> additional obligations...The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgement required for making life's difficult decisions. More importantly, historically it has been recognized that natural bonds of affection lead parents to act in the best interest of their children.

Parham v. J.R., 99 S.Ct. 2493, 2504 (1979).[13]

The Supreme Court does, however, recognize that a parent is not always acting in the best interests of the child and that a "state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jepardized."[14] Therefore, in order to assist the judicial decision-maker in determining whether treatment is within the best interests of the child, and should be given over the objection of the parent, it is imperative that an appropriate treatment professional evaluate the child and the proposed plan of treatment where all three parties (parent, minor and treatment personnel) agree, in-patient, invasive treatment can occur without court involvement. Invasive in-patient treatment may never occur without experts agreeing that it is necessary.[14A] Nor should a treatment staff be able to take a minor under the age of discretion into in-patient, invasive treatment over the objections of parents, without court approval that such treatment is necessary in the minor's best interest.[14B]

Therefore in a case of a child suffering from a substance abuse problem, a parent is not always acting in the best interests of the child when they are contacted by the state licensed facility and refuse to give consent to treatment. At this stage the Commission recommends an appropriate judicial body review the

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[13] Parham dealt with the constitutionality of involuntary commitment of minor children by their parents. Thus, while Parham is not relevant in some ways to this recommendation, it contains the absolute minimal safeguards for procedural due process in commitment proceedings. This recommendation goes beyond the requirements of Parham.

[14] Id.

[14A] Id.

[14B] Milam v. Straight, ____F. Supp. ____ (N.D. Ga).

treatment program within 48 hours, parents be given the opportunity, if they so desire, to make an appearance at the hearing, and counsel be appointed to represent the juvenile's interests. This "buffer" of court review has several beneficial results: 1) the parents ultimately may be assured that the treatment is in fact in the child's best interest; 2) if the parents are not convinced they will be be prevented from interfering with the child's treatment; 3) over-zealous treatment advocates will be curtailed should the judicial body find that treatment is unwarranted; and 4) on advice of counsel, the juvenile will retain the right to refuse treatment should it be found that the treatment is not in the child's best interest.

Although it is always preferable to include parents in a child's drug or alcohol treatment, as demonstrated infra, there are occasions whereby a parents refusal to cooperate or consent to a child's treatment will allow a serious disease to continue to harm the child and, perhaps, others. When this situation arises, it is necessary for the child to act in his own behalf to seek appropriate treatment. When this treatment is custodial or invasive, treatment personnel is not an adequate substitute in guiding a young minor into treatment. Therefore, it is necessary for the court, who has traditionally filled the role of parental decision-maker, to invoke additional procedural safeguards to insure that constitutional rights and protections are not infringed. Accordingly, this recommendation urges the states to adopt legislation that will lift the barriers that block access to drug or alcohol treatment to a minor.

1056j

DRAFT

4. Dram Shop and Host Liability

AMERICAN BAR ASSOCIATION

SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES

RECOMMENDATION

BE IT RESOLVED that the American Bar Association recommends that states should enact statutes to establish civil liability of persons who negligently sell or serve alcoholic beverages to a guest or customer whom the server knows or should know to be under the legal age where that person, when, as the result thereof, becomes intoxicated and injures himself, a thrid person, or such third person's property.

REPORT

The current state of dram shop liability policy is one of disarray.[1] Each of the fifty states possesses and applies its own idiosyncratic view of dram shop law. While one state moves judicially to expand the reach of dram shop liability to include social and business hosts[2], another passes legislation severely limiting the scope of possible liability[3]; as one state hands out record monetary damage awards against alcohol beverage servers [4], another legislatively limits the damages recoverable by any allegedly injured plaintiff.[5]

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[1]See attached chart, Appendix A.

[2]See Kelly v. Gwinnell, 476 A.2d 1219 (N.J. 1984).

[3]In 1978 the California Legislature, in response to a California case finding social host dram shop liability, passed two related statutes severely curtailing the court's ability to find dram shop liability. Cal. Bus. & Prof. Code S.25602, 25602.1 (West Supp. 1983).

[4]For example, in Cabrian v. Booe, #78-05432 127th Judicial District of Harris County (Tex. 1983), the court awarded a dram shop plaintiff a record $2.5 million in damages, despite the fact that Texas possessed no dram shop law. In another case, Pattison v. Brooks, #80CV0876 District Court, County of Denver (Colo. 1983), the parties settled on a $10 million award for plaintiff, even though Colorado possessed neither a statute nor a common law rule providing for dram shop recovery.

[5]N.C. Gen. Stat. S. 183-123 (19__) limits total dram shop recovery to a maximum of $500,000.

Resulting from this legislative and judicial non-conformity is an uneven system of victim compensation, an unreliable system of deterrence, and an unpredictable system by which alcohol servers may be held liable. The Commission received repeated testimony from its field hearings, criticizing the current state of dram shop law, and recommending a uniform policy of alcoholic beverage server liability for serving minors.[6]

A coherent uniform dram shop liability policy would foster several social goals. Such a policy would work to compensate innocent victims, allowing those injured in alcohol-related accidents to seek recovery not only from the person who injured them, but also from the person or enterprise who negligently contributed to the intoxicant's impaired condition.

In addition, such a policy would deter accidents due to drunk driving. The threat of liability posed by a consistent dram shop policy could substantially alter the way we view social drinking and driving.

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[6]See generally, testimony of James F. Mosher, Los Angeles, "It is critical that dram shop laws provide a clear set of guidelines to licencees that will promote the responsible service of alcoholic beverages"; Judge Leon Emerson, Los Angeles, "Shielding Laws that prevent judges and courts from applying civil, criminal and economic responsibility from licencees and negligent, careless hosts are dead wrong in my opinion,"; Lawrence Wallack, Los Angeles, "Because the laws concerning dram shop liability vary from state to state there is no consistent view of the legal responsibility of the server or the establishment. The lack of clear policy in this area results in 'business as usual' which can mean inappropriate serving techniques resulting in preventable traffic crashes and related problems"; and Alan Stoudemire, Atlanta, "Epidemiologic, Economic and Clinical Perspectives in the Prevention of Alcohol Dependence and Abuse" (paper presented).

Finally, a coherent, uniform dram shop liability policy would help to prevent not only alcohol-related accidents, but also the problem of excessive drinking. Re-oriented to include explicit prevention goals, dram shop laws would encourage server intervention as a tool to avoid excessive drinking and the accidents which inevitably follow. A dram shop liability policy built around prevention goals would induce alcohol beverage servers to take the reasonable precautions necessary to avoid legal liability, such as instituting alcohol education programs for the server's employees, or offering alternative transportation to those who have consumed alcohol.[7]

With this in mind, the American Bar Association recommends that all states enact social host liability legislation which would establish civil liability against a negligent server of alcoholic beverages to an individual whom that server knew or should have known to be a minor, where that minor subsequently becomes intoxicated and as a result injures himself, a third person, or such third person's property.

A. Background

Dram shop liability first appeared in American law in the 1880's as an attempt by the temperance movement to close saloons.[8] These early statutes typically provided that financial support be paid by tavern owners to the families of patrons who had become habitual drunkards.

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[7]Organizations in various states are investigating different ways of using dram shop policy to encourage prevention techniques among alcohol beverage servers. For example, the Prevention Research Center of California is drafting a model dram shop act with the explicit purpose of trying to "prevent intoxicated related traumatic injuries, death, and other damages." See also the work of James M. Schaefer, Director, University of Minnesota's Office of Alcohol and Other Drug Abuse. Mr. Schaefer's organization is researching a program which would require liquor establishments to hire only specially trained and certified bartenders, waiters and waitresses. Such training programs for alcohol servers would be encouraged by offering discounts to bar owners who hire trained and licensed servers. Similar work is being done by Intermission Unlimited. Intermission is working to establish alcohol training programs for Massachusetts bar employees. To aid in its efforts, Intermission also publishes a newsletter, Responsible Beverage Service, to educate the public with regard to serving alcoholic beverages. See also, testimony of James F. Mosher, Los Angeles.

[8]Mosher, J. Dram Shop Liability and the Prevention of Alcohol Related Problems, 40 J. Stud. Alcohol 773, (1979).

In their current application, modern dramshop statutes refer to the potential liability of the furnisher of alcoholic beverages for the negligent, reckless or intentional conduct of the drinking patron which causes harm to either the drinker or a third party. Most courts, before finding server liability, require the plaintiff to demonstrate that the patron's intoxicated condition contributed to the injury.

Currently, several states fail to recognize any form of dram shop liability. These states prefer to retain the traditional common law doctrine which recognizes no relation to proximate cause between the sale of liquor and a tort committed by a buyer who has consumer the liquor.[9] The ABA recommends that the traditional common law rule barring third party dram shop claims be abandoned.

B. The Current Status of Dram Shop Liability Among the States

Twenty-three states currently possess some form of dram shop liability legislation.[10] (See attached chart) Fourteen of these statutes are at least thirty-five years old, with a majority dating back to the turn of the century. As products of the temperance movement, these laws primarily seek to abolish habitual drunkeness by awarding financial support to the drunkard's family.[11] Six of these fourteen statutes are so archaic that their limited scope effectively precludes most, if not all, modern dram shop suits. For example, Colorado, by law, permits dram shop suits only where a licensee serves a habitual drunkard.[11] Georgia, on the other hand, permits server liability if a licensee serves a minor, but such suits may only be brought by the minor's parents, thus barring third party claims.[13] The remaining eight pre-1950 statutes contain language broad enough to permit recovery in most modern third party dram shop suits.

[9]State for Use of Joyce v. Hatfield, 197 Md. 249, 249-255, 78 A.2d 754, 756 (1953).

[10]Mosher, J., Legal Liabilities of Licensed Beverage Establishments: Recent Development in the United States at 8 (1983).

[11]See e.g., Act of May 1, 1954, Ohio Stat. S. 5, Ohio Rev. Code Ann. S. 4399.01 (Page 1954).

[12]Colo. Rev. Stat. S. 13-21-103 (1983).

Nine states have enacted new dram shop legislation since 1971. Seven of these statutes permit broad recovery by third party plaintiffs. Two states, Florida and California, have recently passed laws strictly limiting dram shop liability. Florida's statute allows liability only in those cases where the licensee "willfully" serves a minor[13] and California's statute requires liability only where a licensee serves an "obviously intoxicated minor."[14] In each case, the state legislatures sought to stem the growth of potential dram shop liability by narrowly defining who may be sued, and what constitutes culpable conduct.

Seventeen jurisdictions currently enforce dram shop liability as a matter of common law. The supreme courts of 10 jurisdictions (9 states and the District of Columbia) have imposed dram shop liability soley as a matter of common law. In 1959, New Jersey in Rapporport v. Nichols,[15] became the first state to assign civil liability to an alcohol retailer even though New Jersey lacked a statute providing for such liability.

Seven states possess both statutory and common law liability. Thus states like Ohio and Wyoming, which have arachaic and restrictive dram shop statutes, have broadened possible recovery through common law.[16]

The current trend among the states is toward a substantial expansion of dram shop liability.[17] For example, five of the seven state legislatures which have enacted dram shop legislation in the last twenty-five years have passed laws which created new liability. In addition, six state supreme courts have created dram shop liability by case decision in the past twenty-five years.[18]

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[13]Fla. Rev. Stat. S. 51-1-18 (1983).

[14]Cal. Bus. & Prof. Code S. 25602.1 (West Supp. 1983).

[15]31 N.J. 188, 156 A.2d. 1 (1959).

[16]See, e.g. Mason v. Roberts, 294 N.E.2d 884 (1973), and McClellan v. Totten, 666 P.2d 408 (1983).

[17]A March 24, 1985 article in the Philadelphia Inquirer highlights this trend in the growth of alcohol server liability (p. B-1). The article, entitled "Risky Business," recognizes the rapid expansion of alcohol server litigation, and the threat tavern owners experience as a result of this explosion in litigation.

[18]For a recent example of a State Supreme Court creating common law dram shop liability see Sorensen v. Jarvis, 350 N.W.2d 108 (Wisconsin, 1984).

In the twenty-five states which possess either restrictive statutes or no official statewide liability policy, only seven supreme courts have explicitly deferred to their respective state legislatures, and refused to accept a new common law rule.[19] The remaining seventeen states have yet to have the issue reviewed by their respective highest courts. Yet, in each of these states, the trial and appellate court decisions have generally favored imposing dram shop liability.[20]

Large settlements and unappealed plaintiff verdicts are occurring with regularity even in states where there is no statutory dram shop liability, and where appellate courts have not accepted the modern common law theory of dram shop liability.[21] For example, one California settlement awarded $2.5 million to a young girl who was injured when the car in which she was a passenger struck a tree.[22] The driver, a minor, had purchased (or was given) beer from a friend who worked at defendant convenience store. This settlement is significant not only for its record size, but that it occurred in California, a state with an extremely restrictive dram shop law.

Even the federal government has come to view dram shop liability as a viable weapon in the battle with alcohol related accidents. Both the Presidential Commission on Drunk Driving (1983),[23] and the National Highway Traffic Safety

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[19]See, Mosher, Legal Liabilities of Licensed Beverage Establishments at 12.

[20]Id. at 13.

[21]Harrington, C., Illustrative Dram Shop Settlements and Jury Verdict Cases: Further Evidence that Server Liability is Expanding? at 1-15, National Association of State Alcohol & Drug Abuse Directors, Special Report--Alcohol Server Liability and the Law: Examples of Lawsuits, Major Financial Settlements and State Laws (December, 1984).

[22]Cunningham v. Shorttop, Inc., #108600 Sup. Ct. of Marin County, Cal. (May, 1983).

[23]Presidential Commission on Drunk Driving, Final Report, (November 1983). The Commission's Dram Shop Recommendation states:

> States should enact "dram shop" laws establishing liability against any person who sells or serves alcoholic beverages to an individual who is visibly intoxicated.

Id. at 11.

Administration (NHTSA) have endorsed dram shop liability as a legitimate strategy for reducing drunk driving. NHTSA has stated:

> The potential threat of a substantial jury award resulting from a dram shop suit...can effectively motivate people to stop serving drivers who are obviously becoming intoxicated.[24]

The trend among the various legislatures, courts and agencies around the country is to adopt dram shop liability as a tool with which to confront alcohol related problems. The difficulty these various bodies face is to modernize and revitalize the 19th century concept of dram shop liability to do the work of contemporary social policy.

C. The Elements of Dram Shop Liability

In establishing dram shop liability policy three key issues must be resolved: who may be found liable; what constitutes actionable negligence; and who may sue.

Who May Be Found Liable

All the states which recognize dram shop liability make state licensed retail establishments (both on-sale and off-sale) potentially liable for harms caused their patrons.[25] In reaching this result many courts and legislatures have relied on statistical evidence linking automobile accidents to consumption of alcohol in bars and restaurants. For example, a 1978-79 Los Angeles study found that approximately 50 percent of those arrested for driving while intoxicated, identified a licensed establishment as the location of their last drink prior to the arrest.[26] Another study, a 1973 report on a national roadside

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[24]48 Fed. Reg. 5545 (1985).

[25]Mosher, Legal Liabilities of Licensed Beverage Establishments at 4.

[26]Mosher J. and Wallack L., The DUI Project: Description of an Experimental Program to Address Drunk Driving Problems Conducted by the California Department of Alcoholic Beverage Control (1979).

breathalizer test survey, found that 44 percent of those tested with a blood alcohol content level of 0.10 percent or greater were driving to, from, or between public drinking places.[27]

But the general rule among courts has been to limit the application of dram shop acts so that they provide a cause of action only against those in the business of selling liquor and not against one who provides another an intoxicating beverage as a mere act of hospitality.[28] It is interesting that those courts which distinguish social hosts from commercial servers in this way, do so, though most dram shop acts explicitly prohibit "any person" from serving intoxicated persons or minors. Courts which accept this approach do so on the basis that commercial enterprises are better equipped than social hosts to pay damages for the injuries caused by intoxicated patrons.

A number of courts, however, "have been willing to impose a duty on social hosts similar to that imposed on commercial vendors" where the guest is a minor.[29] In 1972, the Minnesota Supreme Court became the first modern court to impose social host liability in the case of Ross v. Ross.[30] Following the Ross decision, a number of other state courts followed suit in establishing social host liability.[31] In reaching this conclusion these courts have relied on one of the three theories of liability: 1) a strict statutory approach--that the dram shop act does not preclude social host liability[32];

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[27]Mosher, J., Server Intervention: A New Approach for Preventing Drinking and Driving, 15 Accident Analysis Prevention 483, 487 (1983).

[28]53 ALR 3d 1285, 1286 (1973): See e.g., Camille v. Barry Fertilizers, Inc., (cite) in which the court comments on the fundamental difference between serving alcohol in social and commercial settings.

[29]Id. at 1268.

[30]294 Minn. 115, 200 N.W.2d. 149 (1972).

[31]See e.g., Brattain v. Herron, 155 Ind. 663, 309 N.E.2d 150 (1975); Wener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity, 258 Or. 632, 485 P.2d 18 (1971); Linn v. Rand, 356 A.2d 15 (N.J. 1976); holding a social host liable to a third person injured by a minor who previous to the accident was served alcoholic beverages by the social host.

[32]See e.g., Brattain v. Herron, 155 Ind. 663, 309 N.E.2d 150 (1975).

2) notions of per se negligence[33]--that the serving of alcoholic beverages to a minor is a criminal violation and automatically subjects the offender to civil liability; or 3) on a traditional negligence theory[34]--that a reasonable person could foresee that an intoxicated minor would become involved in some type of accident, and thus, that person has a duty to refrain from providing alcohol to minors.

To this point, no cases have been found holding parents liable under a dram shop theory for injuries caused by their children or their children's guests, who have consumed the parent's alcoholic beverages. Two New York Supreme Court Appellate Division cases,[35] however, have held that parents may be subject to negligence actions for injuries caused by intoxicated minors who had been served alcoholic beverages by the parent's child. In both of these cases the court relied on traditional common law principles of negligence and not on New York's dram shop act.

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[33]See e.g., Adamian v. Three Sons, Inc., 353 Mass. 498, 233 N.E.2d 18 (1968).

[34]See e.g., Weiner v. Gamma Phi Chapter of Alpha Tau Omega Fraternity, 258 Or. 632, 485 P.2d 18 (1971).

[35]Hugler v. Rose, 88 App. Div.2d 755, 451 NYS2d 478 (1982) and Comeau v. Lucas, 90 App. Div.2d 674, 455 NYS2d 871 (1982).

The negligent furnishing of alcoholic beverages consists of two elements: that the defendent affirmatively offered the liquor to the consumer; and that the defendent possessed the capacity to control the service of the alcoholic beverages.[36] Inherent in this definition of the negligent furnishing of liquor are traditional notions of reasonable standards of care which form the basis of all tort law.

What Constitutes Actionable Negligence

Dram shop liability may result either from serving alcoholic beverages to those under the minimum drinking age, or from serving obviously or apparently intoxicated adults: All fifty states make either practice criminally punishable.

Those states which recognize dram shop liability can find one who serves liquor to a minor negligent in one of three ways: 1) expressly imposing liability for serving minors who subsequently become involved in an injury producing accident; 2) finding liability by using traditional negligence concepts--minors are presumptively unable to responsibly consume alcohol, thus a reasonably prudent person would not provide alcohol to a minor in order to avoid forseeable injury to that minor or others and; 3) finding servers per se negligent, where the serving of alcoholic beverages to minors is a criminal offense, the offender is per se subject to civil liability for subsequent injury.

With regard to serving adults, rather than minors, dram shop liability currently depends on whether the consumer was "obviously intoxicated" when he was served. The "obviously intoxicated" standard is criticized by many commentators as too subjective and imprecise to fairly judge the relative reasonableness or unreasonableness of an alcohol server's conduct.[37]

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[36]Bedard, One More for the Road: Civil Liability of Licensees and Social Hosts for Furnishing Alcoholic Beverages to Minors. 59 B.U. L. Rev. 725, 741 (1979).

[37]See e.g., Server Intervention, 15 Accident Analysis & Prev. at 483.

Though courts are almost unanimous in espousing the notion that "obvious intoxication" is readily apparent to any reasonable person, many critics maintain that the standard fails to prevent the very harm which dram shop liability seeks to curtail: injuries caused by inebriated people. In most cases, once the point of "obvious intoxication" is reached, a person is well beyond the level of legal intoxication.[38] For example, in Paule v. Gagnon,[39] the defendants blood alcohol content level was twice that of legal intoxication (0.19 percent), and yet, the court would not consider that figure conclusive evidence of obvious intoxication.

Some critics contend that the"obviously intoxicated" standard is so vague it precludes alcohol servers from conforming with the law.[40] This measure of liability fails to provide a simple, objective standard against which servers may guage their conduct, or have their conduct judged. The Commission recommends replacing the anachronistic "obviously intoxicated" standard with the accepted and traditional common law torts standards of reasonable care and negligence: has the alcoholic beverage provider taken the necessary and reasonable precautions to avoid forseeable harm to his drinking patrons, social guests, or unknown third parties. This type of tort analysis more properly frames dram shop liability as a preventative device.

Who May Sue?

All courts which recognize dram shop liability include third party victims (neither the server nor consumer) as potential plaintiffs.[41] In the case where patron A leaves

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[38]See n. 36, supra at 736.

[39]81 Cal. App.3d 680, 146 Cal. Rptr. 701 (Ct. App. 1978).

[40]See n. 36, supra at 735-742.

[41]Mosher, Legal Liabilities of Licensed Beverage Establishments at 7.

tavern B and causes crash with victim C, who does not contribute to his own injury, courts in dram shop liability jurisdictions are unanimous: C has a valid cause of action against tavern B.

The Courts, however, are split as to cases where the factual setting varies from that above. For example, where victim C is a drinking partner of patron A, and C actually encourages A to become intoxicated, the courts differ as to whether victim C is contributorily negligent in fostering A's intoxication, and if so, whether C is barred from recovery against B. The court decisions are similarly confused where patron A sues tavern B for injuries he sustained as a result of an alcohol-related incident.

Conclusion

Across the nation courts are being asked to judge the civil liability of those who provide alcoholic beverages to minors, where those minors, subsequently intoxicated, injure the property or person of another. The decisions from district to district often conflict in result, as well as in rationale. This lack of coherence in dram shop policy deprives: injured plaintiffs of a complete system of compensation; government officials of a reliable system of deterrence; and alcohol beverage servers of a predictable system of civil liability.

The Commission's recommendation calls upon the states to harmonize their various dram shop laws and adopt a unified policy establishing civil liability against those who negligently provide alcohol beverages to a minor. In addition, it would be helpful to the states if the National Conference of Commissioners on Uniform State Laws would draft a model dram shop law statute addressing the concerns of this recommendation.

1033j

DRAFT

5. Media/Ads

AMERICAN BAR ASSOCIATION

SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES

RECOMMENDATION

BE IT RESOLVED that the American Bar Association opposes media programming or advertising which glamorizes or promotes the use of alcohol or other drugs by youth or media programming which fails to portray accurately to youth the effects of alcohol and other drugs. Accordingly, appropriate entities should take and continue to take actions and further research aimed at limiting the effects which alcohol advertising, or media programming has upon the acceptance and use of alcohol and other drugs by youth.

REPORT

The issue of restricting alcohol advertising over the broadcast media was thoroughly examined, considered and debated at the Advisory Commission field hearings.[1] There were widely divergent opinions on the necessity for any such restrictions, their nature and legality expressed by the media broadcasters,[2] the alcohol producers (specifically the brewers and vintners who advertise over television and radio stations and networks)[3] and a number of the leading critics of such advertising.[4] In addition to this testimony, the Commission received and reviewed extensive current scientific, economic and legal materials from various interested parties concerning alcohol advertising.[5] Finally, in its own review and deliberations, the Commission considered a wide range of evidence, opinions and proposals on

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[1]The issue of alcohol advertising was raised at all three field hearings, See e.g. Testimony of Dr. Al Mooney, Atlanta; George Hacker, Esq., Princeton; and Brian L. Dyak, Los Angeles.

[2]Testimony of Richard Wiley, Esq. (National Assoc. of Broadcasters) Los Angeles.

[3]Testimony of Donald B. Shea (U.S. Brewers Assoc.) and Patricia Schneider (Wine Institute), Los Angeles.

[4]Testimony of George Hacker, Princeton; and James F. Mosher, Los Angeles.

[5]See e.g. Mosher and Wallack, Government Regulation of Alcohol Advertising: Protecting Industry Profits Versus Promoting the Public Health, 2 J. Publ. Health Pol'y. (Dec. 1981); NAB: Summary and Citations of Records Related to Beer and Wine Advertising, (Nov. 1984); Pittman and Lambert, Alcohol, Alcoholism and Advertising (St. Louis, 1978); Wallack, Alcohol Advertising Reassessed: The Public Health Perspective,; Wallack, The Prevention of Alcohol-Related Problems: Recommendation for Public Policy Initiatives; and Watson, Advertising and Alcohol Abuse, (Ad. Assoc. 1981).

this particular issue before making its recommendations.

Notwithstanding these contested matters, however, there appears to be a broad consensus developing on one fundamental issue in this area. No one involved, including the broadcasters, alcohol producers, and advertising critics appears to favor any media advertising that would demonstrably tend to stimulate the universally-acknowledged tidal wave of youth alcohol and other drug problems.[6]

With regard to this issue, there presently exists an opportunity to fashion workable compromises and coalitions across the spectrum of interests represented. There is a clear mandate to do so. According to the Harris polling organization, 57 percent of the public favor banning alcohol advertising from the broadcast media.[7] The publicity surrounding the petition to the President and Congress by Project S.M.A.R.T. (Stop Marketing Alcohol on Radio and Television) is yet another indication of the increasing level of public concern.[8] Similarily indicative are the legislative and administrative proceedings on alcohol advertising which will be described more fully infra.[9]

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[6]See e.g. Testimony of Richard Wiley; Donald B. Shea; James Mosher; and Patricia Schneider, Los Angeles.

[7]Business Week at 2 (Feb. 25, 1985).

[8]See e.g., Folty, Alcohol on the Rocks, Newsweek at 52, (Dec. 31, 1984).

[9]See part 4, infra.

Each of these public concerns demonstrate that alcohol advertising is undeniably a national issue. The Commission, therefore, recommends that the ABA should now go on record regarding its own concern and opposition in principle to such advertising and its possible effects on youth.

The Commission also recommends that the ABA support further research on this issue. The Commission, however, proposes that at this time, the ABA express no preference for any particular reform proposal. For the moment, the design of a specific remedy, if any, should be left to further public debate and reflection, and to the legislative and administrative process.

2. The Alcohol Advertising Issue

As set forth in the extensive testimony and written evidence submitted to the Advisory Commission, the critics of alcohol advertising are primarily concerned regarding the glamorization of alcohol and other drug use, and abuse, without any realistic depiction of these drugs and their many attendant dangers and serious health consequences.[10] The advertising critics also voiced their concern about the pervasiveness of the media advertising of alcohol, particularly with regard to sports and other programs with large youth audiences, and the perceived effects on vulnerable youth, who are susceptible to alcohol and other drug problems.[11]

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[10] See e.g. Testimony of Timothy McFlynn, Los Angeles and Dr. Al Mooney, Atlanta. Both of these witnesses, and others, noted the persuasiveness of alcohol advertising jingles, "buzzwords" or "slogans" among youth. Examples are "This _'s_ for you"; "You can have it all"; "Bring out your best,; "There's a style in your life, _____"; "It's ____time"; "____tastes so nice..._____,_____on ice"; "_____ will sell no wine before its time"; and "_____ is made the American way." See also Thompson, The Battle is Brewing: A Campaign Against the Broadcasting of Wine and Beer Ads, The Wash. Post, K.1. (Mar. 24, 1985).

[11] Testimony of Timothy McFlynn; Barbara Emerich; Los Angeles. Another related aspect of this problem is the alcohol industry's college marketing practices. See the recommendation and report on this issue.

In addition to the broadcast media's protrayal of alcohol through advertising, the Commission also heard several criticisms of the way in which alcohol and other drugs is being depicted on television programming generally.[11A] These criticisms are directed at the frequency in which social drinking is shown on programs that are particularly attractive to younger viewers.[11B] Some members of the entertainment industry have become involved in trying to reduce the amount of drinking in programming and to show alcohol use only when necessary for artistic reasons.[11C] The alcohol advertisers and producers have questioned both the statistics and generalizations on the issue of alcohol programming.[11D] The controversial issues involved in alcohol advertising and television programming overlap to some extent, and in other ways, they are very distinct.[11E] However, when opposing the glamorization and unrealistic portrayal of alcohol and other drugs - the issues are very similar.

[11A] See e.g. Testimony of George Hacker, Phyllis Scheps, Princeton, Paul Mones, Ray Chavira, Los Angeles. See also, Testimony of Martha Baker, President, National Council on Alcoholism, before the U.S. Senate Subcommittee on Alcoholism and Drug Abuse, (Feb. 7, 1985).

[11B] Id.

[11C] See Report of the Program Adopted by the Caucus for Producers, Writers and Directors, by Caucus Alcohol and Drug Abuse Committee, Larry Stewart, Chairman. See also Testimony regarding the Entertainment Industries Council, Inc., Brian L. Dyak, Los Angeles.

[11D] See Testimony of Richard Wiley, Los Angeles; See also, Testimony of Edward O. Fritts, National Association of Broadcasters before the U.S. Senate Subcommittee on Alcoholism and Drug Abuse, (Feb. 7, 1985).

[11E] See e.g. part 5, infra.

On either side of the advertising and programming controversary there is no denial of the enormity of youth alcohol and other drug problems.[12] Similarly, the impact of television on youth is increasingly being documented.[13] The dollar amounts and frequency of alcohol advertising are a matter of public record. Regardless of whether one chooses data from the broadcast industry, the alcohol producers or the critics, the amounts involved exceed $750 million annually.[14] As the broadcasters and producers have noted, the alcohol advertising revenue is a significant factor to the networks and many stations throughout the country.[15]

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[12] See generally, the Introduction to these recommendations. See also, Weekly Reader, A Study of Children's Attitudes and Perceptions About Drugs and Alcohol (The Study reviewed children's own attitudes by analyzing a sample of 600 survey sheets from a pool of 15,000 from 3,700,000 students in grades 4 to 12. Sample results include the result that "one-third of students in grade 4-8 believe that drinking alcohol is 'A big problem' among kids their age, and about 40 percent say the same about drugs. In both cases, the percentage rises among high school students." Study, question 7. In all, the Study featured 8 questions concerning alcohol and other drug problems.)

[13] See e.g. Tooth, Why Children's TV Turns Off So Many Parents, U.S. News & World Report at 65 (Feb. 18, 1985).

[14] Newsweek op. cit. at 53. But see Wash. Post, op. cit. ($1 Billion annually). One study suggests that, typically, children see 3,000 "drinking acts" each year, Stoudemire, Wallack, Hedemark, Frank and Kamlet, Epidemologic, Economic and Clinical Perspectives in the Prevention of Alcohol Dependence and Abuse. "Given current levels of exposure a person under the legal drinking age will be exposed to more than _____, at 23-24.

[15] See, e.g., Testimony of Edward O. Fritts, National Association of Broadcasters, before the U.S. Senate Subcommittee on Alcoholism and Drug Abuse, (Feb. 7, 1985). See also, Testimony of Stephen K. Lombright, Vice President, Anheuser-Busch Companies, Inc., Id. But see Gay, Beer Ad Ban Won't Hurt Nets, Ad Age (Mar. 11, 1985).

The broadcasters and alcohol advertisers maintain that media advertising of alcohol is legal and is largely directed at brand selection, rather than encouraging increased consumption or abuse by anyone, especially the young.[16] As set forth more fully infra, the broadcasters and producers argue that they are responding to the youth alcohol problem by self-regulation through their own alcohol advertising codes[17] which already limit various aspects of their advertising, and by their youth driver education and other alcohol moderation efforts directed at youth.[18]

The debate over the advertising issue has produced at least two highly emotional issues that appear to be in direct conflict. On one side, there is the serious concern over increasing youth alcohol problems as a national issue and, on the other, the shadow of a new prohibition with its denial of what some view, one of their most basic rights.[19] It is hoped that some common ground between these two polar extremes is the reality and that neither must ultimately prevail in order to remedy the problem.

3. The Proposals for Reform

Coming from a variety of sources, a series of proposed reforms of media alcohol advertising have been made, ranging in scope from one end of a continuum of restrictiveness from the greatest (a) to the least restrictive (d), as follows:

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[16]See e.g. Testimony of Donald B. Shea before the U.S. Senate Subcommittee on Alcoholism and Drug Abuse, Feb. 7, 1985. See also, Testimony of Stephen K. Lambright, Vice President, Anheuser-Busch, Companies, Inc., and Edward O. Fritts, National Association of Broadcasters, Id.

[17]Testimony of Patricia Schneider, Los Angeles. The use of these codes is limited by antitrust considerations. See Letter of FTC to John DeLuca, Wine Institute, March 31, 1976, submitted with Ms. Schneider's statement. See also on this issue, the recommendation and report regarding college alcohol marketing practices.

[18]Id. Testimony of Donald B. Shea, Los Angeles.

[19]Id. and Testimony of Timothy McFlynn, James Mosher, Judge Leon Emerson, Los Angeles, George Hacker, Princeton.

(a) An enforced absolute ban on all broadcast media advertising of alcohol.

The Project SMART petition is in the vanguard of this proposal at present. There are already state and local examples of such bans as well as several foreign countries with absolute prohibitions on such advertising in law or in practical effect.[20] The closest precedent for such a proposal is the existing self-imposed ban on distilled spirits media advertising and the tobacco advertising ban.[21] This degree of restriction clearly raises the most complex questions regarding the constitutionality among the various proposed reforms, however, there are already three leading cases involving such bans which have not finally decided the question.[22]

(b) Time and manner restrictions on media alcohol advertising.

This proposal has been made by several critics of alcohol advertising.[23] Again, there are existing precedents among the media practices regarding children's'programming and adult material. The particular area of concern over alcohol advertising seem to be sports events and other programming which have large youth audiences.[24] In addition, another concern is

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[20]See e.g. Testimony of Donald B. Shea, n.16, supra; see also Winski, Pressures Mounting to Curtail Liquor Advertising, Ad Age at 1 (July 18, 1983)(re: state ad ban proposals). NAB: Background Material for 'Broadcasters' Responsibilities: Beer and Wine Advertising at 3 (Nov. 1984).

[21]See e.g. Testimony of Timothy McFlynn, Los Angeles; but see part 6a infra regarding the tobacco ban.

[22]See part 6b infra.

[23]See FTC Staff Recommendations, n. _____ infra at 31. (12 letter comments to BATF regarding prime time restrictions). In addition, the Australian government ban proposed restrictions on alcohol advertising during prime time and other children's'viewing times.

[24]Testimony of Dr. Al Mooney, Atlanta.

the sheer volume of such advertising during prime time television.[25]

(c) Required equal-time or counter advertising.

The model for this proposed reform is the so-called "Fairness Doctrine" of the Federal Communication Commission.[26] Because of the continued legal validity of the rule, some critics have proposed extending it to the alcohol advertising issue as it was applied earlier to smoking which then resulted in a self-imposed ban.[27] The Doctrine itself has its own critics who argue that its application to alcohol as a public issue would be inappropriate and would in turn create an unwieldy precedent for enforcement against other legal products and issues.[28] There are legal precedents on both sides and recent legislative and agency considerations of this issue are discussed infra.[28A]

(d) Required warning labeling on all alcohol products and on all alcohol advertising.

This option has been suggested due to the already well-documented serious health hazards relating to use of alcohol by pregnant women -

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[25]Testimony of Barbara Emerich, Los Angeles.

[26]Testimony of Richard Wiley, Los Angeles.

[27]Testimony of George Hacker, Princeton. See also Welling, What if the Americans Can't Hold Their Beer at 112 Business Week (Mar. 11, 1985).

[28]Testimony of Richard Wiley, Los Angeles. Proponents of equal-time messages, however, see this as a vehicle to offer public information as to health and safety risks involved with alcohol abuse.

[28A]Rep. John Siberling (D., OH), has expressed his support in sponsoring legislation which would amend the FCC Act and extend the Fairness Doctrine to alcohol advertising by requiring equal time for advertising health and safety messages.

Fetal Alcohol Syndrome[29] - and by other particularly vulunerable individuals such as children of alcoholics[30] - an increasing number of localities already require health

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[29]Fetal Alcohol Syndrome - "FAS" - has been widely studied both here and abroad, and specific criteria was developed in 1980 to identify the related abnormalities. See e.g. HHS, Fifth Special Report to the U.S. Congress on Alcohol and Health, Dec. 1983, at 6470. That report concludes: "Heavy drinking during pregnancy adversely affects organs and behavioral fetal development and increases the risks of miscarriage." Id. at 78.

See also, House Joint Res. 324, 98th Cong. 1st Sess.

> To designate the week beginning January 15, 1984 as "National Fetal Alcohol Syndrome Awareness Week," Whereas fetal alcohol syndrome is one of three major cases of birth defects and accompanying mental retardation in the United States...;

See also, "Surgeon General's Advisory on Alcohol and Pregnancy," 11 FDDA Bulletin at 2 (July 1981):

> The Surgeon General advises women who are pregnant (or considering pregnancy) not to drink alcoholic beverages and to be aware of the alcoholic content of foods and drugs. (emphasis added)

[30]Statistics indicate that as many as 28 million Americans may be in this group. See e.g. Consensus Statement from the Conference on Research Needs and Opportunities for Children of Alcoholics, April 18, 1984.

[31]For example, alcohol servers in Philadelphia and New York City must now display warnings related to FAS. Similarly, Phila. Municipal Ord. No. 96-1984 (July 10, 1984) requires all alcohol servers to post a notice reading as follows:

> A healthy baby begins with you: Pregnancy and alcohol do not mix. Drinking beer and wine or liquor while you are pregnant or a nursing mother can be harmful to your baby. For more information, call...

See Testimony of Timothy McFlynn, Los Angeles. The 1983 N.Y.C. Laws No. 63 S. 569-1.0 requires signs which read as follows:

> WARNING: Drinking alcoholic beverages during pregnancy can cause birth defects.

See also, Testimony of Shiela B. Blume, M.D., Princeton (regarding the American Medical Society on Alcoholism: A Position on Labeling, (Oct. 19, 1979).

warnings concerning alcohol.[31] The other serious health issues of alcohol include: dependence, heart and liver disease, cancer and a wide range of other physical and psychological dangers, as well as increased risk of accidents, disabling injuries and suicide.[32] Besides tobacco, there are numerous other precedents for both labeling and advertising warnings for dangerous albeit, legal products.[33] The effectiveness of such proposals is one area of concern as is the level of proof required for warnings of the dangers of each product.[34]

The arguments for and against each of these alcohol advertising proposals are often inextricably bound up with the resolution of other issues, in addition to the basic underlying issue of the problems of alcohol itself.[35] The debate, however, is no longer concerned with whether there is a serious youth alcohol problem, or whether there should be alcohol advertising if it contributes to that problem. Rather, the issue is whether any steps can be taken regarding the advertising - including the proposed reforms, among others, which will help alleviate youth alcohol and other drug problems.

The Commission's view is that the growing number of research studies,[36] the legislative and administrative record[37] and other still developing evidence concerning alcohol advertising[38] all support consideration of the possibility and propriety of various remedial measures. While still more research and deliberation is needed, the mandate for proceeding with such a study does not require rendering a final decision at this time favoring any one proposal or remedy.

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[32] See e.g. Testimony of George Hacker, Princeton.

[33] Testimony of Timothy McFlynn, Los Angeles.

[34] Id. However, the serious health warnings for such risks as Reys Syndrome from aspirin and from phenylalanine in soft drinks are related to very low percentage risks but are required nonetheless. See e.g., testimony of Sheila Blume, M.D., Princeton (3 - 4,000 phenylketonurics)

[35] For example, the critics of the advertisers and alcohol producers continually debate the issue of the effects of alcohol advertising on consumption, as well as whether or not such effects are even relevant. See part 5 infra.

[36] Id.

[37] See part 4 infra.

[38] See e.g., Weekly Reader op. cit., n.12.

4. Current Legislative and Agency Proceedings

On February 7, 1985, the U.S. Senate Subcommittee on Alcoholism and Drug Abuse, Committee on Labor and Human Resources, chaired by Senator Paula Hawkins (R., Fla.) held a hearing on the issue of alcohol advertising on the broadcast media. The Senate also heard testimony from the broadcasters, producers, critics, as well as leading advertising researchers and regulators.[39]

These recent hearings were not the first on the issue of alcohol advertising[40] and to date, additional Congressional hearings are scheduled for later this spring before the House Select Committee on Youth, Children and Families, chaired by Representative George Miller (D. Cal.) and the House Subcommittee on Telecommunications, Consumer Protection and Finance chaired by Representative Tim Wirth (D., Col.) In addition, on April 2, 1985, Representative Howard C. Nielson (R., Utah) introduced H.R. 1901 calling for a study of broadcast alcohol advertising to be completed within one year by the Bureau of Alcohol, Tobacco and Firearms (BATF) with the help of the Federal Communications Commission, the Surgeon General of the Public Health Service, and other federal agencies. The bill has been referred to the Committee on Energy and Commerce.

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[39]The complete transcript is not yet available from the U.S. Government Printing Office. The prepared statements are on file at the Advisory Commission. They include statements inter alia by Stephen K. Lambright, Vice President of Anheuser-Busch Company, Inc.; Martha Baker, President of the National Council on Alcoholism; James C. Miller, III, Chairman, Federal Trade Commission; Edward O. Fritts, National Association of Broadcasters; Michael Jacobsen, The Center for Science in the Public Interest; Elaine Stienkemeyer, President, National Parents and Teachers Association; and Donald B. Shea, President, U.S. Brewers Association.

[40]See e.g. these earlier Congressional hearings: Media Images of Alcohol: The Effect of Advertising and Other Media on Alcohol Abuse, Hearings of the Senate Subcommittee on Alcoholism and Narcotics, Senate Labor and Public Welfare Committee (Senator Wm. Hathaway, Chrmn.), Mar. 8 and 11, 1976, Washington: U.S. Gov. Printing Off. 1976. (hereinafter the "1976 Senate Hearings"); Juvenile Alcohol Abuse, Hearings of Senate Subcommittee to Investigate Juvenile Delinquency, Senate Committee on the Judiciary (Senator John C. Culver, Chrmn.), January 28, 1978, Washington, U.S. Gov. Printing Off. 1978; and The Role of Media in Drug Abuse Prevention and Education, Hearings of the Subcommittee on Alcoholism and Drug Abuse, Senate Committee on Labor and Human Resources (Senator Paula Hawkins, Chrmn.), April 6, 1984, Washington, U.S. Gov. Printing Off. 1984.

Until recently, the Federal Trade Commission (FTC) was in the process of reviewing the "Omnibus Petition for the Regulation of Unfair and Deceptive Alcoholic Beverage Advertising and Marketing Practices" filed by the Center for Science in the Public Interest (CSPI) and others seeking, inter alia, action through FTC rulemaking, investigation and enforcement against broadcast alcohol advertising as "deceptive" and "unfair" under the Federal Trade Commission Act, 15 U.S.C. 45, 52, 55 and regulations. In a letter dated April 16, 1985, the FTC denied that petition in its entirety as to its requests for rulemaking, an industry-wide investigation and/or institution of any enforcement action challenging the legality of certain specified ad campaigns.[41] The FTC letter stated:

> ... and the enormous personal tragedy and economic inquiry connected with alcohol abuse. It (the FTC) has found, however, no reliable basis on which to conclude that alcohol advertising significantly affects alcohol abuse. Absent such evidence, there is no basis for concluding that rules banning or otherwise limiting alcohol advertising would offer significant protection to the public.[41A]

The Commission then deferred to the ongoing BATF proceedings to be described below:

> For the Commission also to engage in rulemaking procedures would be needlessly duplicative governmental action.[41B]

Finally, the Commission noted the ongoing efforts of other federal agencies, state and local governments and the private sector in conducting public information campaigns, drunk driving programs and coordinating activities.[41C]

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[41] Letter to Michael F. Jacobsen, CSPI, from the FTC, dated April 15, 1985 at 1. See Henderson, FTC Won't Restrict Alcohol Ads, Will Review Issue on Case-by-Case Basis, The Wash. Post at F1 (April 17, 1985): "Any decision to ban or impose new restrictions on alcohol advertising should be made by selected officials rather than the FTC," Miller said, Id. at F7.

[41A] Id. at 2.

[41B] Id.

[41C] Id. at 4. It should be noted that BATF has officially stated that it will not act with regard to the use of athletes in beer and wine commercials.

FTC Commissioner Patricia F. Bailey filed a dissenting statement disagreeing with the Commission's decision "not even to engage in some factual inquiry with respect to certain questionable advertisements and practices."[41D] She specifically noted various alcohol ads involving driving and what appeared to be alcohol abuse, in addition to college marketing promotions and chug-a-lug contests sponsored by brewers and college newspaper advertisers.[41F] Commission Bailey concluded:

> Finally, companies that market alcoholic beverages have a keen awareness of the importance of brand loyalty and the benefits of establishing brand loyalty at an early age. Promotions aimed at youth, including those who are under-age, help to establish brand loyalty that can pay dividends well into the adult years of a company's customers.[41E]

The release of the Commission's letter was accompanied by the release of the recommendations of its staff regarding the denial of the petition.[41G] These recommendations consist of a 52-page review of the petition, the relevant law and scientific evidence, followed by a 53 page appendix entitled "Alcohol Advertising, Consumption and Abuse" prepared by the FTC Bureau of Economics, dated March 5, 1985. The staff does note the various remedies sought by the petition including the ban, counter-advertising and labeling, but the latter two are hardly discussed in the rest of the document which is principally focused on the ban

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[41D] See specifically noted Dissenting Statement of Commissioner Patricia F. Bailey from Denial of the CSPI Petition to Regulate Unfair and Deceptive Alcoholic Beverage Advertising and Marketing Practices, at 1 (April 15, 1985).

[41E] Id. at 2-3. See on this issue the recommendation and report on college alcohol marketing.

[41F] Id. at 4.

[41G] Recommendations of the Staff of the Federal Trade Commission, re: Omnibus Petition for Regulation of Uniform and Deceptive Alcoholic Beverage Advertising and Marketing Practices, Docket No. 209-46, March, 1985. ("the FTC Staff Recommendation") The recommendations are, however, prefaced as follows:

> NOTE: This report has been prepared by staff members of the Cleveland Regional Office of the Bureau of Economics of the Federal Trade Commission. The Commission has authorized its release. It does not necessarily reflect the views of the Federal Trade Commission or any of its individual Commissioners.

proposal.[41H] The scientific evidence on causation is then dismissed as inconclusive, or contradictory, yet the staff report does not include any of the more recent studies.[41I] Nevertheless, the FTC staff concludes:

> Most of the studies done so far seem to be the conscientious efforts of competent researchers, so the fact that they have not reached definition or even consistent results does not bade well for future studies.[41J]

And further:

> When the substantial work is already done and the meager achievements gained in the face of severe methodological problems are combined, it is problematic whether further studies are warranted. It seems unlikely that a more striking result will be achieved than the standard one that the effect of advertising on sales is found to be small or more often statistically insignificant.[41K]

The FTC letter was, therefore, issued without any apparent consideration of the factual record concerning the specific advertising and marketing practices noted and criticized by Commissioner Bailey. CSPI and the other petitioners may appeal the FTC denial, subject to the significant burden of overturning the agency's discretion. However, it can be argued that the record before the FTC was somewhat incomplete in terms of the factual record, the scientific studies, and possible remedies other than an absolute ban on broadcast alcohol advertising.

[41H] Id. at 4-5.

[41I] See part 5, infra for some of the more recent studies on broadcast alcohol advertising.

[41J] FTC Staff Recommendations at 2.

[41K] Id. at 23.

As the FTC letter noted, BATF has pending before it a proposed set of regulations regarding alcohol advertising, including restrictions on the advertiser's use of athletes, celebrities, athletic events and other potentially "glamorizing aspects of alcohol advertising as well as proposals to extend the wine, beer and distilled spirits producers' voluntary advertising codes to other, non-consenting parties."[42] The Wine Institute,[43] U.S. Brewers Association[43A] and Distilled Spirits Council of the Untied States (DISCUS)[43B] have all promulgated voluntary advertising codes which inter alia regulate the broadcasting of alcoholic beverages. These codes, for example, prohibit the depiction of excessive drinking or intoxication, the minimum ages of advertising actors, and the showing of dangerous activities in connection with alcohol.

The Wine Institute has proposed that the BATF permit the extension of the Code of Advertising Standards to nonsignatories such as the other domestic and foreign producers.[43C] However, there have already been questions raised by the FTC regarding the possible application of the antitrust laws to any coerced adherence to such advertising codes by non-parties. It is clear that even well-intentioned, public interest codes and standards promulgated by non-profit industry associations may still result in antitrust liability due to the potential anti-competitive effects.[43D]

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[42]See BATF, Labeling and Advertising Regulation Under the Federal Alcohol Administration Act, 45 Fed. Reg. 83530, 83532 (Dec. 19, 1980).

[43]The Wine Institute's Code of Advertising Standards is discussed at p. 36 of the FTC Staff Recommendation, testimony of Patricia Schneider, Los Angeles, and John DeLuca before the U.S. Senate Subcommittee at n.17, supra.

[43A]The U.S. Brewers Association's Guidelines for Beer Advertising is discussed at p. 35 of the FTC Staff Recommendations and in the testimony of Donald B. Shea, Los Angeles.

[43B]DISCUS' The Code of Good Practice is discussed at p. 34 of the FTC Staff Recommendation.

[43C]See Testimony of John DeLuca at n.17 supra.

[43D]See e.g., American Society of Mechanical Engineers Inc. v. Hydrolend Corp., 456 U.S. 556 (1982) (non-profit industrial standards association held liable for treble damages).

The DISCUS Code of Good Practice and the broadcaster's code may also soon be under review. The recent Seagram's national newspaper advertising campaign raised questions about the propriety of these codes' long-standing voluntary bans on broadcast advertising of distilled spirits. Seagrams had proposed broadcast advertising on the "equivalency" of wine, beer and distilled spirits alcohol content which the major networks have rejected.[43E] Clearly, the networks' refusal to carry the Seagrams' ad raises both First Amendment and antitrust implications due to the absence of any government imprimatur by way of legislation, regulation or supervision of the voluntary ban on distilled spirits ads; especially since wine and beer ads are permitted.[43E]

BATF proceedings began in 1978 when the agency first issued its Advance Notice of Proposed Rulemaking.[43] Subsequently, BATF received almost 5,000 comments and 140 citizen petitions regarding its proposed rulemaking.[45] Final BATF action has not yet been promulgated.

5. Recent Scientific Studies on Alcohol Advertising

As the issue of the alcohol advertising has become increasingly popular and more defined, virtually every public debate has brought forth new studies and counter-criticisms of the pre-existing ones. To that extent, the current controversy has stimulated a new wave of research and abstracts. This new material approaches the question of the advertising of alcohol from a variety of perspectives designed to refute critics of the earlier "standard" while still defining new directions for further study. Some

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[43E] See Seagram's: It's Time Americans Knew the Facts About Drinking, The Wash. Post at A20, (April 15, 1985); The N.Y. Times at A15, (April 15, 1985); The Wall St. Journal at 27, (April 15, 1985); and The Phila. Inq. at 8B (April 15, 1985).

[43F] See the issue of requirements for "state action" antitrust exemptions, recommendation and report on college alcohol marketing practices. See also, Southern Motor Carriers v. U.S., No. 82-1922 (date).

[44] 43 Fed. Reg. 54266 (Nov. 21, 1978).

[45] See statement of James C. Miller, III, n. 41, supra.

have even suggested that this recent quantitative or "effects" orientated research should now be supplemented by new "qualitatively" orientated studies of the effects of media advertising on changing drinking patterns which may be harmful as well.[46]

On these scientific issues, there follows a list of some of the basic material as well as some of the more recent research on the issue of broadcast media alcohol advertising: Atkin and Block, CONTENT AND EFFECTS OF ALCOHOL ADVERTISING 1980 (this is the so-called "Michigan study," that resulted largely from the 1976 Senate Hearings described above. It was funded by BATF, FTC, NIAAA and DOT support); Pittman and Lambert, ALCOHOL, ALCOHOLISM AND ADVERTISING 1978 (This study subtitled, A Preliminary Investigation of Asserted Associated was supported in part by a grant from the United States Brewers Association, Inc."); Strickland, Content and Effects of Alcohol Advertising: Comment on NTIS Pub. No. PB 82-123142, 45 Jour. Stud. on Alcohol at 87 (1984). (This article is a critique of Atkin's Michigan study.) See also Atkin, Hoching and Block, Teenage Drinking: Does Advertising Make a Difference?, 34 Jour. of Commun. at 157 (April 1984); and McCarty and Ewing, Alcohol Consumption While Viewing Alcoholic Beverage Advertising, 18 Int'l. J. of Addiction at 1011 (1983). But see Estes and Heinemann, Alcoholism, Development Consequences and Intervention at 85 (2nd ed. 1982). There were other comments, in addition to a reply by Profs. Atkin, Kohn and Smart, The Impact of Television Advertising on Alcohol Consumption: An Experiment, 45 Jour. of Stud. on Alcohol at 295 (1984) (this is one of a number of Canadian studies as well as English, Australian and other foreign based research reports on this issue.) More recent articles and studies

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[46]See e.g. Dorn and South, Alcohol and the Media: A Review and Critique of the 'Effects' Model, 3 Int'l Quot. of Comm. Health Educ. at 183 (1982-3). (The authors criticize the emphasis in previous studies on the amount of drinking as a function of advertising versus changes in drinking "styles" as a result of advertising emphasis. This may have equally as serious health consequences as increased amounts. The new brands and line extensions being introduced by the brewers may also reflect this concern. See Hume, Brewers Enlist New Brands to Battle Problems, Ad Age (Jan. 31, 1985).

include two new studies by different research teams both focusing on the M.A.S.H. television show which was criticized in the 1976 Senate Hearings described supra.[46A]

Recently, also, the American Academy of Pediatrics issued its own Policy Statement on Children, Adolescents and Television concluding inter alia: "Television conveys unrealistic messages regarding drugs, alcohol and tobacco, and indirectly encourages their use."[46B]

The full impact, however, of these more recent analyses and studies has yet to be felt in the legislature and courts. It seems clear that the stimulus of public debate over these issues is now being felt increasingly in the academic, professional and scientific studies research facilities. Where in the recent past, scientific studies were few and hard conclusions to be drawn therefrom even more rare, now the literature on the subject is growing both in sheer numbers and in sophistication. If the legislative, judicial and administrative bodies charged with oversight require a "critical mass" of data before acting on the issue of alcohol advertising, the current literature is surely fast approaching that level.

[46A]Rychterik, Fairbank, Allen, Foy and Drabman, Alcohol Use in Television Programming: Effects on Children's Behavior, 8 Addictive Behaviors at 19 (1983) and Futch, The Influence of Televised Alcohol Use on Children's Problem Solving, unpublished Ph. D. dissertation, SUNY Binghamton (1984) (University Microfilms No. 1 8416783). In addition, there are new studies by Prof. Atkin and his colleagues, including: Atkin, Neuendorf and McDermott, The Role of Alcohol Advertising in Excessive and Hazardous Drinking, 13 Jour. Drug. Educ. at 313 (1983) and Atkin, Alcohol Beverage Advertising: Its Content and Impact (1984).

[46B]Any review of this literature is quickly outdated but some journals regularly update their texts and articles. See e.g. Rutgers Center on Alcohol Studies, Alcohol Studies Retrospective Bibliographies - B725, Advertising and the Media (Updated Oct. 1984). See also NAB Summary and Citation of Research Related to Beer and Wine Advertising, (Nov. 1984.) See also Strickland and Pittman, Social Learning and Teenage Alcohol Use: Interpersonal and Observational Influences Within the Sociocultural Environment, Jour. of Drug Issues at 137 (Winter 1984). In this new article, Professor Strickland and Pittman focus on the interplay between teenage peer influence and media exposure to alcohol use.

6. The Legal Authorities

(a.) The "Commercial Speech" Cases.

Both the critics of advertising and its proponents rely on the commercial speech cases. Some of the basic commercial speech, First Amendment cases worthy of note are as follows: Bigelow v. Virginia, 421 U.S. 809 (1975), (the Virginia "abortion advertising case" that first extended First Amendment constitutional protection to commercial speech); Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council, 425 U.S. 748, (1975) (another commercial speech landmark case relating to advertising of drug price information in the professional setting of pharmacy); and Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, (1980) (the leading commercial speech case, involving a state ban on gas appliance advertising during the natural gas shortage). Central Hudson resulted in a decision by the U.S. Supreme Court establishing a four-part test for determining the legality of proposed limits on commercial speech.[47]

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[46]These commercial speech cases and the Central Hudson test are well summarized and analyzed in: Note, Liquor Advertising: Resolving the Clash Between the First and Twenty First Amendment, 59 N.Y.U.L. Rev. 157 (1984) and Sackett, Alcoholic Beverage Advertising and the First Amendment, 52 U. Cinn. L. Rev. 861 (1983).

[47]The following is the Supreme Court's explanation of the four part test in the Central Hudson decision:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566.

Finally, two of the more recent commercial speech cases applying the Central Hudson test in the Supreme Court have been in the area of attorney advertising.[47A] Both the FTC Final Staff Report and the Antitrust Division of the U.S. Deptment of Justice have strongly advised bar authorities against any similar restrictions on truthful advertising by attorneys.[47B] The FTC Staff Report is primarily an economic study of the price effects of advertising on legal fees designed to support the agency's prohibition on any advertising ban by the bar.[48]

The critics of alcohol advertising have contended that these leading commercial speech precedents are relatively new, still untried legal developments, and that they may not be controlling in this situation because of the more serious health and welfare hazards related to alcohol use and abuse, as opposed to public utilities or bar advertising. Further, they argue that even if Central Hudson, et al. are relevant to alcohol advertising, the proposed ban and other proposed restrictions would pass the four-part test.[49]

[47A]See Bates v. State of Bar of Arizona, 433 U.S. 350 (1977) and In re R.M.J., 455 U.S. 192 (1982) which concludes: "The absolute prohibition on appellant's speech, in the absence of a finding that his speech was misleading, does not meet these requirements." Id. at 207.

[47A]See Letter from U.S. Department of Justice, Antitrust Division to State Bar Executives, September 21, 1984 (re: American Bar Association Model Rules of Professional Conduct Concerning Fees, Solicitation and Advertising) and Report of the Staff of the Federal Trade Commission, Improving Consumer Access to Legal Service: The Case for Removing Restrictions on Truthful Advertising (1984).

[48]See e.g., Anderson, Birth of Salesman, (Am. Bar Found., 1981).

[49]See e.g., Letter to Senator Paula Hawkins from Prof. Marc A. Franklin, Stanford Law Professor, Feb. 2, 1985 (describing the commercial speech cases as "a very new area of law that (the Supreme Court) has been developing case by case in context totally unlike the one facing your subcommittee. But the Court has been sensitive to subtle fact differences in the commercial speech cases and to subtle fact differences between broadcasting and other media"). But see unpublished speech by Floyd Abrams, Esq., Counsel to the N.A.B. et al., as amicus curiae in Capital Cities v. Crisp, see part 6b infra, before the Law and Justice Committee, National Conference of State Legislatures, Boston, Mass, July 23, 1984. ("The Supreme Court has never upheld any ban on advertising of a lawful product that was not deceptive"). Speech on file at the Advisory Commission.

The broadcasters, alcohol producers, their allies and advisers have steadfastly maintained that the First Amendment, as interpreted by the commercial speech cases, prohibits any advertising restrictions on a legal products such as alcohol, so long as the advertising is not false, misleading or deceptive.[50] The critics, however, argue that as the proposed advertising restrictions move along the continuum set forth supra, from more to less restrictive, and from providing virtually no consumer product information to providing more such data, constitutionality may become less problematic.

To some extent, the issues of "equal time" or counter advertising tied to other products or services will be reviewed in the next term by the U.S. Supreme Court in Pacific Gas & Electric v. Public Utilities Commission, No. 84-1044, (53 U.S.L.W. 3578, Feb. 12, 1985), where the question presented for review is "Does an order of a state public utilities Commission violate the First Amendment by compelling a privately-owned public utility to include in its monthly billing envelope funding solicitation messages of a third party?" In its ruling below, by the California Supreme Court refused to review the California Public Utilities Commission order requiring the inclusion of the third party mailing by a utility consumer group.[51]

Finally, as both proponents and critics of alcohol advertising have noted, there has already been a Supreme Court comment - in the context of attorney advertising - on the "special consideration" applicable to proposed restrictions on commercial speech over the broadcast media.[52] Thus, the legal stage has already been set for a review of any alcohol advertising restrictions regarding television and radio broadcasting.

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[50]Testimony of Richard Wiley, Los Angeles.

[51]Jurisdictional statement of Pacific Gas & Electric Co., at 1, No. 84-1044.

[52]Bates v. State Bar of Ariz., 433 U.S. 350 (1977).

(b.) The Alcohol Advertising Ban Cases - Thus Far

There have already been at least three noteworthy appellate cases on the issue of restricting alcohol advertising. To date, the courts have ruled 2 to 1 with regard to upholding such restrictions, but there is a wide divergence of opinion on what these decisions hold for the future. The advertising critics point to these cases as supporting their arguments regarding the "special" hazards of alcohol advertising.[53] Nevertheless, perhaps predictably, the broadcasters and producers have found their own grounds for solace in these decisions, supporting their views.[54]

The first of these cases, Queensgate Inv. Co. v. Liq. Con. Comm.,[55] involved a state ban on liquor retail price advertising. The Ohio Supreme Court upheld the ban under the four-part Central Hudson test noted infra.[56] Moreover, only two Justices dissented from the dismissal, Justices Brennan and Stevens, on the basis that they would have noted probable jurisdiction and heard the case. The refusal of the Supreme Court even to hear the case has been relied upon by the proponents of alcohol advertising restrictions.[58]

In the next case, Dunagin v. City of Oxford, Mississippi,[59] the state of Mississippi enforced a ban on

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[53]See e.g. testimony of George Hacker, Princeton.

[54]Testimony of Donald B. Shea, Los Angeles.

[55]69 Ohio St.2d 361, 433 N.E.2d 138, (1982) appeal dismissed, 459 U.S. 807 (1982).

[56]433 N.E.2d at 141.

[57]459 U.S. 807 (1982). But see, as to the limited precedential value of such a denial, Anderson v. Celebreeze, 103 S. Ct. 1564 (1983).

[58]See e.g., testimony of George Hacker, Princeton.

[59]718 F.2d 738 (5th Cir. 1983)(en banc), cert. denied, 104 S. Ct. 3554 (1984)

intrastate media advertising of liquor. The federal court of appeals for the Fifth Circuit upheld the ban as not being in violation of the First Amendment, notwithstanding the admitted absence of scientific proof linking such advertising to alcohol consumption. Dunagin and a companion case were taken to the U.S. Supreme Court by way of petitions for certiorari, which were then denied by the Court.[60]

For the alcohol advertising critics, Dunagin quickly proved to be a hollow, shortlived victory. In its Dunagin, opinion, the Court of Appeals had noted the fact that interstate media were not regulated by the state's ban on intrastate media. In Capital Cities Cable v. Crisp[61] the issue was the effect of a state's attempt to enforce its liquor advertising ban on interstate media, specifically on an out-of-state cable company carrying broadcast wine ads that were prohibited under the state statute. In its opinion, the U.S. Supreme Court held that federal law and federal communication regulation pre-empted the state's attempt to control the interstate media under its liquor law. The Court, however, specifically noted that it was not deciding the First Amendment question since it was unnecessary to do so given the other deciding factor, federal pre-emption of state law.[61]

Capital Cities was, in effect, the preliminary bout for the main contest. Virtually every interest group in the alcohol advertising controversy filed a brief amicus curiae in that case, including the broadcasters,[62] the alcohol industry[63] and the advertising critics.[64] The issue in the Supreme Court in Capital Cities was where the next battle in this issue would be fought. If the states could have regulated interstate media in each of their jurisdictions as they regulated intrastate media under Queensgate and

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[60]Lamar Outdoor Advertising v. Mississippi State Tax Comm'n No. 83-1244, cert. denied, 104 S. Ct. 3554 (1984).

[61]104 S. Ct. 2694 (1984).

[62]Brief Amici Curiae of the National Association of Broadcasters, American Broadcasting Companies, Inc., CBS, Inc. and the National Broadcasting Company, Inc.

[63]Brief Amici Curiae of the American Civil Liberties Union and the American Civil Liberties Union of Oklahoma in Support of Petitioners, Capital Cities Cable, Inc., (Floyd Abrams, Esq., Counsel of record).

[64]Brief of S.A.N.E. Inc. as Amicus Curiae in Support of Respondent, Crisp in Capital Cities.

Dunagin, then such one-state restrictions could have been sought in one state after the other. However, since the Supreme Court said that these states could not control interstate media in the face of federal pre-emption, the focus of the advertising critics has necessarily shifted back to Washington to the Congress and the federal agencies.

Thus Queensgate, Dunagin and Crisp were just the beginning of the first chapter in the last volume of this senario. Now, without statutes, the FCC under the "fairness" doctrine,[65] or the Congress - the interstate media - such as cable television or satellite "super stations" - are beyond the reach of the states because of the gap left after Queensgate, Dunagin and Capital Cities Cable.[66] The current petition by Project SMART to the President and the Congress and the BATF proceedings are all reflections of this perceived need for a federal remedy rather than state-by-state bans. Such a federal remedy based on national concerns is necessary in order to be able to deal effectively after Capital Cities with all alcohol advertising by both intra and inter state media.

(c.) The Tobacco Ban Precedent

The critics of alcohol advertising point to the tobacco ban as precedent for their proposed restrictions.[66] In the testimony before the Commission and the Congress the tobacco advertising restrictions have been exhaustively described and compared to the alcohol proposals by the critics, alcohol industry, broadcasters and other interested parties.[67] As with so many other aspects of this issue, the relevance, if any, of the tobacco ban precedent is very much still in dispute.[67A]

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[65] See part 3, supra.

[66] See part 3a, supra.

[67] See e.g. testimony of Richard Wiley, Los Angeles; George Hacker, Princeton.

[67A] We have already noted the history of the fairness doctrine in the tobacco cases. See also, Note, Liquor Advertising: Resolving the Clash, 59 N.Y.U.L. Rev., supra at 184, n. 198 questioning the continued validity of the "tobacco ban" case, Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971) (three judge court), aff'd mem. 405 U.S. 1000 (1972) as predating the commercial speech decisions. Also questioned for the same reasons, is Banzhaf v. F.C.C., 405 F2d 1082 (D.C. Cir. 1968). But see Weiliger, The Constitutional Rights of Puffery; Commercial Speech and the Cigarette Broadcast Advertising Ban, 36 Fed. Comm L.J. at 1 (July 1984).

7. Conclusion

For those who must decide the issue, the controversy over restrictive broadcast alcohol advertising is unlikely to fade away. Its continued vitality can be measured by the current petition to the President, Congress and the agencies, current public opinion polls and by the political process which reflects all public pressures. The issues raised by these reform proposals are far too complex for a "quick fix"; some of the issues may in fact defy any final resolution. However, one issue on which all concerned can agree is opposition to broadcast media advertising which distorts or glamorizes alcohol to youth so as to encourage abuse. That issue, at least, is straight forward and calls for response and hopefully, agreement due to the tremendous harm being suffered by youth with alcohol and other drug problems.

This recommendation makes no case for any one solution to the broader issue of restricting alcohol advertising. It merely calls for more serious, thoughtful consideration of the issue of such media advertising and programming's unrealistic depiction of alcohol and its possible effects on our youth. The welfare of our youth in this regard is the Commission's mandate and the basis for all of our concern about alcohol advertising in the first instance.

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DRAFT

6. Marketing on College Campuses

AMERICAN BAR ASSOCIATION

SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES

RECOMMENDATION

BE IT RESOLVED that the American Bar Association opposes alcohol advertising and marketing strategies for college campuses that promote or tend to promote either the heavy use of alcohol or the use of alcohol by underage youth and encourages government action, if necessary, to permit cooperative activity toward ending these practices.

Report

At its field hearings, the Advisory Commission listen to repeated testimony criticizing youth-oriented alcohol advertising in college newspapers and other marketing practices specifically directed at the college age group.[1] As described to the Commission, the alcohol industry, particularly the brewers, have advertised heavily in college newspapers; produced college concerts; and provided low price, and at times free, promotional products to college groups.[2] As with the media alcohol advertising issue, college alcohol advertising implicates several concerns. These concerns include among others, the special susceptibility of the college population to such advertising, the high incidence of alcohol-related health and accident injury problems in this age group, and the evident illegality of alcohol consumption by college age youths in the now 27 jurisdictions with an over 18 minimum drinking age.[3]

There is evidence of increasing concern regarding the effects of college marketing. For example, the Michigan Liquor Control Commission has recently proposed a rule to ban promotion of alcoholic beverages on Michigan college campuses.[4] The Michigan proposal is scheduled for hearings and proposed amendments or changes to permit exceptions for some industry activities such as "responsible" drinking campaigns and charitable contributions.[5] Meanwhile, other liquor commissions and campus authorities in Massachusetts, South Carolina and elsewhere have also begun to question campus alcohol advertising and promotions.[6]

The National Council on Alcoholism (NCA) has issued its own Prevention Position Statement on Alcoholism and Alcohol-Related Problems as it Relates to College and University Campus Alcohol Advertising. The NCA statement calls for "the elimination of alcohol advertising and promotion in all forms from university and college campuses" noting the implication of alcohol consumption on college campuses in lowered school performance, vandalism, automobile and other types of accidents, illness and

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[1] See e.g., testimony of Delores Napper, Atlanta.

[2] See testimony of Judge Leon Emmerson, Los Angeles.

[3] See e.g. testimony of Delores Napper, Atlanta; See also the recommendation and report regarding the 21 minimum drinking age.

[4] Goldberg, Plan to Ban Liquor Ads on Campuses Stir, Detroit Free Press, (Feb. 19, 1985).

[5] The Michigan proposal is attached hereto as Appendix A.

[6] Roberts, Controversy is Rising Over Beer Promotion on College Campuses, The Wall Street Journal, 15 (Jan. 30, 1985).

suicide.[7]

Finally, on the federal level, officials of both the Federal Trade Commission (FTC)[8] and the Bureau of Alcohol, Tobacco and Firearms (BATF)[8A] have recently indicated their growing concern over the college marketing activities of the alcohol indsutry.

Enforced bans are clearly only one solution to these concerns. Another answer may be the voluntary, self-restraint of the producers. One brewer has already voluntarily and unilaterally "pulled back" on its college marketing activities.[9] Other alcohol producers have openly criticized their own industry's promotional activities directed at college students.[10] The industry position, however, has more often

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[7] Id.

[8] See e.g., Dissenting Statement of FTC Commissioner Patricia P. Bailey from Denial of Center for Science in the Public Interest Petition to Regulate Unfair and Deceptive Alcoholic Beverage Advertising and Marketing Practices, Docket No. 209-46 (April 15, 1985) at 3 noting in particular:

> ...(5)various beer companies promotion on college campuses involving clug-a-lug contests; and (6) various advertisements for alcoholic beverages in college publications in states where the drinking age is 21.
>
> ...The last two promotional practices encourage young people to drink alcohol in ways that are dangerous or in situations where it violates state law and public policy. Clearly, such promotional techniques could constitute deceptive or unfair practices and deserve further analysis by the Commission.

See also Henderson, FTC Won't Restrict Alcohol Ads, Will Review Issue on Case-by-Case Basis, The Wash. Post at F1, (April 17, 1985:

> FTC chairman James C. Miller, III said some ads 'are close to the margin' of legality. He cited beer ads and promotions that appear aimed at college students and urged beer advertisers to clean up their act. Id. at F7.

[8A] See Hume, Feds Rap Beer Promo Tactics, Advertising Age, at ___, (Nov. 1, 1984).

[9] In a conversation on April 15, 1985 with Ellen S. Teller, Esq., Project Consultant to the Advisory Commission, William Weatherston confirmed that Stroh's had decided to cease sponsoring some college events and was evaluating its other activities in areas where there has been concern expressed.

[10] Sobczynski, Trouble is Brewing on Campus, Advertising Age, at ___, (Jan. 16, 1984).

been to defend college marketing as being directed at influencing brand identification, or product choice, rather than encouraging youth alcohol consumption.[11] Whatever the motivation, college marketing of alcohol raises many of the same health and safety concerns previously noted by media advertising of alcohol.[12]

This background of alcohol-related youth problems may be critical to the legality of any cooperative action, or inaction, by the alcohol industry regarding college marketing. Even without an actual agreement, the simultaneous voluntary withdrawal of college ads and promotions might be subject to legal challenge under the antitrust laws.[13] If the college

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[11] Id., See also, testimony of Donald B. Shea, President, U.S. Brewers Association, Los Angeles.

[12] See the recommendation and report on media advertising.

[13] See e.g., Matsushita v. Zenith, No. 83-2004, cert. granted, 53 U.S.L.W. March __, 1985). See also letter from the FTC to John DeLuca, President, Wine Institute dated March 31, 1976 regarding the proposed Code of Advertising Standards. Mr. DeLuca also commented on the antitrust issue as follows in his prepared statement to the Senate Subcommittee on Alcoholism and Drug Abuse on February 7, 1985:

> In 1977 the Wine Institute requested permission of the Federal Trade Commission to enter into negotiations with media organizations, and vinters outside of California, to extend the California Code to the remainder of the industry. The FTC withheld permission on antitrust grounds. We subsequently proposed to the Bureau of Alcohol, Tobacco and Firearms that our Code be made mandatory for all vintners, both American and foreign. This is now under consideration. Id. at 5.

See the recommendation and report on advertising for background on the BATF regulation proposal.

advertising ban, however, were regulated and supervised, the liquor industry could also be exempt under the "state action" exemption to the federal antitrust laws.[14] Alternatively the college advertising ban could be specifically exempt from the antitrust laws by amending those laws. In either exemption situation, one of the critical issues is the underlying social justification for banning college alcohol marketing. Under Parker v. Brown and the Southern Motor Carriers rationale, the states must clearly articulate and affirmatively express the college ban as a state policy and then must actively supervise the ban.[15] The potential harm of alcohol abuse would be a critical part of the justification for such a state ban. Similarly, if the alcohol industry were to seek a specific antitrust exemption for a college ad ban, the "clearly paramount social purpose" for a ban would be necessary to justify such an exemption.[16]

Given the alcohol industry's own expressed concerns regarding youth alcohol abuse,[17] the voluntary cessation of college alcohol advertising would seem to be a prime example of corporate social responsibility. Because voluntary restrictions may be feasible, industry support of proposed state or federal rules prohibiting such marketing, would seem appropriate to deal with the growing concern regarding alcohol abuse on our college campuses.

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[14]See e.g., Parker v. Brown, 317 U.S. 341 (1943); Southern Motor Carriers v. U.S., No. 82-1922 (decided March 27, 1985). cf., Cal. Retail Dealers Ass'n. v. Medical Alum. Inc., 445 U.S. 97 (1980).

[15]The proposed Michigan rule banning college alcohol marketing, supra, could be a case in point on the issue of what constitutes a Michigan Liquor Control state policy. After hearings, any rule promulgated by the Commission must be reviewed and approved by a joint-committee of the Michigan state legislature before enforcement can begin.

[16]See e.g. the Jan. 1979 Report of the President's Nat'l Comm. for the Review of Antitrust Laws and Procedures at 17. See also, Sanger, Business and the Law, Joint Research: Barriers Fall, N.Y. Times at D2, (April 23, 1984).

[17]See, e.g., testimonies of Donald B. Shea, and Patricia Schneider, Los Angeles.

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7. Child Custody and Visitation

AMERICAN BAR ASSOCIATION

SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES

RECOMMENDATION

Judges handling domestic relations cases should require, in order to promote the best interest of the child, the evaluation by appropriate alcohol or other drug treatment professionals, parents reasonably suspected of alcohol and other drug abuse problems, before decisions affecting custody and visitation rights are made.

Report

The Advisory Commission received testimony from several witnesses regarding the power of domestic courts, as a condition in custody or visitation matters, to require referral and evaluation of parents whom the courts reasonably suspect of having alcohol or other drug problems.[1] It was apparent that many judges and other court personnel are cognizant of the degree to which their caseloads reflect substance abuse.[2] These concerns are the basis for the Commission's child custody and visitation recommendation which follows the recent trend establishing court referral and diversion in areas such as juvenile cases,[3] drunk-driving,[4] and spouse or child abuse.[5]

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[1] See e.g., Testimony of Sheila B. Blume, M.D., and Thomas H. Blattner, Princeton.

[2] See e.g., Testimony of Hon. Leon Emmerson, Hon. Randolph Moore and Hon. Jerry Moore, Los Angeles.

[3] See the recommendation and report regarding juvenile court diversion.

[4] See e.g., 39 N.J. Stat. Ann. S. 50-4 (West 198_) for drunk driver treatment.

[5] See 16 D.C. Code Ann. S. 1005(c)(1)(2) and (3) (198_):

> (c) If, after hearing, the Family Division finds that there is good cause to believe the respondent has committed or is threatening an intrafamily offense, it may issue a protection order:
>
> (1) directing the respondent to refrain from the conduct committed or threatened and to keep the peace toward the family member;
>
> (2) requiring the respondent, alone or in conjunction with any other member of the family before the court, to participate in psychiatric or medical treatment or appropriate counseling programs;
>
> ...
>
> (3) directing the respondent to perform or refrain from other actions as may be appropriate to the effective resolution of the matter. (emphasis added).

See also the recommendation and report regarding child abuse and neglect.

Recent statutes in the latter areas provide a precedent, in addition to model language, authorizing such referrals.[5A]

The issues of alcohol and other drug abuse by parents and its impact on children in custody and visitation cases is not new to domestic relations courts.[5B] The courts' attitude toward parental substance abuse problems, however, have been steadily evolving[5C] away from a strict, uncompromising moral condemnation of the abusing parent, to one of concern toward the child.[5D] Where some courts would have formerly denied

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[5A] See e.g., Ill. Ann. Stat. ch. 40, S. 2303-8(c)(5) (Smith - Hurd 198_):

> (c) The order of protection may include any or all of the following remedies:...
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> (5) Requiring or recommending the respondent to undergo counseling for a specified duration with a social worker, psychologist, clinical psychologist, psychiatrist, family service agency, mental health center guidance counselor, or any other guidance service the court deems appropriate

[5B] See e.g., Ploscowe, Foster and Freed, FAMILY LAW, "Intoxication, Drug Addiction and Parental Fitness," at 917-2 (2nd ed. 1972) (and cases cited therein).

[5C] See e.g., Note, The Best Interests of the Child in Custody Controversies Between Natural Parents: Interpretations and Trends, 18 Washburn L.J. 482, 491-2 (1979): "Evidence of drunkenness is treated with contempt by most courts. The offending parent encounters difficulty in persuading the court he or she can provide a suitable living environment. An adverse impact on the child may be presumed." (citing, Comment, Child Custody: Considerations in Granting the Award Between Adversely Claiming Parents, 36 S. Cal. L. Rev. 255 (1963).

[5D] Id., there has also been an apparent change in the attitudes related to drinking in particular: "Although the older cases regarded female drinking as immoral, the more recent cases look at its effect upon parental functioning and possible detriment to the child." For examples[2C] of this attitude, see Wallser, Measuring the Child's Best Interests - A Study of Incomplete Considerations, 44 Den. L.J. 132, 137 (1967):

> Alcohol and motherhood are as incompatible as drinking and driving in terms of a mother's fitness to have custody. The alcoholic mother finds difficulty recovering custody of her children. Her drinking seems to contradict the devotedness a court expects in a mother.

See also Bergman, Custody Awards: Standards Used When the Mother Has Been Guilty of Adultery or Alcoholism, 2 Fam. L.J. 384, 404 (1968).

custody or visitation, more recent decisions indicate a willingness by the courts to consider the recovery from the illness or the possibility that fitness for custody or visitation might be affected by treatment for substance abuse problems.[5E] The question to be addressed is whether or not domestic relations courts have the power to require evaluation for such problems under their existing statutory authority.

In the first instance, a domestic relations court's authority to refer an individual for substance abuse evaluation would seem to parallel other necessary protections for children such as supervised visitation[6] or requirements for psychiatric or psychological treatment for parents and children.[7] In the context of domestic relations cases, courts have been vested with a wide range of authority in deciding the delicate matters of custody and visitation. In addition to specifically requiring parents to attend counselling

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[5E]Ploscowe et al., op.cit at n. above.

> In the case of alcoholic parent, the court should consider the welfare of both the patient and the child plus medical opinion as to the effect of a continued relationship upon the treatment of the parent for alcoholism. Id. at 918. (emphasis added).

Cf. Hardin, When a Parent is Unfit, 4 Fam. Advoc. 8, 11 (1981).

> It is not enough, therefore, to prove that a parent is an alcoholic. You must prove that, for example, the parent is neglectful while drinking, and that neither the drinking nor the neglect is likely to improve.

See also, Hardin and Tazzara, TERMINATION OF PARENTAL RIGHTS, at 8-9 (1981).

[6]See e.g., Parker v. Ford, 89 A.D.2d 806, 453 N.Y.S.2d 465 (1982) (supervised visitation with "unfit," "common drunkard" father); Tibbetts v. Tibbetts, 6 Ariz. App. 316, 432 P. 2d 282 (1967) (transferring custody to admitted alcoholic father who had stopped drinking).

[7]See generally, Note, Making Parents Behave: The Conditioning of Child Support and Visitation Rights, 84 Colum. L. Rev. 1059 (1984).

sessions,[8] some courts now have the authority to act by: setting conditions on custody or visitation;[9] seeking advice of professional personnel, whether or not employed by the court;[10] ordering an appropriate agency to exercise continuing jurisdiction over the case;[11] and ordering the use of physicians, psychiatrists, social agencies or others to facilitate conciliation court functions.[12]

One of the sources for these provisions has been the Uniform Marriage and Divorce Act (UMDA) which has been enacted in large part in Arizona, Illinois, Kentucky, Minnesota, Missouri, Montana and Washington.[13] The UMDA includes several sections providing for supervision of the mental and physical health of the family in divorce proceedings.[13A] For example, UMDA Section 402 conditions custody on the "best interest of the child" considering inter alia:

> 5. the mental and physical health of all individuals involved.[14]

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[8]See e.g., 23 Pa. Cons. Stat. Ann. S. 1006 (Purdon 19__).

[9]See e.g., Minn. Stat. S. 518.13(h) (1) (19__).

[10]See e.g., Ind. Code Ann. S. 31-1-11.5-21(e) (West 19__).

[11]See e.g., Wash. Rev. Code Ann. S. 2609.250 (19__). See also Ind. Code Ann. S. 31-1-11.5-21(c) (West 19__).

[12]See e.g., Ariz. Rev. Stat. Ann. S. 25-381.16C (West 19__); Calif. Civ. Proc. Code S. 1770, 1771 (West 19__); Ind. Code Ann. S. 31-1-11.5-19; and IA. Code Ann. S. 598.16.

[13]Uniform Marriage and Divorce Act, National Conference of Commissioners on Uniform State Laws, 9A U.L.A. 56 et. seq., (Rev. 1973).

[13A]Two cases decided under the Illinois version of the UMDA have indicated that willingness to undergo psychiatric treatment may be a factor in the court's allowance of visitation. See Taraboletti v. Taraboletti, 14 Ill. 2d 350, 372 N.E. 2d 155, 56 Ill. App. 3d 854 (1978) (mother with a history of violence and paranoia, although properly denied visitation, may re-petition the court upon obtaining psychiatric treatment); In re Marriage of Newt, 57 Ill, App 3d 1046 (1981) (lower court improperly denied visitation to mother with history of severe psychiatric difficulty who was much improved and continuing psychiatric treatment and medication as prescribed).

[14]See Ariz. Rev. Stat. Ann. S. 25-332(A)(5) (date).

With respect to visitation and custody, UMDA Section 404(b) states:

> The courts may seek the advise of professional personnel, whether or not employed by the court on a regular basis.[15]

In cases of contested custody, the Section 405(a) of the UMDA authorizes courts to employ an investigator who, in preparing a court-ordered report, may refer the child for professional diagnosis, or consult with medical, psychiatric or other professionals who have served the child in the past.[16]

UMDA Section 407 permits denial or modification of a parents' visitation rights in the event that such visitation may "endanger seriously the child's physical, mental, moral or emotional health"[17] in which case, pursuant to UMDA Section 408(b), the court may also require continuing supervision over the exercise of the custodial or visitation terms of the decree by the local probation, welfare or court social service agency.[18] In their comments to UMDA Section 408, the Commissioners on Uniform State laws specifically noted that:

> The court could intervene in the decision of grave behavioral or social problems such as refusal by a custodian to provide medical care for a sick child.[19]

In the case where a parent's alcohol or other drug problem is sufficiently grave, UMDA Section 408 may authorize referral for evaluation and treatment.

In one variation on UMDA provisions on supervision, Delaware does not specifically provide for court supervision but does allow the court to set "a specific limitation of the custodians' authority" in the best interest of the child.[20]

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[15] See Ariz. Rev. Stat. Ann. S. 25-334(B) (198__); Del. Code Ann. S. 724(b) (Rev. 1973); Ill. Ann. Stat. ch. 40, S. 604(h) (Smith Hurd 198__); Ind. Code Ann. S. 31-1-11.5-2(e) (West 19_).

[16] See Del. Code Ann. S. 255(b) (Rev. 1973); Ill. Ann. Stat. ch. 40, S. 605(b) (Smith Hurd 198__); Ind. Code Ann. S. 31-1-11.5-22(b) (West 19__).

[17] See Ariz. Rev. Stat. Ann. S. 25-337 (198__); Ill. Ann. Stat. ch. 40, S. 607; (Smith Hurd 198__); Ind. Code Stat. Ann. S. 31-1-11.5-24 (West 198__).

[18] See Ariz. Rev. Stat. Ann. S. 25-338(b) (198__); Ill. Ann. Stat. ch. 40, 608(b) (Smith Hurd 198__). Ind. Code Ann. S. 31-1-115-21(c) (West 19__).

[19] See the recommendation and report regarding consent. See also Sokolsky, The Sick Child and the Reluctant Parent, 20 J. Fam. L. 69 (1981).

[20] Del. Code Ann S. 728 (Rev. 1973).

Other state statutes that do not follow the UMDA, however, rely upon broad language authorizing the domestic court for to fashion custody or visitation orders "equitably" depending upon the courts "best judgment" in order to insure that the case is decided with the child's best interest as paramount.[21] Therefore, it may prove beneficial to the family to have either the UMDA provisions or language similar to other family "protection" statutes cited above.[22]

Without domestic court authority to refering parents for evaluation, it would be futile for the Commission to recommend further training and education for domestic relations court judges, court personnel and lawyers regarding alcohol and other drug abuse.[23] Given the wide variation in procedures now utilized by domestic relations courts, this recommendation to provide specifically for referral and evaluation of parents reasonably suspected of alcohol and other drug problems is both timely and appropriate.

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[21] See e.g. Conn. Gen. Stat. S. 466-56, 46(b)-59; Iowa Code Ann. S. 598.41 (West Supp. 1985).

[22] See n. 5 and 5A above.

[23] See the recommendations and reports regarding Coalitions, Community and School Involvement.

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Nothing herein contained shall be construed as the action of the American Bar Association unless the same shall have been first approved by the House of Delegates or the Board of Governors

8. Juvenile Offender Treatment

AMERICAN BAR ASSOCIATION

SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES

RECOMMENDATION

BE IT RESOLVED that the American Bar Association recommends that when a juvenile offender is answerable within the juvenile justice system and has been evaluated and found to have alcohol and/or other drug abuse problems, any disposition of the case should include treatment. Any such juvenile must be given access to appropriate alcohol or drug treatment if detained pending trail.

Report

In 1967, President Johnson's Commission on Law Enforcement and the Administration of Justice recommended the "early identification and diversion to other community resources those offenders in need of treatment, for whom full criminal disposition does not appear required."[1] This recommendation won swift approval from a variety of sources in the legal community.[2]

The American Bar Association endorsed offender diversion early,[3] and has been instrumental in the creation and development of subsequent criminal diversion policy. In fact,

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[1]Report of the President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society, at 332 (1967).

[2]See, former Attorney General John Mitchell's address to the National Conference on Corrections, in which he states, "in many cases society can best be served by diverting the accused to a voluntary, community-oriented correctional program instead of bringing him to trial." The Minneapolis Star, Dec. 6, 1971, at 13b. See also an address by Associate Justice Rehnquist before the National Conference on Criminal Justice, in Washington, D.C., January 24, 1973. Other groups voicing support of diversion as a viable alternative to adjudication and incarceration, include the National District Attorneys Association, American Correctional Association, and National Council on Crime and Delinquency.

[3]See, ABA Commission on Correctional Facilities and Services, Coordination Bulletin No. 17, June 1973; see also, ABA Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function, (1971). Standard 3.8(a) of the Prosecution Function, and Standard 6.1 of the Defense Function urge each party to explore the availability of non-criminal disposition, including early diversion into community-based rehabilitation programs, especially for first offenders.

the ABA in conjunction with the Institute of Judicial Administration has dedicated whole volumes of the Juvenile Justice Standards to discussing and standardizing the procedures involved in juvenile diversion.[4]

The American Bar Association's support of offender diversion has not wanted. As recently as 1983, the ABA House of Delegates approved revisions of the Juvenile Justice Standards, reaffirming the ABA's commitment to juvenile diversion policy.[5] In 1983, the House of Delegates also voted to encourage Congressional legislation which provides funding assistance to improve the criminal justice system and should:

> specifically authorize projects and programs designed to develop, test, and encourage the implementation of alternatives to the criminal justice process such as pretrial diversion, medical treatment of alcoholics or other drug abusers.[6]

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[4]Institute of Judicial Administration-American Bar Association Joint Commission on Juvenile Justice Standards, Standards Relating to Youth Service Agencies, approved by the House of Delegates, American Bar Association, 1979. See, e.g., the commentary to Standard 2.1 of Youth Service Agencies:

> The primary goal of each youth service agency is to ensure that needed services are delivered to juveniles in the community before any court contact occurs. A subsidiary goal is to ensure that suitable programs are also available for all juveniles and their families formally referred by the police or courts, and not simply for those who are most easily rehabilitated." Id., at 38.

[5]See, e.g., Standards Relating to Youth Service Agencies, Part VI:

> Intake, Early Disposition and Detention. Approved Oct. 13, 1983. One new provision of the Standards reads:
>
> > Whenever the nature and circumstance of the case permit, counsel should explore the possibility of an early diversion from the formal juvenile court process through sub-judicial agencies and other community resources.

[6]Recommendation of the Judicial Administration Division, Law Enforcement Assistance Administration (date).

The American Bar Association's support of juvenile diversion policy has been continuous, which has been a crucial factor in the development and maintenance of the various diversion programs around the country.[7]

The Advisory Commission's recommendation concerning juvenile diversion is firmly rooted within the ABA's tradition of promoting diversion as an important alternative to the standard tools of juvenile justice: prosecution and incarceration. Therefore, the Commission recommends that any juvenile who has come in contact with the juvenile justice system, and who has been found to have alcohol and/or other drug abuse problems, must be given access to appropriate treatment for those problems. The Commission further recognizes and recommends juvenile diversion as an appropriate method by which to facilitate those treatment needs.

Background: The Problem

As early as 1967, government officials were concerned about the sharply rising numbers of arrests, and the high recidivism rates among juveniles. The President's Commission on Law Enforcement and Administration of Justice, critical of the formal juvenile justice system, concluded that, "the formal sanctioning system and pronouncement of delinquency should be used only as a last resort."[8]

The U.S. Supreme Court in In re Gault, reviewed the work of the juvenile court system, and held that the wide powers of the juvenile court system had not appreciably diminished youthful crime, that inconsistencies in its philosophy had adverse effects upon youth under its control, and that gross injustices had resulted from its procedures in which youth were punished

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[7]See, The Performance Standards and Goals for Pretrial Release and Diversion, approved by the National Association of Pretrial Services Agencies, which remarks in the preface, "To date the American Bar Association and the National Advisory Commission on Criminal Justice Standards and Goals have led the way in attempting to define some standards in the area of diversion against which we can all measure whether we are coming any closer to being able to administer justice", Id. at iii.

[8]President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Socity, at 81 (1967). The Report continued to say, "[the juvenile court system] has not succeeded significantly in rehabilitating delinquent youth, in reducing or even stemming the tide of delinquency or in bringing justice and compassion to the child offender."

[9]387 U.S. 1 (1967).

more severely than adults for comparable offenses.[10] Critics of the juvenile court system condemned it as "degrading,"[11] "unreasonable, prone to ordering detention,"[12] and "criminogenic."[13] This was the atmosphere from which the juvenile diversion programs first arose.[14]

According to the testimony received by the Advisory Commission, the same problems which confronted the juvenile justice system in the 1960's are present today. A broad consensus exists among juvenile justice officials and scholars that an unacceptably high rate of recidivism continues to

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[10] Id., at 1-81; see also, Edwin M. Lemert, Instead of Court: Diversion in Juvenile Justice, at 3, (Center for Studies in Crime and Delinquency, National Institute of Mental Health 1971).

[11] Lemert, n.10, supra at 12.

[12] Ferster, Juvenile Detention: Protection, Prevention or Punishment?, 37 Fam. L. Rev. ____, (1969); also published in Diverting Youth from the Correctional System (Youth Development and Delinquency Prevention Administration, U.S. Department of Health, Education and Welfare, 1973), at 31.

[13] Vorenberg, E., and Vorenberg, J., Early Diversion From the Justice System: Practice in Search of a Theory, published in Prisoners in America, at 154, (Ohlin, L., ed. 1973), The Vorenbergs, described the court system as "hopelessly overloaded with cases;...brutal, corrupt and ineffective."

[14] Sally Hillsman, Pretrial Diversion of Youthful Adults: a Decade of Reform and Research, 7 Just. Syst. J. 361 (1982):

> Defendants were afflicted with a wide array of social, emotional and physical problems, and their criminality tended to be neither violent nor particularly serious. What struck the reformers of the 1960's was the court's inability to address these deeper problems as they went about their traditional task of processing cases.

persist among juvenile offenders;[15] that the juvenile justice system fails to meet the specific needs of juveniles;[16] and that contact with the juvenile justice system can be more injurious than rehabilitative.[17]

The specific issue confronting the Advisory Commission in this area is drug and alcohol abuse which pervades the juvenile justice system.

There is general agreement among those involved in juvenile justice administration, whether judge,[18] prosecutor,[19] or treatment specialist,[20] that alcohol and drug abuse has reached epidemic proportions among juvenile offenders. One treatment official in Los Angeles reported to the Advisory COmmission that,

> Of the 35,000 plus youngsters who come through Los Angeles County's Juvenile Courts each year..., 85 to 90 percent have a basic, underlying drug problem.[21]

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[15]See generally, Philip Karchman, Princeton. See also, Selke, Diversion and Crime Prevention, 20 Criminology 395 (1982); Rojek and Erickson, Reforming the Juvenile Justice System: the Diversion of Status Offenders, 16 Law & Soc'y Rev. 241 (1981-82).

[16]See generally, Philip Karchman, Princeton. Judge Randolph Moore, Gary Mangiofico, Los Angeles; Hillsman, 7 Just. Sys. J. at 361.

[17]See generally, Paul Mones, Esq., Los Angeles; Thomas H. Blatner, Princeton; Baker, Hillsman, and Sadd, The Court Employment Project Evaluation: Final Report (Vera Institute of Justice, 1979).

[18]See Judge Leon Emmerson, Los Angeles.

[19]See Philip Karchman, Princeton: "I can only speak for [my] county, perhaps in excess of 50 percent of the offenses we seem committed by juveniles involve alcohol abuse of or drug abuse."

[20]See, the testimony of Thomas H. Blatner, Princeton: "The New Jersey Department of Corrections estimates that 25 to 40 percent of the adolescents admitted to its facilities are either alcohol or drug addicted, or are experiencing problems with drugs or alcohol."

[21]Judge Randolph Moore, Los Angeles. Judge Moore added that the statistics he reported did not account for "the many more thousands that do not come before our Courts and go unnoticed, untreated, and uncared for..."

A recent national study reported by the Office of Juvenile Justice and Delinquency Prevention (OJJDP) found that 50.3 percent of adolescents treated for delinquency had drug and/or alcohol problems.[22]

This serious youth drug and alcohol problem confronts the juvenile justice system today. It is a problem which the current system has failed to adequately address, and which it may, without reform, be unable to overcome.[23] It is in light of this drug abuse epidemic among the juvenile justice population that the Advisory Commission recommends, first, that all juvenile offenders in need of alcohol or drug abuse treatment be given access to that treatment while in the custody of legal authorities. Second, the Advisory Commission recommends the diversion of eligible juveniles into treatment facilities as a method of achieving such treatment.

Diversion: a Definition

The American Bar Association in its Juvenile Justice Standards adopts the definition of diversion found in the Report of the Corrections Task Force of the National Commission on Criminal Justice Standards and Goals[24]

> Diversion refers to formally acknowledged .... efforts to utilize alternatives to ... the justice system. To qualify as diversion, such efforts must be undertaken prior to adjudication and after a legally proscribed action has occurred ... Diversion implies halting or suspending formal criminal or juvenile justice proceedings against a person who has violated a statute in favor of processing through a non-criminal disposition.[25]

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[22]Thomas M. Young et al., Residential Child Care, 1966 and 1981: Facilities for Children and Youth with Special Problems and Needs, (University of Chicago, School of Social Service Administration, 1982), at 92.

[23]See, generally Gary Mangiofico, Los Angeles: "the adolescent treatment community does] not believe that jail cells will cure chemical dependency, but we do believe the law enforcement/legal system can make a major impact in getting young people the appropriate help they need."

[24]Institute of Judicial Administration-American Bar Association Juvenile Justice Standards: Standards Relating to Youth Service Agencies, at 5.

[25]National Commission on Criminal Justice Standards and Goals, Corrections Task Force Report, at 50 (1973).

Implicit in the above definition is a two step process: first the accused is diverted from the traditional criminal process and then, placed into an alternative rehabilitative program, such as an employment training program, psychological counseling, or, most relevant to the Commission, an alcohol and/or drug abuse program.

The term diversion has been used to describe various administrative practices which procedurally have very little in common.[26] For example, the police officer who rather than arresting a delinquent youth, chooses to take him home for a talk with his parents, exercises in essence a diversion decision.[27] The unstructured discretion of a prosecutor to decline to charge or to prosecute in the interest of justice is also diversion.[28] The problem with defining these informal procedures as juvenile diversion, is that such procedures, ad hoc by their very nature, are subject to uneven, even unfair, application.[29] Thus, the American Bar Association, National Association of Pretrial Services Agencies, and other concerned organizations promulgated standards by which pretrial diversions should be governed.[30]

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[26]Raymond T. Nimmer, Diversion: The Search for Alternative Forms of Prosecution, at 4 (American Bar Foundation, 1974).

[27]Klein, M., Issues and Realities in Police Diversion Programs, 22 Crime and Delinquency no. 421 (1976).

[28]National District Attorney's Association, Monograph on Philosophical, Procedural and Legal Issues Inherent in Prosecutor Diversion Programs, at 3-4 (1974).

[29]National Association of Pretrial Services Agencies, Pretrial Diversion: Performance Standards and Goals for Pretrial Releases and Diversion, approved 1978. See generally Vera Institute of Justice, Programs in Criminal Justice Reform (1972).

[30]Institute of Judicial Administration-American Bar Association, Standards Relating to Youth Sevice Agencies; National Association of Pretrial Services Agencies, Diversion: Performance Standards and goals for Pretrial Release and Diversion; see also Note, Pretrial Diversion from the Criminal Process, 83 Yale L. J. 827 (1974):

> The label of diversion may properly be reserved for dispositions pursuant to formal standards followed by supervised rehabilitation. Pretrial diversion provides, in principle, criteria for decisionmaking, ...[I]t is an attempt to standardize ad hoc procedures of an informal discretionary system.

The Advisory Commission makes this recommendation, aware of the various procedural and Constitutional challenges which have been levied against diversion.[31] The Commission believes that these very real and valid concerns are adequately dealt with in the Institute of Judicial Administration-American Bar Association Juvenile Justice Standards, which refer to diversion. Thus, issues such as, juvenile representation, the requirement of a plea, and the right to a speedy trial will not be discussed in this report; the Advisory Commission adopts those positions contained in the Juvenile Justice Standards.

Goals of Diversion

The traditional goals of pretrial diversion include: unburdening court dockets and conserving judicial resources for more serious cases; reducing the incidence of offender recidivism by providing an alternative community-based rehabilitative incarceration, and benefiting society, as well as the accused, by the training and placement of previously unemployed persons.[32]

The Advisory Commission believes another goal should be added to the above list: where evaluation and screening indicate an alcohol and other drug abuse problem, diversion can facilitate the treatment and rehabilitation of the accused. The Commission received a great deal of testimony throughout its hearings explicitly recommending that juvenile diversion be used to provide adequate and complete substance abuse treatment to those juveniles in need of such treatment.[33]

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[31]See generally, 83 Yale L.J. 827.

[32]These goals had general support. See, e.g., testimony of K. Mossman, Chairman of the Criminal Law Section of the American Bar Association, at 379 (1973). See also, National Association of Pretrial Services Agencies, Standards and Goals for Pretrial Release and Diversion, which defined the goals of diversion as:

> providing the traditional criminal justice system with greater flexibility and enabling the system to conserve its limited resources for cases more appropriately channeled through the adversary process; providing eligible defendants with a dispositional alternative that avoids the consequences of regular criminal processing and possible conviction, yet insures that defendants' basic legal rights are safeguarded; advancing the legitimate societal need to deter and reduce crime by impacting on arrest-provoking behavior by offering participants opportunities for self-development. Id., at 24.

[33]See generally, Blatner, and Karchman, Princeton; and Mangiofico, Moore, Mones, Los Angeles.

These recommendations are important given the recent history of the pretrial diversion movement. Though pretrial diversion is far from dead,[34] its prominence has decreased over the last several years.[35] While the number of diversion programs across the country has fallen over the last several years,[36] the amount of criticism the movement received has increased.[37] Most of the criticism which the diversion movement received has centered on its failure to achieve the lofty goals it set for itself back in the late 1960's.

Pretrial diversion advocates have responded to this accurate criticism by reappraising their goals:

> It would appear that the most relevant question today about the pretrial diversion movement is not whether the programs have the impact they originally intended but why they do not, or why those effects are not stronger... the major task now facing this field involves identifying the conditions under which pretrial diversion programs might achieve more of what they set out to do over a decade ago.[38]

The Advisory Commission believes that one condition under which pretrial diversion might achieve that which it originally intended would be in the diversion of chemically dependent youth to substance abuse treatment programs. Such programs, with this limited scope and purpose, can and do produce dramatic results in the treatment and rehabilitation of

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[34]Hillsman, 7 Just. Sys. J., at 367.

[35]Donald Pryor, Practices of Pretrial Diversion Programs: Review and Analysis of the Data, (Pretrial Services Resource Center, 1982).

[36]The American Bar Association's Directories of Pretrial Intervention Projects identified 148 projects in 1976. The Pretrial Services Resource Center identified 127 such projects in a 1981 survey. An interesting fact uncovered by this recent survey is the volitility of diversion programs; of the 127 projects identified 62 percent had started up after 1974, and 28 percent since 1976.

[37]See note 15, 16 Law. & Soc'y. Rev. at 241 (date).

[38]Hillsman, 7 Just. Sys. J. at 380.

juvenile offenders.[39]

[39]A limited but rewarding investigation by the Advisory Commission uncovered a number of successful diversion projects around the country. For example:

The Youth Diversion Unit of Whittier, Ca. This project is administered by the local law enforcement agency. The Unit identifies eligible first offenders and refers them to the appropriate treatment facility. The Unit reports that in fiscal year 1984, of the total number of juveniles taken into custody, 19.2 percent were diverted, of that number, 19.8 percent recidivated.

The District of Columbia Juvenile Diversion Project. This project refers eligible juveniles to treatment in one of a consortium of private agencies. The project reports that while 30-35 percent of previously incarcerated juveniles are subsequently rearrested, only 20 percent of those juveniles who have been diverted are later rearrested.

Alcohol-Jail Program, Metropolitan Atlanta Council on Alcohol and Drugs, Inc. Due to the fact that the local county and city jail facilities in metropolitan Atlanta were estimating that 75-80 percent of their inmates had alcohol related incidents, an "Alcohol-Jail Pre-Release Course" was initiated by the Metropolitan Atlanta Council on Alcohol & Drugs, Inc. The Alcohol-Jail Pre-release course consists of 4 two-hour sessions taught over a two week period. The medical aspects of alcoholism, the relationship between alcohol/drugs and crime, the relationship between alcoholism/drugs domestic relationships, the disease of alcoholism, and the revolving door jail syndrome are just some of the topics covered by the course. A personal action plan is also developed and tailored to fit the needs of the individual and help find constructive alternatives to his alcohol/drug abuse. See Robert Y. Halford, Atlanta.

The Intake Service Conferences of Essex County, New Jersey. This diversion process is administered by an adjunct of the county Family Court. The court case managers review those accused, and refer eligible candidates to outside agencies. Essex County reports that of those diverted, 68 percent never come before a court. Each of New Jersey's counties has an equivalent program. These programs derive their authority from the New Jersey Family Court Act, N.J.S.A. #2A:4A-70 et seq., which refers explicitly to alcohol and drug abuse as one of the criteria to be considered in making the decision to divert. Other states possess similar diversion statutes as that contained in the New Jersey Family Court Act. See e.g., The California Juvenile Court Law, Cal. Welf. & Inst. Code S. 654 (West 19__); Massachusetts Family Court Act, 276A et seq.

Conclusion

The Advisory Commission has found that a crisis exists in the Juvenile Justice System: the juvenile courts across the nation are ill-equipped to deal with the alcohol and drug abuse epidemic which prevails in its court rooms and jails. The Commission calls upon the states to confront this crisis, and provide effective treatment to those who require it. The Commission recommends that states adopt pretrial diversion as part of their armamentarium in the battle against juvenile drug and alcohol abuse.

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II. Preface to Criminal Law Reform

At all three Commission field hearings and throughout the course of correspondance, the Commission has received testimony relating to the need for recommendations which would increase penalities for offenses directly related to youth alcohol and other drug problems.[3] Both the recommendations on drug paraphernalia and illegal sales to minors, specifically reflect these concerns. However, the recommendations advocating the adoption of the 21 drinking age and revocable youth licenses, while quasi-criminal in nature, are extensions of already existing prevention approaches rather than purely criminal offense proposals. Finally, the recommendation urging the specific addition of serious incapacitating substance abuse to child abuse and neglect laws is similarly a preventative and treatment oriented proposal.

Thus, this grouping of recommendations is intended to provide both additional criminal penalities and other less stringent controls on behavior related to youth alcohol and other drug problems.

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[1] See e.g., Testimony of _____.

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as the action of the American Bar Association unless the same shall have been first approved by the House of Delegates or the Board of Governors

9. Paraphernalia Law

AMERICAN BAR ASSOCIATION

SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES

RECOMMENDATION

BE IT RESOLVED that the American Bar Association recommends federal legislation be enacted to make it unlawful to 1) transport or ship drug paraphernalia to minors by mail through the United States Postal Service or 2) transport or ship to minors in interstate commerce drug paraphernalia as defined in the Model Drug Paraphernalia Act.

REPORT

The problems involved with the easy availability of drug paraphernalia were raised throughout the Advisory Commission hearings.[1] Parent groups, school administrators, students and treatment professionals[2] all remarked on the ease in which a juvenile may acquire the needed tools of drug use.

The statistics are staggering. Nearly 65 percent of all juveniles have tried marijuana and 48 percent of those individuals have used the drug more than 10 times.[3] The Surgeon General of the United States, Dr. C. Everett Koop, has reported that:

> In the past 20 years there has been a 30-fold increase in (marijuana)use among youth. More than a quarter of the American population has used (marijuana). The age at which people first use marijuana has been getting consistently lower and is now most often in the junior high school years. Daily use of marijuana is greater than that of alcohol among this age group. More high school seniors smoke marijuana than smoke cigarettes.[4]

The statistics are equally alarming with regard to other controlled substances. Cocaine use among high school students leaped from an estimated 6 percent in 1976 to over 20 percent in 1982.[5] This figure translates to one out of every seven high school seniors experimenting with cocaine.[6] This increase in use has been attributed to easy availability,

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[1] See testimony of William Colletti, and Amy Haywood, Atlanta, and Dr. Arnold Washton, Princeton.

[2] Id.

[3] 131 Cong. Rec. S3319 (daily ed. March 20, 1985) (statement of Sen. Pete Wilson).

[4] Id.

[5] Testimony of Dr. Arnold Washton, Princeton.

[6] See n.3, supra.

reduced prices and improved purity.[7] In response to these figures, it is not surprising that the drug paraphernalia industry reports record sales. The numbers are estimated in the billions of dollars.[8] As an outgrowth of this boom, the paraphernalia industry in 1977 established its own trade organization, trade journal, and periodical. This recommendation[9] would encourage federal action to outlaw the interstate sale and shipment of drug paraphernalia which would prohibit the mail order and catalog sales of the instruments of drug use to minors.[9A]

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[7]Testimony of Dr. Arnold Washton, Princeton. According to Dr. Washton:

> The price of cocaine has fallen by as much as 50 percent in the past year in many of the large cities: one gram of cocaine, at $60-70 on the illegal market, is now cheaper than an ounce of marijuana. Meanwhile, the purity has increased from about 28 percent in 1982 to over 40 percent in 1983.

[8]see n.3, supra.

[9]See S.713, "The Mail Order Drug Paraphernalia Control Act" which was introduced on March 20, 1985 to the Senate Committee on the Judiciary by Senator Pete Wilson (R., Ca). 131 Cong. Rec. S 3319 (daily ed. March 20, 1985).

[9A]Similarly, See for example, federal law also restricts the sale of all firearms or ammunition to youth uder eighteen, and cert other weapons to youth under 21. See e.g., 18 U.S.C.A. 922 (b)(1). See also, the recommendation and report regarding illegal sales to minors (II. B.).

The Advisory Commission adopted the definition of drug paraphernalia as stated in the Model Drug Paraphernalia Act (MDPA).[10] That definition states that:

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[10]The Drug Enforcement Administration drafted the Model Drug Paraphernalia Act (MDPA) in 1979 to counter the availability of drug paraphernalia, which the DEA characterized as at an epidemic level. The MDPA attacks the drug paraphernalia industry

> which promotes, even glamorizes, the illegal abuse of drugs by adults and children alike. Sales of drug paraphernalia are reported as high as three billion dollars a year. What was a small phenomenon at the time the (original) Uniform Act was drafted has now mushroomed into an industry so well entrenched that it has its own trade ...lines and associations.

The MDPA was written in response to judicial invalidation of various state and municipal laws controlling drug paraphernalia. Several of these pre-MDPA laws fell before constitutional challenges on both overbreadth and vagueness grounds.

> The MDPA is the DEA's attempt to write a statute broad enough to deal with the problem of drug paraphernalia, narrow enough to avoid impinging on constitutionally protected conduct, and precise enough to be understood by both the law's enforcers and its targets.

Note, The Constitutionality of Anti-Drug Paraphernalia Laws - The Smoke Clears. Notre Dame L. Rev. 833, 840 (1983).

The MDPA attempts to overcome overbreadth and vagueness concerns in two ways. First, the Act precisely defines drug paraphernalia, and gives examples and other factors for a court to consider when determining whether a particular item is proscribed paraphernalia. (see n. 12, infra) Second, the Act includes an intent (to use with a controlled substance) requirement to obviate any definitional ambiguity. "The term 'Drug Paraphernalia' means all equipment, products and materials of any kind which are used, intended for use, or designed for use ...with a controlled substance." MDPA Art. I.

The MDPA has been adopted in its entirety or in a modified version, by a majority of the states and by many communities. Only seven states and the District of Columbia, lack laws focused on prohibiting drug paraphernalia. See 58 Notre Dame L. Rev. at 842, n.44. (listing of state codification of the MDPA).

Drug Paraphernalia means all equipment, products and materials of any kind which are used, intended for use, or designed for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this Act.[10A]

[10A]This definition includes, but is not limited to:

1) Kits used, intended for use, or designed for use in planting, propagating, cultivating, growing or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived;

2) Kits used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing, or preparing controlled substances;

3) Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant which is a controlled substance;

4) Testing equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness or purity of controlled substances;

5) Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances;

6) Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose and lactose, used, intended for use, or designed for use in cutting controlled substances;

7) Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, marijuana;

8) Blenders, bowls containers, spoons and mixing devices used, intended for use, or designed for use in compounding controlled substances;

[10A]Continued:

9) Capsules, balloons, envelopes and other containers used, intended for use, or designed for use in packaging small quantities of controlled substances;

10) Containers and other objects used, intended for use, or designed for use in storing or concealing controlled substances;

11) Hypodermic syringes, needles and other objects used, intended for use, or designed for use in parenterally injecting controlled substances into the human body;

12) Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, or hashish oil into the human body, such as:

(a) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

(b) Water pipes;

(c) Carburetion tubes and devices;

(d) Smoking and carburetion masks;

(e) Roach clips: meaning objects used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand;

(f) Miniature cocaine spoons, and cocaine vials;

(g) Chamber pipes;

(h) Carburetor pipes;

(i) Electric pipes;

(j) Air-driven pipes;

(k) Chillums;

(l) Bongs;

(m) Ice pipes or chillers.

In order to further avoid claims of vagueness or overbreadth the definition of paraphernalia[11] has been

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[11]Early "pipe laws" were struck down on the grounds that they were inherently vague and included a wide variety of objects that the non-hypodermic drug user employed. See Grayned v. City of Rockford, 408 U.S. 104 (1972); See also, n. 10, supra, 58 Notre Dame L. Rev. at 836.

refined to provide a fair warning to manufacturers of what conduct is prohibited and a list of appropriate standards for police and courts to follow when enforcing the law.[12] The Act also

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[12]In determining whether an object is Drug paraphernalia, a court or other authority should consider, in addition to all other logically relevant factors, the following:

(1) Statements by an owner or by anyone in control of the object concerning its use;

(2) Prior convictions, if any, of an owner, or of anyone in control of the object, under any State or Federal law relating to any controlled substance;

(3) The proximity of the object of controlled substances on the object;

(4) The proximity of the object to controlled substances;

(5) The existence of any residue of controlled substances on the object;

(6) Direct or circumstantial evidence of the intent of an owner, of anyone in control of the object to deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of this Act shall not prevent a finding that the object is intended for use, or designed for use as Drug paraphernalia;

(7) Instructions, oral or written, provided with the object concerning its use;

(8) Descriptive materials accompanying the object which explain or depict its use;

(9) National and local advertising concerning its use;

(10) The manner in which the object is displayed for sale;

(11) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community such as licensed distributor or dealer or tobacco products;

(12) Direct or circumstantial evidence of the ratio of sales of the object(s) to the total sales of the business enterprise;

(13) The existence and scope of legitimate uses for the object in the community;

(14) Expert testimony concerning its use.

contains a specific intent requirement "to mitigate any definitional ambiguity or uncertainty."[13]

To date, there has been no direct constitutional challenge to the MDPA in the U.S. Supreme Court. Though in 1982, in Hoffman Estates v. Flipside,[14] the Court upheld a city anti-paraphernalia ordinance which did not contain language as precise as that of the MDPA. That decision virtually assures that a carefullly drawn anti-paraphernalia law will withstand a pre-enforcement facial challenge to its constitutional validity.[15]

Since Flipside, of the 13 cases considering drug paraphernalia laws, only one has held an ordinance unconstitutional; and that ordinance was not based on the MDPA.[16] In addition, no appellate level Federal Court has overturned a state or local ordinance mirroring the MDPA.[17] An Eleventh Circuit decision, Florida Businessmen for Free Enterprise v. the City of Hollywood,[18] indicative of similar decisions reached by the other circuits, held that the city ordinance, based on the MDPA, did not impinge on protected non-commercial speech. The intent provisions of the ordinance gave fair notice of which articles fell within the ordinance's scope, and the ordinance's "reasonably should know" standard defining substantive offenses was not impermissably vague.[19]

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[13] See n.10, supra, 58 Notre Dame L. Rev. at 841.

[14] 455 U.S. 489 (1982), Reh'g denied, 102 S. Ct. 2023 (1982).

[15] In Flipside the court employed a two-pronged analysis in upholding the constitutionality of the ordinance: Overbreadth whether the enactment reaches a substantial amount of constitutionally protected conduct, Vagueness - whether the enactument is impermissibly vague in all its applications.

[16] Record Head Corp. v. Sachen 682 F.2d 672 (7th Cir. 1982).

[17] See e.g., Nova Records, Inc. v. Sendak, No. 81-1107 (7th Cir. 1983), Camille Corp. v. Phares, No. 82-1410 (7th Cir. 1983) Stoianoff v. State of Montana, 695 F.2d 1214 (9th Cir. 1983).

[18] 673 F.2d 1213 (11th Cir. 1982), cert. den., 51 U.S.L.W. 3520 (Jan. 11, 1983).

[19] Id.

To date, 38 states and hundreds of localities[20] have enacted statutes prohibiting the sale of drug paraphernalia. An unfortunate outgrowth of the success of these state and local statutes has been the emergence of the mail order paraphernalia industry. Upon introducing S. 713, the Mail Order Drug Paraphernalia Control Act, Senator Pete Wilson, (R., Ca) stated:

> By using the mail to ... transport drug paraphernalia this industry is seeking to circumvent state and local laws. These products enhance or aid consumption of illegal drugs, glorify the use of drugs, and enrich those who would victimize our nation's children through these mind-destroying drugs.[21]

The constitutionality of the local paraphernalia ordinances have been challenged and defeated in virtually every case where the ordinance was patterned after the definition used in the MDPA. With the subsequent rise of the mail order paraphernalia houses, the Advisory Commission responded with the instant recommendation which supports enactment of legislation designed to prohibit the transport or shipping of drug paraphernalia through the mails and through interstate commerce.

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[20] See News Release, Senator Pete Wilson (R. Ca.) (March 20, 1985). See also, n.3, supra.

[21] Id.

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10. Illegal Sales to Minors

AMERICAN BAR ASSOCIATION

SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association recommends that criminal penalties for persons convicted of selling alcohol or other drugs to youth should be increased over penalties for violations involving such sales to adults.

REPORT

Throughout the Advisory Commission field hearings, a recurrent theme was the need, expressed by of the public, law enforcement and treatment personnel, for tougher penalties against proven drug pushers, especially those who sell drugs or alcohol to our youth.[1] It is clear that there is ample precedents for creating a separate class or category of crimes specifically focused on the sale of large quantities of alcohol and hard drugs to young people. The typical state alcohol beverage control laws or minor protection laws already provide for penalties for purchase and/or sales of alcohol by or to minors.[2] However, in addition to these penalties, state laws also typically prohibit sales of alcohol and other potentially dangerous substances to other particularly vulnerable persons.[3] Moreover, many state's laws prohibit sales or the act of providing dangerous substance weapons or other instrumentalities to young people.[4] It is also typical of many states' laws to prohibit specifically sexual

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[1] See e.g.: Testimony of William Coletti, Sue Rushe; Gregg Raduka, Ph.D., Randall Simpson, Atlanta; Barry Nidorf, Los Angeles.

[2] See e.g. 18 Pa. Cons. Stat. Ann. S. 6308 (Purdon 1984). ("A person commits a summary offense, if he, being less than 21 years of age, attempts to purchase, purchases, consumes, possesses or transports any alcohol, liquor or malot or brewed beverages." See also 1 Pa. Cons. Stat. Ann. S. 6307 (Purdon 1984) (misrepresentation of age to purchase liquor); 18 Pa. Cons. Stat. Ann. S. 6309 (Purdon 1984) (representing to liquor dealers that minor is of age); 18 Pa. Cons. Stat. Ann. S. 6310 (Purdon 1984) (inducement of minor to buy liquor); 47 Pa. S 4-493(1) (sales to minors).

[3] See e.g. 50 Pa. Cons. Stat. Ann. S. 4605(1) (Purdon 1984) (providing separate original penalities for delivery of "any alcoholic or other intoxicating or narcotic substance" to any person in a mental health facility without the directors' knowledge or consent.)

[4] See e.g. 18 Pa. Cons. Stat. Ann. S. 6302(a) (Purdon 1984) (providing separate criminal penalities for sale or lease "to any person under 18 years of age of any deadly weapon cartridge, gunpowder, or other similar dangerous explosive substance." See also 18 Pa. Cons. Stat. Ann. S. 6303(a) (Purdon 1984) ("starter pistols"); 18 Pa. Cons. Stat. Ann. S. 6304(a) (Purdon 1984) ("tobacco in any form"); 18 Pa. Cons. Stat. Ann. S. 6306(a) (Purdon) ("cigarettes or cigarette paper").

conduct regarding youth and other vulnerable persons.[5] Finally, many states also provide special assualt "victim" categories to protect certain persons at risk, particularly police officers, teachers, students and the elderly.[6] Since there can be little argument that youth are particularly vulnerable to alcohol and other drugs, this proposal is consistent with these other, longstanding prohibition regarding sales or conduct involving the young and other susceptible groups. Recently, the states have in fact been proposing and enacting mandatory minimum sentences for a very limited group of serious crimes of greatly damaging social impact including gun violations,[7] drunk driving[8] and drug selling generally.[9]

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[5]See e.g. 18 Pa. Cons. Stat. Ann. S. 3123(4) and (5) (Purdon 1984) (involuntary deviate sexual intercourse with any person "who is so mentally deranged or deficient that such person is incapable of consent; or who is less than 16 years of age." See also 18 Pa. Cons. Stat. Ann. S. 3121 (Purdon 1984)(rape); 18 Pa. Cons. Stat. Ann. S. 3126(2) and (5) (Purdon 1984) (indecdent assault) cf. Cal. Penal Code S. 266(H) (providing for higher penalities for facilitating the prostitution of a person under 16 as opposed to an adult); 266(I) (pandering to minors); 311.2 (felony penalty for exhibiting child pronography to a minor versus misdemeanor for adult exhibits.

[6]See e.g. 18 Pa. Cons. Stat. Ann S. 2702(2) and (3) (Purdon 1984) (police officers), and (5) ("teaching staff member, school board member, other employee or student of any elementary or secondary publicly-funded educational institution....") It should be noted that these special "victim" categories were specifically enacted despite the Commentary to the Model Penal Code opposing such special categories. See Model Penal Code and Commentaries (Official Draft and Revised Comments 1980), Part II, at 183-5, See also Cal. Penal Code S. 243(b) et. seq.

[7]See e.g. Heumann, Loftin and McDowall, "Federal Firearms Policy and Mandatory Sentencing," 73 J. Crim. L. & Criminology 1051 (1982)

[8]See e.g. Note, "Under the Influence of California's New Drunk Driving Law: Is the Drunk Driver's Presumption of Innocence on the Rocks?," 10 Pepperdine L. R. 91 (1982); see also 39 N.J. Stat. Ann. S. 4-50 (as amended by Chapter 243, Laws of 1984) (West 19__)

[9]See e.g. Ruff, "Mandatory Minimum Sentencing Initiative," 8 Dist. Lawyer 28 (1984) See also II Crim. J. News. 1 (1980) (23 states enacting similar laws).