, Sir, take a dram first.'"[13] Following the Revolutionary War, the societal structure that American colonies were subject to under British rule was less cohesive once Americans gained independence.[14] Social controls that had largely kept alcohol abuse under control began to dissipate, and anti-drunkenness ordinances were relaxed, leading to an increase in alcohol consumption.[15]

As drinking patterns changed, the American attitude toward alcohol consumption began to shift, triggering the temperance movement.[16] As early as 1829, the State of Maine passed a statute instilling local political units with the right to prohibit liquor sales in their districts, followed in 1851 by legislation that prohibited liquor sales state-wide.[17] By 1918, several organizations, including the Women's Christian Temperance Union, the National Temperance Society, the Total Abstinence Society, the Total Abstinence Brother, the National Prohibition Party, and the Anti-Saloon League had gained political momentum both at the local level and the national level, enacting laws that banned the sale of

11. David J. Hanson, *Alcohol in Colonial America: Earliest Beginnings*, ALCOHOL PROBS. & SOLS., https://www.alcoholproblemsandsolutions.org/alcohol-in-colonial-america-earliest-beginnings-in-the-new-world/ (last visited Mar. 16, 2025).

12. *Id.*

13. W.J. RORABAUGH, THE ALCOHOLIC REPUBLIC 21 (1979).

14. David J. Hanson, *Drinking in Early America: Beliefs About Alcohol Changed,* ALCOHOL PROBS. & SOLS., https://www.alcoholproblemsandsolutions.org/drinking-in-early-america-beliefs-about-alcohol-changed/ (last visited Mar. 16, 2025).

15. *Id.*

16. RORABAUGH, *supra* note 13, at 73.

17. Clarance E. Hagglund & Lindsay G. Arthur, Jr., *Common Law Liquor Liability*, 7 FORUM 73, 73 (1972).

liquor in twenty-eight states.[18] The anti-liquor sentiments came to a head on January 16, 1919, with the ratification of the Eighteenth Amendment to the Federal Constitution, a culmination of the efforts of the National Temperance Movement.[19]

The Eighteenth Amendment to the U.S. Constitution, often referred to as "Prohibition," prohibited the "manufacture, sale, or transportation of intoxicating liquors" throughout the United States.[20] The Amendment was ratified in only thirteen months by thirty-six states upon proposal, which constituted the three-fourths majority of total states required to validate the Amendment as part of the Constitution.[21] In order to enforce the Eighteenth Amendment, Congress passed the Volstead Act on October 28, 1919, which defined the term "intoxicating liquors" as any alcohol content of over 0.5%, which had not previously been defined; "criminalized the manufacture and sale (but not the consumption) of alcoholic beverages; and allowed for home manufacture and alcohol for medical and religious use."[22]

Prior to the ratification of the Eighteenth Amendment, temperance forces pushed state legislatures to enact "dram shop acts," statutes designed to curb alcohol sales traffic and "provide against the evils . . . of intoxicating liquors."[23] When dram shop laws were first enacted, they contained general provisions regulating the "times, places and persons to whom sales could be made, and required a bond conditioned upon adherence to such regulations."[24] These bonds resembled early iterations of liquor liability insurance policies, covering damages up to the amount of the bond.[25]

Over time, dram shop laws strengthened, prohibiting sales of alcohol to specific groups, including minors, intemperate persons, students, and habitual drunkards.[26] Commercial establishments selling alcoholic beverages, known at the time as dram shops, were

18. *Id.*
19. *Id.*
20. U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI.
21. *Id.*
22. *The Volstead Act*, DOCSTEACH, https://www.docsteach.org/documents/document/volstead-act (last visited Feb. 3, 2025); National Prohibition (Volstead) Act, Pub. L. No. 66-66, 41 Stat. 305 (repealed 1935).
23. Richard B. Ogilvie, *History and Appraisal of the Illinois Dram Shop Act*, U. ILL. L.F. 175, 176–77 (1958).
24. Hagglund & Arthur, *supra* note 17, at 73.
25. *Id.* at 74.
26. *Id.*

made liable for the amount of their required bond for any injury or damage caused by sales that violated the conditions of the dram shop laws.[27] A dram shop owner could be held liable for an amount greater than the bond if they, or an agent or employee of their establishment, made an illegal sale of alcohol, resulting in an injury or property damage.[28]

In 1933, following the repeal of prohibition through the ratification of the Twenty-First Amendment, several states retained their dram shop laws, or enacted new laws, as a mechanism to protect plaintiffs' rights to recover against a financially accountable commercial establishment.[29] Strong examples of affirmative dram shop laws can be seen to this day in the New England corridor of the United States, as well as more populous areas such as New York and Washington, D.C.

B. Concurrent Actions of the Alcoholic Beverage Industry

The alcoholic beverage industry enjoyed a boom of activity in America since the arrival of the Puritans in 1620.[30] However, when attitudes toward the industry began to shift post-Revolutionary War, the need for key players in the industry to protect their interests became apparent.[31] The spread of the temperance movement throughout the late 1800s served as a catalyst for the formation of associations in the alcoholic beverage industry to provide common resources and support for brewers, distillers, wine makers, and other parties in the industry.[32] These associations, including the United States Brewers Association, formed with an eye trained on the current political scene to safeguard the long-term well-being of their associated industry by constraining federal taxes and expanding their potential markets.[33]

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27. *Id.*
28. *Id.*
29. *Id.* at 74–75. The intent of post-prohibition dram shop laws differed from that of pre-prohibition laws, which were enacted to control and restrict the sales of liquor in enacting jurisdictions. *Id.* at 75.
30. Dean Albertson, *Puritan Liquor in the Planting of New England*, 23 NEW ENG. Q. 477, 479 (1950).
31. Christina Regelski, *The Revolution of American Drinking*, U.S. HIST. SCENE, https://ushistoryscene.com/article/american-drinking/ (last visited Mar. 14, 2025).
32. Morgan, *supra* note 6, at 178. Many alcoholic beverage industries recognized the necessity of promoting a better image to combat the growing prohibitionist mindset. *Id.*
33. *Id.*

Despite the consensus to protect themselves, the wine, beer, and liquor industries "remained divided on overall strategy, convinced that to unite would spell doom for their own particular interests."[34] It was not until prohibition took effect in 1919 that these industries united, sharpening their lobbying abilities and redoubling efforts to lobby for repeal of prohibition, as well as protective legislation in the form of subsidies to help the industries through the dry period.[35] The three major beverage industries uniting strengthened their collective political bargaining power, which in turn improved their overall strategies. A number of associations also adopted self-imposed codes of conduct to maximize government buy-in for repeal.[36]

A major strategy that the alcoholic beverage industry employed during this time was to stress the increase of illegal alcohol sales caused by prohibition.[37] Industry executives highlighted to "federal lawmakers that a moderately-taxed, rational and socially responsible industry was much preferred over racketeering, bootlegging and the illegal production of non-taxable adulterated alcohol."[38] By 1925, the economic implications of repealing prohibition began to appeal to lawmakers at both the local and federal level, so much so that both state and federal governments sought guidance from the alcoholic beverage industry in the creation of post-repeal alcoholic beverage regulations.[39] This solidified the industry's power in the political realm.[40]

III. ANALYSIS OF THE ORIGINAL COMMON LAW STANCE ON DRAM SHOP LIABILITY IN FLORIDA

Florida did not enact a dram shop law prior to or following prohibition, as many other states chose to, and instead continued to rely on the common law stance that had developed over centuries of litigation. This Part will begin by detailing Florida's original common law stance on dram shop liability, followed by a discussion of the national attitude toward extending liability to

34. *Id.*
35. *Id.* at 179.
36. *Id.*
37. *Id.* at 180.
38. *Id.*
39. *Id.* at 180–81.
40. *Id.* at 181.

commercial establishments, and finally discussing Florida's response to the national trend.

A. Florida's Original Common Law Stance to Dram Shop Liability

The original stance that Florida common law took toward drunk driving related injuries was that "the proximate cause of the injury was the *consumption* of the intoxicating beverage by the person, rather than the *sale* of intoxicating beverages to the person."[41] This attitude essentially stripped commercial establishments of liability and placed responsibility solely on the consumer who chose to drink to excess and then get behind the wheel.[42]

Following the repeal of prohibition, the State of Florida enacted Florida Statutes Section 562.11, a statute prohibiting the sale of intoxicants to minors, but the legislation failed to include language adopted by many other jurisdictions that also forbade the sale of intoxicants to habitual drunkards.[43] Prior to the enactment of Section 768.125, any case that fell outside the proscription of alcohol sales to a minor was required to be decided by the common law rule.[44]

This rule was clearly defined by Florida's Third District Court of Appeal in the 1964 case of *Reed v. Black Caesar's Forge Gourmet Restaurant, Inc.*, which illustrated the common law attitude toward liability for commercial vendors.[45] In *Reed*, it was established that for a commercial establishment to be held liable for injuries caused by a drunk driver, the actions of the establishment or its agents must be the proximate cause of the victim's injuries.[46] Voluntary intoxication was viewed as the negligence of the tortfeasor, rather than the establishment that furnished the alcohol to the tortfeasor, and the tortfeasor's

41. Ellis v. N.G.N. of Tampa, Inc., 586 So. 2d 1042, 1044 (Fla. 1991).

42. *Id.*

43. *Id.* at 1045. This statute was not considered a dram shop law, as it only governed the sale of alcohol to minors.

44. Ripley v. Ewell, 61 So. 2d 420, 421 (Fla. 1952).

45. Reed v. Black Caesar's Forge Gourmet Rest., Inc., 165 So. 2d 787, 788 (Fla. 3d Dist. Ct. App. 1964). In states with affirmative dram shop legislation, commercial establishments can be held liable for serving an already intoxicated individual, as it is considered foreseeable that an intoxicated person would pose a danger to themselves and providing them with a further intoxicant makes it more likely that they would injure another. *See, e.g.*, N.Y. GEN. OBLIG. LAW § 11-101 (McKinney 2024).

46. *Reed*, 165 So. 2d at 788.

negligence could not be imputed upon a third-party commercial vendor.[47]

Other states shared this viewpoint at some point, although many trended toward the national attitude of extending liability to commercial establishments over time. In *Cowman v. Hansen*, the Iowa Supreme Court deduced that while it may be foreseeable that selling liquor to an intoxicated individual will result in an injury to that individual, "it is not at all clear that he will naturally assault someone, drive a car and injure or kill another, or do some other tortious act."[48] The common thread between the *Reed* decision and the *Cowman* decision can be seen in *Barnes v. B.K. Credit Service, Inc.*, in that liability is limited to commercial establishments based on the logic that patrons voluntarily ingest alcohol, rendering themselves unfit to drive.[49]

B. A National Trend Toward Extending Liability to Commercial Establishments

After the repeal of prohibition, with the enactment of dram shop legislation, a national trend commenced toward protecting plaintiffs' rights in drunk driving accidents. Slowly, states began extending liability to commercial establishments for the negligent service of alcohol. This trend quickly amplified in 1959 with the New Jersey Supreme Court's decision in the case of *Rappaport v. Nichols*.[50]

In *Rappaport*, the court extended liability to a tavern owner who sold alcoholic beverages to a customer they knew to be a minor, who subsequently operated a motor vehicle while intoxicated and killed a third party.[51] The commercial vendor was held liable to the decedent's estate, with the court stating that the "recognition of the plaintiff's claim will afford a fairer measure of justice to innocent third parties whose injuries are brought about by the unlawful and negligent sale of alcoholic beverages to minors

47. *Id.*

48. 92 N.W.2d 682, 686–87 (Iowa 1958).

49. Barnes v. B.K. Credit Serv., Inc., 461 So. 2d 217, 219 (Fla. 1st Dist. Ct. App. 1984). What this fails to take into account is that many people do not understand the rate at which intoxicants work, while staff at commercial establishments are trained to understand these issues.

50. *See generally* Rappaport v. Nichols, 156 A.2d 1, 10 (N.J. 1959).

51. *Id.* at 3, 9.

and intoxicated persons."[52] Ultimately, the holding of this case determined that whether a bartender was negligent in selling liquor to an individual who was already intoxicated, and whether this negligence was the proximate cause of the plaintiff's injuries, were questions for the jury.[53]

Around the same time as the *Rappaport* decision, the Seventh Circuit Court of Appeals decided *Waynick v. Chicago's Last Department Store*, further illustrating the strengthening of the national attitude toward extending liability to commercial establishments in drunk driving accidents.[54] The *Waynick* case involved a fatal drunk driving crash where the adult defendants consumed excessive amounts of liquor in a Chicago tavern, followed by additional consumption in a parking lot after purchasing bottles of liquor from a nearby liquor store, before crossing state lines and causing the car accident.[55] This crash caused a conundrum for the courts, as the consumption of liquor took place in Illinois, but the fatal crash took place in Michigan.[56]

The Seventh Circuit Court of Appeals refused to extend either the Illinois Dram Shop law or the Michigan Liquor Control Act to decide the issue.[57] Instead, quoting Aristotle in saying, "nature abhors a vacuum; so does the law," the court applied a common law solution, finding that the defendant commercial establishments named in the complaint owed the plaintiffs a duty under Illinois Statute Section 131, which established that it is unlawful to sell alcoholic beverages to intoxicated persons.[58] The court found that the commercial defendants' breach of this duty was the proximate cause of the decedent's injuries and extended liability to the Illinois corporate defendants, eliminating the sales-consumption distinction previously used to establish duty.[59]

52. *Id.* at 10.
53. Hagglund & Arthur, *supra* note 17, at 77.
54. Waynick v. Chicago's Last Dep't Store, 269 F.2d 322, 325 (7th Cir. 1959).
55. *Id.* at 323–24.
56. *Id.* at 324. The Seventh Circuit Court of Appeals was left to decide among a choice of laws between Illinois, where the consumption occurred, or Michigan, where the collision occurred. *Id.* at 324–25.
57. *Id.* at 324.
58. *Id.* at 324–25; 235 ILL. COMP. STAT. ANN. 5/6-16 (West 2024). This allowed the court to extend liability using the long-arm doctrine to the Illinois commercial establishment without concern that jurisdictional issues would arise. *See Waynick*, 269 F.2d at 324–25.
59. *Waynick*, 269 F.2d at 325.

IV. FLORIDA'S CHANGES IN LIQUOR LIABILITY LAW IN RESPONSE TO THE NATIONAL TREND

In 1963, shortly after the *Rappaport* and *Waynick* decisions, the Florida Supreme Court had the opportunity to address the issue of alcohol vendor liability in *Davis v. Shiappacossee*.[60] In *Davis*, the court departed from Florida's original common law position of denying liability to third-party victims of drunk driving accidents when the court held a liquor vendor liable for the death of a minor to whom the vendor had furnished alcohol.[61] This decision acknowledged that the sale of alcohol to a minor was negligence *per se* for violation of Florida Statutes Section 562.11 and could give rise to civil liability against commercial establishments.[62]

Following the *Davis* decision, the Second District Court of Appeal extended this precedent in its holding in *Prevatt v. McClennan* to hold a tavern liable for the illegal sale of alcohol to a minor, which resulted in the minor becoming intoxicated and shooting another patron.[63] In this case, the court emphasized that the proximate cause of the victim's injury was the negligent sale of the alcohol rather than the minor's consumption, as the minor would be unaware of the effects of alcohol upon his behavior; however, the vendor, and their agents, would be trained to understand these effects.[64] The Second District applied common law negligence principles to resolve the issue and found in favor of the injured plaintiff.[65]

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60. *See generally* Davis v. Shiappacossee, 155 So. 2d 365 (Fla. 1963).

61. *Id.* at 365. The court in *Davis* determined that, "generally, in the absence of statute, a seller of liquor is not responsible for injury to the person who drinks it," *id.* at 367; however, in a case involving the sale of intoxicants to minors who were "seated in a dangerous instrumentality when the transaction occurred," as the sale was made at a liquor store drive-thru window, the probability of future injury was foreseeable, and thus the sale violated the prohibition of alcohol sales to minors, constituting an independent cause of action under a negligence *per se* theory. *Id.*

62. *Id.* at 367–68. The Florida Supreme Court argued by analogy, extending the logic from *Tamiami Gun Shop v. Klein*, 109 So. 2d 189 (Fla. 3d Dist. Ct. App. 1959), which found that the sale of weapons to minors expressly violated the language of Florida Statutes Section 790.18, and thus constituted negligence *per se*. *Davis*, 155 So. 2d at 367. The Florida Supreme Court found that the sale of alcohol to a minor, too, directly violated the language in Florida Statutes Section 562.11, and thus constituted negligence *per se*. *Id.* at 367–68.

63. Prevatt v. McClennan, 201 So. 2d 780, 780 (Fla. 2d Dist. Ct. App. 1967).

64. *Id.*

65. *Id.* Interestingly, the extension of this precedent could have brought Florida in line with the national position regarding dram shop liability had decisions continued to trend in this direction.

This Part will begin with the effects of the enactment of Florida Statutes Section 562.11 and its delaying of the enactment of, and ultimate effect on, Section 768.125. Next, it will discuss Florida's response to the common law trend in the state toward extending liability to commercial establishments with the enactment of Section 768.125 and its two vague exceptions. This will be followed by a discussion of the difficulty of applying the habitual drunkenness exception. Next, the rationale behind the passage of Section 768.125 will shed light on the situation at hand. This will be followed by a tragic example of the effects of the statute at work. Next will be a discussion of how Florida courts have inconsistently applied Section 768.125 at all levels. Finally, this Part will discuss challenges to the constitutionality of Section 768.125.

A. The Effects of the Enactment of Fla. Stat. Section 562.11

In the 1978 regular session of the Florida legislature, Section 562.11 was enacted, providing commercial liquor vendors protection by codifying the common law rule making the sale of alcohol to minors illegal.[66] Section 562.11(1)(b) provided protection to commercial establishments who furnish alcohol to a minor who provides false identification.[67] The statute provides a complete defense to civil liability for vendors who check the driver's license or analogous identification of a purchaser prior to the sale of alcohol and rely in good faith on that identification in furnishing alcohol to the purchaser, if the identification provided is false.[68]

The enactment of this statute further insulated commercial vendors from liability, although the common law attitude had begun to impose liability on commercial vendors. However, the extension of protection provided by Section 562.11 actually delayed the enactment of Section 768.125, allowing the legislative process to dull the edges of proposed legislation for Florida's dram shop law. Section 768.125, the ultimate codification of the dram shop act, had been present on the Florida legislature's radar for a number of years. There were multiple iterations of the legislation proposed prior to the ultimate passage of the law in 1980. The

66. H.R. JOURNAL, 6th Leg., Spec. Sess., at 17–18 (Fla. 1979).
67. FLA. STAT. § 562.11(1)(b) (1979).
68. *Id.*

evolution of the statute is discussed in further as this Article progresses.

In 1979, the Florida legislature proposed House Bill 1546 in the regular session, with initial proposed language in pertinent part: "An act relating to the Beverage Law; creating s. 562.51, Florida Statutes, providing that a person selling or furnishing alcoholic beverages to another person is not thereby liable for injury or damage caused by or resulting from the intoxication of such other person. . . ."[69] This proposal was promoted by "interested parties and concerned citizens," upon which the legislature did not elaborate.[70] However, Governor Bob Graham relied on the protections that the newly enacted Section 562.11 provided when he vetoed the proposed H.B. 1546, stating that Section 562.11 already "afforded substantial and sufficient protection [for licensees] under existing law."[71]

In his communication to the Secretary of State, Governor Graham further stated that "HB 1546 would unduly insulate licensees from civil liability while eviscerating a one year old statute [sic] that affords licensees a degree of protection consistent with the public interest."[72] If H.B. 1546 had passed, it would have created a nearly impenetrable shield to liability for commercial alcohol vendors. As Governor Graham expressed, this would have disrupted the delicate balance achieved through the enactment of Section 562.11.[73] Enacting a statute containing complete insulation from liability for alcoholic beverage vendors would also have failed to provide protection to the public, tourists and residents alike, which in turn could have major negative impacts on the state and its tourism industry. Nevertheless, although Section 562.11 provided an additional layer of protection for commercial establishments, that layer of protection also delayed the passage of a dram shop statute that could have had even more devastating effects on the State.

69. H.R. JOURNAL, 6th Leg., Spec. Sess., at 17–18 (Fla. 1979).

70. *Id.* However, it is heavily insinuated by Governor Graham in his veto letter that these interested parties are players in the alcoholic beverage industry who were trying to protect their interests through lobbying efforts. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

B. Florida's Response to the Judicial Trend

Following Governor Graham's veto of H.B. 1546, in 1980 the Florida House of Representatives introduced House Bill 1561, companion to Senate Bill 233, which was passed into law over the governor's veto through a supermajority of votes.[74] House Bill 1561 was ultimately codified into the Florida Statutes as Section 768.125.[75] The push to pass this legislation was a response to the judicial trend set forth in the state after the *Rappaport* decision from 1963 to 1980, which produced decisions recognizing an independent cause of action against commercial establishments for sale of liquor to minors and started to move Florida's attitudes toward alcohol vendor liability in line with the national values.[76]

Section 768.125, Florida's new dram shop law, essentially revived the original common law rule "absolving vendors from liability for [alcohol] sales."[77] This new statute contained a compromise from the previous year's iteration, incorporating language creating two amorphous exceptions to the shield from liability for commercial vendors, extending liability to establishments that unlawfully sell liquor to minors or that knowingly sell alcohol to a habitual drunkard.[78] Victims of drunk driving accidents must rely on these poorly defined exceptions in order to bring a successful dram shop action.[79] Consequently, personal injury attorneys must find a connection to one of these exceptions to bring a claim for damages against a commercial alcohol vendor.

The sale of alcohol to a minor has been established to be negligence *per se* as a violation of Section 562.11, constituting an independent cause of action.[80] However, the habitual drunkard exception does not provide victims the same independent cause of action. Florida courts have established that in order to bring a claim under this second exception, the plaintiff must present evidence, circumstantial or otherwise, that the establishment

74. H.B. 1561, 6th Leg., 2d Reg. Sess. (Fla. 1980).
75. *Id.*
76. Main St. Ent., Inc. v. Faircloth, 342 So. 3d 232, 235 (Fla. 1st Dist. Ct. App. 2022).
77. *Id.*
78. FLA. STAT. § 768.125 (2024). This exception brought the Florida dram shop law into line with the original theories of liability adopted by many states after prohibition. *Id. See Main St. Ent., Inc.*, 342 So. 3d at 235.
79. *See* Garcia, *supra* note 9, at 107.
80. Davis v. Shiappacossee, 155 So. 2d 365, 367 (Fla. 1963).

knew the individual being served was a habitual drunkard.[81] In the case of *Migliore v. Crown Liquours of Broward, Inc.*, the Florida Supreme Court determined that Section 768.125 was intended to limit the liability of alcoholic beverage vendors, and that the statute itself does not generate a cause of action against a habitual drunkard.[82]

C. Circumstantial Evidence of Habitual Drunkenness

At trial, it is difficult to establish appropriate circumstantial evidence of habitual drunkenness, which is why bringing a successful claim under the Florida Dram Shop Act has proven to be such a challenge. One marginally successful strategy has been to argue that an individual is a "habitual drunkard" according to the guidelines set forth in the DSM-5.[83] Under the DSM-5, alcohol abuse and alcohol dependence were combined since the last publication to create alcohol abuse disorder ("AUD").[84] Under this disorder, eleven criteria were recognized to identify an individual who may be experiencing AUD, and if two of the eleven criteria were exhibited by the individual in the past year, a physician may make a diagnosis of mild AUD.[85] A moderate case of AUD involves four to five symptoms, and a severe case involves six or more symptoms.[86]

In order to establish that the defendant in a dram shop case is a habitual drunkard, the plaintiff's attorney would need to request a specialty compulsory medical examination of the defendant. This would involve a longer period of observation, a more in-depth examination, and total honesty on the part of the defendant, which may be a tall order considering the examination would be ordered by their opponent. Even if the plaintiff's attorney was able to successfully prove an AUD diagnosis, this still does not guarantee that a jury will determine that the defendant is a habitual drunkard. As an additional hurdle to recovery, the plaintiff in a

81. MICHAEL D'LUGO ET AL., US LAW NETWORK, INC., STATE OF FLORIDA RETAIL AND HOSPITALITY COMPENDIUM OF LAW 31 (2021).

82. Migliore v. Crown Liquors of Broward, Inc., 448 So. 2d 978, 979 (Fla. 1984).

83. *Alcohol Use Disorder: A Comparison Between DSM–IV and DSM–5,* NAT'L INST. ON ALCOHOL ABUSE & ALCOHOLISM, https://www.niaaa.nih.gov/publications/brochures-and-fact-sheets/alcohol-use-disorder-comparison-between-dsm (last visited Mar. 23, 2025).

84. *Id.*

85. *Id.*

86. *Id.*

dram shop case must prove that the *commercial establishment knew* that the defendant was a habitual drunkard, which the AUD diagnosis does not necessarily prove but merely serves as circumstantial evidence.[87] The difficulty of proving the habitual drunkard condition highlights yet another weakness in Section 768.125, as it fails to provide sufficient protection to the public by establishing hurdles to recovery for victims of drunk driving, the very reason that its predecessors were vetoed.

D. Florida Legislature's Rationale for Enacting Section 768.125

Despite nearly destroying any consequential means of redress for victims of drunk driving accidents, the Florida legislature was not able to articulate a reason for enacting Section 768.125 beyond potential financial ramifications for commercial vendors. The claim was made that the statute was enacted to protect commercial alcohol vendors from rising costs of liability insurance resulting from changes to the original common law rule.[88] With the shift toward extending liability to commercial alcohol vendors after the *Rappaport* decision, the legislature expressed concern that these changes would increase liquor liability insurance premiums for existing establishments and make these policies difficult for new establishments to obtain.[89] Admittedly, if liquor liability policies had become more difficult to obtain, this could have had a nominal effect on Florida's tourism industry. However, would this nominal effect be worth eschewing public protection by denying victims of drunk driving accidents their only meaningful avenue of redress?

Despite proffering this rationale for enacting Section 768.125, the Florida legislature was unable to produce any concrete data to support its new bill.[90] Additionally, the codified statute did not

87. Ellis v. N.G.N. of Tampa, Inc., 586 So. 2d 1042, 1048 (Fla. 1991). The lack of sufficient evidence to establish that the defendant in a dram shop case is a habitual drunkard presents a real danger of plaintiffs' claims being subject to summary judgment, denying victims of drunk driving their day in court.

88. Garcia, *supra* note 9, at 106 (citing S. COM. COMM., S. STAFF ANALYSIS & ECON. IMPACT STATEMENT, 1980 Leg., Reg. Sess., at 1–2 (Fla. 1980) (on file with the State Archives of Florida)). Because the bill could eliminate a commercial establishment's liability in many situations, premiums for liability insurance were projected to decrease, and it was purported to promote access to liability coverage for new establishments. *Id.*

89. *Id.*; *see also* H. COMM. ON REG. INDUS.' & LICENSING, PROPOSED COMM. B. 19, 1980 Leg., Reg. Sess. (Fla. 1980) (on file with the State Archives of Florida).

90. S. COM. COMM., S. STAFF ANALYSIS & ECON. IMPACT STATEMENT, 1980 Leg., Reg. Sess., at 1–2 (Fla. 1980) (on file with the State Archives of Florida). In the Senate committee report, there is a simple one paragraph explanation for the rationale behind the statute. *See*

provide a mechanism to cap insurance premiums or pass any savings that may be afforded in liquor liability premiums on to commercial establishments, creating a gaping hole in the choice to rely on this foundation.[91] Notwithstanding issues in the logic proffered by legislative officials, this was the only basis that was offered for the enactment of the new dram shop law.[92]

E. A Tragic Example of the Effect of Section 768.125

Prior to the enactment of Section 768.125, while chances of a plaintiff recovering against a commercial establishment were slim, judicial decisions were trending toward offering this consequential means of redress. However, the enactment of the statute shut down the plaintiff's right to recovery aside from cases containing circumstances that fell squarely within the two exceptions offered. A tragic example of the shortcomings of this statute was illustrated in the *Hall v. West* case in which the plaintiff, Andrew Hall, was waiting at a bus stop one night when a drunk driver who had just come from Shepard's Beach Club ran off the road, plowing into Mr. Hall and ripping his right leg off at the hip.[93] Mr. Hall was hospitalized in critical condition for six months, amassing devastating hospital bills, and yet he was only able to recover the minimal limits of Mr. West's insurance policy because recovery against Shepard's was barred by Section 768.125.[94]

The facts in *Hall* seemingly presented the perfect challenge to the dram shop statute. Mr. West had become so intoxicated at Shepard's that he was rendered unconscious outside the men's restroom.[95] The manager on duty that evening called security to remove Mr. West from the premises.[96] The security guard escorted Mr. West to his car, took the keys from Mr. West's pocket, handed the keys to Mr. West when he entered the vehicle and remained outside the establishment to ensure Mr. West drove away from the premises.[97] Attorney Tom Carey, whose wife, Joni Carey, was

id. This was the only explanation for the legislation offered by the Florida Senate despite the devastating effects that Section 768.125 had on a plaintiff's right to redress. *See id.*

91. *Id.*

92. *Id.*

93. Hall v. West, 157 So. 3d 329, 330 (Fla. 2d Dist. Ct. App. 2015).

94. *Id.* at 331.

95. Interview with Thomas Carey, Esq., Founding Partner, Carey Leisure Carney, in Clearwater, Fla. (June 24, 2023).

96. *Id.*

97. *Id.*

killed by a drunk driver, was one of the attorneys of record for Mr. Hall and appealed the case all the way to the Florida Supreme Court. Appallingly, the Second District Court of Appeal held that the narrow margins of Section 768.125, and the two limited and amorphous exceptions, did not encompass the factual situation presented in the *Hall* case.

Despite intentionally placing a drunk driver on the road, the actions of Shepard's Beach Club did not fall under either exception set forth under Section 768.125, as Mr. West was not a minor, and there was insufficient evidence that he was a habitual drunkard.[98] At the scene of the accident, where Mr. West had driven off the road and struck Mr. Hall on the bus bench, Mr. West's blood alcohol level ("BAC") was 0.188, more than twice the legal limit of 0.08.[99] However, without more evidence showing that Mr. West was a habitual drunkard, the Florida Supreme Court would not grant certiorari to hear the appeal.[100]

F. Florida Courts Inconsistently Applying the Dram Shop Laws

Following the passage of Section 768.125, the Florida courts had a difficult time consistently applying the rules set forth in the statute. A classic example of this was the *Ellis v. N.G.N. of Tampa* case, where three levels of Florida courts came to three different conclusions on the facts of the case.[101] In *Ellis*, a young man was served twenty drinks in one sitting, proceeded to drive himself home after consuming twenty drinks, and operated his vehicle in such a manner that it flipped over, causing him permanent brain damage and rendering him mentally incapacitated.[102] His mother, who resumed legal guardianship over Mr. Ellis after the accident, sued the commercial establishment that had served him, alleging that the establishment was negligent in serving her son, who was a regular at the establishment, so the staff knew he was a habitual drunkard.[103]

98. *West*, 157 So. 3d at 331. The Second District Court of Appeal determined that Mr. Hall's injuries were brought about by Mr. West's intoxication, and any alleged negligence on the part of Shephard's did not break the chain of Mr. West's negligence. *Id.*

99. Interview with Thomas Carey, *supra* note 95.

100. Hall v. West, 177 So. 3d 1266 (Fla. 2015) (declining to exercise jurisdiction and denying the petition for review); *West*, 157 So. 3d at 331.

101. Ellis v. N.G.N. of Tampa, Inc., 586 So. 2d 1042, 1043 (Fla. 1991).

102. *Id.*

103. *Id.*

First, the trial court immediately dismissed the case, finding that "Section 768.125 does not provide a first-party cause of action for a one-car accident involving an injured adult drinker/driver."[104] Ellis's mother next appealed the case to the District Court of Appeal, which agreed that the action needed to be dismissed, but reached their conclusion on the grounds that, while the habitual drunkard himself was one of the classes intended to be protected by the Statute, the commercial establishment had not received prior written notice of Ellis's alcohol addiction as required by Florida Statutes Section 562.50, the Florida criminal statute addressing the sale of alcohol to a habitual drunkard.[105] Ultimately, the Florida Supreme Court held that Section 768.125 was not required to be read *in pari materia* with Section 562.50, and that because the provision of Section 768.125 addressing the sale of alcohol to habitual drunkards relies upon a standard of knowingly furnishing the alcohol, all Mr. Ellis needed to prove was that the establishment knew he was a habitual drunkard.[106] The court determined that this could be proven through circumstantial evidence that the establishment had served Mr. Ellis numerous drinks on several occasions.[107]

The inconsistencies demonstrated in *Ellis* by three different levels of Florida courts, including the Florida Supreme Court, demonstrate how difficult Section 768.125's language is to interpret. The way the statute was written suggests that it was intentionally vague to extend blanket protection to alcohol vendors for the sale of alcoholic beverages. The longer this statute remains in effect, the more uneven precedent will become. Thus, there have been several challenges to Section 768.125 since its enactment,

104. *Id.*

105. *Id.*; *see also* FLA. STAT. § 562.50 (2024). The statute reads:

> Any person who shall sell, give away, dispose of, exchange, or barter any alcoholic beverage, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever under any name, label, or brand, which produces intoxication, to any person habitually addicted to the use of any or all such intoxicating liquors, after having been given written notice by wife, husband, father, mother, sister, brother, child, or nearest relative that said person so addicted is an habitual drunkard and that the use of intoxicating drink or drinks is working an injury to the person using said liquors, or to the person giving said written notice, shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

§ 562.50.

106. *Ellis*, 586 So. 2d at 1048.

107. *Id.*

including challenges to the constitutionality of the statute under both the Florida and U.S. Constitutions.

G. Challenges to Constitutionality

As with any newly enacted statute, the ultimate interpretation of the statute must come about through litigation. With Section 768.125, the vaguely written exceptions proved to be a particularly difficult challenge for Florida courts to interpret. As such, several constitutional challenges arose, particularly when the statute was newly enacted. In *Barnes v. B.K. Credit Service, Inc.*, Linda Nell Shaw was overserved at a bar while already intoxicated, resulting in a tragic accident wherein Ms. Shaw fell unconscious behind the wheel, swerving off the road and striking a tree.[108] Ms. Shaw was only twenty years old when she died on impact.[109] Linda's mother brought suit against the bar in a wrongful death action, alleging that the bar was negligent for serving her daughter while Ms. Shaw was already intoxicated, and that the bar breached their duty to Linda to refuse service when she would no longer be able to safely operate a vehicle.[110] The trial court issued a directed verdict on behalf of the defendants, claiming that Section 768.125 only provides an independent cause of action for service of alcohol to minors.[111]

In *Barnes*, two constitutional challenges were made to the language of the statute. The first challenge was on the grounds that the statute imposes a "different duty or standard of care on tavern owners in their sale of alcoholic beverages to minors as compared to adults."[112] This challenge was expressly rejected by the trial court as an immaterial designation. On appeal, the plaintiff alleged that the statute was "unreasonable, arbitrary, and capricious, and in violation of the equal protection and due process

108. Barnes v. B.K. Credit Serv., Inc., 461 So. 2d 217, 218 (Fla. 1st Dist. Ct. App. 1984).
109. *Id.*
110. *Id.* In a state with an affirmative dram shop act, it is a legitimate cause of action to sue a commercial alcohol vendor for serving an individual who is already intoxicated. *See, e.g.*, N.Y. GEN. OBLIG. LAW § 11-101 (McKinney 2024). While this is included in the language of most dram shop acts, Florida's dram shop law fails to include this as a cause of action. *See* FLA. STAT. § 768.125 (2024).
111. *Barnes*, 461 So. 2d at 218. When this case was tried, the drinking age in Florida was still nineteen years of age. The drinking age in Florida was raised to twenty-one in 1986. Lonn Lanza-Kaduce & Pamela Richards, *Raising the Minimum Drinking Age: Some Unintended Consequences of Good Intentions*, 6 JUST. Q. 247, 247 (1989).
112. *Barnes*, 461 So. 2d at 218.

clauses of the Florida and United States Constitutions."[113] The appellate court rejected this notion, pointing to the original common law position, which dispensed of liability for commercial establishments, and stating that this view was simply codified into the statute when it was enacted.[114]

The standard of review that the appellate court relied upon in reaching its decision was a rational basis standard. This is the most deferential standard of review to the Florida legislature, requiring only that the statute be rationally related to a legitimate state interest. The court in *Barnes* determined that the plaintiff, as the challenger, had the burden of proving that the statute was arbitrary and capricious, and that the plaintiff in this case failed to do so. The court further explained that it "may not substitute [its] judgment for that of the legislature 'insofar as the wisdom or policy of the act is concerned.'"[115] Therefore, the statute was deemed to be rationally related to a legitimate state interest under both the Equal Protection and Due Process Clauses, and the constitutional challenges were denied.[116]

V. FLORIDA'S ENACTMENT OF THE RESPONSIBLE VENDORS ACT

In 1989, the Florida legislature enacted Florida Statutes Section 561.702, the Responsible Vendors Act, with the intentions of (1) eliminating underaged drinking; (2) reducing drunk driving accidents in Florida; (3) encouraging the prevention of drug activity on commercial alcohol vendor properties; and (4) encouraging prudent alcohol service.[117] Under the Act, employees at a licensed alcoholic beverage purveyor are required to complete a certified training course within thirty days of their date of employment, or fifteen days if the individual is a managerial employee, if the employer has chosen to opt into the protections provided by the Act.[118] Certified employees must attend a

113. *Id.*
114. *Id.* at 219.
115. *Id.*
116. *Id.* at 220.
117. FLA. STAT. § 561.702 (1989); Kyle Smeback, *What is Florida Alcohol Server Training?*, SERVESMART (Mar. 2, 2023), https://iservesmart.com/what-is-florida-alcohol-server-training/.
118. FLA. STAT. § 561.705 (2024).

minimum of one training meeting every four months to remain compliant with the Act.[119]

The Responsible Vendor's Act includes notice requirements at all levels, from requiring new hires at commercial alcohol vendors to fill out a questionnaire determining their fitness to sell alcohol to patrons as a condition of their employment, to establishing a written policy that employees must sign under which any employee who "engages in the illegal use of controlled substances on the licensed premises will be immediately dismissed from employment."[120] This was designed to create a trail of documentation of proper service practices for vendors that participate in the Act.[121] All vendors that choose to participate are required to maintain thorough records of applications for employment, employee acknowledgements of the responsible vendors policies, and all training requirements in personnel files.[122]

While the Responsible Vendors Act is not currently legally required, vendors with Florida retail liquor licenses who opt to participate in the Act and meet all the training requirements are entitled to benefits provided directly through Section 561.706.[123] One such benefit is the protection of the commercial alcohol vendor's license in the event an illegal alcohol sale takes place on the premises.[124] The establishment's license may not be suspended or revoked if an employee engages in the illegal sale of alcohol to a minor, or for "an employee engaging in or permitting others to engage in the illegal sale, use of, or trafficking in controlled substances," providing the employee has completed the requisite training prior to their illegal acts, and the vendor had no knowledge of, and did not participate in, the illegal sales.[125] If an employee at a licensed vendor engages in the illegal sale of alcohol to a minor, the Division of Alcoholic Beverages & Tobacco will consider an establishment's status as a responsible vendor to mitigate administrative penalties resulting from the illegal sale,

119. *Id.*
120. *Id.*
121. Smeback, *supra* note 117.
122. § 561.705.
123. *Protect Your Investment, Become a Responsible Vendor*, FLA. DIV. OF ALCOHOLIC BEVERAGES & TOBACCO, https://www2.myfloridalicense.com/abt/enforcement/vendor_training/ResponsibleVendorsBrochure_LATEST.PDF (last visited March 14, 2025).
124. *Id.*
125. *Id.*

provided the vendor remains current with the training requirements of Section 561.705.[126] Commercial alcohol vendors opting into the responsible vendor qualification may be entitled to other benefits from participation in the program, including potentially lower liquor liability insurance rates and reduced risk of civil liability resulting from irresponsible alcohol service.[127]

Because Florida does not legally require that establishments opt into the Responsible Vendors Act, the state does not have the infrastructure to fully implement a safe service program. For example, most states that require safe service programs by law have an official list of approved alcohol server training courses.[128] Florida merely provides guidelines that courses must meet to obtain compliance, which does not guarantee a quality or uniform training experience across the state.[129] Nationally approved vendors such as ServSafe and TIPS do qualify as approved training programs under Florida's Responsible Vendors Act, and have developed specially tailored programs that comply with the requirements of the Act.[130] However, there are many privately offered programs that implement different training techniques and standards.

Safe alcohol service programs paired with affirmative dram shop statutes not only provide sufficient protection for the public, but they also help moderate costs of liability insurance. In many areas of the country, this is the combination employed to protect residents and visitors from drunk driving accidents. Florida's combination of anti-dram shop legislation and voluntary safe service programs fails to provide adequate protection for people within the state, whether citizens or tourists. In order to fully understand the difference between the different forms of dram shop legislation, a comparison between Florida's system and a system employing an affirmative dram shop is in order.

126. *Id.*
127. Smeback, *supra* note 117.
128. *Id.*
129. *Id.*
130. *Florida Alcohol Responsible Vendor Training*, TIPS, https://www.gettips.com/online/alcohol-certification-florida? (last visited May 20, 2023); *see also Online Products & Participant Guides*, SERVSAFE ALCOHOL, https://www.servsafe.com/access/ss/Catalog/ProductList/14 (last visited May 20, 2023).

VI. COMPARISON OF FLA. STAT. SECTION 768.125 TO D.C. CODE SECTION 25-781

Florida and Washington, D.C. present an excellent opportunity for comparison. Both areas attract substantial tourism throughout the year. Washington, D.C. attracts a large transient workforce, as do many of the larger cities in Florida, such as Miami, Orlando, and Tampa. The populations of both areas have become increasingly dense over time, providing a rational comparison of a similar demographic area.

An analysis of D.C. Code Section 25-781 shows that it extends liability, not only to the drunk driver, but also to the commercial establishment who served alcohol unlawfully, and even individual staff members who provided the service.[131] The Statute outlines that no person under twenty-one years of age should be served in a dram shop, the sale of alcoholic beverages should be refused to an intoxicated individual, and a "notorious drunkard" may be refused service.[132] Washington, D.C.'s statute is written in the affirmative tone, imposing liability on commercial alcohol vendors rather than serving as a limitation on liability.[133] Thus, Washington, D.C.'s statute creates an independent cause of action for an injured plaintiff, whereas Section 768.125 does not.

Washington, D.C. has also established the Alcoholic Beverage Regulation Administration ("ABRA"), which administers liquor licenses, both to commercial establishments and to the staff and management of those establishments.[134] ABRA allows the D.C. Metropolitan Police to perform unannounced audits of a licensed establishment, wherein they may check to see the establishment's liquor license, ServSafe or equivalent certifications for staff, and an ABRA license for at least one manager on the premises.[135] If a manager is unable to produce their ABRA license, the police have the authority to suspend alcoholic beverage service until such time that a license can be produced.[136] The stringent requirements to pass an inspection and regular compliance inspections imposed by ABRA provide a valuable incentive for commercial establishments

131. D.C. CODE § 25-781 (2025).
132. *Id.*
133. *Id.*
134. ALCOHOLIC BEVERAGE REGUL. ADMIN., DISTRICT OF COLUMBIA OFFICIAL CODE TITLE 25 AND DISTRICT OF COLUMBIA MUNICIPAL REGULATIONS TITLE 23, at 25 (2022).
135. *Id.*
136. *Id.*

to adhere to the dram shop laws, an area in which Florida is severely lacking.

VII. AN ARGUMENT BY ANALOGY TO DECLARE SECTION 768.125 UNCONSTITUTIONAL

The Florida legislature's contention that Section 768.125 would decrease liquor liability insurance is not a fair and accurate representation of the landscape of liability insurance in Florida, particularly in light of the fact that the legislature was unable to provide any meaningful data to back up its argument. As such, the rationale behind the statute deserves a second look. This Part will first discuss Florida Statutes Section 766.118, the statute governing medical malpractice noneconomic damages, and analyze how this statute was deemed unconstitutional based on argument by analogy from the recently overturned caps on noneconomic damages in wrongful death cases. Next, that logic will be extended to Section 768.125, showing how the statute should be changed to become constitutional.

A. Overturning the Caps of Medical Malpractice Noneconomic Damages

Another Florida Statute, Section 766.118, was enacted based purely on an economic contention, placing caps on medical malpractice noneconomic damages, because the Florida legislature claimed that there was a medical malpractice insurance crisis in the state.[137] However, the legislature failed to provide any data to support its claim that there was a malpractice insurance crisis in Florida.[138] Therefore, the Florida Supreme Court recently rescinded the caps on medical malpractice noneconomic damages in the case of *North Broward Hospital v. Kalitan* by declaring that Section 766.118 violated Article I, Section 2 of the Florida Constitution, the Equal Protection Clause.[139]

In coming to this conclusion, the Fourth District Court of Appeal relied on the reasoning in *Estate of McCall v. United States*,

137. N. Broward Hosp. Dist. v. Kalitan, 219 So. 3d 49, 54–55 (Fla. 2017).

138. *Id.* This included a failure to provide any data that malpractice insurance premiums had increased in recent years, and a failure to provide evidence that these increases were causing medical practitioners to leave the state. *Id.* at 55–56.

139. *Id.* at 59.

where the Florida Supreme Court determined that caps on wrongful death noneconomic damages in medical malpractice cases violated the right to equal protection under the Florida Constitution.[140] The *McCall* case involved the wrongful death of a mother who suffered from preeclampsia during her delivery.[141] The Airforce Hospital staff who monitored Ms. McCall during her labor and delivery failed to adequately monitor and report her vitals and her blood loss throughout the delivery.[142] As a result, Ms. McCall went into shock, and ultimately became unresponsive, having to be removed from life support.[143]

Ms. McCall's parents filed suit against the United States under the Federal Tort Claims Act on behalf of themselves and Ms. McCall's infant son, who survived the birth.[144] The U.S. District Court for the Northern District of Florida awarded a jury verdict of $980,462.40 in economic damages, and an additional $2 million in noneconomic damages, "including $500,000 for Ms. McCall's son and $750,000 for each of her parents."[145] The district court subsequently limited the noneconomic damages on the medical malpractice claim to $1 million as required by the noneconomic damages cap provided in Florida Statutes Section 766.118(2), and the Eleventh Circuit Court of Appeals affirmed, but did certify four questions to the Florida Supreme Court regarding the constitutionality of the wrongful death damages cap.[146]

In a plurality decision, the Florida Supreme Court determined that the damages cap was unconstitutional because it failed to account for multiple claimants. The plurality stated that "the greater the number of survivors and the more devastating their losses are, the less likely they are to be fully compensated for those losses."[147] In quoting *St. Mary's Hospital, Inc. v. Phillipe*, the court stated that it "fail[ed] to see how this classification bears any rational relationship to the Legislature's stated goal of alleviating the financial crisis in the medical liability industry."[148] Thus, the Florida Supreme Court determined that the caps on wrongful

140. McCall v. United States, 134 So. 3d 894, 916 (Fla. 2014).
141. *Id.* at 897–98.
142. *Id.* at 898–99.
143. *Id.* at 899.
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.* at 902.
148. *Id.* at 901.

death noneconomic damages violated the Equal Protection Clause, and overturned that portion of the statute.[149] The *McCall* decision was made to protect the rights of plaintiffs to recover after facing the gravest injuries in the form of pain and suffering due to the wrongful death of a loved one brought about by medical negligence.[150]

In the *Kalitan* decision, the plaintiff suffered a perforated esophagus while undergoing an elective carpal tunnel surgery, causing severe permanent injury and lifelong complications.[151] Ms. Kalitan filed a medical malpractice suit, and the jury ultimately awarded her $2 million in past pain and suffering and $2 million in future pain and suffering, for a total of $4 million in noneconomic damages.[152] The trial court limited the damages to $2 million per the noneconomic damages cap set forth in Florida Statutes Section 766.118 for a personal injury medical malpractice claim, an award that was further reduced due to the hospital's sovereign immunity.[153]

On appeal, the Fourth District argued that, by analogy, the logic set forth in *McCall* that caps on wrongful death noneconomic damages were unconstitutional should apply to noneconomic damages in a personal injury medical negligence action, and thus the total damages awarded by the jury should be reinstated.[154] The *Kalitan* case was then appealed to the Florida Supreme Court.

The court pointed to the legislative intent behind the enactment of Florida Statutes Section 766.118, stating that the Florida legislature "asserted that the increase in medical malpractice liability insurance premiums has resulted in physicians leaving Florida, retiring early from the practice of medicine, or refusing to perform high-risk procedures, thereby limiting the availability of health care."[155] However, the court cited the plurality in *McCall*, who determined that even if the alleged medical malpractice crisis could be found based on legislative findings, Section 766.118 would still fail a rational basis test, as no relationship could be established between the noneconomic

149. *Id.* at 912.
150. *Id.* at 903.
151. N. Broward Hosp. Dist. v. Kalitan, 219 So. 3d 49, 50–51 (Fla. 2017).
152. *Id.* at 52.
153. *Id.*
154. *Id.*
155. *Id.* at 55 (citing *McCall*, 134 So. 3d at 906).

damages cap and mitigation of the purported crisis.[156] In her concurring opinion in *McCall*, Justice Pariente observed that the statute does not impart a mechanism to ensure that any savings resulting from capped economic damages are passed to doctors in the form of lower malpractice liability premiums, further solidifying the lack of relationship between the statute and its purported goal.[157]

The Florida Supreme Court followed the reasoning set forth in *McCall* in its decision in *Kalitan*, finding that it was "unreasonable *and* arbitrary to limit [plaintiffs'] recovery in a speculative experiment to determine whether liability insurance rates will decrease,"[158] exposing that the purported legislative intent of keeping malpractice insurance rates low in the state of Florida was a legislatively concocted device to pass the bill.[159] Thus, Section 766.118 failed a rational basis test in *Kalitan*, holding that no rational relationship to a legitimate state interest could be found in the legislature's reasoning for enacting the statute.[160] The cap was removed from noneconomic damages in medical malpractice liability claims to protect the rights of plaintiffs to recover in the case of catastrophic and permanent injuries caused by doctors who did not follow the medically accepted standard of care.[161]

In both *McCall* and *Kalitan*, the only legislative intent purported in support of Section 766.118 was the fear of rising insurance premiums, resulting in a mass exodus from the medical field in Florida.[162] However, in both cases, there was not sufficient data offered to support these allegations, and no legislative findings were reported. Similarly, in the passage of Section 768.125, the prohibitive costs of liquor liability insurance were purported as the reasoning behind enacting the statute and limiting potential liability for commercial establishments, but no data was offered in support of this contention.[163] Fear is not an appropriate basis upon which to base legislation.

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156. *Kalitan*, 219 So. 3d at 55.
157. *Id.* at 55–56.
158. *Id.* at 58 (quoting *McCall*, 134 So. 3d at 912).
159. *Id.* While it must be acknowledged that many times compromises are required to enact legislation, the purporting of a supposed crisis with no concrete data confirming this crisis cannot be determined to be a compromise.
160. *Id.* at 58–59.
161. *Id.* at 59.
162. *Id.* at 58–59; *McCall*, 134 So. 3d at 911.
163. *See* Garcia, *supra* note 9, at 106.

B. Extending the Logic of *McCall* and *Kalitan* to Section 768.125

Based upon the reasoning and logic set forth in both *McCall* and *Kalitan*, Section 768.125 should be deemed unconstitutional, as the limitations on liability that have been afforded to commercial liquor vendors violate the equal protection rights owed to victims of drunk driving. The provisions of Section 768.125 force an arbitrary classification upon plaintiffs in a dram shop case based upon the status of the defendants as a drunk driver and a commercial alcohol vendor, often eliminating the plaintiffs' only meaningful form of redress based upon this arbitrary classification. Thus, the Florida legislature should amend the statute to eliminate these arbitrary and capricious limitations. This will also ensure that potential plaintiffs' constitutional rights to access the courts are protected.[164]

VIII. SUGGESTIONS FOR THE REFORM OF SECTION 768.125

In order to protect Floridian citizens and visitors, Section 768.125 should be amended to provide plaintiffs injured in drunk driving accidents a meaningful avenue for redress. This Part of the Article will discuss potential ideas for reform of the statute to provide sufficient protection to the general public in Florida. First, the need for legislative intervention will be discussed. Second, the implementation of stronger measures of accountability will be argued, promoting the safe service of alcohol in the state of Florida. Third, the implementation of a mandatory tax on alcoholic beverages to assist victims of drunk driving and their families will be proposed.

A. Amending Section 768.125

To avoid precedent becoming too uneven and difficult to follow, the Florida legislature needs to step in and amend Florida Statutes Section 768.125 to contain affirmative language akin to that found in D.C. Code Section 25-781. At this point, only the legislature will be able to make this change, as the Florida Supreme Court will review any challenges to the statute using the rational basis

164. FLA. CONST. art. I, § 21.

review standard, which Section 768.125 has survived in the past. Statutes operate in derogation of common law, therefore the only way to correct the precedent on dram shop cases moving forward will be action by the Florida legislature.

B. Increased Accountability Measures to Promote the Safe Service of Alcohol

The Florida Division of Alcoholic Beverages & Tobacco needs to take a stronger stance on encouraging responsible sales for alcohol vendors. In doing so, the Florida legislature should support these efforts, amending the Responsible Vendor Act to require increased training and notice requirements by law. In conjunction, Florida should establish an official list of approved alcohol service training programs to ensure uniform training standards are implemented statewide. This will clarify the state's stance toward safe alcohol service and set a clear standard by which to hold commercial establishments accountable for negligent service.

Once the Act has been reinforced, the Division of Alcohol & Tobacco should conduct regular unannounced inspections of licensed commercial alcohol vendors to increase accountability and further incentivize the responsible service of alcohol. Service licenses for management of commercial establishments, similar to the ABRA licenses required in Washington, D.C., should be implemented to help offset the increased costs of heightened accountability measures. The cost of an ABRA beverage manager license as of 2018 was $450, an amount that can provide substantial support for the costs of implementing these increased accountability measures.[165] These measures, along with requiring increased uniform training by law, will promote a renewed sense of urgency in ensuring responsible alcohol service.

C. The Penny for the People Fund

Drunk driving accidents often occur at high speeds, leaving devastation in their wake. Costly, unexpected hospital stays can

165. The Author of this Article worked as a manager in the food service industry in Washington, D.C. in 2018, and was required to obtain an ABRA beverage manager license as a condition of employment. Such a policy was standard in the at-will employment environment of the District of Columbia and therefore would translate in Florida, an at-will employment state.

put victims of drunk driving in dire financial straits after receiving necessary treatment. The tragedy that faces many families who have been victimized by drunk driving is that the at-fault drivers are usually uninsured or underinsured, providing the victims no meaningful avenue for redress. Any insurance policy that the drunk driver may have is typically not enough to cover the cost of treating the catastrophic injuries caused by these accidents. In light of this sad fact, and in order to provide financial relief for victims of drunk driving and their families, the Florida legislature should implement a mandatory tax of $0.01 on every alcoholic beverage sale, from distribution, to retail sale, to sale in food and beverage establishments, called the Penny for the People fund.

The Penny for the People fund would create a trust, akin to the Neurological Injury Compensation Association fund, for Florida residents who have been injured in a drunk driving accident to help cover medical expenses incurred as a result of the accident. The fund would also be available to the families of Florida residents who have been killed in a drunk driving accident to assist in covering medical expenses and funeral costs. Additionally, the fund would be available for counseling and psychiatric assistance for victims and their families to help recovery after a drunk driving accident. The effects of these accidents reverberate well beyond the actual impact, and it is imperative to offer holistic support to victims and families of victims to aid in recovery.

A percentage of the funds collected in the Penny for the People tax should be reserved to help increase education about various aspects of drunk driving. This should be split to cover the problem of drunk driving from all angles, beginning with educating the state's youth on the effects and consequences of drunk driving. Preventing teens and young adults from believing that drunk driving is an acceptable activity in Floridian culture will be a powerful preventative measure. Additionally, part of the fund should be used to help implement standardized training for management and employees of commercial establishments. If the state subsidizes the implementation of new training procedures, there will be greater buy-in to the program. Another part of the fund should be reserved to equip police departments with the tools they need to catch drunk drivers before they cause devastation. The equipment the departments need, but cannot always afford, includes stop sticks, portable breathalyzers, and other specialized equipment for use in the field.

The number of tourists that Florida attracts every year, along with the high volume of alcohol sales throughout the state, would result in a substantial fund fairly quickly. This fund, paired with increased accountability measures for commercial alcohol vendors and affirmative dram shop language, would provide sufficient protection for victims of drunk driving and their families. The Florida legislature could implement this tax through their taxing power under the Florida Constitution with no issue, as ultimately part of the fund would be used to support the state police force. Of course, an essential element of this plan would be amending Section 768.125, as previously discussed.

When considering the potential effects a fund of this nature may have, it may be helpful to return to some of the tragic examples of the effects of drunk driving. Had the Florida legislature approved this fund at the time Section 768.125 was originally passed, Joni Carey's parents and her new husband, Tom Carey, would have at least had assistance in paying Joni's medical bills and funeral expenses after her tragic accident. The fund would also have provided counseling for the family to help them move forward in their grief. The Penny for the People fund would also have helped Andrew Hall tremendously by providing financial relief from his medical bills and ongoing treatment after having his right leg ripped off at the hip in a drunk driving accident. More importantly, had the educational, training, and police resources been available at the time of each of these events, they may never have happened.

IX. CONCLUSION

Drunk driving is an entirely preventable crime, and yet it continues to be one of the leading causes of death on the roads today. The lackadaisical attitude toward drunk driving and the acceptance of drinking and driving as a tolerable activity continues this trend, endangering lives unnecessarily for a moment of selfishness. According to statistics provided by Mothers Against Drunk Driving, a driver becomes a statistic as a victim of drunk driving every thirty-nine minutes.[166] Why is this acceptable in the state of Florida? The answer is: it is not. But there are obstacles standing in the way of changing this mindset.

166. MOTHERS AGAINST DRUNK DRIVING, https://madd.org (last visited July 20, 2024).

A major obstacle standing in the way of protecting victims of drunk driving in Florida is Florida Statutes Section 768.125. As drunk drivers are often uninsured or underinsured, frequently the only meaningful form of redress for injured plaintiffs is to pursue a dram shop action against the commercial alcohol vendor who negligently overserved the driver. In the majority of states, this allows victims a meaningful avenue for recovery. However, in Florida, Section 768.125 acts as a shield, protecting alcohol vendors from liability, except in two very specific, and ill-defined, exceptions. The attitude of the Florida courts thus far has been to err on the side of shielding vendors from liability even when applying the exceptions, because the language was so poorly crafted that the statute does not provide a solid foothold, even for the exceptions. This leaves many people who have been gravely injured with virtually no avenue for recovery.

The only course of action is for the Florida legislature to step in and take action. The legislature has the power to change the language of Section 768.125 to include affirmative language that will protect injured plaintiffs', or their families', right to recover. The following suggested Statute includes language akin to the dram shop statute of New York state, a powerful statute geared at protecting the public by providing an avenue for redress against commercial alcohol vendors, and even individual employees whose negligence causes injury or death.

The proposed revision of Section 768.125 is as follows:

> A person who sells or furnishes alcoholic beverages negligently to a person of lawful drinking age who is already intoxicated shall become liable to any person injured, in person or property, by reason of the intoxication of any person served therefrom, whether resulting in injury or death, and a cause of action shall arise through the unlawful selling to, or unlawful assisting in procuring of, alcohol for such intoxicated person; and in any such action the injured party, or their next of kin, shall have a right to recover actual and future damages. A cause of action shall also arise for the negligent sale or furnishing of alcohol to a person who is not of lawful drinking age, and thereafter causes the injury, in person or property, or death of another.[167]

167. N.Y. GEN. OBLIG. LAW § 11-101 (McKinney 2024); *see also* FLA. STAT. § 768.125 (2024).

Armed with a new statute such as that proposed above, the legislature must also change the language of Florida Statutes Section 561.705, the Responsible Vendors Act. Ensuring that this Act requires alcohol vendors, by law, to implement increased training and notice standards across the alcohol industry, will strengthen the infrastructure needed to effectively monitor the safe service of alcohol. An official list of approved training programs should also be developed in order to implement uniform standards statewide. The Division of Alcohol & Tobacco should conduct systematic standards inspections, ensuring that commercial alcohol vendors are following the standards set forth after the changes to Section 768.125 and Section 561.705 have been implemented. Developing a licensing program akin to the ABRA program in Washington, D.C. would help offset the costs of increased safe service enforcement, while simultaneously reinforcing the restructured standards.

With the current lack of accountability for commercial alcohol vendors, there is minimal incentive to practice safe service, often resulting in tragedy on the roads. The current stance of the law in Florida provides negligible protection for the general public and places all fault in drunk driving accidents on the driver who chose to ingest multiple alcoholic beverages before getting behind the wheel. But what about the commercial establishment, who continues to serve an individual long past the point where the bartender knows, or should know, that the individual can safely operate a motor vehicle? Should they, and the establishment they work for through the doctrine of vicarious liability, not be held accountable for their role in serving an already intoxicated individual? In order to protect the Florida public, and those who visit this great state, from tragically becoming part of the grizzly statistics surrounding drunk driving, the Florida legislature, along with the Division of Alcohol & Tobacco, must step in to reform Section 768.125, and bolster the current system policing safe alcohol service.