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DRINK, DRIVE, SUE, REPEAT: THE VICIOUS CYCLE CREATED
BY VOSS V. TRANQUILINO

*Katie Barrett**

I. INTRODUCTION

Tiffany's Restaurant in Toms River, New Jersey, appears to be like any other sports bar—boasting over twenty flat-screen high-definition TVs, constantly slinging their “world famous” wings, and offering a generous happy hour from 4–7 p.m. and then again from 10–11 p.m.¹ November 9, 2006, was like any other Monday evening at Tiffany's, drawing a crowd of patrons who wanted to take advantage of happy hour specials. Among the drinkers was Frederick Voss, a 46-year-old man who was looking to unwind with a few alcoholic beverages. But upon leaving Tiffany's, the night took a turn for the worse when Voss ran a red light² and then crashed his motorcycle into a vehicle driven by Kristoffe Tranquilino.³ The latter was unharmed, but Voss sustained serious personal injuries.⁴ He was fortunate to survive, for not only was he more vulnerable as a motorcyclist, but he was also drunk.⁵ His blood alcohol content was .196 percent—well over twice the legal limit of .08 percent.⁶ Following this accident, the law ran its typical course when prosecutors charged Voss with driving while intoxicated (DWI), to which he pled guilty.⁷ But then in a bizarre twist of events, Voss—the drunk driver—sued Tranquilino (the person he hit) and Tiffany's Restaurant (the establishment that had served him alcohol earlier in the evening).⁸ The trial court dismissed the suit against the injured motorist, but allowed the suit against Tiffany's Restaurant to proceed.⁹ On appeal, the defendant restaurant pointed to a New Jersey statute mandating that a driver who is convicted of DWI “shall have no cause of action for recovery of economic or noneconomic loss sustained as a

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1. TIFFANY'S RESTAURANT, <http://www.tiffanysrestaurant.com>. (last visited Feb. 26, 2012).

2. Interestingly, neither the Superior Court nor the Supreme Court of New Jersey mentioned the fact that Voss ran a red light. This fact was widely reported in other news sources. See, e.g., Daniel Nee, *Court: Brick Man Who Drove Drunk Can Sue Toms River Bar*, BRICKPATCH (June 2, 2011), <http://brick.patch.com/articles/court-brick-man-who-drove-drunk-can-sue-toms-river-bar>.

3. Voss v. Tranquilino, 992 A.2d 829, 831 (N.J. Super. Ct. App. Div. 2010).

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

result of the accident.”¹⁰ Despite the plain text of the statute, the appellate court allowed Voss to sue Tiffany’s.¹¹ When the Supreme Court of New Jersey affirmed this decision, it essentially allowed Voss to benefit from drunk driving.¹²

The case *Voss v. Tranquilino* was met with immediate backlash—and for a variety of reasons.¹³ People complained that the decision completely eviscerated personal responsibility and unfairly allowed people to profit from their crimes.¹⁴ Others lamented the hit that the bar and restaurant industry would take in the form of increased insurance premiums.¹⁵ Still others pointed out that the decision would enable frivolous lawsuits and increase the perception of a litigious society.¹⁶ Yet perhaps the most obvious criticism was the court’s willingness to completely flout on-point legislation.¹⁷ Part II of this Casenote examines the background of the specific type of law at issue—dram shop liability—and also parses out the particular New Jersey statute involved. Part III provides an overview of the case *Voss v. Tranquilino* and briefly explores how other jurisdictions have settled the issue. Part IV analyzes the *Voss* court’s rationales and ultimately concludes that the court’s reasoning was seriously flawed. Finally, Part V explores the consequences of the decision and provides general suggestions for how to construct more effective dram shop acts.

II. DRAM SHOP LIABILITY BACKGROUND AND STATUTORY PROVISIONS

At common law, “a person who sold or gave liquor to an intoxicated adult drinker was not liable for subsequent injuries caused by his intoxication.”¹⁸ Yet as American society changed, becoming increasingly mobile and simultaneously less tolerant of irresponsible

10. *Id.* (quoting N.J. STAT. ANN. § 39:6A-4.5(b) (2003)).

11. *Id.* at 831.

12. *Voss v. Tranquilino*, 19 A.3d 470 (N.J. 2011). The prior citations come from the Superior Court, which provided an in-depth analysis of the facts, legal arguments, and legislative history. Since the New Jersey Supreme Court affirmed the Superior Court without adding or amending the lower court’s rationales, most of this Comment will cite to the Superior Court.

13. One of the more memorable images that emerged from the controversy was a cartoon of an angel and devil sitting on a troubled man’s shoulders, with the devil encouraging the man, “Have another brew!” The caption reads, “The Devil Made Me Do It!” and then in smaller letters states, “NJ Court: it’s the bartender’s fault, no personal responsibility here!” *New Jersey: “The Devil Made Me Do It” . . . High Court Rules Drunk Driver Who Wrecked Can Sue Bar Who Served Him Too Much*, DWI HIT PARADE! (June 9, 2011), <http://www.dwhitparade.com/tag/fredrick-voss/>.

14. *Public Weigh-In on Voss v. Tranquilino*, LAWSUIT REFORM WATCH (June 3, 2011), <http://www.lawsuitreformwatch.org/2011/06/public-weigh-in-on-voss-v-tranquilino.html>.

15. *Id.*

16. *Id.*

17. *Voss*, 19 A.3d at 472 (Albin, J., dissenting).

18. VICTOR E. SCHWARTZ ET AL., TORTS: CASES AND MATERIALS 359 (12th ed. 2010).

drinking and serving practices, legislatures recognized the need to amend the common law no-liability rule.¹⁹ Thus, the 19th century witnessed an onslaught of dram shop acts, or statutes that allowed a civil cause of action against any licensed establishment that over-served a patron who was thereafter responsible for injury due to his intoxication.²⁰ Subpart A explores the general background and history of dram shop acts, and Subpart B examines New Jersey's specific statute, which is generally indicative of other states' dram shop acts.

A. Background and History

A “dram” is a small unit of alcohol, usually whiskey or scotch.²¹ Thus, “dram shop” was a common term in the 19th century to refer to any establishment that sold alcohol for consumption on the premises.²² This broad definition included bars, restaurants, saloons, taverns, and any other licensed vendor.²³ Today, the term “dram shop” is generally only used in the context of dram shop liability, which was legislatures' way of abrogating common law's harsh no-recovery rule.²⁴ The common law approach reasoned that the drinker's consumption—not the dram shop's provision—of the intoxicating beverage was the sole and proximate cause of any resulting injury and therefore the dram shop could not be held liable.²⁵ Where the drinker himself was injured, common law's no-recovery rule was bolstered by basic tort principles such as assumption of the risk and contributory negligence.²⁶

Yet by the mid-1800s, with the Temperance Movement well underway, society and legislatures alike came to view dram shops and

19. Richard Smith, *A Comparative Analysis of Dramshop Liability and a Proposal for Uniform Legislation*, 25 J. CORP. L. 553, 555 (2000).

20. *Id.*

21. *Dram*, OXFORD DICTIONARIES, <http://oxforddictionaries.com/definition/dram?region=us> (last visited Mar. 1, 2012).

22. BLACK'S LAW DICTIONARY 342 (6th ed. 1991).

23. *See id.*

24. STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS § 9:82 (Supp. 2008–09) (“The dram shop statute was enacted to provide a recourse in an area where courts had refused to recognize a cause of action arising out of the furnishing of intoxicating beverages.”).

25. SCHWARTZ ET AL., *supra* note 18, at 359. In some instances, the common law rule of no liability was taken to the extreme. Indeed, one historian found that during the colonial period, dram shop owners could be fined for *refusing* to allow customers to drink as much as they wanted. BENSON BOBRICK, *ANGEL IN THE WHIRLWIND* 53 (Penguin 1998).

26. *See* Joel E. Smith, Annotation, *Liability of Persons Furnishing Intoxicating Liquor for Injury to or Death of Consumer, Outside Coverage of Civil Damages Acts*, 98 A.L.R. 3d 1230 (1980). Contributory negligence, an affirmative defense, arises where the plaintiff's conduct was “below the standard to which he is legally required to conform for his own protection and which is a contributing cause” to his injuries. BLACK'S LAW DICTIONARY 717 (6th ed. 1991).

alcohol in general with disdain.²⁷ Reformers argued that the common law no-recovery rule encouraged a culture of excessive drinking, which in turn contributed to the deterioration of the family unit and the nation's moral fiber.²⁸ In an effort to avoid this undesirable trajectory, legislatures passed the first dram shop acts.²⁹ Reflecting the social goals of the Temperance Movement, these early statutes provided causes of action for the limited class of spouses and children who were injured in person, property, or means of support in connection with negligent serving practices.³⁰ Although these types of negligence suits are commonplace in today's society, the first dram shop statutes marked a sea change in American jurisprudence because now dram shops had a statutorily-created duty to their patrons—a duty that had never before existed.³¹

States that resisted the initial wave of dram shop acts were again confronted with the issue throughout the 1970s and 1980s, when the popularity of dram shop acts underwent a wave of resurgence due largely to the prevalence of automobiles and the rise in drunk-driving related accidents.³² Advocating to abrogate the common law no-liability rule, one judge explained, “the basis upon which these [common law] cases were decided is sadly eroded by the shift from commingling alcohol and horses to commingling alcohol and horsepower.”³³ Indeed, courts and society alike were quick to recognize a vehicle in the hands of an intoxicated individual as “an instrument of danger.”³⁴ Elaborating on this theme, the Pennsylvania Supreme Court noted:

The person who would put into the hands of an obviously demented individual a firearm with which he shot an innocent third person would be amenable in damages to that third person for unlawful negligence. An intoxicated person behind the wheel of an automobile can be as dangerous as an insane person with a firearm.³⁵

27. Smith, *supra* note 19, at 555. As Smith explained, “the goal of the Temperance Movement was, after all, to banish demon rum because it was the nemesis of domestic life.” *Id.* at 565.

28. These early rationales supporting dram shop liability differ greatly from the rationales of today, which argue that the common law rule unfairly insulates commercial establishments from liability, thereby allowing establishments to earn a profit from over-serving without fear of being held socially and legally accountable.

29. Smith, *supra* note 19, at 555.

30. *Id.* at 555–56.

31. *See, e.g.,* Slager v. HWA Corp., 435 N.W.2d 349, 360 (Iowa 1989) (explaining that “dram shop statutes were created to fill a void left empty at common law”).

32. Smith, *supra* note 19, at 556.

33. Garcia v. Hargrove, 176 N.W.2d 566, 572 (Wis. 1970) (Hallows, C.J., dissenting), *overruled by* Sorensen v. Jarvis, 350 N.W.2d 108 (Wis. 1984).

34. Jardine v. Upper Darby Lodge No. 1973, 198 A.2d 550, 553 (Pa. 1964).

35. *Id.*

Yet like any new legislation, the dram shop acts were riddled with uncertainties and inconsistencies.³⁶ Recurring issues sprung up involving basic questions such as whether the dram shop acts provided the exclusive remedy for the injured individual, whether the acts ought to be construed narrowly or liberally, and most importantly for purposes of this Casenote, whether or not the intoxicated person himself could recover.³⁷ The answer to this latter question necessarily depended on the specific statute at issue.

B. New Jersey's Dram Shop Act

New Jersey was one of the later states to codify its dram shop act, which it finally enacted in 1987.³⁸ The act, formally called the “New Jersey Licensed Alcoholic Beverage Server Fair Liability Act,”³⁹ provides that it “shall be the exclusive civil remedy for personal injury or property damage resulting from the negligent service of alcoholic beverages by a licensed alcoholic beverage server.”⁴⁰ As is typical of other dram shop laws, the New Jersey law allows a person who sustains personal injury or property damage as a result of the negligent service of alcoholic beverages to recover damages from a licensed alcoholic beverage server only if the server was negligent, the injury was proximately caused by the negligent service of alcoholic beverages, and the injury was a foreseeable consequence of the negligent service.⁴¹ The legislature took care to define “negligent” as requiring a showing that the server served a *visibly* intoxicated person.⁴² States have tinkered with the definition of “visibly intoxicated,” such as by requiring proof that the person was so obviously intoxicated that, at the time of sale, he presented a clear danger to others.⁴³

36. Smith, *supra* note 19, at 556–57. Smith argues that dram shop laws of today are largely uniform, but this was not the case before the tort reform movement. Prior to the reform, it was often unclear when liability would attach under the dram shop laws. Compounding the uncertainties, in some cases the legislature imposed damage caps or outright returned to the common law rule of no liability.

37. For a brief overview of these issues, see generally SPEISER ET AL., *supra* note 24, § 9:86.

38. N.J. STAT. ANN. § 2A:22A-1 (West 1987). Recognizing the numerous uncertainties in dram shop laws discussed *supra* notes 36 and 37, the legislature proposed, “the incidence of liability should be more predictable. That predictability may be achieved by defining the limits of the civil liability of licensed alcoholic beverage servers in order to encourage the development and implementation of risk reduction techniques.” *Id.* § 2A:22A-2.

39. *Id.* § 2A:22A-1.

40. *Id.* § 2A:22A-4.

41. *Id.* § 2A:22A-5(a).

42. *Id.* § 2A:22A-5(b).

43. ARK. CODE ANN. § 16-126-104 (2005).

III. FOUR APPROACHES TO APPLYING DRAM SHOP LAWS TO THE VOLUNTARILY INTOXICATED INDIVIDUAL

Justice Brandeis' vision that the individual states would serve as laboratories and "try novel social and economic experiments without risk to the rest of the country"⁴⁴ was especially prophetic in the context of dram shop laws. Indeed, the states have truly resorted to federalist principles in an effort to tailor dram shop laws best suited to their specific populace.⁴⁵ The most extensive dram shop laws cover a wide variety of issues, including service to minors, social host liability, and recovery for noneconomic damages like loss of consortium.⁴⁶ Despite the interesting aspects each of these issues raises, this Casenote focuses only on the issue posed in *Voss v. Tranquilino*; that is, should the driver who pleads guilty to driving while intoxicated be able to bring a dram shop action against the establishment that served him? The *Voss* case answered this question affirmatively, and this Part examines each of the three rationales the court presented. In addition, this Part examines state supreme court decisions that have arrived at the opposite conclusion. This Part will also provide a brief overview of jurisdictions that have provided an intermediate option and those that have denied recovery entirely—regardless of the plaintiff's level of intoxication.

A. Allowing the Voluntarily Intoxicated Individual to Bring a Dram Shop Action: New Jersey's Voss v. Tranquilino

In *Voss*, had New Jersey's Dram Shop Act been the only relevant legislation, the court's determination that the drunk driver could recover from the bar would be well-founded.⁴⁷ This is due to the fact that the Dram Shop Act, as written in 1987, did not specifically limit recovery to third parties only.⁴⁸ In defining a person who may recover under the statute, the legislature was extremely broad, allowing the definition to include, "a natural person, the estate of a natural person, an association of natural persons, or an association, trust company, partnership,

44. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

45. The expansive differences among state statutes have led one commentator to dub this field of law, "a bewildering chiaroscuro. Any attempt at a sweeping generality would be totally unwarranted." SPEISER ET AL., *supra* note 24, § 9:86.

46. See, e.g., ME. REV. STAT. tit. 28-A, § 2504 (1987) (which covers various issues not limited to who may bring suit, definitions of negligent and reckless service, damages, limits on damages, and common law defenses).

47. See N.J. STAT. ANN. § 2A:22A-1-7 (1987). On its face, the statute says nothing about barring a voluntarily intoxicated patron from bringing an action against the establishment that over-served him.

48. *Voss v. Tranquilino*, 992 A.2d 829, 834 (N.J. Super. Ct. App. Div. 2010) (finding that "dram shop claims by drunk drivers are . . . encompassed by the plain terms of the Dram Shop Act").

corporation, organization, or the manager, agent, servant, officer or employee of any of them.”⁴⁹ The legislature could have defined person to refer to the person *of another* (thereby making clear that only third parties could recover), but it failed to do so. Thus, had the *Voss* court been confronted with this statute only, the decision allowing Voss to recover would be disturbing to some, but logically sound.

However, legislation does not exist in a vacuum; it must co-exist with other related statutes.⁵⁰ In *Voss*, this meant that the New Jersey Supreme Court had to read the Dram Shop Act alongside N.J.S.A. 39:6A-4.5(b).⁵¹ Enacted ten years after the state’s Dram Shop Act, this statute provided that a driver who is convicted of or pleads guilty to driving a vehicle while intoxicated⁵² “shall have no cause of action for recovery of economic or noneconomic loss sustained as a result of the accident.”⁵³ The language used here could not be more explicit: the legislature used the command “shall” instead of the more permissive “may.”⁵⁴ Thus, reading this statute with the Dram Shop Act, it appears as though N.J.S.A. 39:6A-4.5(b) was intended to prohibit drunk drivers from recovering under the Dram Shop Act.⁵⁵ Even the *Voss* court conceded, “a literal reading of the statute suggests that all claims [brought by a drunk driver] are barred . . .”⁵⁶ Despite this admission, the *Voss* court “reach[ed] a contrary conclusion.”⁵⁷

The appellate court’s analysis first delved into the legislative history surrounding the earlier of the two relevant statutes, the Dram Shop Act.⁵⁸ As originally written, the act contained a provision that expressly stated, “[a] person who becomes intoxicated and sustains personal injury or property damage as a result of his actions while intoxicated shall be prohibited from instituting a civil action for damages against a licensed

49. N.J. STAT. ANN. § 2A:22A-3 (1987).

50. See, e.g., *In re DeMarco*, 414 A.2d 1339, 1345 (N.J. 1980) (where the Supreme Court of New Jersey stated that examining a statute “includes not simply the language of the provision itself, but related provisions as well, and especially the reality to which the provision is to be applied”). The United States Supreme Court has also endorsed this rule of statutory construction. See, e.g., *Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87 (1995).

51. N.J. STAT. ANN. § 39:6A-4.5(b) (2003).

52. New Jersey’s DWI provision is codified in N.J. STAT. ANN. § 39:4-50 (2010).

53. N.J. STAT. ANN. § 39:6A-4.5(b) (2003).

54. See, e.g., *Harvey v. Bd. of Chosen Freeholders of Essex Cnty.*, 153 A.2d 10, 16 (N.J. 1959) (where the Supreme Court of New Jersey stated, “the word ‘may’ is ordinarily permissive or directory, and the words ‘must’ and ‘shall’ are generally mandatory”).

55. See, e.g., *Caviglia v. Royal Tours of Am.*, 842 A.2d 125, 133 (N.J. 2004). Here, the New Jersey Supreme Court cited to N.J.S.A. 39:6A-4.5(b) when it stated, “a motorist may not pursue a personal injury action if he was intoxicated at the time of the accident.”

56. *Voss v. Tranquilino*, 992 A.2d 829, 831 (N.J. Super. Ct. App. Div. 2010).

57. *Id.*

58. *Id.* at 832–33.

alcoholic beverage server.”⁵⁹ The court went on to explain that then-Governor Kean objected to this provision, finding that it eviscerated the licensed server’s duty to patrons.⁶⁰ Complying with the Governor’s conditional veto, the legislature deleted the provision.⁶¹ In light of this history, the *Voss* court correctly pointed out that the original Dram Shop Act was intended to allow the drunk driver himself to recover.⁶²

After exploring the history and applicability of the original Dram Shop Act, the appellate court had to decide its first conclusion of law: whether the legislation that came ten years later, N.J.S.A. 39:6A-4.5(b), barred drunk drivers from bringing Dram Shop Act claims.⁶³ Turning again to the legislative history, the court noted that N.J.S.A. 39:6A-4.5(b) was part of a larger legislative effort to reduce automobile insurance premiums.⁶⁴ Specifically, “the Act was designed to address ‘various aspects concerning enforcement against insurance fraud’”⁶⁵ The legislature’s theory was that by reducing the instances of insurance fraud, automobile insurance premiums would also fall, thereby saving New Jersey drivers \$150 million per year in rate increases.⁶⁶ Although one does not typically associate drunk driving with insurance fraud, the legislature reasoned that prohibiting drunk drivers from recovering economic or noneconomic losses fits into the larger scheme of reducing insurance premiums.⁶⁷ Because of the insurance-based focus of N.J.S.A. 39:6A-4.5(b), the *Voss* court determined that the statute’s scope should be limited as such.⁶⁸ Had the legislature intended the insurance premium legislation to amend the Dram Shop Act as a secondary purpose, this intent would have been apparent from the legislative history.⁶⁹ Yet because the legislative history revealed no such intent, the *Voss* court declined to amend

59. *Id.* at 833.

60. *Id.* at 834.

61. *Id.*

62. *Id.* The court’s reasoning follows a principle of statutory construction referred to as *expressio unius est exclusio alterius*, meaning the expression of one thing is the exclusion of others. BLACK’S LAW DICTIONARY 403 (6th ed. 1991). Since the statute specifically outlined when a person was prohibited from recovering, *only* those situations would bar recovery. Other factual situations, not contemplated by the statute, would not prevent one from recovering.

63. *Voss*, 992 A.2d at 834.

64. *Id.* at 835.

65. *Camp v. Lummino*, 800 A.2d 234, 236 (N.J. Super. Ct. App. Div. 2002) (quoting the statement to the bill (S.2223)).

66. *Id.*

67. *Id.* The court explained that the statute is “related to the ongoing endeavor in this State to reduce automobile insurance fraud *and* the cost of automobile insurance.” *Id.* (emphasis added). Use of the word “and” suggests the statute was not limited to targeting insurance fraud exclusively.

68. *Voss v. Tranquilino*, 992 A.2d 829, 831 (N.J. Super. Ct. App. Div. 2010).

69. *Id.* at 835 (“We find no evidence of legislative intent in the enactment of N.J.S.A. 39:6A-4.5(b) to undo a major aspect of the Dram Shop Act.”).

judicially what the legislature had failed to amend explicitly.⁷⁰

This latter point regarding the court's proper role in the scheme of checks and balances bleeds into the court's next argument regarding statutory construction. The opinion operates under the tacit acknowledgement that the judiciary is the "honest agent"⁷¹ of the legislature; that is, the judiciary carries out the laws—it generally does not make or abolish them.⁷² For this reason, courts are reluctant to repeal legislation by implication.⁷³ The hesitancy derives from the assumption that if lawmakers intended to repeal a statute, they would do so *explicitly* instead of waiting for courts to notice and interpret the implied repealer.⁷⁴ Judicially-mandated implied repealers also run a high risk of mistake: the legislature may not have intended the law to be repealed, believing instead that the law was compatible with other laws.⁷⁵ Noting these dangers and the general disruption to the overall governmental system, the *Voss* court explained that implied repealers "require clear and compelling evidence of the legislative intent, and such intent must be free from reasonable doubt."⁷⁶ Imposing the reasonable doubt standard—the highest standard afforded in the judicial system—bars almost all implied repealers—the *Voss* case was no different. The court scoured the legislative history, record of the testimony, and appendices of the public hearing on the bill, but to no avail.⁷⁷ The search failed to yield any reference to amending New Jersey's Dram Shop Act, thereby precluding the argument of repeal by implication.⁷⁸

The last argument in the *Voss* court's trifecta rationale was perhaps the most surprising: public policy considerations.⁷⁹ Admittedly, the average person does not consider allowing a drunk driver to profit from his criminal activity as a pressing public issue (or an area of concern at

70. *Id.*

71. Karen Petroski, Comment, *Re theorizing the Presumption Against Implied Repeals*, 92 CALIF. L. REV. 487, 491 (2004).

72. *Voss*, 992 A.2d at 834–35.

73. *Id.* at 835 ("[T]here is a strong presumption against implied repealers and every reasonable construction should be applied to avoid them.").

74. *See, e.g.*, Petroski, *supra* note 71, at 489 ("[T]he presumption against implied repeals . . . embodies a policy of hostility to the notion of statutory updating unless the legislature makes that updating explicit.").

75. *Id.* at 492 (explaining that the presumption against implied repealers "proposes that legislatures neither (1) intend to create inconsistencies in the statutory scheme nor (2) intend their enactments to have unforeseen effects on other parts of the statutory scheme.").

76. *Voss*, 992 A.2d at 834 (quoting *Twp. Of Mahwah v. Bergen Cnty. Bd. of Taxation*, 486 A.2d 818 (N.J. 1985)).

77. *Id.* at 835.

78. *Id.*

79. *Id.* at 836.

all, for that matter), but the *Voss* court's understanding of public policy was not so limited as considering only the drunk driver's ability to recover. Instead, the court broadened the parameters and considered the responsibility of the serving establishments.⁸⁰ Barring *Voss* from recovering from the restaurant that negligently over-served him would be the equivalent of "immunizing liquor licensees from liability."⁸¹ Such a policy, the court explained, "would be inimical to the policy of this State of curbing drunk driving."⁸² Thus, the court's reasoning recognized that reducing the incidents of drunk driving is necessarily related to placing some responsibility on the serving establishment, which possesses the expertise related to proper serving practices.⁸³

B. The Majority Approach: Reserving Dram Shop Actions for Third Parties

Although not the first decision of its kind,⁸⁴ *Voss v. Tranquilino* is an anomaly in an age where the modern trend in most jurisdictions is to bar the drunk driver from bringing suit against the establishment that served him.⁸⁵ Some states have this approach explicitly spelled out by statute. For example, Colorado law provides: "No civil action may be brought pursuant to this subsection . . . by the person to whom the alcohol beverage was sold or served or by his or her estate, legal guardian, or dependent."⁸⁶ Idaho goes one step further, barring from recovery the intoxicated individual and his estate as well as any passenger in a vehicle driven by the intoxicated individual.⁸⁷

In other jurisdictions, the dram shop acts are not as clear, thereby leaving state courts of last resort to decide the issue. In *Klever v. Canton Sachsenheim*, the Supreme Court of Ohio was asked to interpret

80. *Id.* The decision to hold the driver or the serving establishment liable raises a chicken-or-egg problem, since holding the establishment liable does not deter one from drinking *ex ante*. Yet the counterargument is that *ex post* dram shop liability will encourage responsible serving techniques to those who are going to drink anyway. This argument was discussed by the Supreme Court of Ohio in *Smith v. 10th Inning, Inc.*, 551 N.E.2d 1296 (Ohio 1990).

81. *Voss*, 992 A.2d at 831.

82. *Id.*

83. *Id.* at 836.

84. *See, e.g.*, *Smith v. Sewell*, 858 S.W.2d 350 (Tex. 1993) (holding that an individual who is provided, sold, or served alcoholic beverages in violation of the Alcoholic Beverage Code and injures himself may assert a cause of action against the provider). *See also* IND. CODE § 7.1-5-10-15.5 (1996) (specifically granting recovery to a person whose death or injury is caused by his voluntary intoxication if certain conditions are met).

85. *See, e.g.*, *Smith*, *supra* note 19, at 563-64 ("[T]he clear majority rule among states that recognize dramshop actions is that an adult customer may not recover from a negligent dramshop for injuries caused by the customer's own intoxication.").

86. COLO. REV. STAT. § 12-47-801(3)(b) (2007).

87. IDAHO CODE ANN. § 23-808(4)(a)(b) (1986).

O.R.C. § 4399.18, entitled, “[l]iability for acts of intoxicated person.”⁸⁸ The statute provided that “a person” has a cause of action against the serving establishment for damage “caused by the negligent actions of an intoxicated person”⁸⁹ The unfortunate facts of the case involved a 19-year-old motorist who was killed in a single-car accident after he had been drinking at a wedding reception.⁹⁰ The decedent’s mother brought an action against the club hosting the reception, but the Supreme Court of Ohio held that no cause of action existed.⁹¹ As the court explained, “the phrasing and structure of R.C. 4399.18 do not countenance a reading that allows the contemplated ‘intoxicated person’ (the person causing the injury) to be one and the same with the contemplated injured ‘person’ (the person with the authorized cause of action).”⁹²

Besides relying on statutory construction, the Supreme Court of Ohio justified its decision by using one of the same rationales the *Voss* court applied, although to reach a completely contrary result. Both courts claimed that their decision was supported by basic public policy considerations, yet the *Klever* court understood these considerations as intended to protect third parties, not the drinker himself.⁹³ Thus, like other statutorily-defined duties that create no duty of conduct toward the plaintiff, “the evident policy of the legislature is to protect only a limited class of individuals.”⁹⁴ The court further justified this approach by explaining that because dram shop acts abrogate the common law, they must be narrowly construed.⁹⁵

Interestingly, the Supreme Court of Ohio denied recovery even though the intoxicated individual was an underage adult.⁹⁶ Traditionally, minors were the exception to the rule that a voluntarily intoxicated individual could not recover against the establishment that served him.⁹⁷ Dram shop laws afforded minors this added protection under the theory that their youth and inexperience prevented them from

88. *Klever v. Canton Sachsenheim, Inc.*, 715 N.E.2d 536 (Ohio 1999).

89. OHIO REV. CODE ANN. § 4399.18 (West 2004).

90. *Klever*, 715 N.E.2d at 537.

91. *Id.* at 538. The court’s decision reaffirmed the approach that the lower courts had already been applying. *See, e.g.*, *Kemock v. Mark II*, 404 N.E.2d 766 (Ohio Ct. App. 1978); *Tome v. Berea Pewter Bug, Inc.*, 446 N.E.2d 848 (Ohio Ct. App. 1982) (both denying the intoxicated person or his estate from recovering).

92. *Klever*, 715 N.E.2d at 538–39.

93. *Id.* at 539.

94. *Id.* (quoting WILLIAM LLOYD PROSSER ET AL., PROSSER & KEETON ON TORTS § 36 (5th ed. 1984)).

95. *Id.* at 538.

96. *Id.* The court referred to the decedent as “an underage adult” instead of a “minor” because he had attained the age of majority (18), but not the legal drinking age (21).

97. Smith, *supra* note 19, at 564.

understanding the debilitating effects of alcohol.⁹⁸ Despite this rationale, the Supreme Court of Ohio departed from the special standard, concluding, “an underage adult who is served alcohol by a liquor permit holder is legally indistinguishable from [any other] adult.”⁹⁹ Even though the court’s position seemed to defy the trend to protect minors, the court cited to several other jurisdictions that similarly decided to bar minors and underage adults from recovering against the establishments that illegally served them.¹⁰⁰ These decisions reveal that jurisdictions are increasingly moving toward zero-tolerance policies with respect to self-inflicted intoxication followed by injuries.¹⁰¹ The fact that the drinker is underage is irrelevant in jurisdictions that view blamelessness as a prerequisite to recovery in any judicial proceeding.

C. An Intermediate Approach

Besides the diametrically opposed approaches of the Supreme Courts of New Jersey and Ohio, some courts have applied an intermediate approach. This compromise does not allow a surviving drunk driver to bring suit against the serving establishment, but in the case of death, the decedent’s family may recover for loss of support.¹⁰² In *Jones v. Fisher*, a widow brought suit against the driver who hit and killed her husband, an intoxicated pedestrian.¹⁰³ Pursuant to Minnesota’s dram shop act, the widow also sued the American Legion and VFW bars that had served her husband.¹⁰⁴ The bars argued that because Minnesota law barred a voluntarily intoxicated individual from bringing a dram shop action, the spouse of a voluntarily intoxicated decedent should similarly be barred from bringing such an action.¹⁰⁵ The Supreme Court of Minnesota disagreed: “Although one who voluntarily becomes intoxicated cannot recover for his own injury under the Dram Shop Act, a spouse may recover for loss of support under that act notwithstanding the injured party’s or decedent’s voluntary intoxication.”¹⁰⁶ The court explained its

98. *Id.* (explaining that whereas an able-bodied adult is assumed to understand the risk that voluntary-intoxication poses, “Congress and the state legislatures have already made the judgment that minors are incompetent to make decisions about their alcohol consumption”).

99. *Klever*, 715 N.E.2d at 538.

100. *Id.* at 539.

101. The Supreme Court of Ohio cited to *LaGuire v. Kain*, 487 N.W.2d 389 (Mich. 1992); *Nutting v. Zieser*, 482 N.W.2d 424 (Iowa 1992); *Randall v. Excelsior*, 103 N.W.2d 131 (Minn. 1960).

102. *See Jones v. Fisher*, 309 N.W.2d 726 (Minn. 1981).

103. *Id.* at 727.

104. *Id.*

105. *Id.* at 729.

106. *Id.* at 728 (internal citations omitted).

rationale by equating the spouse to an “innocent third party.”¹⁰⁷ Framing the issue this way precluded the interpretation that the drinker was benefiting from his own drunkenness. This intermediate approach allows a broader class of individuals to recover under a dram shop action, but still requires the individual to meet a minimum threshold of third party innocence.¹⁰⁸

D. Jurisdictions that Refuse to Pass Dram Shop Acts

Finally, a few jurisdictions have resisted enacting any type of dram shop act at all.¹⁰⁹ These few states can generally be divided into two categories. The first consists of those that continue to follow the common law rule of no-recovery whatsoever. *Williamson v. Old Brogue, Inc.* involved allegations that bartenders at The Old Brogue served “prodigious quantities of alcohol” to a patron who then drove his vehicle across the centerline, colliding head-on with the plaintiff’s vehicle.¹¹⁰ In the ensuing litigation, the plaintiff argued that even though the General Assembly of Virginia had not adopted any type of dram shop legislation, the principles of such an action were rooted in Virginia common law, thus creating a cause of action.¹¹¹ Additionally, the plaintiff argued that since selling alcohol to a visibly intoxicated individual constituted a misdemeanor, this fact gave rise to a claim of negligence per se.¹¹² The Supreme Court of Virginia rejected both arguments.¹¹³ Regarding the common law claim, the court reminded the plaintiff that at common law, non-liability was the norm.¹¹⁴ Thus, until the legislature deliberately amends the common law approach, the court stated that it would continue to employ principles of non-liability.¹¹⁵

107. *Id.* at 729. The court’s repeated use of the phrase “innocent third party” might be understood as a preemptive rebuttal were the defendant to raise the defense of the non-innocent party doctrine. Applying this doctrine, courts have barred from recovery the intoxicated person as well as those who contribute to or encourage his intoxication. Non-innocent conduct can be as innocuous as buying a round for the intoxicated individual. *See, e.g., Goss v. Richmond*, 381 N.W.2d 776 (Mich. Ct. App. 1985).

108. *Id.* at 728–29 (again referring to Mrs. Jones as an “innocent third party”).

109. *See, e.g., Shea v. Matassa*, 918 A.2d 1090 (Del. 2007); *Ono v. Applegate*, 612 P.2d 533 (Haw. 1980) (but allowing common law dram shop actions); *Ling v. Jan’s Liquors*, 703 P.2d 731 (Kan. 1985); *Felder v. Butler*, 438 A.2d 494 (Md. 1981); *Pelzek v. Am. Legion*, 463 N.W.2d 321 (Neb. 1990); *Rodriguez v. Primadonna Co., LLC*, 216 P.3d 793 (Nev. 2009); S.D. CODIFIED LAWS § 35-11-1 (1985); *Williamson v. Old Brogue, Inc.*, 350 S.E.2d 621, 622 (Va. 1986); *Estate of Kelly ex rel. Kelly v. Falin*, 896 P.2d 1245 (Wash. 1995) (en banc).

110. *Williamson*, 350 S.E.2d at 622.

111. *Id.* at 623.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* (“The courts in Virginia operate under a statutory mandate which provides that the

Regarding the negligence per se argument, the court found that this argument only has force if the plaintiff is within the class that the statute was intended to protect.¹¹⁶ Because the misdemeanor of serving a visibly intoxicated person was meant to promote *individual* moderation, the third party was not within the class to be protected and therefore could not recover under this theory either.¹¹⁷ The Virginia approach initially appears unfairly harsh to innocent third parties, but these parties are not without a remedy. They can—as was the case in *Old Brogue*—sue the drunk driver himself, though this solution presupposes that the driver is solvent.

The second category of jurisdictions that lack dram shop actions still allows recovery under normal negligence principles. Hawaii is representative of this approach, refusing to pass dram shop legislation, but nonetheless allowing third parties to recover from the establishment in certain circumstances.¹¹⁸ Explaining the rationale for changing its approach, the Supreme Court of Hawaii stated that it was “persuaded by public policy reflecting a clear judicial trend across the nation to allow such a cause of action.”¹¹⁹ Thus, the court held that Hawaii’s liquor control statute created a duty on establishments not to serve an intoxicated person.¹²⁰ Violation of the statute could then be submitted to the jury as evidence of negligence.¹²¹ In subsequent cases, the Supreme Court of Hawaii clarified that the privilege of a common law dram shop action is not afforded to self-induced intoxication.¹²²

IV. *VOSS v. TRANQUILINO*: BAD LAW AND WORSE PUBLIC POLICY

As the foregoing Part reveals, the field of dram shop liability provides an ample opportunity for states to experiment with different laws that are attuned to the special needs of the specific citizenry. In the course of the experimentation process, it becomes clear that some approaches are better than others. This Part argues that the *Voss* approach is an aberration in traditional dram shop liability and should not be followed

common law of England, if not repugnant to the principles of the Bill of Rights or the Virginia Constitution, continues in full force and effect within the State, and shall ‘be the rule of decision, except as altered by the General Assembly.’”).

116. *Id.* at 624.

117. *Id.* at 625.

118. *See, e.g.*, *Ono v. Applegate*, 612 P.2d 533 (Haw. 1980).

119. *Winters v. Silver Fox Bar*, 797 P.2d 51, 52 (Haw. 1990).

120. *Ono*, 612 P.2d at 539.

121. *Id.*

122. *Winters*, 797 P.2d at 52–53. In *Klever v. Canton Sachsenheim, Inc.*, 715 N.E.2d 536, 540 (Ohio 1999), the Supreme Court of Ohio cited to *Winters* to support the proposition that voluntarily intoxicated individuals should not be able to recover for self-inflicted injuries—whether or not the jurisdiction has a dram shop act.

by other states due to its fundamentally unsound rationales and glaring logic gaps. This Part explores in turn each of the court's three arguments.

A. Inadequate Insurance Premiums Argument

The *Voss* court conclusively determined that the purpose of enacting the legislation containing N.J.S.A. 39:6A-4.5(b) was to bring down automobile insurance premiums.¹²³ The court described the laborious endeavor it undertook to support this assertion: analyzing the legislative history, reviewing the complete record of the testimony and appendices of the public hearing on the bill, and unearthing prior drafts of the legislation.¹²⁴ Amidst these various means of legislative interpretation, the court failed to implement two of the most obvious tools: the text itself and common sense.

The starting point for any statutory interpretation is the plain language of the statute itself.¹²⁵ Had the *Voss* court focused more on the text of the *specific* statute, instead of the history surrounding the larger legislative effort of Chapter 6A, the court would have realized that N.J.S.A. 39:6A-4.5(b) only marginally affects insurance premiums.¹²⁶ The statute provides that a driver of a motor vehicle who is convicted of or pleads guilty to driving while intoxicated in connection with an accident “shall have no cause of action for recovery of economic or noneconomic loss sustained as a result of the accident.”¹²⁷ On its face, this provision has nothing to do with insurance premiums.¹²⁸ After all, New Jersey insurance premiums were skyrocketing due to the prevalence of insurance fraud, not due to the number of drunk driving accidents.¹²⁹ There is an argument that barring drunk drivers from recovery may reduce the total number of insurance claims and thereby contribute to lower insurance premiums, but this argument is attenuated at best and overlooks the targeted subjects of the provision. Indeed, the provision applies exclusively to drunk drivers without regard to their

123. *Voss v. Tranquilino*, 992 A.2d 829, 835 (N.J. Super. Ct. App. Div. 2010).

124. *See id.*

125. *Patel v. N.J. Motor Vehicle Comm'n*, 982 A.2d 445, 448 (N.J. 2009).

126. *See, e.g., Craig J. Casey, 19 Reasons Why Car Insurance Premiums Increase*, 4 CAR INS. QUOTES, <http://www.4carinsurancequotes.com/premium-increases.htm> (last visited Apr. 23, 2012). Of the numerous listed reasons, the majority involve non-liability and non-criminal incidents, such as turning 50 years old, adding a minor to the policy, or moving to a high-risk area. A handful of reasons cite car accidents and law violations as contributing factors, but none directly identifies drunk driving as a source of statewide increases in premiums.

127. N.J. STAT. ANN. § 39:6A-4.5(b) (2003).

128. *See id.*

129. *Camp v. Lummino*, 800 A.2d 234, 236 (N.J. Super. Ct. App. Div. 2002).

insurance coverage.¹³⁰ As the dissent pointed out, “It makes no difference whether the drunk driver has liability insurance to the highest possible limits.”¹³¹ Thus, since the provision identifies a specific class of law-breakers and applies indiscriminately to that class, N.J.S.A. 39:6A-4.5(b) is best understood as targeted legislation that serves the primary purpose of advancing the social policy of deterring drunk driving.¹³²

As the *Voss* dissent explains, N.J.S.A. 39:6A-4.5(b) accomplishes its social agenda by barring a drunk driver from suing another person or entity for any loss resulting from the accident—even if the drunk driver was not at fault.¹³³ Thus, if a drunk driver is rear-ended by a garbage truck while waiting patiently at a red light, the statute prohibits the drunk driver from recovering.¹³⁴ The effect is obvious: by prohibiting any reimbursement, N.J.S.A. 39:6A-4.5(b) functions as a strong disincentive to drink and drive—regardless of whether or not the driver has liability insurance.¹³⁵ In this way, the specific provision only marginally serves the purpose of reducing insurance premiums and is better characterized as a codification of the societal disapproval of drunk driving.¹³⁶

B. Posing a Problem for Statutory Interpretation

While masquerading as a judicial effort to loyally adhere to legislative intent, the *Voss* decision completely flouted the legislature’s will and improperly delved into an area outside the province of the courts. These unorthodox tactics will have a disturbing effect for statutory interpretation because now no statute—no matter how plainly written—will be free from judicial second-guessing and rewriting.

The *Voss* court conceded, “[A] literal reading of the statute suggests that all claims [brought by a drunk driver] are barred.”¹³⁷ Indeed, the plain language of N.J.S.A. 39:6A-4.5(b) provides that a driver convicted of DWI “shall have *no* cause of action for recovery.”¹³⁸ Due to this

130. See N.J. STAT. ANN. § 39:6A-4.5(b).

131. *Voss v. Tranquilino*, 19 A.3d 470, 473 (N.J. 2011) (Albin, J., dissenting).

132. *Id.* The dissent cited to *Caviglia v. Royal Tours of Am.*, 842 A.2d 125 (N.J. 2004), where the Supreme Court of New Jersey had previously found that the undergirding of N.J.S.A. 39:6A-4.5(b) “is to deter drunk driving.” The majority failed to analyze this case.

133. *Voss*, 19 A.3d at 473.

134. *Id.* at 474–75.

135. *Id.* at 473.

136. In an age of legislative bundling, the practice of including seemingly unrelated provisions in one bill is not uncommon.

137. *Voss*, 19 A.3d at 474.

138. N.J. STAT. ANN. § 39:6A-4.5(b) (2003) (emphasis added).

unambiguous language, the *Voss* court did not even need to consider the argument that N.J.S.A. 39:6A-4.5(b) repealed the earlier Dram Shop Act by *implication*. Instead, the court should have found that the Dram Shop Act—as relating to drunk drivers—was repealed *explicitly*. Upon this realization, the court’s analysis should have ceased—it did not even need to delve into the murky waters of legislative history or speculate as to the actual intent of the legislature. The dissent elaborated on this cardinal rule of statutory construction: “We cannot, and should not, ‘rewrite a plainly-written enactment of the Legislature’ or ‘write an additional qualification which the Legislature pointedly omitted.’”¹³⁹ The approach of deferring to the text itself when clearly written is more plausible than the court’s contention that “even apparently plain words must be read in context.”¹⁴⁰ Here, a literal reading of the statute was possible, and thus the court had a duty to give effect to that literal interpretation. To do otherwise elevates the judiciary over the legislature, thereby defying the scheme of co-equal branches of government.

Indeed, when the judiciary begins to question the wisdom of a given piece of legislation, the delicate separation of powers system descends into grave peril. Whereas the *Voss* majority relied on a similar argument to avoid repealing legislation by implication, the *Voss* dissent employed—more convincingly—this checks and balances argument to support the conclusion that N.J.S.A. 39:6A-4.5(b) barred *Voss* from bringing a dram shop action. Since the language was “clear and unambiguous,” the court’s only duty was to give effect to the legislation.¹⁴¹ This is true “however imperfect or misguided the statute may seem to the majority as written.”¹⁴² Such is the foundational nature of our system of governance: the legislature writes the laws and the judiciary interprets them. Yet the majority in *Voss* defied this tested method by rewriting an unambiguous statute “under the dubious assumption that the Legislature did not mean what it said.”¹⁴³ The *Voss* court had the audacity to speculate, “a literal reading [of N.J.S.A. 39:6A-4.5(b)] would be contrary to the meaning intended by the legislature.”¹⁴⁴ This second-guessing approach to statutory construction is problematic for several reasons, including the fact that it assumes that the legislature—whose task it is to write the laws—suffers from an inability

139. *Voss*, 19 A.3d at 474 (N.J. 2011) (Albin, J., dissenting) (quoting *Mazzacano v. Estate of Kinnerman*, 962 A.2d 1103 (N.J. 2009)).

140. *Voss v. Tranquilino*, 992 A.2d 829, 836 (N.J. Super. Ct. App. Div. 2010).

141. *Voss*, 19 A.3d at 472 (Albin, J., dissenting).

142. *Id.*

143. *Id.*

144. *Voss*, 992 A.2d at 836.

to articulate its intent. Only through the patient interpretation of the benevolent judiciary can the legislature's true intent be discerned. Such an approach ignores the fact that the three branches of government are equal and the judiciary was not intended to lord over the legislature and rewrite facially unambiguous legislation. Yet this is the very effect of the *Voss* decision.

Another problem with the *Voss* approach is that it overlooks the rule in statutory construction that the legislature is assumed to have knowledge of all previously enacted legislation.¹⁴⁵ Accordingly, the legislature that enacted N.J.S.A. 39:6A-4.5(b) is presumed to know of and understand the effects on the earlier dram shop legislation.¹⁴⁶ Under this line of reasoning, the legislature is assumed to know that it was altering the entire Dram Shop Act: "if the legislature intended to carve out cases arising under the Dram Shop Act, it knew how to do so."¹⁴⁷ This is the obvious counterargument to the majority's assertion that since N.J.S.A. 39:6A-4.5(b) failed to mention how it changed the Dram Shop Act, it must not have been intended to have such an effect. The majority's argument also loses force when one considers that N.J.S.A. 39:6A-4.5(b) came only ten years after enactment of the Dram Shop Act. No doubt many of the same legislators who passed the Dram Shop Act were still in the General Assembly or Senate when they voted on N.J.S.A. 39:6A-4.5(b). Thus, the closeness in time, combined with the presumption that legislators are aware of previously-enacted bills, lead to the conclusion that the *Voss* dissent advanced the better argument in finding that N.J.S.A. 39:6A-4.5(b) was clearly meant to repeal the Dram Shop Act as it relates to drunk drivers.

Perhaps the most unsettling aspect of the *Voss* court's approach to statutory construction is that it marks the judiciary's systematic willingness to blatantly disregard the plain text of N.J.S.A. 39:6A-4.5(b).¹⁴⁸ In *Camp v. Lummino*, the underage plaintiff—just like *Voss*—pled guilty to driving while intoxicated, but still proceeded to bring suit against the social hosts that had served him after he was injured in a single-vehicle accident.¹⁴⁹ Rather than citing to the text of N.J.S.A. 39:6A-4.5(b) and dismissing the plaintiff's complaint, the Superior Court allowed the suit to go forward, explaining that the legislative

145. See, e.g., *State v. Federanko*, 139 A.2d 30, 36 (N.J. 1958) ("[T]he Legislature is presumed to be familiar with its own enactments, with judicial declarations relating to them, and to have passed or preserved cognate laws with the intention that they be construed to serve a useful and consistent purpose.").

146. *Voss*, 19 A.3d at 474 (Albin, J., dissenting).

147. *Id.*

148. See, e.g., *Camp v. Lummino*, 800 A.2d 234 (N.J. Super. Ct. App. Div. 2002); *Walcott v. Allstate N.J. Ins. Co.*, 870 A.2d 691 (N.J. Super. Ct. App. Div. 2005).

149. *Camp*, 800 A.2d at 416.

history surrounding the statute “cannot be understood to affect the right of a driver who is under the legal drinking age.”¹⁵⁰ Similarly, in *Walcott*, a plaintiff who had pled guilty to driving while intoxicated brought an action against her insurance company after it refused to cover her medical expenses amounting to \$33,472.17.¹⁵¹ The insurance company argued that since the plaintiff had pled guilty to DWI, she was ineligible to receive any compensation under N.J.S.A. 39:6A-4.5(b).¹⁵² As in *Camp*, the *Walcott* court found “no basis in the statutory scheme or legislative history to apply Section 4.5’s bar to the recovery by drunk drivers of economic and non-economic losses to PIP [personal injury protection] benefits as well.”¹⁵³ In the wake of *Camp*, *Walcott*, and *Voss I*, one commentator noted, “it became questionable whether Section 4.5(b) would ever be an effective defense to bar liability in any context outside of the motor vehicle arena.”¹⁵⁴ This question was definitely answered in the negative after the Supreme Court of New Jersey affirmed the lower court’s decision in *Voss*¹⁵⁵ even though the plain text of N.J.S.A. 39:6A-4.5(b) does not limit its application to the motor vehicle arena, but explicitly says the drunk driver shall have “no” cause of action.¹⁵⁶

By declining to follow the plain text of the statute, the *Voss* decision creates an uncertain future for cases involving any amount of statutory interpretation. Now, even if the statute is clear on its face, courts will be able to cite *Voss* and claim that “a literal reading [of the statute] would be contrary to the meaning intended by the Legislature.”¹⁵⁷ Such an approach defies common sense, creates a world of unpredictability, and bestows upon the judiciary undeserved power at the expense of the legislature.

C. Distorting Public Policy

The *Voss* court lauded its decision as one “bolstered by a public policy consideration” of discouraging drunk driving.¹⁵⁸ Indeed, in recent years, the issue has garnered increased attention as powerful lobbying groups like Mothers Against Drunk Driving have raised

150. *Id.* at 418.

151. *Walcott*, 870 A.2d at 692.

152. *Id.*

153. *Id.* at 695.

154. Robert A. Diehl, *N.J. Court to Mull Drunken Drivers’ Standing to Bring Dram Shop Claims*, N.J. L.J., Feb. 7, 2011, at 2.

155. *Voss v. Tranquilino*, 19 A.3d 470 (N.J. 2011).

156. N.J. STAT. ANN. § 39:6A-4.5(b) (2003).

157. *Voss v. Tranquilino*, 992 A.2d 829, 836 (N.J. Super. Ct. App. Div. 2010).

158. *Id.*

awareness, funds, and votes to strengthen drunk driving laws.¹⁵⁹ In this way, the important social consideration of reducing drunk driving is not being questioned; the debate centers around the best way to go about this goal. The *Voss* court misunderstood that between a voluntarily intoxicated individual and the establishment that served that individual, society prefers that the *individual* pay, not get paid.

Indeed, *Voss* essentially allows drunk drivers to profit from their own wrongdoing. As the defendant Tiffany's Restaurant tried to argue, limiting dram shop claims to third parties (and thus making the cause of action inapplicable to drunk drivers) would send a firm message to all drivers in the state that drunk driving will not be tolerated or profitable.¹⁶⁰ However, the court rejected this argument, explaining, "the Legislature could not have intended to relieve those responsible for the intoxication of the drivers."¹⁶¹ This especially holds true, the court reasoned, since the serving establishments "possess the expertise and the statutory and regulatory responsibility to avoid serving visibly intoxicated patrons."¹⁶² If this were society's true sentiments, however, the *Voss* decision would not have been met with an overwhelming amount of backlash from citizens and the legislature alike.

A random sampling of online comments posted immediately after the *Voss* decision range from funny to thought-provoking to genuine concern for the future of this country, but in all of the comments, the theme is the same: the *Voss* decision just doesn't make sense.¹⁶³ One commentator offered the obvious concern, "Idiots in THIS state will start driving drunk on purpose hoping to get rich when they sue the bar after."¹⁶⁴ Another pondered, "[D]o we need to go back to prohibition [sic] because humans no longer take blame for any actions or free choice they make?"¹⁶⁵ Other comments revealed the sheer disgust with the judicial system: "Sounds like another self serving ruling by our court system. [T]he more we are allowed to sue the more the lawyers make."¹⁶⁶ One commentator faulted the fact that New Jersey Supreme

159. Since its inception in 1980, MADD now commands a presence in all 50 states, boasting more than 300 chapters and 1,200 victim advocates. Additionally, MADD leaders have testified in front of Senate subcommittees regarding highway safety initiatives. MADD has also filed key amicus curie briefs to the U.S. Supreme Court that helped to uphold the federal drinking age and establish the constitutionality of sobriety checkpoints. See generally MADD, <http://www.madd.org/> (last visited Apr. 2, 2012).

160. *Voss*, 992 A.2d at 836.

161. *Id.*

162. *Id.*

163. *Public Weigh-In on Voss v. Tranquilino*, LAWSUIT REFORM WATCH. (June 3, 2011), <http://www.lawsuitreformwatch.org/2011/06/public-weigh-in-on-voss-v-tranquilino.html>.

164. *Id.*

165. *Id.*

166. *Id.* One journalist noted that the problem of a litigious society was especially prevalent in

Court Justices are appointed by the governor. In states where the justices are subject to election, “you don’t see too many . . . judges acting like legislators . . . or otherwise reaching idiotic decisions as they did in [Voss].”¹⁶⁷ Although these quoted passages are not scientifically indicative of the entire New Jersey populace, this informal public weigh-in does reveal the citizenry’s rightful concern with the Voss decision. In an age when most people do not pay attention to cases decided by state supreme courts—let alone publicly discuss such decisions—the outrage is especially notable.

Beyond mere online bloggers, the Voss decision also attracted the attention of the General Assembly of New Jersey.¹⁶⁸ Ironically, the legislature sought to repeal the very decision that the New Jersey Supreme Court claimed was firmly grounded in legislative intent.¹⁶⁹ Led by Assemblyman John Amodeo and the tort-reform organization New Jersey Lawsuit Reform Alliance (NJLRA), the campaign to overturn Voss came less than one month after the case was affirmed by the state supreme court.¹⁷⁰ In a statement supporting A-4228, the new legislation, NJLRA explained:

Common sense is being downgraded to the point where drunk drivers can relinquish personal responsibility by collecting monetary damages from the restaurateur serving them drinks. This decision was a kick in the gut to New Jersey’s restaurateurs. A-4228 is a first step toward protecting our business community from the Supreme Court’s misinterpretation of the law.¹⁷¹

Despite the fact that no one had publicly opposed the bill, A-4228 died when the legislative session ended on January 2, 2012.¹⁷² Mr. Amodeo has recently reintroduced the bill as A-2459, but no further action has

New Jersey, earning the garden state “a national reputation as a lawsuit magnet.” As the journalist explained, due to New Jersey’s plaintiff-friendly laws, “93 percent of the plaintiffs suing pharmaceutical companies in New Jersey in large class actions are from outside of the state . . . One in five small businesses in New Jersey, many with fewer than ten employees, report that they have been sued in the last few years as well.” Marcus Rayner, *Stop Legalized Extortion: Op-Ed: Drunken Motorist Shouldn’t Be Able to Sue for His Injuries in NJ*, N.J. LAWSUIT REFORM ALLIANCE (June 29, 2011), <http://www.njlra.org/news.php?newsid=48>.

167. *Public Weigh-In on Voss v. Tranquilino*, LAWSUIT REFORM WATCH (June 3, 2011), <http://www.lawsuitreformwatch.org/2011/06/public-weigh-in-on-voss-v-tranquilino.html>.

168. *Legislation to Overturn Voss v. Tranquilino Decision Introduced*, LAWSUIT REFORM WATCH (June 30, 2011), <http://www.lawsuitreformwatch.org/2011/06/legislation-to-overturn-voss-v-tranquilino-decision-introduced.html>.

169. *See id.*

170. *Id.* The Supreme Court of New Jersey decided the case on June 1, 2011. The legislation to repeal the case was introduced on June 30, 2011.

171. *Id.*

172. *Cf.* H.R. 2459, 215th Gen. Assemb. (N.J. 2012).

yet been taken.¹⁷³

Even before the introduction of A-4228, the legislative goal of curbing drunk driving was apparent.¹⁷⁴ For example, N.J.S.A. 39:4-50(a) increased the penalties and broadened the class of people who may be liable for driving while intoxicated.¹⁷⁵ The reformed law allows even a sober person to be found guilty of DWI if that person permitted an intoxicated individual to drive.¹⁷⁶ Similarly, N.J.S.A. 2A:15-5.6(b)(3) expanded the class of people potentially facing alcohol-related liability by establishing social-host liability, or liability for non-licensed alcohol providers.¹⁷⁷ N.J.S.A. 36:2-98 declared New Jersey a “HERO Campaign state,” meaning the state undertook the effort to raise awareness of the dangers of drunk driving and simultaneously promote the use of sober, designated drivers.¹⁷⁸ “The Drunk Driving Victim’s Bill of Rights,” codified in N.J.S.A. 39:4-50.9 to 50.13, marks an extensive effort to explain to victims of drunk driving what type of recourse they are entitled to.¹⁷⁹ Finally, N.J.S.A. 39:4-50.17 permits courts to impose the additional penalty of requiring a convicted drunk driver to install an interlock device on his car to ensure sober driving.¹⁸⁰ Each of these statutes serves as a reminder that the legislature is faced with the task of determining the pressing social needs of the day and legislating accordingly. In this way, the pre-existing legislation should have alerted the *Voss* court to the direction of public policy—a direction that certainly did not indicate a willingness to allow drunk drivers to recover under the Dram Shop Act.

The immediate public outcry and legislative response reveal that the New Jersey Supreme Court chose the wrong method to enforce the public policy of deterring drunk driving. Instead of holding the establishments accountable to the drunk driver himself, the court should have held the drunk driver accountable to the public that he was endangering. This could have been accomplished by refusing to allow

173. H.R. 2459, 215th Gen. Assemb. (N.J. 2012). The statement to the bill explains in unambiguous terms, “This bill is intended to reverse the *Voss* decision by explicitly stating in the dram shop law that intoxicated drivers, as well as passengers who know they are driving with an intoxicated driver, are prohibited from bringing a dram shop claim against servers of alcoholic beverages.”

174. *See generally*, *Voss v. Tranquilino*, 19 A.3d 470, 473 (N.J. 2011) (Albin, J., dissenting) (explaining that N.J.S.A. 39:6A-4.5(b) “is just one in a series of laws passed by the Legislature aimed at reducing the carnage caused on our highways by drunk drivers”).

175. N.J. STAT. ANN. § 39:4-50(a) (2010).

176. *Id.*

177. N.J. STAT. ANN. § 2A:15-5.6 (1988).

178. N.J. STAT. ANN. § 36:2-98 (2007). *See also* HERO CAMPAIGN, <http://www.herocampaign.org/> (last visited Apr. 2, 2012) (encouraging, “Be a hero. Be a designated driver”).

179. N.J. STAT. ANN. § 39:4-50.9-50.13 (1985).

180. N.J. STAT. ANN. § 39:4-50.17 (2010).

the drunk driver any type of recovery. In this regard, the approach taken by the Supreme Court of Ohio in *Smith v. The 10th Inning* is instructive.¹⁸¹ There, the court refused to allow an intoxicated patron to recover when his injury was the result of his own intoxication.¹⁸² The court could have adopted a comparative negligence approach—that is, submitting to the jury the issue of the patron’s fault compared to the serving establishment’s fault—but the court expressly declined to do so.¹⁸³ As the court explained, such an approach would result in a puzzling “‘chicken or egg’ question: Is the permit holder who admittedly has experience in knowing the predilections and capacities of his or her customers more negligent or blameworthy than the intoxicated patron who is clever enough to mask his or her own intoxication in order to be served another drink?”¹⁸⁴ The court rejected this nebulous weighing test and instead opted for a bright-line rule barring a voluntarily intoxicated individual from seeking any type of dram shop recovery.

The *Smith* court found support for this bright-line rule in “commonsense public policy; namely, that an adult who is permitted to drink alcohol must be the one who is primarily responsible for his or her own behavior and resulting voluntary actions.”¹⁸⁵ In a litigious society where people always want someone to blame, someone to sue—and preferably someone with deep pockets—this approach reinserts “personal” in “personal responsibility.”

Relatedly, the *Smith* court considered judicial integrity—a value completely overlooked by the *Voss* court.¹⁸⁶ As the *Smith* court explained, allowing a drunk driver to recover for his self-inflicted injuries

would simply send the wrong message to all our citizens, because such a message would essentially state that a patron . . . may drink such alcohol with unbridled, unfettered impunity and with full knowledge that the permit holder will be ultimately responsible for any harm caused by the patron’s intoxication.¹⁸⁷

Thus, the Supreme Court of Ohio rightfully anticipated the very same arguments that the New Jersey populace leveled against its highest court.

181. *Smith v. 10th Inning, Inc.*, 551 N.E.2d 1296 (Ohio 1990).

182. *Id.* at 1297.

183. *Id.* at 1298.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

V. CONCLUSION

Courts and legislatures have come to recognize the acceptable social uses of alcohol while simultaneously realizing the need to regulate the substance. Dram shop liability is one means by which the legislature can effect this regulation. Although there is no single dram shop formula that is agreed to be “the best,” some approaches have proved more workable and logical than others. The approach taken by the *Voss* court is one that should be repealed and never again repeated. For each of the *Voss* court’s arguments, there is a stronger counterargument that the court completely ignored. In the first place, the court’s willingness to limit post-dram shop legislation as applying exclusively to the insurance realm amounts to a subterfuge since the clear intent of the relevant post-dram shop law was to ensure that drunk drivers have *no* cause of action for recovery of loss sustained as a result of the accident. The court’s arrival at the opposite conclusion poses serious problems for future issues of statutory construction, as now New Jersey courts will be able to overlook the plain text of a statute even when that statute is facially unambiguous.

Yet perhaps the most offensive aspect of *Voss* was the court’s audacious claim that its decision was “bolstered by a public policy consideration” of discouraging drunk driving.¹⁸⁸ The immediate public outcry and the urgent legislative attempts to repeal the decision demonstrate that the court was severely mistaken in gauging public policy. Indeed, as the post-*Voss* public sphere dialogue reveals, as between a voluntarily intoxicated individual and the serving establishment, society prefers blame to rest with the former. In holding otherwise, the Supreme Court of New Jersey effectively implemented a policy of “grab a drink and pass the blame.”¹⁸⁹ The backlash that ensued reveals the illusory nature of the court’s “public policy” rationale and just how out of touch the court is with its constituents.

Fortunately, *Voss* is the minority approach to dram shop liability.¹⁹⁰ Most jurisdictions abide by the far superior rule that the voluntarily intoxicated individual cannot recover for what essentially amounts to self-inflicted injuries.¹⁹¹ This approach, as the Supreme Court of Ohio in *Smith* explained, coalesces with common sense, public policy,¹⁹² and,

188. *Voss v. Tranquilino*, 992 A.2d 829, 836 (N.J. Super. Ct. App. Div. 2010).

189. This phrase was borrowed from Richard M. Scherer, Jr., *Grab a Drink and Pass the Blame: An Argument Against Social Host Liability*, 77 DEF. COUNS. J. 238 (2010).

190. See Richard Smith, *A Comparative Analysis of Dramshop Liability and a Proposal for Uniform Legislation*, 25 J. CORP. L. 553, 563–64 (2000).

191. *Id.*

192. *Smith v. 10th Inning, Inc.*, 551 N.E.2d 1296, 1298 (Ohio 1990).

in the case of New Jersey, the legislative text itself.¹⁹³ Furthermore, such an approach restores personal responsibility, judicial integrity, and society's sense of security. Indeed, the most basic argument against *Voss* is essentially one of self-preservation: in allowing the drunk driver to recover from the establishment that over-served him, drunk drivers have no disincentive to abandon their destructive practices. In fact, the instances of drunk driving are likely to increase post-*Voss*. Such an undesirable result is completely preventable by abandoning the *Voss* decision and adopting a rule that bars the voluntarily intoxicated individual from bringing a dram shop action.

Yet repealing *Voss* alone does not go far enough. The social and public policy rationales for barring the drunk driver from recovery likewise extend to the passenger who knowingly and voluntarily enters a vehicle with an obviously intoxicated driver. A contrary rule would encourage instances of drunk driving, as passengers—wanting to go home or change venues, but unwilling or unable to find alternate transportation—may goad the driver into believing that he is not that drunk, that he will not get caught, or that he drives better with a buzz. New Jersey legislators have recognized the need to discourage this culture of negligent passengering, and thus the proposed legislation to repeal *Voss* also includes language that bars the passengers from recovery.¹⁹⁴ Although this is a commendable effort to limit the class of people who can bring a dram shop action, the proposed legislation is silent regarding another class of individuals: voluntarily intoxicated underage adults.¹⁹⁵ These individuals should be treated no differently than any other adult for purposes of dram shop liability. Indeed, as the Supreme Court of Ohio recognized in *Klever*, there is no convincing reason to allow a 20-year-old to sue a drinking establishment, but then bar a 21-year-old from doing the same.¹⁹⁶ In order to show that the zero-tolerance policy regarding voluntary intoxication is not an empty threat, this class should likewise be barred from recovery. In this way, repealing *Voss* is a step in the right direction, but it is not the final step in restoring the rationales of dram shop liability.

Despite the aberrant and counterintuitive nature of the *Voss* decision, the case has had one positive consequence: raising awareness of dram

193. N.J. STAT. ANN. § 39:6A-4.5(b) (2003).

194. See H.R. 2459, 215th Gen. Assemb. (N.J. 2012) (declaring, “a person who rides in a motor vehicle which the person knows is operated by an intoxicated person and who sustains personal injury or property damage as a result of a motor vehicle accident shall be prohibited from instituting a civil action for damages against a licensed alcoholic beverage server”).

195. For purposes of dram shop liability, an “underage adult” should be distinguished from “minor,” as the former has attained the age of majority (18), but not the legal drinking age (21). This Comment does not opine on the appropriateness of allowing minors to bring dram shop actions.

196. Cf. *Klever v. Canton Sachsenheim, Inc.*, 715 N.E.2d 536 (Ohio 1999).

shop acts. In an age where most people have never heard of this type of liability, the backwards *Voss* decision finally drew attention to the issue and engaged citizens in meaningful discourse. If the conversation continues at this trajectory, soon the New Jersey populace and legislature alike will unite in the political process in an effort to repeal the *Voss* decision. The proposed bill to do so recognizes, much like the Supreme Court of Ohio in *Smith*, that the rationales of dram shop liability contemplate recovery benefiting an injured third party, not a voluntarily intoxicated individual. This reasoning is supported by the plain text of New Jersey's Dram Shop Act, as well as public policy considerations. In this way, the issue presented in *Voss* is far from being settled. Hope remains that good law and common sense will be restored.