

**TORTS: RESPONDEAT SUPERIOR AND THE CDA:
LETTING THE SUPERIOR OFF THE HOOK— *URBAN V.*
*AMERICAN LEGION DEPARTMENT OF MINNESOTA***

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I. INTRODUCTION

A. *Facts*

On August 10, 2000,¹ Todd Urban, thirty-four, and his wife Barbara Ann, thirty-eight, were driving south on Highway 52 in Goodhue County, Minnesota with their young children, five-year old Marcus and two-year old twins Michael and Brett.² The Urbans were traveling to Janesville, Wisconsin to leave their children with Todd's parents while Todd and Barbara went to a softball tournament for the weekend.³

At the same time, Orvin Rolland, eighty-four, who had been drinking at the American Legion Post in Pine Island, Minnesota, was driving north in the southbound lane of Highway 52.⁴ Rolland drove the wrong way down the highway for at least a few miles; other drivers used cell phones to report the problem to the State Patrol.⁵ Unfortunately, state troopers did not respond quickly enough.⁶

Todd Urban was following another vehicle in the southbound lane of the highway. The other vehicle swerved to avoid Rolland's car, and Todd collided head-on with Rolland.⁷ The collision killed Barbara and Rolland.⁸ Todd suffered a crushed right leg, a broken left wrist, and a dislocated right shoulder.⁹ Marcus was paralyzed from the chest down.¹⁰ Brett was left in a coma and needed to have

1. *Urban v. Am. Legion Dep't of Minn.*, 723 N.W.2d 1, 3 (Minn. 2006); John Weiss, *2 Die in Head-on Crash on U.S. 52*, THE ROCHESTER POST-BULL. (Minn.), Aug. 11, 2000, available at <http://www.duipictures.com/barbara.htm>. The court of appeals incorrectly listed the date of the accident as August 10, 2004. *Urban v. Am. Legion Post 184*, 695 N.W.2d 153, 156 (Minn. Ct. App. 2005), *aff'd*, 723 N.W.2d 1 (Minn. 2006).

2. *Urban*, 723 N.W.2d at 2.

3. *Wrong-Way Driver Shatters the Lives of a Young Family*, THE ROCHESTER POST-BULL. (Minn.), Sept. 14, 2000, available at <http://www.duipictures.com/barbara.htm> [hereinafter *Wrong-Way Driver*].

4. *Urban*, 723 N.W.2d at 2-3; *Wrong-Way Driver*, *supra* note 3. This was the second head-on collision caused by a vehicle driving the wrong way on Highway 52 in that area in the previous five months. *Wrong-Way Driver*, *supra* note 3.

5. Weiss, *supra* note 1.

6. *Id.*

7. *Coroner Rules Driver in Fatal Crash Was Drunk*, THE ROCHESTER POST-BULL. (Minn.), Sept. 5, 2000, available at <http://www.duipictures.com/barbara.htm> [hereinafter *Coroner*].

8. *Urban*, 723 N.W.2d at 3; *Coroner*, *supra* note 7.

9. *Wrong Way Driver*, *supra* note 3.

10. *Id.*

part of his brain and skull removed.¹¹ Michael suffered only minor injuries and was released from the hospital shortly after the accident.¹²

The accident was reported to the State Patrol at 5:02 in the evening.¹³ The police found alcohol in Rolland's car at the scene of the accident.¹⁴ The coroner later ruled that "acute alcohol intoxication" was a significant factor in Rolland's death.¹⁵ The death certificate does not reveal Rolland's exact blood-alcohol level, but the diagnosis of acute alcohol intoxication indicates his blood-alcohol concentration was at least 0.10 percent.¹⁶

B. Background

In Latin, respondeat superior means "let the superior make answer."¹⁷ Respondeat superior is a common-law doctrine of vicarious liability that imposes liability "on the master who is not directly at fault."¹⁸ In *Urban*, the Minnesota Supreme Court had to determine whether respondeat superior applied to actions brought under the Minnesota Civil Damages Act (CDA).¹⁹ When an injury results from the acts of an intoxicated person who has been illegally sold alcohol, the CDA allows the injured victim to bring suit against the culpable vendor.²⁰ The CDA created a new statutory "cause of action that did not exist at common law."²¹

A statute creating a new cause of action abolishes the common law only by "by express wording or implication."²² Therefore, unless statutory provisions instruct otherwise, common-law principles remain for the court to interpret.²³

11. *Id.*

12. *Id.*

13. Weiss, *supra* note 1.

14. *Id.*

15. *Coroner, supra* note 7.

16. *Id.*

17. BLACK'S LAW DICTIONARY 1338 (8th ed. 2004).

18. *See Lange v. Nat'l Biscuit Co.*, 297 Minn. 399, 403, 211 N.W.2d 783, 785 (1973) (defining respondeat superior and explaining its policy considerations).

19. MINN. STAT. §§ 340A.801–.802 (2004). *See Urban v. Am. Legion Dep't of Minn.*, 723 N.W.2d 1, 4 (Minn. 2006).

20. § 340A.801, subdiv. 1.

21. *Urban*, 723 N.W.2d at 5.

22. *Id.* (quoting *Shaw Acquisition Co. v. Bank of Elk River*, 639 N.W.2d 837, 877 (Minn. 2002)).

23. *See Shaw*, 639 N.W.2d at 877.

The question remains—under what circumstances can a statute be interpreted to abrogate common law? Courts have used many methods of analysis to arrive at this answer, including employing the rule that the CDA must be “strictly construed in the sense that it cannot be enlarged beyond its definite scope.”²⁴ But, it is often difficult for courts to determine what the legislature intended the scope of a statute to be. When legislative intent cannot easily be gleaned from the words of a statute, courts employ specific methods of statutory construction. “These rules are said to enable interpreters to draw inferences from the language, format, and subject matter of the statute.”²⁵ Unfortunately, most methods of statutory construction are highly criticized because for every canon that might apply, there is an equal and opposite canon.²⁶ Therefore, the rules often do nothing more than “describ[e] results reached by other means,”²⁷ such as in *Urban*.²⁸

This note first explores the historical development of dram shop acts, specifically the CDA and common-law doctrines of vicarious liability and respondeat superior.²⁹ It then discusses the supreme court’s analysis of *Urban*³⁰ and analyzes the court’s holding.³¹ This note ultimately concludes that the court’s decision in *Urban* is incorrect and does not serve the intended purposes of the CDA.³²

II. HISTORY

A. Alcohol Regulation

In the two hundred years after Jamestown, Virginia was founded in 1607, there were a few pre-Prohibition attempts to limit

24. *Urban*, 723 N.W.2d at 6 (quoting *Beck v. Groe*, 245 Minn. 28, 34, 70 N.W.2d 886, 891 (1955)).

25. WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 818 (3d ed. 2001).

26. See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395, 401 (1950).

27. REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 234 (1975).

28. See *Urban*, 723 N.W.2d at 12–13.

29. See *infra* Part II.

30. See *infra* Part III.

31. See *infra* Part IV.

32. See *infra* Part V.

alcohol use.³³ Government attempts focused on preventing alcohol use by groups likely to organize against the government, particularly Native Americans.³⁴ Louis XIV of France prohibited the sale of liquor in New France in 1681.³⁵ Alexander Hamilton recommended high liquor taxes to raise revenue after the adoption of the Constitution, but his proposal was not adopted.³⁶

At the local government level, colonists' alcohol regulations were measures "to outlaw drunkenness, not to reform social customs."³⁷ Because state and local governments felt responsibility toward drunken society members, who were viewed as lacking self-control, strict rules governing tavern owner and patron behavior were enacted.³⁸ Actions taken by various religious groups providing guidelines or regulations for alcohol use also "played a key role in the evolution of Prohibition."³⁹ By the early nineteenth century, Americans' increasing concern with moral standards led to the emergence of societies aimed at reforming morals.⁴⁰ This led to the first anti-alcohol society comprised of men in high social standing, in 1813.⁴¹ During the mid-1800s, a prohibitionist group called the American Temperance Society grew in influence.⁴² As a result, temperance societies became more prevalent, and temperance "became a popular intellectual movement."⁴³

33. FRANK A. SLOAN ET AL., *DRINKERS, DRIVERS, AND BARTENDERS: BALANCING PRIVATE CHOICES AND PUBLIC ACCOUNTABILITY* 25 (2000).

34. *Id.*

35. *Id.* New France included the territory that later became Michigan, Illinois, Indiana, and Ohio. *Id.*

36. *Id.* at 26.

37. *Id.* The goals of tavern restrictions were: (1) to prevent personal excess and public disorder; (2) to protect against Native Americans under the influence; (3) to provide accommodations in taverns for travelers without exposing them to drunkenness and disorder; (4) to recognize the economic importance of the brewing and distilling industries; and (5) to raise revenue through liquor taxation. *Id.*

38. *Id.*

39. *Id.* at 27. The Methodist church began the movement in 1753 by enacting disciplinary recommendations for members who drank. *Id.* In 1787, the Quakers declared that members should not deal in liquor. *Id.* At a Presbyterian convention in Philadelphia in 1812, members agreed to alcohol restrictions. *Id.* The Methodist General Conference advised its members to discontinue the sale and manufacture of alcohol. *Id.*

40. *Id.*

41. *Id.* at 27-28.

42. *Id.* at 28.

43. *Id.* at 29. In 1828, there were 1000 temperance societies with 100,000 members. *Id.* In 1831, the number had increased to 2200 societies with 170,000 members. *Id.* By 1832, 4000 societies had emerged with 500,000 members. *Id.*

B. *Dram Shop Acts*

1. *Background*

Under the common law, servers or suppliers of alcohol were not held liable for injuries inflicted on third parties as a result of alcohol consumption.⁴⁴ The rationale for this rule was that *drinking* was the proximate cause⁴⁵ of intoxication, not the serving of alcohol.⁴⁶ “[E]ven if a vendor breached a duty to those injured by an intoxicated person, the vendor was not legally liable” because the chain of causation between the vendor’s negligent serving and the patron’s injury was held to be severed by the voluntary act of drinking the alcohol.⁴⁷

Departing from the common-law rule, many states began to enact civil damage or “dram shop”⁴⁸ statutes that imposed strict liability on vendors for injuries caused by intoxicated patrons.⁴⁹ Wisconsin enacted the first of these statutes in 1849. It required that tavern owners post a bond to cover the expenses of prosecutions arising from alcohol related accidents and the support of poor people, widows, and orphans injured by a patron’s excessive consumption.⁵⁰ Indiana passed the prototype of today’s dram shop statute in 1853.⁵¹ Eleven states had enacted statutes by the mid-1870s.⁵²

Amherst, Dartmouth, Brown, Middlebury, Yale, Union, Kenyon, and Oberlin had college temperance organizations as part of the intellectual temperance movement. *Id.*

44. *Id.* at 115, 118.

45. See BLACK’S LAW DICTIONARY 234 (8th ed. 2004) (defining proximate cause as “cause that is legally sufficient to result in liability; an act or omission that is considered in law to result in a consequence, so that liability can be imposed on the actor”).

46. SLOAN, *supra* note 33, at 118.

47. *Id.*

48. See BLACK’S LAW DICTIONARY 531 (8th ed. 2004) (defining dram shop as “[a] place where alcoholic beverages are sold; a bar or saloon”).

49. James R. Myers, *Dramshop Liability: The Blurry Status of Drinking Companions*, 34 ST. LOUIS U. L.J. 1153, 1156 (1990) (discussing the historical background of dram shop liability).

50. *Id.* See also Act of February 8, 1850, ch. 139 § 1, 1850 Wis. Sess. Laws 109; SLOAN, *supra* note 33, at 118.

51. SLOAN, *supra* note 33, at 118. The statute stated:

Any wife, child, parent, guardian, employer or other person who shall be injured in person, or property, or means of support, by any intoxicated person . . . shall have the right of action in his or her own name against any person . . . who shall, by retailing spirituous liquor, have caused the

Upon the repeal of Prohibition, states stopped enacting dram shop statutes. After World War II, pressure from bars and taverns convinced state legislatures to repeal their existing statutes.⁵³ Since the 1970s, however, many states have enacted new dram shop statutes.⁵⁴ In other states, liability for dram shops has been imposed through modern common law.⁵⁵ Arkansas, Delaware, Kansas, Maryland, Nebraska, Nevada, and Virginia do not recognize dram shop liability.⁵⁶

2. *Minnesota*

The predecessor to Minnesota's dram shop act was passed by the first Minnesota legislature, which convened in 1858.⁵⁷ In 1911, Minnesota adopted four separate alcohol related statutes, one of which was the Civil Damages Act, now codified at section 340A.801 of Minnesota Statutes.⁵⁸ Before the enactment of the CDA, those injured by intoxicated persons had no cause of action against vendors of alcohol because there was no cause of action at common law.⁵⁹ Originally, the adoption of dram shop statutes in Minnesota and elsewhere was mostly accomplished as a result of restrictions

intoxication of such person for any and all such damages sustained and for exemplary damages.

Id. (citing Act of March 4, 1853, § 10, 1853 Ind. Acts 87).

52. *Id.* These states were Connecticut, Illinois, Indiana, Iowa, Kansas, Maine, Michigan, New Hampshire, New York, Ohio, and Wisconsin. *Id.*

53. *Id.*

54. *Id.* Alabama, Alaska, Arizona, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, Wisconsin, and Wyoming have statutory dram shop liability provisions. *Id.* at 116–17 (listing liability by state as of 1998).

55. *Id.* at 118. Arizona, Connecticut, District of Columbia, Hawaii, Indiana, Iowa, Louisiana, Maine, Minnesota, Mississippi, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Washington, West Virginia, and Wyoming enforce common law dram shop liability. *Id.* at 116–17.

56. *Id.* at 116–17.

57. Lindsay G. Arthur, Jr., *Minnesota Liquor Liability Law*, ADVANCED LEGAL EDUC. § 1.2, at 5 (1983). The legislation made it necessary for those selling intoxicating beverages to obtain a license and post a bond in the penal sum of \$1000 for malt liquors. *Id.*

58. MINN. STAT. § 340A.801 (2004); Arthur, *supra* note 57, § 1.2, at 6.

59. Strand v. Vill. of Watson, 245 Minn. 414, 419, 72 N.W.2d 609, 614 (1955); Arthur, *supra* note 57, § 1.2, at 6.

on alcohol consumption.⁶⁰ The adoption was a method to control liquor traffic, not to compensate injured persons.⁶¹ Historically, the Minnesota Supreme Court considered the CDA as “highly penal in its nature . . . [and] . . . to be strictly construed in the sense that it [could not] be enlarged beyond its definite scope”⁶² Recently, however, the court has applied the CDA’s remedial purposes more liberally.⁶³

Minnesota’s dram shop law applies only to commercial vendors of alcoholic beverages and not to social hosts.⁶⁴

Under the current version of the Minnesota Civil Damages Act, a plaintiff must satisfy five elements to establish liability against a Minnesota liquor vendor:

- (1) An illegal sale of intoxicating liquor;
- (2) The illegal sale caused or contributed to the allegedly intoxicated person’s (AIP) intoxication;
- (3) The AIP’s intoxication was a direct cause of the plaintiff’s injury;
- (4) The plaintiff sustained damages recoverable under the Civil Damages Act; and
- (5) Proper notice must be provided to the liquor vendor pursuant to Minn. Stat. § 340A.802.⁶⁵

60. Arthur, *supra* note 57, § 1.2, at 6.

61. *Id.* For example, the primary consequence of making an illegal sale of alcohol under Minnesota’s first Dram Shop Act was loss of license, and liability to those injured was limited to \$1000. *Id.* (citing 1858 Minn. Laws at ch. 124).

62. Beck v. Groe, 245 Minn. 28, 34, 70 N.W.2d 886, 891 (1955).

63. Arthur, *supra* note 57, § 1.2, at 7. For example, the court stated “[t]he civil damage act is both penal and remedial, an inconsistency which we have recognized but resolved in favor of a liberal construction to suppress the mischief and advance the remedy.” *Id.* (citing Ross v. Ross, 294 Minn. 115, 120, 200 N.W.2d 149, 152 (1972)).

64. Byron M. Peterson et al., *Minnesota Liquor Liability*, MINN. INST. LEGAL EDUC., § 1, at 2 (1999).

65. *Id.* § 1, at 2–3.

The first element, an illegal sale, can happen in a number of ways: (1) sale to an obviously intoxicated person;⁶⁶ (2) sale to an underage drinker;⁶⁷ (3) sale to a non-member of a club;⁶⁸ (4) sale after hours;⁶⁹ (5) sale on a prohibited day;⁷⁰ or (6) an on-sale alcoholic beverage is consumed off premises.⁷¹ Second, a plaintiff must prove that the illegal sale caused or contributed to the intoxication.⁷² The illegal sale need not be the sole cause of intoxication.⁷³ “[T]he surrounding circumstances must show ‘a practical and substantial relationship’ between the illegal sale and intoxication.”⁷⁴ The plaintiff must also prove that the AIP’s intoxication was a direct (proximate) cause of plaintiff’s injuries.⁷⁵

C. Vicarious Liability

Typically, liability under tort law in the United States is based on fault.⁷⁶ But in some cases a supervisory party bears liability for “the actionable conduct of a subordinate or associate . . . based on the relationship between the two parties.”⁷⁷ This doctrine is known as vicarious liability.

Around 1700, the rule of vicarious liability first appeared in England’s common law through a series of judicial opinions, mainly authored by Justice Holt.⁷⁸ The new rule was rejected by the

66. *Id.* § 1, at 4.

67. *Id.* § 1, at 6.

68. *Id.* § 1, at 8.

69. *Id.*

70. *Id.* § 1, at 9.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Hollerich v. City of Good Thunder*, 340 N.W.2d 665, 668 (Minn. 1983) (quoting *Kvanli v. Vill. of Watso*, 272 Minn. 481, 484, 139 N.W.2d 275, 277 (1965)).

75. Peterson, *supra* note 64, § 1, at 10.

76. Daniel J. Koevary, *Automobile Leasing and the Vicarious Liability of Lessors*, 32 FORDHAM URB. L.J. 655, 663 (2005).

77. BLACK’S LAW DICTIONARY 934 (8th ed. 2004).

78. *Hern v. Nichols*, 91 Eng. Rep. 256 (1709); *Lane v. Cotton*, 88 Eng. Rep. 853 (1701); *Tuberville v. Stampe*, 91 Eng. Rep. 1072 (1697); *Boson v. Sandford*, 87 Eng. Rep. 212 (1689); Gary T. Schwartz, *The Hidden and Fundamental Issue of Employer Vicarious Liability*, 69 S. CAL. L. REV. 1739, 1746 (1996) [hereinafter Schwartz, *Employer Vicarious Liability*]. As late as the 1680s, English courts ruled that an employer was liable only if he had “commanded” the specific negligent act of his employee, rejecting employer vicarious liability. Gary T. Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. REV. 641, 695 (1989) [hereinafter Schwartz, *Early American Tort Law*].

Exchequer in 1721,⁷⁹ but was accepted in a 1738 decision⁸⁰ and restated by Blackstone in his 1765 Commentaries.⁸¹

American courts accepted employer vicarious liability in the early 1800s.⁸² At first, the application of the doctrine was imperfect and uncertain.⁸³ Today, however, vicarious liability is consistently applied to hold an employer liable for its employee's negligent act toward a third party, as a result of a special relationship between the employer and employee.⁸⁴

Vicarious liability must be justified differently than negligence liability because it imposes liability on a party not at fault, typically an employer.⁸⁵ There are at least three identified policy goals of the vicarious liability doctrine: (1) enterprise liability/allocation of resources; (2) risk/loss spreading; and (3) prevention/deterrence.⁸⁶

79. *Naish v. E. India Co.*, 92 Eng. Rep. 1160, 1163 (1721) (“[n]othing is . . . more certain” than that a master is not per se liable for his servant’s in-service wrongs).

80. *Jarvis v. Hayes*, 93 Eng. Rep. 1047 (1738).

81. Schwartz, *Early American Tort Law*, *supra* note 78, at 695. *See also* 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAW OF ENGLAND* 430–31 (1765).

82. Schwartz, *Employer Vicarious Liability*, *supra* note 78, at 1746.

83. For example, since Justice Holt and Blackstone each characterized the rule as a resolution of the equities between the employer and a “stranger,” American courts gave the vicarious liability doctrine a narrow interpretation with respect to the issue of an employer’s liability to an injured *employee*. Schwartz, *Early American Tort Law*, *supra* note 78, at 696–97; Schwartz, *Employer Vicarious Liability*, *supra* note 78, at 1747–48.

84. *See* VICTOR E. SCHWARTZ ET AL., *PROSSER, WADE AND SCHWARTZ’S TORTS* 660 (11th ed. 2005).

85. Koevary, *supra* note 76, at 663.

86. ARTHUR BEST & DAVID W. BARNES, *BASIC TORT LAW* 390 (2003); Steven N. Bulloch, *Fraud Liability Under Agency Principles: A New Approach*, 27 WM. & MARY L. REV. 301, 303 (1986). Thomas Baty analyzed nine different justifications that had historically been put forth for vicarious liability: (1) Control—Based on the premise that to an extent, a master controls the actions of his servant; (2) Master’s Benefit from Servant’s Work—The master should bear the burdens caused by servants because the master obtains the benefit of the servant’s work; (3) Revenge—Put forward by Holmes because he thought vicarious liability for servants originated with liability for actions of slaves; (4) Care and choice—If the master chooses his servants poorly, *he* ought to suffer, rather than the innocent victim; (5) Identification—*Qui facit per alium facit per se*, the servant’s act is the master’s act; (6) Evidence—It is often difficult to identify the individual responsible for a tortious act; where all possible responsible parties are servants of the same master, vicarious liability ensures the plaintiff will succeed; (7) Indulgence—Bacon originally put forth this idea that people are allowed to employ others only by an indulgence of the law, and part of the price they must pay is liability for their servant’s acts; (8) Danger—Pollock believed that a person who employed a servant was setting a dangerous operation into motion, which is

1. *Enterprise Liability/Allocation of Resources*

Enterprise liability theory focuses on allocation of resources. It is “the means by which society seeks to ensure that the employer bears the costs of its operation.”⁸⁷ In Judge Friendly’s view, vicarious liability finds its basis “in a deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities.”⁸⁸ Under this theory, an employer is liable for torts of its employee because the employee is acting for the employer’s benefit, and the enterprise is liable for the costs associated with doing business.⁸⁹ The price of a good or activity should reflect any accident costs it might cause, and if an enterprise is held liable for harms it causes, the “internalization of costs” is facilitated.⁹⁰ An underlying aspect of this theory is also the principle that no party should be left without recourse to compensation for its injuries.⁹¹

The enterprise liability theory is based on the allocation of resources justification.⁹² A fundamental assumption is that on the whole, people know what is best for them.⁹³ It is important for people to know the costs of producing goods in order to determine

analogous to keeping a water reservoir or wild animals on one’s land; (9) Satisfaction—An employer is usually wealthier than a servant and is capable of paying damages while a servant usually is not. PATRICK S. ATIYAH, VICARIOUS LIABILITY IN THE LAW OF TORTS 15–22 (1967).

87. JEFFREY M. KAPLAN ET AL., COMPLIANCE PROGRAMS AND THE CORPORATE SENTENCING GUIDELINES § 24:2 (2006). See Bulloch, *supra* note 86, at 316 (stating that the “price of the employer’s product should reflect the cost of compensating the [potential tort] victim”); Koevary, *supra* note 76, at 663 (stating that enterprise liability, the “predominant theory” justifying vicarious liability, “holds that an enterprise should be liable for the costs associated with its business”).

88. *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167, 171 (2d. Cir. 1968).

89. Koevary, *supra* note 76, at 663–64.

90. DAN B. DOBBS & PAUL T. HAYDEN, TORTS AND COMPENSATION 625 (5th ed. 2005).

91. Koevary, *supra* note 76, at 664–65. Under enterprise liability, the chances a plaintiff can recover are increased because he can sue more or wealthier defendants, and victims of insolvent employees are left with a remedy. *Id.* As a result, the enterprise is allowed to “impose large costs on society through actions of their employees.” *Id.* at 665. According to the enterprise liability theory, the Urbans should not have to face the risk that Post 184 is insolvent, and American Legion Department of Minnesota and the American Legion National should be responsible for the cost of doing business.

92. Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 501–02 (1961).

93. *Id.* at 502.

what they really want.⁹⁴ Prices should reflect actual costs of competing goods, which enables buyers to make informed decisions in purchases.⁹⁵ Under a strict resource allocation theory, it is important for the prices of goods to accurately reflect their full cost to society.⁹⁶ Hence, the theory requires that the cost of injuries be borne by the activities that caused them, regardless of whether fault is involved.⁹⁷ The theory also requires that “among the several parties engaged in an enterprise the loss should be placed on the party which is most likely to cause the burden to be reflected in the price of whatever the enterprise sells.”⁹⁸

2. *Risk/Loss Spreading*

The second theory of justification for vicarious liability attempts to shift risk to those better positioned to spread losses.⁹⁹ Proponents of the loss-spreading theory suggest that enterprises are more capable of spreading losses.¹⁰⁰ One reason for their theory is

94. *Id.*

95. *Id.*

96. *Id.* at 505.

97. *Id.*

98. *Id.*

99. KAPLAN, *supra* note 87; Bulloch, *supra* note 86, at 316. In 1923, Young B. Smith introduced the loss-spreading theory in an article for the Columbia Law Review entitled *Frolic and Detour*, 23 COLUM. L. REV. 444 (1923) (noting that the master should be held responsible for his servant's actions because “it is socially more expedient to spread or distribute among a large group of the community the losses which experience has taught are inevitable in the carrying on of industry, than to cast the loss upon a few”). The principle of loss distribution first came to be recognized in the field of industrial accidents. ATYAH, *supra* note 86, at 23. The cost of industrial accidents was originally not placed on the employer, but instead a great part of the cost was imposed on the victim. *Id.* In 1881, Sir Edwin Chadwick opposed views that industrial accidents should not be paid for by employers, based on the reasoning that they were not the employer's fault, and that they were inevitable risks of employment. *Id.* at 23–24. Instead, Chadwick said, “[T]he costs of the accidents, and of the resultant widowhood and orphanage are a necessary consequence of your business and should be borne by the trade, and ultimately by the consumer, and not by the parish rates on which they are so heavy a burden.” *Id.* at 24. Eventually, this view was used as a justification for the Workmen's Compensation Act of 1897. *Id.* It was soon discovered that the same principles were present in cases of vicarious liability. *Id.*

100. Bulloch, *supra* note 86, at 306. Underlying this theory is the assumption that the injured party would have to bear the entire loss if the enterprise is not made to absorb it. *Id.* In *Urban*, the Department and National are presumably in a better position to absorb the costs of the injuries because insurance is arguably more easily obtainable by them. See generally *Urban v. Am. Legion Dep't of Minn.*, 723 N.W.2d 1 (Minn. 2006).

that most employers are not individuals, but corporations.¹⁰¹ The cost of liabilities can be spread by an enterprise over a period of time, and “distributed [across] a larger section of the community.”¹⁰² Enterprises can use “the mechanisms of insurance, profit reduction, wage reduction, and price increases” to distribute costs.¹⁰³ In this way, losses can be efficiently spread among employees, customers, producers of similar products, and others.¹⁰⁴ For example, an enterprise generally insures itself against legal liabilities.¹⁰⁵ Insurance costs can be covered by goods and services sold, which in turn will be passed on to the consumer in the form of higher prices.¹⁰⁶

Even if an enterprise does not have insurance, or if it is uneconomical to pass extra costs on through higher prices, enterprises are still capable of spreading losses.¹⁰⁷ Increased costs may be distributed among the shareholders, staff, and employees of the enterprise.¹⁰⁸ This is accomplished through smaller dividend payments to shareholders and smaller wage increases for employees.¹⁰⁹ To allocate part of the cost to one class rather than the other would be practically impossible.¹¹⁰ Typically, both methods of distribution will occur, and it will be impossible to isolate the cost incurred from insurance against tort liabilities because so many factors are present in management decisions regarding dividends, prices, and wages.¹¹¹

3. Deterrence/Prevention

Finally, deterrence/prevention is a theory often used to justify vicarious liability.¹¹² This theory operates under the assumption that masters have the ability to control servants and are in the best

101. ATYAH, *supra* note 86, at 23.

102. *Id.*

103. Bulloch, *supra* note 86, at 306.

104. *Id.*

105. *See* ATYAH, *supra* note 86, at 23.

106. *Id.* Furthermore, the consumer may also be able to spread the cost if the consumer is a business entity, rather than an individual. *Id.*

107. *Id.* Some larger enterprises will find it more appropriate to self-insure. *Id.* It may not be possible for an enterprise to pass on costs through higher prices because of fierce competition in the industry. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. KAPLAN, *supra* note 87.

position to prevent torts.¹¹³ In theory, “if the tortfeasor is a servant and the tort is committed within the scope of [his] employment, no one, other than the tortfeasor himself, is in a better position than the master to prevent the [tortious action].”¹¹⁴ Furthermore, imposing liability “creates a strong incentive for vigilance by those in a position ‘to guard substantially against the evil to be prevented.’”¹¹⁵ Strict liability for an employee’s tort will theoretically encourage employers to take necessary precautions to prevent torts from occurring.¹¹⁶ For example, an employee making a delivery using his employer’s vehicle runs a red light and injures a pedestrian.¹¹⁷ Both the employee and the employer will be liable to the pedestrian for the pedestrian’s injuries.¹¹⁸ Under the prevention theory, the employer could, and presumably should, have taken precautions to prevent the accident, such as requiring traffic safety training for its drivers.¹¹⁹

113. Bulloch, *supra* note 86, at 315. Some might argue that, for this control reason, the Department and National should not be vicariously liable. See *Urban v. Am. Legion Dep’t of Minn.*, 723 N.W.2d 1, 5–6 (Minn. 2006) (concluding that because the legislature has chosen not to include an element of vicarious liability in the CDA since its enactment, the exclusion is significant). In the dissent, however, Justice Hanson makes a valid point that while the quantity of control by the Department and National is not likely sufficient to create a principal-agent relationship, the two do have the right to control the “specific aspect of [Post 184’s] business that is alleged to have caused the [plaintiffs’] harm.” *Id.* at 13 (Hanson, J., dissenting) (quoting *Kerl v. Dennis Rasmussen, Inc.*, 682 N.W.2d 328, 341 (2004)). Justice Hanson went on to explain that the aspect of Post 184’s business that caused the harm is the illegal sale of alcohol to a non-Legion member, which is specifically prohibited by the Department and National. *Id.* The enforcement of the rule is essential to the Department and National because if it is not enforced they might lose a group tax exemption granted by the Internal Revenue Service. *Id.* Under the rules of the exemption, only members of National may be served in bars of the local posts. *Id.* Under this reasoning, vicarious liability is applicable. *Id.*

114. Bulloch, *supra* note 86, at 303–04.

115. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 14 (1991) (quoting *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112, 116 (1927)).

116. Bulloch, *supra* note 86, at 304. The rule may seem overbroad when viewed this way. DANIEL S. KLEINBERGER, *AGENCY, PARTNERSHIP AND LLCs* § 3.2.3 (Aspen 3d ed. forthcoming 2008). If the goal is to encourage employers to engage in conduct that enables employees to act safely, why impose liability when the employer has used reasonable care to select, train, and supervise its employees properly? *Id.* There are two possible answers to this question. *Id.* First, both enterprise liability and risk spreading take a broad approach to imposing liability. *Id.* Second, a narrow rule would lead to problems proving negligence on the part of the employer, making the rule ineffective. *Id.*

117. Bulloch, *supra* note 86, at 304.

118. *Id.*

119. *Id.*

D. Respondeat Superior

The primary application of vicarious liability is “an employer’s obligation to pay for an employee’s tortious conduct,” known as respondeat superior.¹²⁰ In 1894, Professor John Wigmore determined that the evolution of respondeat superior occurred in three phases from the 1500s to the 1800s.¹²¹ Originally, respondeat superior was based on a theory in which the master himself breached his duty to the plaintiff by ordering his servant to commit a tort.¹²² After Lord Holt was appointed Chief Justice of the King’s Bench in 1689, the Implied Command theory developed.¹²³ The Implied Command theory imposed liability on an innocent master because “seeing somebody must be a loser . . . it is more reason that he that employs and puts a trust and confidence in the wrongdoer should be a loser, than a stranger.”¹²⁴

Under the modern common-law doctrine of respondeat superior, an employer¹²⁵ may be held vicariously liable for a tort

120. BEST & BARNES, *supra* note 86, at 387.

121. Rhett B. Franklin, *Pouring New Wine Into an Old Bottle: A Recommendation For Determining Liability of an Employer Under Respondeat Superior*, 39 S.D. L. REV. 570, 573–74 (1994).

122. *Id.* at 574.

123. *Id.*

124. *Id.* at n.32 (quoting *S.C. Ins. Co. v. James C. Greene & Co.*, 348 S.E.2d 617, 622 (S.C. Ct. App. 1986)).

125. The terminology relating to respondeat superior is in transition. KLEINBERGER, *supra* note 116, § 3.2.2. Under the Restatement (Second) of Agency, “[a] servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other’s control or right to control.” RESTATEMENT (SECOND) OF AGENCY § 220 (1958). Under the Restatement (Third) of Agency, “an employee is an agent whose principal controls or has the right to control the manner and means of the agent’s performance of work” RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a) (2006). The Restatement (Third) of Agency modified the terminology because “the connotation that household service is the prototype for employment is dated, as is its suggestion that an employer has an all-pervasive right of control over most dimensions of the employee’s life.” *Id.* at intro. cmt. B. “The difference is a matter of semantics, not substance.” KLEINBERGER, *supra* note 116, § 3.2.2.

Unfortunately, the current Restatement terminology is not a perfect solution because “employer” and “employee” have well-established everyday meanings. *Id.* “The resulting connotation is that the agency law meaning corresponds to the ordinary meaning, and that connotation is inaccurate. While all employees in the lay sense may well be employees in the [Restatement (Third)] sense, not all [Restatement (Third)] employees are necessarily employees in the lay sense.” *Id.*

committed by his employee¹²⁶ if the tort was committed within the scope of employment.¹²⁷ If applicable, respondeat superior automatically holds the employer liable for the employee's tortious actions, regardless of whether the employer authorized, forbade, or used all reasonable means to prevent the misconduct.¹²⁸

III. THE *URBAN* DECISION

In *Urban*, Todd Urban and his family were involved in a collision with a drunk driver. The collision resulted in injuries to himself and his children, as well as the loss of his wife. Urban, on behalf of himself and his minor children, brought an action against American Legion Post 184 (the place where Rolland, the drunk driver, became intoxicated) under the CDA.¹²⁹ The Urbans also sued the American Legion Department of Minnesota (Department) and the American Legion National (National) under alternative theories including respondeat superior.¹³⁰ The district court granted summary judgment in favor of the

126. The Restatement (Third) of Agency outlines factors relevant in determining whether an agent is an employee:

[T]he extent of control that the agent and the principal have agreed the principal may exercise over details of the work; whether the agent is engaged in a distinct occupation or business; whether the type of work done by the agent is customarily done under a principal's direction or without supervision; the skill required in the agent's occupation; whether the agent or the principal supplies the tools and other instrumentalities required for the work and the place in which to perform it; the length of time during which the agent is engaged by a principal; whether the agent is paid by the job or by the time worked; whether the agent's work is part of the principal's regular business; whether the principal and the agent believe that they are creating an employment relationship; and whether the principal is or is not in business. Also relevant is the extent of control that the principal has exercised in practice over the details of the agent's work.

RESTATEMENT (THIRD) OF AGENCY § 7.07 cmt. f (2006).

127. Franklin, *supra* note 121, at 572. In order for the doctrine to apply, there must be a master-servant relationship between the employer and the employee who commits the tort and the tort must be committed within the employee's "scope of employment." *Id.* at 572-73. "Scope of employment" is defined as "[t]he range of reasonable and foreseeable activities that an employee engages in while carrying out the employer's business." BLACK'S LAW DICTIONARY 1374 (8th ed. 2004).

128. KLEINBERGER, *supra* note 116, §3.2.1.

129. *Urban v. Am. Legion Post 184*, 695 N.W.2d 153, 156 (Minn. Ct. App. 2005).

130. *Urban v. Am. Legion Dep't of Minn.*, 723 N.W.2d 1, 2 (Minn. 2006).

Department and National on all theories.¹³¹ The court of appeals affirmed the summary judgment rulings.¹³² Urban appealed to the Minnesota Supreme Court.¹³³

A. *Majority Opinion*

The Minnesota Supreme Court addressed whether the Department and National could be held vicariously liable on the theory of respondeat superior for Post 184's liquor sale to Rolland.¹³⁴ The court first looked to the language of the CDA and agreed with the Department and National that, because the language of the statute narrows the previous scope of the law from "employers" to "licensees," the legislature specifically limited vicarious liability under the CDA.¹³⁵

The CDA created a cause of action that did not exist at common law.¹³⁶ The court relied on the presumption that statutes creating new causes of action do not abolish the common law unless they do so "by express wording or necessary implication."¹³⁷ The court also presumed that every statute has a purpose, so no statutory language should be deemed unnecessary or insignificant.¹³⁸ Furthermore, the court stated that Minnesota Statutes section 340A.501, which makes licensees responsible for the sale of alcohol by their employees, implies that the legislature did not expect respondeat superior to apply to CDA liability.¹³⁹ The court opined that if respondeat superior applied to actions under the CDA, section 340A.501 would have no purpose.¹⁴⁰

The court further argued that the doctrine of *expressio unius est exclusio alterius*—the expression of one thing indicates the exclusion of another¹⁴¹—suggests that the legislature meant that *only* licensees

131. *Id.*

132. *Id.*

133. *Id.*

134. *Urban*, 723 N.W.2d at 3.

135. *Id.* at 5 (comparing MINN. STAT. § 340.941 (1984) with MINN. STAT. § 340A.501 (2004)).

136. *Id.* (citing *Beck v. Groe*, 245 Minn. 28, 34, 70 N.W.2d 886, 891 (1955)).

137. *Id.* (citing *Shaw Acquisition Co. v. Bank of Elk River*, 639 N.W.2d 837, 877 (Minn. 2002)).

138. *Id.* (citing *Mayo Collaborative Servs., Inc. v. Comm'r*, 698 N.W.2d 408, 423 (Minn. 2004); *Vlahos v. R & I Constr. of Bloomington, Inc.*, 676 N.W.2d 672, 679 (Minn. 2004)).

139. *Id.* at 5.

140. *Id.*

141. *Id.* See also BLACK'S LAW DICTIONARY 620 (8th ed. 2004). For example, the

are vicariously liable for the alcohol distribution.¹⁴² The court noted that the legislature had ample opportunity to recognize vicarious liability as it has in other statutes, since the CDA was enacted nearly 100 years ago.¹⁴³ The court therefore “declines to act where the legislature has chosen not to.”¹⁴⁴

Finally, the court stated that the legislature’s elimination of social-host liability leads it to conclude that the policy underlying the CDA is to “apply liability for alcohol-related harms to *commercial vendors* who *profit* from the sale of alcohol.”¹⁴⁵ Even if the CDA applied to owners of licensees where owners receive profits from alcohol sales, the court argued that the Department and National would not be liable because neither receives revenue or profits from alcohol sales.¹⁴⁶

B. Dissent

In a dissenting opinion, Justice Hanson concluded that the CDA does not abrogate, but instead incorporates, common-law principles of vicarious liability.¹⁴⁷ He reasoned that the underlying cause of action alleged against Post 184 was for direct liability

rule that “each citizen is entitled to vote” implies that noncitizens are not entitled to vote. *Id.*

142. *Urban*, 723 N.W.2d at 5.

143. *Id.* at 5–6. *See, e.g.*, MINN. STAT. § 169.09, subdiv. 5(a) (Supp. 2005). In 1972, the court concluded that the CDA permitted social-host liability because liability could be incurred by “giving” alcohol to tortfeasors. *Urban*, 723 N.W.2d at 6 (citing *Koehnen v. Dufour*, 590 N.W.2d 107, 109 (Minn. 1999)). Shortly thereafter, the legislature amended the CDA to remove “giving” and the court held that the amendment makes clear that the legislature was specifically denying social host liability. *Id.* (citing *Cole v. City of Spring Lake Park*, 314 N.W.2d 836, 840 (Minn. 1982)).

144. *Urban*, 723 N.W.2d at 6. The court went on to say that the CDA may be “liberally construed” where its “provisions are clear as to intent and purpose,” but must be “strictly construed in the sense that it cannot be enlarged beyond its definite scope.” *Id.* (quoting *Beck v. Groe*, 245 Minn. 28, 34, 70 N.W.2d 886, 891 (1955)). *See generally* 45 AM. JUR. 2D *Intoxicating Liquors* § 460 (2007) (discussing interpretation of dram shop statutes).

145. *Urban*, 723 N.W.2d at 6 (citing *Cady v. Coleman*, 315 N.W.2d 593, 595–96 (Minn. 1982)).

146. *Id.* The Urbans argued that the court should extend respondeat superior because the decision in *Hahn v. City of Ortonville*, 238 Minn. 428, 438, 57 N.W.2d 254, 262 (1943) states that masters may be held liable for the actions of their servants under the CDA. *Urban*, 723 N.W.2d at 6–7. The court dispelled this argument by stating that while *Hahn* used a master-servant argument, it was decided before the legislature adopted section 340A.501, which amended the CDA. *Id.* at 7.

147. *Urban*, 723 N.W.2d at 7 (Hanson, J., dissenting).

under the CDA, but the claim against the Department and National was for vicarious liability under common-law principles of respondeat superior.¹⁴⁸ In support of this conclusion, Justice Hanson indicated that *Hahn* pointed out that common-law vicarious liability applies to the CDA, and a principal may be held liable under common-law respondeat superior where its agent is directly liable under the CDA statute.¹⁴⁹ The true legal issue, according to the dissent, is whether, under *Hahn*, the Department and National were vicariously liable under common law as principals of Post 184 for the direct statutory liability of Post 184.¹⁵⁰

The dissent also argued that the CDA has been construed liberally in determining proper plaintiffs to bring CDA claims, and the same liberal rule of construction should be used in deciding proper defendants to a CDA claim.¹⁵¹ Justice Hanson argued that the maxim “the expression of one thing indicates the exclusion of another” is not applicable where the two things are consistent.¹⁵² He also agreed with Professor Dickerson’s opinion that *expressio unius est exclusio alterius* is one of a few Latin maxims that “masquerade as rules of interpretation while doing nothing more than describing results reached by other means.”¹⁵³ Justice Hanson dismissed the majority’s arguments relating to profits from alcohol sales and the analogy to social hosts by stating that these facts are only relevant to direct liability under the CDA, not vicarious liability.¹⁵⁴ Finally, the dissent suggested that the failure of the legislature to address vicarious liability in the CDA statute does not indicate intent to eliminate it.¹⁵⁵

148. *Id.* at 8. Justice Hanson opined that the majority commingled the separate theories of liability (direct liability under CDA and vicarious liability under respondeat superior) and applied the elements of one to the analysis of the other. *Id.*

149. *Id.* Hanson read the language of section 340A.501 as adding to a licensee’s common law vicarious liability as an employer by creating a direct statutory liability, rather than limiting vicarious liability only to licensees. *Id.*

150. *Id.* The court’s case law on the rule of statutory construction for newly created causes of action creates a presumption that statutes are consistent with the common law and should be construed strictly against the notion that they abrogate the common law. *Id.* (citing *Shaw Acquisition Co. v. Bank of Elk River*, 639 N.W.2d 837, 877 (Minn. 2002)).

151. *Id.* at 9–10.

152. *Id.* at 10.

153. *Id.* See also DICKERSON, *supra* note 27, at 234–35.

154. *Urban*, 723 N.W.2d at 11 (Hanson, J., dissenting).

155. *Id.* Justice Hanson gave two reasons to support his conclusion. First, in over forty years since *Hahn*, the legislature took no action to eliminate common

IV. ANALYSIS OF THE *URBAN* DECISION

The Minnesota Supreme Court is forced to deal with competing interests in its examination of *Urban*. On one hand, the CDA must be “strictly construed in the sense that it cannot be enlarged beyond its definite scope.”¹⁵⁶ On the other hand, a statute creating a new cause of action, such as the CDA, must not abrogate common law unless it does so “by express wording or necessary implication.”¹⁵⁷

The majority’s approach to resolving the competing interests is unsound for a number of reasons. First, the court mistakenly commingled direct statutory liability under the CDA with vicarious liability under the doctrine of respondeat superior.¹⁵⁸ Next, the court employed a flawed theory of statutory construction.¹⁵⁹ Finally, the court erroneously concluded that legislative inaction affirms judicial correctness.¹⁶⁰

A. *CDA/Vicarious Liability Split*

In *Hahn*, the Minnesota Supreme Court holds that common-law vicarious liability is applicable under the CDA to make a master liable for the torts of its servants acting within the scope of employment.¹⁶¹ Through section 340A.501 of Minnesota Statutes, the legislature specifically extended liability to licensees for sales of alcohol made by their employees.¹⁶² In the view of Justice Hanson, section 340A.501 supplements the common-law vicarious liability of a licensee by creating direct statutory liability for licensees, who may or may not already be liable as employers under the common law.¹⁶³ The majority focused its analysis on whether the

law vicarious liability under the CDA. *Id.* Second, until the court of appeals’ decision in this case, the legislature did not have a reason to consider that a court might interpret section 340A.501 as abrogating vicarious liability. *Id.*

156. *Id.* at 6 (majority opinion) (quoting *Beck v. Groe*, 245 Minn. 28, 34, 70 N.W.2d 886, 891 (1955)).

157. *Id.* at 5 (quoting *Shaw Acquisition Co. v. Bank of Elk River*, 639 N.W.2d 837, 877 (Minn. 2002)).

158. *See infra* Part IV.A.

159. *See infra* Part IV.B.

160. *See infra* Part IV.C.

161. *Hahn v. City of Ortonville*, 238 Minn. 428, 438, 57 N.W.2d 254, 262 (1953).

162. MINN. STAT. § 340A.501 (2004).

163. *Urban v. Am. Legion Dep’t of Minn.*, 723 N.W.2d 1, 11 (Minn. 2006) (Hanson, J., dissenting).

Department and National had direct statutory liability under section 340A.501.¹⁶⁴ Instead, the majority should have focused on whether the Department and National had common-law vicarious liability under the doctrine of respondeat superior, as principals for Post 184, which was directly liable under the CDA. This mistake renders the majority's reasoning flawed from the start.

B. Statutory Construction

The court relied on the principle *expressio unius est exclusio alterius* in reaching its decision that only licensees are liable under the CDA.¹⁶⁵ Latin canons of statutory construction, particularly *expressio unius est exclusio alterius*, have been highly criticized for many years.¹⁶⁶ In particular, the Minnesota Supreme Court's reliance on *expressio unius* in the *Urban* case is unsatisfactory because, in the words of Professor Dickerson, it is used to "describ[e] results reached by other means."¹⁶⁷

The majority argued that section 340A.501 limits liability under the CDA to licensees, thereby abrogating the common law.¹⁶⁸ In his dissent, however, Justice Hanson correctly argued that section 340A.501 *enlarges* common-law respondeat superior liability of a licensee by eliminating two possible defenses available under the common law: (1) the licensee is not the employer of the person making the illegal sale; and (2) the person making the illegal sale is not acting within the scope of his or her employment.¹⁶⁹

The court's "well-settled case law" on statutory construction for statutes that create new causes of action presumes that statutes do not abrogate the common law unless they do so by "express wording or necessary implication."¹⁷⁰ Justice Hanson further clarified that although the court has said it construes such statutes "strictly," it has meant that it construes them "strictly *against* the notion that they abrogate the common law."¹⁷¹ Justice Hanson continued, "we construe such statutes liberally in favor of the continued existence of the common law."¹⁷² But, the majority turns

164. *See id.* at 4–5 (majority opinion).

165. *Id.* at 5.

166. *See, e.g.,* DICKERSON, *supra* note 27, at 234.

167. *Id.*

168. *Urban*, 723 N.W.2d at 6.

169. *Id.* at 11 (Hanson, J., dissenting).

170. *Id.* at 9.

171. *Id.*

172. *Id.*

that rule on its head by presuming that *the failure to mention* common-law vicarious liability principles means the legislature intended to abrogate them.

There are a number of reasons why *expressio unius* “is not useful as a standard of construction” in this case.¹⁷³ First, the maxim is not meant to be used and applied universally.¹⁷⁴ It is not a rule of law, but merely an aid to construction.¹⁷⁵ More specifically, the rule is applicable only in the interpretation of statutes in which the intention of the lawmakers is not otherwise clear.¹⁷⁶ It should never be used to override the clear purpose of the legislature.¹⁷⁷

The Minnesota Supreme Court held in *Hollerich v. City of Good Thunder* that it is appropriate to consider the purpose of the Dram Shop Act as an aid to interpreting statutory language and determining legislative intent.¹⁷⁸ According to the prevailing view, “civil damage acts . . . are to be liberally construed so as to suppress the mischief and advance the remedy.”¹⁷⁹ The CDA “provides an extremely effective incentive for liquor vendors to do everything in their power to avoid making illegal sales,” by imposing the sanction of strict liability.¹⁸⁰ Simultaneously, the CDA “compensate[s] members of the public who are injured as a result of illegal liquor sales”¹⁸¹

If the CDA’s purpose is to be a means to interpret the intent of the legislature, then restricting liability to only Post 184 is not in accordance with that intent. Legislative intent as to the application of the CDA is not ambiguous, and therefore, the use of *expressio unius est exclusio alterius* is not appropriate.¹⁸²

Another reason *expressio unius est exclusio alterius* is not a fitting maxim of statutory construction is that it assumes legislative omniscience.¹⁸³ According to critics, the maxim “would make sense

173. *Id.* at 10.

174. 73 AM. JUR. 2D *Statutes* § 130 (2007).

175. *Id.*

176. 73 AM. JUR. 2D *Statutes* § 130 (2007); 82 C.J.S. *Statutes* § 323 (2007).

177. 73 AM. JUR. 2D *Statutes* § 130 (2007); 82 C.J.S. *Statutes* § 323 (2007).

178. *Hollerich v. City of Good Thunder*, 340 N.W.2d 665, 667 (Minn. 1983).

179. *Hahn v. City of Ortonville*, 238 Minn. 428, 436, 57 N.W.2d 254, 261 (1953).

180. *Skaja v. Andrews Hotel Co.*, 281 Minn. 417, 423, 161 N.W.2d 657, 661 (1968).

181. *Id.* at 422, 161 N.W.2d at 661.

182. *See Skaja*, 281 Minn. at 422, 161 N.W.2d at 661; *Hahn*, 238 Minn. at 436, 57 N.W.2d at 261.

183. Richard A. Posner, *Statutory Interpretation—In the Classroom and in the*

only if all omissions in legislative drafting were deliberate.”¹⁸⁴ *Expressio unius* “assumes that the legislature thinks through statutory language carefully, considering every possible variation.”¹⁸⁵ Unfortunately, this is often untrue because the legislature does not think about certain possibilities or it assumes courts will fill in any gaps.¹⁸⁶ In 1973, Judge Skelly Wright deemed the maxim increasingly unreliable because “it stands on the faulty premise that all possible alternative or supplemental provisions were necessarily considered and rejected by the legislative draftsmen.”¹⁸⁷

When the legislature added section 340A.501 to the CDA, it is extremely likely that it did not think about the possibility that the court would interpret its express mention of licensees as an exclusion of other classes of principals liable under the common law. It is irrational to assume that the failure of the legislature to mention common-law principles of vicarious liability indicates that the principles were “considered and rejected by the legislative draftsmen.”¹⁸⁸ Legislative omniscience is not a valid assumption, which adds further force to the argument that *expressio unius* is highly unreliable in statutory construction.

A third limitation of the maxim *expressio unius est exclusio alterius* is that context must determine its applicability. Professor Reed Dickerson argues that it is one of several Latin maxims that “masquerade as rules of interpretation while doing nothing more than describing results reached by other means.”¹⁸⁹ He adds:

Courtroom, 50 U. CHI. L. REV. 800, 813 (1983).

184. *Id.*

185. ESKRIDGE, *supra* note 25, at 824.

186. *See id.*

187. Nat’l Petroleum Refiners Ass’n v. Fed. Trade Comm’n, 482 F.2d 672, 676 (D.C. Cir. 1973).

188. *See* ESKRIDGE, *supra* note 25, at 824. This is true especially in light of the long-standing presumption that statutes creating new causes of action do not abrogate the common law. Since the legislature knew that an employer was already held responsible for the torts of its employee, the express mention of common-law vicarious liability was probably deemed unnecessary.

189. DICKERSON, *supra* note 27, at 234. Perhaps, then, the majority had alternative grounds upon which it based its decision not to allow the vicarious-liability claims against the Department and National. Vicarious liability is one of the most firmly established common-law principles, but many lawyers have felt that there is something so exceptional about vicarious liability that it needs justification. ATIYAH, *supra* note 86, at 12. One author opined, “[t]hat there could hardly be greater injustice than to take away A’s property and give it to B because C has injured B seems clear, yet that is the result of the maxim *respondeat superior*.” *Id.* (quoting Frederic Cunningham, *Respondeat Superior in Admiralty*, 19 HARV. L. REV. 445, 445 (1906)). At first glance, vicarious liability appears to contradict two

Far from being a rule, it is not even lexicographically accurate, because it is simply not true, generally, that the mere express conferral of a right or privilege in one kind of situation implies the denial of the equivalent right or privilege in other kinds. Sometimes it does and sometimes it does not, and whether it does or does not depends on the particular circumstances of context. Without contextual support, therefore, there is not even a mild presumption here. Accordingly, this maxim is at best a description, after the fact, of what the court has discovered from context.¹⁹⁰

In determining whether context allows application of the maxim, one must determine whether the “contrast between a specific subject matter which is expressed and one not mentioned leads to an inference that the latter was not intended to be included”¹⁹¹ If there is a special reason for mentioning one thing and not the other, which is otherwise within the statute, the absence of mention of the other thing will not exclude it.¹⁹² The maxim also does not apply to a statute in which some things are mentioned only by way of example.¹⁹³

The contextual argument against the application of *expressio unius* is present in Justice Hanson’s dissenting opinion.¹⁹⁴ He correctly argued that the maxim may describe a logical conclusion where the included item is inconsistent with the excluded item, but that where the two items are consistent, it makes no logical sense.¹⁹⁵ In *Urban*, the two things are direct statutory liability of a licensee under the CDA and vicarious liability of the licensee’s principal under *respondeat superior*.¹⁹⁶ The two are complementary because, in

principles of torts. *Id.* First, it seems a person should only be liable for damages caused by his acts or omissions. *Id.* Second, a person should only be liable when he is at fault. *Id.* Nonetheless, the policy reasons underlying the doctrine of vicarious liability provide a stronger argument for allowing the suits to be brought.

190. DICKERSON, *supra* note 27, at 234–35 (footnotes omitted). For example, Mother tells Sally, “Don’t hit, kick, or bite your sister Anne.” ESKRIDGE, *supra* note 25, at 824–25. Sally is *not* authorized by *expressio unius* to “pinch” her little sister, because the baseline “no harming sister” should not be narrowly limited. *Id.* On the other hand, if Mother tells Sally, “You may have a cookie and a scoop of ice cream,” Sally may not have the candy bar sitting on the table. *Id.*

191. 82 C.J.S. *Statutes* § 323 (1999).

192. *Id.*

193. *Id.*

194. *Urban v. Am. Legion Dep’t of Minn.*, 723 N.W.2d 1, 10 (Minn. 2006) (Hanson, J., dissenting).

195. *Id.*

196. *Id.*

its own way, each serves the purpose of strengthening the regulation of the sale of alcohol and furthers the purpose of the CDA.¹⁹⁷ There is no contextual support for the application of *expressio unius* here, and therefore, it should not be applied.

A final flaw in the application of *expressio unius*, and of maxims of statutory construction in general, is that every canon has an equal and opposite counter canon. Nearly sixty years ago, Karl Llewellyn offered the theory that, “[a]s in argument over points of case-law, the accepted convention still, unhappily requires discussion as if only one single correct meaning could exist. Hence there are two opposing canons on almost every point.”¹⁹⁸ In opposition to “[e]xpression of one thing excludes another,” Llewellyn countered: “[t]he language may fairly comprehend many different cases where some only are expressly mentioned by way of example.”¹⁹⁹

In the *Urban* case, one might argue that principals should be included because the CDA could comprehend cases beyond those specifically mentioned in the statute’s language, particularly if it is evident that the statute has a purpose that would be advanced by including principals.²⁰⁰ As evidenced in *Hollerich*, the CDA’s purpose *would* be advanced by construing the statute to include liability by principals.²⁰¹

One might also argue in opposition to *expressio unius*, as Justice Hanson did in his dissenting opinion, that statutes creating new causes of action should be strictly construed against the notion that they abrogate the common law.²⁰² Another possible counter to the *expressio unius* canon is that remedial statutes should be construed liberally to “suppress the mischief and advance the remedy.”²⁰³ The CDA has a remedial objective and therefore should be construed liberally to compensate members of the public who are injured by

197. *Id.*

198. *Id.*

199. *Id.* at 405.

200. See W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167, 1185–88 (2005) (discussing Llewellyn’s theories by using an example of a railroad company governed by a federal statute).

201. See *Hollerich v. City of Good Thunder*, 340 N.W.2d 665, 667–68 (Minn. 1983).

202. *Urban v. Am. Legion Dep’t of Minn.*, 723 N.W.2d 9, 10 (Minn. 2006) (Hanson, J., dissenting).

203. *Hahn v. City of Ortonville*, 238 Minn. 428, 436, 57 N.W.2d 254, 261 (1953).

illegal liquor sales.²⁰⁴ In light of the counter canons that can be offered in opposition to *expressio unius*, it is clearly not sufficient to explain the reasoning of the court.

C. *Legislative Inaction*

In *Urban*, the majority argued that if the legislature had intended for vicarious liability to apply under the CDA it would have amended the CDA to include this liability, and the majority “declines to act where the legislature has chosen not to.”²⁰⁵ Not only is the majority’s logic faulty, but the practice of inferring legislative intent through legislative inaction is ill-advised.

The majority claimed that in the “nearly 100 years since enacting the CDA,” the legislature has had “ample opportunity . . . to recognize vicarious liability.”²⁰⁶ In contrast, the *Hahn* court, in 1953, found that vicarious liability applied under the CDA to hold the employer of the person making the illegal sale liable.²⁰⁷ As Justice Hanson pointed out in his dissenting opinion, the legislature has taken no action in over forty years since *Hahn* to eliminate the common-law claim of vicarious liability under the CDA.²⁰⁸ Instead, in 1985, the legislation extended direct statutory liability to licensees who otherwise would have had to satisfy the elements of common-law vicarious liability.²⁰⁹

The portion of the CDA that the majority claims abrogates common-law vicarious liability was not enacted until 1985. Therefore, the majority is incorrect in stating that the legislature has had “ample opportunity in the nearly 100 years since enacting the CDA to recognize vicarious liability.”²¹⁰ Furthermore, until the Minnesota Court of Appeals decided *Urban* in 2005, the legislature had no reason to think that Minnesota courts might interpret section 340A.501 as limiting the CDA to licensees.²¹¹ Therefore, it is incorrect for the majority to assume that the legislature’s failure to act affirms the court’s interpretation of the statute.

204. See *Hollerich*, 340 N.W.2d at 668.

205. *Urban*, 723 N.W.2d at 5–6.

206. *Id.* at 5.

207. *Hahn*, 238 Minn. at 438, 57 N.W.2d at 262.

208. *Urban*, 723 N.W.2d at 11 (Hanson, J., dissenting).

209. MINN. STAT. § 340A.501 (2004).

210. *Urban*, 723 N.W.2d at 5 (majority opinion).

211. See *id.* at 11 (Hanson, J., dissenting).

Regardless of whether the legislature had time to amend the CDA, the majority's suggestion that legislative inaction equates to judicial accuracy is misguided. "In the realities of the legislative process, almost no reliable inference of current intent could be drawn" from legislative silence.²¹² The legislature may be unaware of relevant court decisions applying the particular statute.²¹³ The legislature may also be too busy with other public matters to take action in response to a court's decision.²¹⁴ Alternatively, the legislature may not "consider the matter important enough to engage the attention of the whole legislative process."²¹⁵

Justice Scalia has adamantly disagreed with the view that legislative inaction can effectively be interpreted in any consistent way:

The "complicated check on legislation," The Federalist No. 62, p. 378 (C. Rossiter ed. 1961),²¹⁶ erected by our Constitution creates an inertia that makes it impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice I think we should admit that vindication by congressional inaction is a canard.²¹⁷

212. DICKERSON, *supra* note 27, at 181.

213. *Id.*

214. *Id.*

215. *Id.* Professor Dickerson gave an example of the Supreme Court's interpretation of the Mann Act in *Caminetti v. United States*, 242 U.S. 470 (1916). "Certainly the . . . interpretation . . . was considered a perversion of congressional intent, and yet political considerations intervened to head off corrective legislation." *Id.*

216. THE FEDERALIST NO. 62, at 378 (James Madison) (Clinton Rossiter ed., 1961).

217. *Johnson v. Transp. Agency*, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting). Justice Scalia opined that if "congressional inaction proves judicial correctness," it is difficult to explain the results of the application of the liability of municipal corporations under 42 U.S.C. § 1983. *Id.* Scalia goes on to mention that in *Monroe v. Pape*, 365 U.S. 167, 187 (1961), the Court held that section 1983 did not reach municipalities. *Id.* After Congress did not overturn the decision, the Court was once again faced with the question in *Monell v. New York City Department of Social Services*, 436 U.S. 658, 663 (1978), and it overturned the *Monroe* decision. *Id.* The *Johnson* majority believed that the *Monell* decision was wrongly based on Congress' seventeen years of silence, which the *Johnson* Court felt established that *Monroe*'s interpretation was correct. *Id.* At the time of the *Johnson* opinion, nine years had passed since the *Monell* opinion, and Congress still had

The premise that if the legislature had intended for vicarious liability to apply to the CDA it would have amended the statute to expressly include it is unfounded.²¹⁸

V. CONCLUSION

In *Urban*, the Minnesota Supreme Court recognized that the doctrine of respondeat superior is based not on the fault of the employer, but on the policy determination that liability should be allocated to the employer as a cost of engaging in business.²¹⁹ The doctrine's objective of "let[ting] the superior make answer"²²⁰ complies with the remedial purpose of the CDA. The two theories of liability serve the same purpose of strengthening the regulation of alcohol sales. Unfortunately, the majority commingled these separate theories of liability. Then it compounded its error by applying an inappropriate canon of statutory construction. Finally, by viewing legislative inaction as proof of its own accuracy, the majority based its decision on a faulty view of legislative intent. In doing so, the Minnesota Supreme Court defeats the purpose of respondeat superior. Rather than letting the superior make answer, it let the superior off the hook.

not amended section 1983. *Id.* Justice Scalia asked, should we now "assume that [*Monell's*] interpretation was correct?" *Id.*

218. Furthermore, vicarious liability is a common-law theory entirely separate from the CDA, so if the CDA is presumed not to abrogate the common law, vicarious liability already applies and need not be mentioned expressly in the statute.

219. *Urban v. Am. Legion Dep't of Minn.*, 723 N.W.2d 1, 4 (Minn. 2006) (quoting *Fahrendorff v. N. Homes, Inc.*, 597 N.W.2d 905, 910 (Minn. 1999)).

220. BLACK'S LAW DICTIONARY 1338 (8th ed. 2004).