NOTE

Social Host Liability: Opening a Pandora's Box

INTRODUCTION

Drunk driving has become one of this nation's most devastating problems.[1] Legislatures, law enforcement officials, and courts have sought effective means of curbing what appears to be an insatiable appetite among many people to drive under the influence of alcohol. One attempt to reduce the incidence of drunk driving has been to look beyond the drinker to the source of his liquor.[2] At common law, no cause of action existed against one who sold or otherwise provided alcoholic beverages to another person who later caused injuries to a third party.[3] The rationale underlying this rule was that the consumption, not the provision, of the alcohol was the proximate cause of the harm.[4] After years of strict adherence, some states began to abrogate the common law rule and to recognize a cause of action in favor of one who is injured by an intoxicated person against the supplier of the tortfeasor's alcohol.[5]

Courts have had little difficulty imposing liability upon suppliers who are commercial vendors.[6] In the last twenty years, however, courts have extended the notion of supplier liability beyond the confines of the commercial vendor

1. *See generally* PRESIDENTIAL COMM'N ON DRUNK DRIVING, FINAL REPORT (1983).

2. *See infra* Section I.

3. J. KROUT, THE ORIGINS OF PROHIBITION (1925).

4. *See* Kingen v. Weyant, 148 Cal. App. 2d 656, 307 P.2d 369 (1957); Nolan v. Morelli, 154 Conn. 432, 226 A.2d 383 (1967); Howlett v. Doglio, 402 Ill. 311, 83 N.E.2d 708 (1949); Colligan v. Cousar, 38 Ill. App. 2d 392, 187 N.E.2d 292 (1965); Elder v. Fisher, 247 Ind. 598, 217 N.E.2d 847 (1966); LeGault v. Klebba, 7 Mich. App. 640, 152 N.W.2d 712 (1967); Mitchell v. Ketner, 54 Tenn. App. 656, 393 S.W.2d 755 (1964).

5. *See, e.g.*, Waynick v. Chicago's Last Dep't Store, 269 F.2d 322 (7th Cir. 1959), *cert. denied*, 362 U.S. 903 (1960); Elder v. Fisher, 247 Ind. 598, 217 N.E.2d 847 (1966); Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959); Berkeley v. Park, 47 Misc. 2d 381, 262 N.Y.S.2d 290 (1965); Jardine v. Upper Darby Lodge, 413 Pa. 626, 198 A.2d 550 (1964).

6. *See* Waynick v. Chicago's Last Dep't Store, 269 F.2d 322 (7th Cir. 1959), *cert. denied*, 362 U.S. 903 (1960); Bradshaw v. Rawlings, 464 F. Supp. 175 (E.D. Pa. 1979); Morris v. Farley Enters., 661 P.2d 167 (Alaska 1983); Alesna v. Le Grue, 614 P.2d 1387 (Alaska 1980); Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215, *cert. denied*, 429 U.S. 859 (1976); Vesely v. Sager, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971); Burke v. Superior Court, 129 Cal. App. 3d 570, 181 Cal. Rptr. 149 (1982); Kowal v. Hofher, 181 Conn. 355, 436 A.2d 1 (1980); Taylor v. Ruiz, 394 A.2d 765 (Del. Super. Ct. 1978); Ono v. Applegate, 62 Hawaii 131, 612 P.2d 533 (1980); Alegria v. Payonk, 101 Idaho 617, 619 P.2d 135 (1980); Colligan v. Cousar, 38 Ill. App. 2d 392, 187 N.E.2d 292 (1963); Elder v. Fisher, 247 Ind. 598, 217 N.E.2d 847 (1966); Elsperman v. Plump, 446 N.E. 2d 1027 (Ind. App. 1983); Pike v. George, 434 S.W.2d 626 (Ky. 1968); Chausse v. Southland Corp., 400 So. 2d 1199 (Ct. App.), *cert. denied*, 404 So. 2d 497, 498 (La. 1981); Michnik-Zilberman v. Gordon Liquors, Inc., 14 Mass. App. Ct. 533, 440 N.E.2d 1297 (1982), *aff'd*, 390 Mass. 6, 453 N.E.2d 430 (1983); Cimino v. Milford Keg, Inc., 385 Mass. 323, 431 N.E.2d 920 (1982); Adamian v. Three Sons, Inc., 353 Mass. 498, 233 N.E.2d 18 (1968); Blamey v. Brown, 270 N.W.2d 884 (Minn. 1978), *cert. denied*, 444 U.S. 1070 (1980); Trail v. Christian, 298 Minn. 101, 213 N.W.2d

by recognizing a cause of action against a private individual who serves alcohol to a minor guest if the intoxicated minor thereafter injures another person.[7] The extension of liability to the individual who serves alcohol to a minor presents the following issue for resolution by state courts and legislatures: whether an injured party has a cause of action against a social host when an *adult* guest to whom the host served alcohol negligently causes harm.[8]

This Note addresses the concept of imposing civil liability on social hosts for the injurious conduct of their intoxicated guests. The presentation begins with a review of the case law in the area of supplier liability. The three legal theories upon which courts have imposed supplier liability serve as the bases for the categorization of the cases, namely liability predicated on dram shop acts,[9] alcoholic beverage control acts, and common law negligence principles. The Note then chronicles the policy considerations relevant to, and examines many of the problems inherent in, the decision to impose civil liability on a host who serves alcohol to an adult guest.

I. LIABILITY FOR THE PROVISION OF ALCOHOL

A. Dram Shop Acts[10]

1. Historical Development

The original dram shop acts were enacted following the temperance movement's failure to eradicate the evils of alcohol by focusing on the individual drinker. By turning to state legislatures, temperance reformers throughout the country hoped to cut off the supply of alcohol.[11] Early efforts to create

618 (1973); Munford, Inc. v. Peterson, 368 So. 2d 213 (Miss. 1979); Nesbitt v. Westport Square, Ltd., 624 S.W.2d 519 (Mo. App. 1981); Aliulis v. Tunnel Hill Corp., 59 N.J. 508, 284 A.2d 180 (1971); Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959); Young v. Gilbert, 121 N.J. Super. 78, 296 A.2d 87 (1972); Lopez v. Maez, 98 N.M. 625, 651 P.2d 1269 (1982); Berkeley v. Park, 47 Misc. 2d 381, 262 N.Y.S.2d 290 (1965); Campbell v. Carpenter, 279 Or. 237, 566 P.2d 893 (1977); Jardine v. Upper Darby Lodge, 413 Pa. 626, 198 A.2d 550 (1964).

7. King v. Ladyman, 81 Cal. App. 3d 837, 146 Cal. Rptr. 782 (1978); Brockett v. Kitchen Boyd Motor Co., 264 Cal. App. 2d 69, 70 Cal. Rptr. 136 (1968); Brattain v. Herron, 159 Ind. App. 663, 309 N.E.2d 150 (1974); Thaut v. Finley, 50 Mich. App. 611, 213 N.W.2d 820 (1973); Lover v. Sampson, 44 Mich. App. 173, 205 N.W.2d 69 (1972); Linn v. Rand, 140 N.J. Super. 212, 356 A.2d 15 (1976); Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity, 258 Or. 632, 485 P.2d 18 (1971).

8. *See* Ashlock v. Norris, 475 N.E.2d 1167 (Ind. App. 1985); Clark v. Mincks, 364 N.W.2d 226 (Iowa 1985); Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984).

9. Although Indiana enacted a dram shop act in 1853 (Act of March 4, 1853, ch. 66, § 10, 1853 Ind. Acts 87, 88), the legislature repealed it five years later (Act of Dec. 21, 1858, ch. 15, 1858 Ind. Acts 40).

10. Dram shop acts are also known as Civil Damages Acts.

11. McGough, *Dram Shop Acts,* 1967 A.B.A. SEC. INS. NEGL. & COMPENSATION L. 448.

temperance by statute were aimed at what was known as the "ale house."[12] Several states enacted statutes which prescribed the minimum amount of alcohol that could be sold by an innkeeper to a patron.[13] The purpose of the statutes was to destroy the business of the drinking establishments where liquor was sold by the drink.[14] In 1850, Wisconsin became the first state to enact a statute placing pecuniary responsibility on the innkeeper for injuries resulting from his sale of liquor.[15] The Indiana legislature, in 1853, enacted the prototype of the dram shop acts as they exist today.[16] Fourteen states presently have dram shop acts in effect.[17] In those states, an individual who has suffered damage to his person or property, or injury to his means of support, may recover from the liquor purveyor, provided that the injured party is able to prove all of the statutory elements.[18]

2. Social Host Liability

a. Cause of Action Denied

The leading case in the area of social host liability based on a dram shop act is *Cruse v. Aden*.[19] The plaintiff's husband was killed when the horse

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12. *Id.*

13. J. KROUT, *supra* note 3.

14. *Id.*

15. Act of Feb. 8, 1850, ch. 139, § 1, 1850 Wis. Laws 109. This statute required vendors and retailers of intoxicating liquors or drinks to post a bond

> conditioned to pay all damages that community, or individuals may sustain by reason of his or her vending intoxicating liquors; support all paupers, widows and orphans made, or helped to be made, by his or her said traffic, and pay the expenses of all civil and criminal prosecutions made, growing out of, or justly attributable to his or her vending or retailing intoxicating liquors or drinks . . . .

Id.

16. Act of Mar. 4, 1853, ch. 66, § 10, 1853 Ind. Acts 88 provides that

> [a]ny wife, child, parent, guardian, employer or other person, who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have right of action in his or her own name, against any person and his sureties on the bond aforesaid, who shall by retailing spiritous liquor, have caused the intoxication of such person, for all damages sustained and for exemplary damages.

17. *See* ALA. CODE § 6-5-71 (1977); COLO. REV. STAT. § 13-21-103 (1974); CONN. GEN. STAT. ANN. § 30-102 (West 1975); ILL. ANN. STAT. ch. 43, § 135 (Smith-Hurd Supp. 1984-85); IOWA CODE ANN. § 123.92 (West Supp. 1985); ME. REV. STAT. ANN. tit. 17, § 2002 (1983); MICH. COMP. LAWS ANN. § 436.22 (Supp. 1985); MINN. STAT. ANN. § 340.95 (West Supp. 1982); N.Y. GEN. OBLIG. LAW § 11-101 (McKinney 1978 & Supp. 1984-85); N.D. CENT. CODE § 5-01-06 (Supp. 1983); OHIO REV. CODE ANN. § 4399.01 (Page 1983); R.I. GEN. LAWS § 3-11-1 (1976); UTAH CODE ANN. § 32-11-1 (Supp. 1983); VT. STAT. ANN. tit. 7, § 501 (1972).

18. According to McGough, *supra* note 11, at 453-54, there are generally five elements which must be proven in order to obtain relief under a dram shop act: (1) a purveying of some intoxicating liquor as defined by statute; (2) a violation of the statute in furnishing the liquor; (3) consumption of the liquor by a person who was or became intoxicated; (4) intoxication which was caused at least in part by the liquor furnished; and (5) that the intoxication was at least one cause of the damage for which plaintiff claims compensation.

19. 127 Ill. 231, 20 N.E. 73 (1889).

that he was riding threw him to the ground. At the time of his death, the husband was intoxicated, the defendant having previously served him two drinks as an act of "mere courtesy and politeness."[20] The wife sought to recover for her loss of means of support under the Illinois Dram Shop Act.[21] In denying the plaintiff's claim, the court explained that, although courts are not confined to the literal meaning of the statutory language, the statute in question must be construed strictly in view of its highly penal nature and its lack of foundation in the common law.[22] The court reasoned that:

> the dram shop act does not apply to persons who are not either directly or indirectly, or in any way, or to any extent, engaged in the liquor traffic . . . the right of action given by [the dram shop act] to one injured in her means of support is not intended to be given against a person who, in his own house or elsewhere, gives a glass of intoxicating liquor to a friend as a mere act of courtesy and politeness, and without any purpose or expectation of pecuniary gain or profit.[23]

The minor plaintiff in *Harris v. Hardesty*[24] also sought recovery for injury to her means of support. She alleged that the defendant induced her mother to drink and provided her mother with alcohol and that, as a result, her mother became an habitual drunkard.[25] The Kansas Supreme Court considered previous judicial interpretation of the state's Dram Shop Act[26] and concluded that the "giving" of intoxicating liquor, as contemplated by the statute, meant only giving as a subterfuge for selling.[27] The court ruled that the plaintiff had failed to state a claim because she failed to allege that the defendant's act of providing alcohol was in any way a pretense to accomplish the proscribed sales.[28]

In the more recent case of *Miller v. Owens-Illinois Glass Co.*,[29] the Illinois Court of Appeals applied reasoning similar to that employed by the *Cruse*[30] and *Harris*[31] courts. The plaintiffs in *Miller* sustained injuries when an allegedly intoxicated employee of the defendant company struck them with his automobile. The plaintiffs claimed that the company was negligent in serving alcohol to the intoxicated employee on the company's premises.[32]

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20. *Id.* at 233, 20 N.E. at 74.
21. Act of Feb. 21, 1885, ch. 31, § 1, 1885 Ill. Laws 50.
22. 127 Ill. at 239, 20 N.E. at 77.
23. *Id.*
24. 111 Kan. 291, 207 P. 188 (1922).
25. *Id.* at 291, 207 P. at 188.
26. KAN. GEN. STAT. § 5507 (1915) provides a right of action against "any person who shall, by selling, bartering, or giving intoxicating liquors have caused the intoxication" of another, thereby causing injury to the intoxicated person's wife, child, parent, guardian or employer.
27. 111 Kan. at 296, 207 P. at 190.
28. *Id.*
29. 48 Ill. App. 2d 412, 199 N.E.2d 300 (1964).
30. 127 Ill. 231, 20 N.E. 73.
31. 111 Kan. 291, 207 P. 188.
32. Several employees and the employees' association were also named as defendants.

The court held that the legislature did not intend for the dram shop act[33] to regulate private activity, but only the business of selling, distributing, manufacturing, and wholesaling alchoholic liquors for profit.[34] To enlarge the scope of the dram shop act to include anyone who gives another a drink of intoxicating liquor, the court reasoned, would make "a social drink with your neighbor or friend . . . a hazardous act. It would open up the floodgates of litigation as to almost every happening where someone was injured."[35]

b. Cause of Action Stated

Notwithstanding the general rule of social host immunity under dram shop acts, two states, Iowa and Minnesota, refused to limit judicially the application of the acts to preclude imposition of liability upon social hosts. The plaintiffs in *Williams v. Klemesrud*[36] were struck by an automobile driven by a minor who had been furnished alcohol by the defendant. The Iowa Supreme Court held that the plaintiffs, who sought recovery under the state's dram shop act,[37] had a right of action against the defendant even though he was not engaged in the liquor traffic.[38] The court distinguished *Miller*[39] and the other Illinois dram shop cases,[40] on the ground that Illinois strictly construes its dram shop act, whereas Iowa precedent[41] construes its statute liberally in view of its remedial nature.[42]

The Minnesota Supreme Court permitted use of that state's dram shop act[43] to impose similar liability in *Ross v. Ross*.[44] The plaintiffs[45] in *Ross* alleged that the defendants[46] had provided the minor decedent with alcohol, from which he became intoxicated, and that the provision of alcohol prox-

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33. ILL. ANN. STAT. ch. 43, § 135 (Smith-Hurd 1984-85). This statute goes beyond many civil damages acts in that it provides:

> [a]ny person owning, renting, leasing or permitting the occupation of any building or premises with knowledge that alcoholic liquors are to be sold therein, or who having leased the same for other purposes, shall knowingly permit therein the sale of any alcoholic liquors that have caused the intoxication of any person, shall be liable, severally or jointly, with the person selling or giving the liquors . . . .

Id.

34. 48 Ill. App. 2d at 423, 199 N.E.2d at 306.

35. *Id.*

36. 197 N.W.2d 614 (Iowa 1972).

37. IOWA CODE ANN. § 129.2 (West 1949).

38. 197 N.W.2d at 616. The court further held that the defense of contributory negligence was not available to a dram shop defendant. *Id.* at 617.

39. 48 Ill. App. 2d 412, 199 N.E.2d 300.

40. *See, e.g.*, Annot., 8 A.L.R.3D 1412 (1966).

41. *See* Bistline v. Ney Bros., 134 Iowa 172, 111 N.W. 422 (1907).

42. 197 N.W.2d at 616.

43. MINN. STAT. ANN. § 340.95 (West 1972).

44. 294 Minn. 115, 200 N.W.2d 149 (1972).

45. The action was brought by the decedent's parents on their own behalf and on behalf of his infant son. *Id.* at 116, 200 N.W.2d at 150.

46. Defendant Ross was the decedent's older brother. *Id.*

imately caused the minor's death when he drove his car off the road.[47] The court found that by enacting the dram shop act, "the legislature intended to create a new cause of action against every violator whether in the liquor business or not."[48] Although the defendants were not in the business of selling liquor, the court's ruling placed them within the reach of the act.[49]

The foregoing review of case law reveals that only two courts have been willing to impose dram shop liability upon a noncommercial vendor. Unlike the cases in which courts have traditionally refused to interpret the statutes as applicable to social hosts,[50] the two exceptions involved provision of alcohol to minors.[51] Following *Klemesrud,*[52] and *Ross,*[53] the Iowa[54] and Minnesota[55] legislatures altered their respective dram shop acts to bar any prospective application to social hosts. The legislative abrogation indicates that even when the provision of alcohol itself is unlawful, dram shop acts afford no basis for a claim against one who furnishes alcohol in a noncommercial context.

B. Alcoholic Beverage Control Acts

1. Historical Development

Alcoholic beverage control acts regulate the sale and distribution of alcoholic beverages to persons in high-risk classes.[56] Each state, as well as the District of Columbia, has enacted a control statute.[57] Indiana's act is typical

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47. *Id.*

48. *Id.* at 119, 200 N.W.2d at 152-53. The court placed great emphasis on the fact that the decedent was a minor, and thus that the act of providing him with alcohol was itself unlawful. *Id.*

49. The court stated that "we have held that the 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.* at 120, 200 N.W.2d at 152.

50. *See supra* text accompanying notes 19-35.

51. *See supra* text accompanying notes 36-49.

52. *Klemesrud,* 197 N.W.2d 614.

53. *Ross,* 294 Minn. 115, 200 N.W.2d 149.

54. The Iowa legislature repealed its previous act and enacted a new one which expressly provides that recovery is limited to the sale or giving of intoxicating liquor by a licensee or permittee. IOWA CODE ANN. § 123.92 (West Supp. 1982).

55. The Minnesota legislature amended its act by deleting the word "giving." MINN. STAT. ANN. § 340.95 (West Supp. 1982). In Cady v. Coleman, 315 N.W.2d 593 (Minn. 1982), the Minnesota Supreme Court determined that by deleting the word "giving" from the act, the legislature intended to insulate all social hosts from liability thereunder.

56. Graham, *Liability of the Social Host for Injuries Caused by the Negligent Acts of Intoxicated Guests,* 16 WILLAMETTE L.J. 561, 569-79 (1980).

57. *See* ALA. CODE § 28-7-21 (Supp. 1982); ALASKA STAT. §§ 04.16.030, .051 (1962); ARIZ. REV. STAT. ANN. §§ 4-241, -244 (1974); ARK. STAT. ANN § 48-529 (1977); CAL. BUS. & PROF. CODE ANN. §§ 25602, 25658 (West 1964 & Supp. 1982); COLO. REV. STAT. § 12-47-128 (1973); CONN. GEN. STAT. ANN. §§ 30-86, -86a (West 1975 & Supp. 1985); DEL. CODE ANN. tit. 4, § 713 (1975 & Supp. 1984); D.C. CODE ANN. § 25-121 (Supp. 1984); FLA. STAT. ANN. §§ 562.11,

of most alcoholic beverage control acts, the relevant provisions of which read as follows:

> It is a Class C misdemeanor for a person to sell, barter, exchange, provide, or furnish an alcoholic beverage to a minor.[58]
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> It is unlawful for a permittee to sell, barter, exchange, give, provide, or furnish an alcoholic beverage to a person whom he knows to be a habitual drunkard.[59]
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> It is unlawful for a person to sell, barter, deliver, or give away an alcoholic beverage to another person who is in a state of intoxication if the person knows that the other person is intoxicated . . . .[60]

In the last quarter-century, several court decisions have imposed civil liability upon the basis of the violation of criminal alcoholic beverage control acts.[61] Courts generally construe violations of these criminal statutes to

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.50 (West Supp. 1985); GA. CODE ANN. § 5A-9901.1 (1981); HAWAII REV. STAT. § 281-78 (1976); IDAHO CODE ANN. §§ 23-312, -929 (1977); ILL. ANN. STAT. ch. 43, § 131 (Smith-Hurd Supp. 1985); IND. CODE ANN. §§ 7.1-5-7-8, -5-10-14, -5-10-15 (Burns Supp. 1982); IOWA CODE ANN. § 123.49 (West Supp. 1985); KAN. STAT. ANN. § 41-2615 (1981); KY. REV. STAT § 244.080 (1981); LA. REV. STAT. ANN. §§ 14:91, 26:88(1) (West 1975 & Supp. 1985); ME. REV. STAT. ANN tit. 28, §§ 303, 1058 (Supp. 1982); MD. ANN. CODE art. 2B, § 118 (Supp. 1984); MASS. GEN. LAWS ANN. ch. 138, §§ 34, 69 (West 1974 & Supp. 1985); MICH. COMP. LAWS ANN. §§ 436.29, .33 (West 1978 & Supp. 1985); MINN. STAT. ANN. § 340.73 (West Supp. 1985); MISS. CODE ANN. §§ 67-1-81, -83 (Supp. 1984); MO. ANN. STAT. § 311, 310 (Vernon Supp. 1983); MONT. CODE ANN. § 45-5-624 (1983); NEB. REV. STAT. § 53-180 (1984); NEV. REV. STAT. § 202.055 (1981); N.H. REV. STAT. ANN. § 175:6 (Supp. 1983); N.J. STAT. ANN. §§ 33:1-39, -77 (West Supp. 1985); N.M. STAT. ANN §§ 60-7A-16, -7B-1 (Supp. 1981); N.Y. ALCO. BEV. CONT. LAW § 65 (McKinney 1970 & Supp. 1984-85); N.C. GEN. STAT. § 18B-305 (1983); N.D. CENT. CODE § 5-01-09 (1975); OHIO REV. CODE ANN. §§ 4301.22, .69 (Page 1982); OKLA. STAT. ANN. tit. 37, § 537 (West Supp. 1984-85); OR. REV. STAT. § 471.410 (1983); PA. STAT. ANN. tit. 47, § 4-493 (Purdon 1969 & Supp. 1985); R.I. GEN. LAWS §§ 3-8-1, -6 (Supp. 1984); S.C. CODE ANN. § 61-3-990 (Law Co-op. Supp. 1984); S.D. CODIFIED LAWS ANN. § 35-4-78 (1978); TENN. CODE ANN. § 57-4-203 (Supp. 1984); TEX. ALCO. BEV. CODE ANN. tit. 4, §§ 101.63, 106.03 (Vernon 1978 & Supp. 1982); UTAH CODE ANN. §§ 32-7-14, -15 (1974); VT. STAT. ANN. tit. 7, § 658 (Supp. 1984); VA. CODE § 4-62 (Supp. 1985); WASH. REV. CODE §§ 66.44.200, .270 (1985); W. VA. CODE § 60-3-22 (1977); WIS. STAT. ANN. § 125.07 (West Supp. 1985); WYO. STAT. § 12-6-101 (Supp. 1985).

58. IND. CODE ANN. § 7.1-5-7-8 (Burns 1985).

59. *Id.* § 7.1-5-10-14.

60. *Id.* § 7.1-5-10-15.

61. *See, e.g.,* Nazareno v. Urie, 638 P.2d 671 (Alaska 1981) (imposed liability on a tavern owner for injuries caused by negligent acts of intoxicated customer); Linn v. Rand, 140 N.J. Super. 212, 356 A.2d 15 (1976) (imposed liability on a social host for injuries caused by an intoxicated guest); Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity 258 Or. 632, 485 P.2d 18 (1971) (imposed liability on a fraternity for injuries caused by a minor who became intoxicated at a fraternity party). Dean Prosser states that:

> [p]erhaps the most satisfactory explanation [for using a criminal statute to establish a duty in tort law] is that the courts are seeking, by something in the nature of judicial legislation, to further the ultimate policy for the protection of individuals which they find underlying the statute, and which they believe the legislature must have had in mind. The statutory standard of conduct is simply adopted voluntarily, out of deference and respect for the legislature.

W. PROSSER & W. KEETON, THE LAW OF TORTS § 36, at 222 (5th ed. 1984).

constitute negligence per se,[62] although some courts have construed a statutory violation to constitute merely evidence of negligence. In order for a plaintiff to recover under a theory of statutory violation, he must usually prove that he is a member of the class of persons that the statute was designed to protect, and that the harm suffered by him was the type of harm that the statute was enacted to prevent.[63]

Two leading cases, *Rappaport v. Nichols,*[64] and *Waynick v. Chicago's Last Department Store,*[65] illustrate the general theory of civil liability based on a statutory violation. The plaintiff in *Rappaport* alleged that the defendant tavernkeeper served liquor to a minor who, thereafter, in a state of intoxication, drove an automobile which struck and killed the plaintiff's decedent. Finding that the defendant had violated the control act,[66] the New Jersey Supreme Court awarded damages to the plaintiff, stating that "these broadly expressed [statutory] restrictions were not narrowly intended to benefit the minors and intoxicated persons alone but were wisely intended for the protection of members of the general public as well."[67] The court further reasoned that the recognition of the plaintiff's claim would afford a fairer measure of justice to innocent third parties whose injuries are caused by the negligent and unlawful sale of alcohol to minors and intoxicated persons.[68] The court also noted that its decision would strengthen the "enlightened statutory and regulatory precautions against such sales and their frightening consequences" and would not place any unjustifiable burdens upon hosts who can discharge their civil responsibilities by the exercise of due care.[69] Despite the court's bold assertions respecting the consequences of its ruling, the court did not explain the ways in which those results would be attained.

In *Waynick,*[70] the plaintiffs were injured when the automobile in which they were passengers collided with another vehicle. The complaint alleged that the driver of the other vehicle was intoxicated and that the defendant

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62. *See, e.g.,* Vance v. United States, 355 F. Supp. 756 (D. Ala. 1973) (violation of the statute constitutes negligence per se); Nazareno v. Urie, 638 P.2d 671 (Alaska 1981) (violation of the statute creates negligence per se); Brattain v. Herron, 159 Ind. App. 663, 309 N.E.2d 150 (1974) (violation of statute constitutes negligence per se); Trail v. Christian, 298 Minn. 101, 213 N.W.2d 618 (1973) (violation of criminal statute constitutes negligence per se); Taggert v. Bitzenhofer, 35 Ohio App. 2d 23, 299 N.E.2d 901 (1972) (violation of the statute constitutes negligence per se).

63. W. PROSSER & W. KEETON, *supra* note 61, at 224-25.

64. 31 N.J. 188, 156 A.2d 1 (1959).

65. 269 F.2d 322 (7th Cir. 1959), *cert. denied,* 362 U.S. 903 (1960).

66. N.J. STAT. ANN. §§ 33:1-39, -77 (West Supp. 1985).

67. 31 N.J. at 202, 156 A.2d at 8. The court rejected defendant's argument that the minor's negligent operation of an automobile while intoxicated was a supervening cause. The court found that the negligent operation of an automobile by an intoxicated person is a foreseeable intervening cause of the harm, and thus the furnishing of the alcohol to the minor was indeed the proximate cause of plaintiff's decedent's death. *Id.* at 204, 156 A.2d at 9.

68. *Id.* at 201, 156 A.2d at 10.

69. *Id.*

70. 269 F.2d 322.

should be held civilly liable since it had violated the Illinois control act[71] by selling alcoholic beverages to the driver when he was visibly intoxicated.[72] The appellate court reversed the district court's dismissal of the complaint against the seller of the liquor.[73] The appellate court determined that since the driver was already intoxicated when he purchased the liquor, the defendant's sale to him was unlawful.[74] In addition, the court concluded that the act which proscribes the sale of alcoholic beverages to any intoxicated person was designed for the protection of any member of the public who might be injured or damaged as a result of the intoxication to which the particular sale of alcoholic liquor contributes.[75]

Although the *Rappaport* and *Waynick* courts imposed liability for the unlawful *sale* of alcohol, some courts have invoked the rationale of those cases to hold that the violation of the statute prohibiting the unlawful provision of alcohol may serve as the basis for imposition of civil liability on a nonvendor as well.[76] Other courts, however, have expressly declined the invitation to extend the application of control acts to social hosts who gratuitously furnish alcohol to their guests.[77]

2. Social Host Liability

a. Cause of Action Denied

Among the jurisdictions refusing to impose civil liability on nonvendors pursuant to their alcoholic beverage control acts, the primary rationale appears to be that since the statutes were designed to regulate the liquor industry, they should apply only to commercial vendors.[78] The Pennsylvania Supreme Court, in *Manning v. Andy*,[79] ruled that the state control act[80] could not be invoked as the basis for imposing liability upon an employer who had served alcohol to an employee. The court reasoned that, although the appellant's proposal to extend the scope of the statute to include non-

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71. ILL. ANN. STAT. ch. 43, § 131 (Smith-Hurd 1957).

72. 269 F.2d at 323.

73. *Id.* at 326. The court applied the common law tort principles of Michigan, the state in which the injury and death were inflicted. *Id.* at 325.

74. *Id.*

75. *Id.*

76. *See infra* text accompanying notes 87-133.

77. *See infra* text accompanying notes 78-86.

78. *See, e.g.*, Edgar v. Kajet, 84 Misc. 2d 100, 375 N.Y.S.2d 548, (Sup. Ct. 1975), *aff'd*, 55 A.D.2d 597, 389 N.Y.S.2d 631 (1976); Hulse v. Driver, 11 Wash. App. 509, 524 P.2d 255 (1974).

79. 454 Pa. 237, 310 A.2d 75 (1973).

80. PA. STAT. ANN. tit. 47, § 4-493 (Purdon Supp. 1979-80). The statute prohibits any licensee, or employee, servant, or agent of the licensee, or any other person to sell or furnish any liquor to any visibly intoxicated person.

licensed persons, not engaged in the liquor business, may have some merit, such a monumental decision is best left to the legislature.[81]

In *Hulse v. Driver*,[82] the Washington Court of Appeals also embraced the notion of judicial restraint respecting the application of the state's control act to a social host. Quoting from the opinion in *Halvorson v. Birchfield Boiler, Inc.*,[83] the *Hulse* court stated:

> It may be that the social and economic consequences of "mixing gasoline and liquor" should lead to a rule of accountability by those who furnish intoxicants to one who becomes a tortfeasor by reason of intoxication, *but such a policy decision should be made by the legislature after full investigation, debate and examination of the relative merits of the conflicting positions.*[84]

The court concluded that a violation of the statute prohibiting the supply of liquor to minors "does not, alone, impose civil liability upon a [gratuitous] furnisher"[85] for injuries sustained by the plaintiff in consequence of the intoxication of a minor.[86]

b. Cause of Action Stated

For a number of years, California was a leading jurisdiction in imposing civil liability for the violation of a control act. In *Coulter v. Superior Court*,[87] the plaintiff was injured when the automobile in which he was a passenger collided with roadway abutments. The plaintiff brought a negligence action against both the owner and the manager of an apartment complex, alleging that the defendants had served alcohol to the driver of the car, an obviously intoxicated person, and that the provision of alcohol was the proximate cause of the plaintiff's injuries.[88] The plaintiff sought recovery under section 25602 of the California Business and Professions Code, which provides that "[e]very person who sells, furnishes, or gives away, any alcoholic beverage . . . to any intoxicated person is guilty of a misdemeanor."[89]

Relying on two previous California decisions,[90] the *Coulter* court determined that section 25602 created a common law duty owed by the social

81. 454 Pa. at 239, 310 A.2d at 76.
82. 11 Wash. App. 509, 524 P.2d 255 (1974).
83. 76 Wash. 2d 759, 458 P.2d 897 (1969).
84. 11 Wash. App. at 513-14, 524 P.2d at 258 (emphasis in original).
85. *Id.* at 513, 524 P.2d at 258.
86. *Id.*
87. 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978).
88. *Id.* at 148, 577 P.2d at 671, 145 Cal. Rptr. at 536.
89. CAL. BUS. & PROF. CODE § 25602(b), (c) (West Supp. 1978).
90. In Vesely v. Sager, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971), the California Supreme Court imposed liability on a tavern owner for the injuries sustained by a motorist when his automobile was struck by an automobile driven by an intoxicated tavern patron. The

host to injured third parties.[91] In addition, the court found that the section provided a sufficient statutory basis upon which a court could impose civil liability on a noncommercial supplier who had furnished alcohol to an obviously intoxicated person, thereby creating a reasonably foreseeable risk of harm to third parties.[92] With the *Coulter* decision, California became the first state to impose civil liability upon a social host for the injuries caused by an adult guest. Within six months after the decision, however, the California legislature amended section 25602 to explicitly overrule *Coulter*.[93]

Although the California legislature abolished social host liability based on violation of the state's control act, other jurisdictions have recognized the cause of action. On rehearing, the Michigan Court of Appeals in *Thaut v. Finley*[94] reversed the trial court's entry of summary judgment in favor of the defendant hosts. In that case, the plaintiff's daughter, a passenger in a car driven by an intoxicated minor, was killed when the car collided with

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court held that the injured motorist was within the class of persons for whose protection § 25602 was enacted and that the injuries sustained by the motorist resulted from an occurrence that the statute was designed to prevent, thereby fastening liability upon the tavern owner.

In Brockett v. Kitchen Boyd Motor Co., 24 Cal. App. 3d 87, 100 Cal. Rptr. 752 (1972), the California Supreme Court extended the *Vesely* rationale to impose liability on an employer who had served copious amounts of alcohol to a minor employee, and later placed the minor in an automobile and directed him to drive the vehicle through traffic to his home. Plaintiffs were injured when their automobile was struck by that driven by the intoxicated minor. The court stated that "the impeccable logic of *Vesely* impels the conclusion that any person, whether he is in the business of dispensing alcoholic beverages or not, who disregards the legislative mandate breaches a duty to anyone who is injured as a result of the minor's intoxication and for whose benefit the statute was enacted. If one wilfully disobeys the law and knowingly furnishes liquor to a minor with knowledge that the minor is going to drive a vehicle . . . he must face the consequences. The law, as well as good sense, can demand no less." 24 Cal. App. 3d at 93, 100 Cal. Rptr. at 756.

91. 21 Cal. 3d at 150, 577 P.2d at 672, 145 Cal. Rptr. at 537.

92. *Id.* at 152, 577 P.2d at 674, 145 Cal. Rptr. at 539.

93. The amended version, in pertinent part, reads as follows:

> (b) No person who sells, furnishes, gives or causes to be sold, furnished, or given away, any alcoholic beverage . . . shall be civilly liable to any injured person or the estate of such person for injuries inflicted on that person as a result of intoxication by the consumer of such alcoholic beverage.
>
> (c) The legislature hereby declares that this section shall be interpreted so that the holdings in cases such as *Vesely v. Sager* . . . , *Bernhard v. Harrah's Club* . . . , and *Coulter v. Superior Court* . . . be abrogated in favor of prior judicial interpretation finding the consumption of alcoholic beverages rather than the serving of alcoholic beverages as the proximate cause of injuries inflicted upon another by an intoxicated person.

CAL. BUS. & PROF. CODE § 25602(b), (c) (West Supp. 1978).

The legislature did provide, however, that a cause of action exists against a licensed provider who serves alcoholic beverages to an obviously intoxicated minor who subsequently causes injury to third persons, the proximate cause of which is the minor's intoxication. CAL. BUS. & PROF. CODE § 25602.1 (West Supp. 1978).

But see Harris v. Trojan Fireworks Co., 120 Cal. App. 3d 157, 174 Cal. Rptr. 452 (1981) (theory of respondeat superior adopted to impose civil liability upon an employer for injuries to a third person caused by an employee who had become intoxicated at a company Christmas party).

94. 50 Mich. App. 611, 213 N.W.2d 820 (1973).

another car. The complaint alleged, inter alia, that the hosts of a wedding reception were negligent in serving liquor to the minor in violation of the statute prohibiting the furnishing of intoxicants to minors.[95] The original court of appeals decision affirmed the trial court's grant of summary judgment for the defendants.[96] The court embraced the basic principle of statutory construction—*expressio unius est exclusio alterius*[97]—and found that the legislature did not intend to create liability beyond the scope of commercial vendors.[98] On rehearing, however, the court vacated its previous decision and held that the plaintiff's complaint did state a cause of action against the hosts.[99] The court considered its previous ruling in *Lover v. Sampson,*[100] wherein the court held that a violation of the penal liquor statute could be applied against one not in the liquor business.[101] The *Thaut* court concluded that it would be absurd to maintain that one of the purposes of the liquor statute was not to protect the public from the risk of injury caused by intoxicated minors.[102] The court, however, did not explain why such a result would be absurd, nor did it indicate the way in which its previous analysis was flawed.

The Indiana case of *Brattain v. Herron*[103] further illustrates judicial application of a penal statute to a civil action. In *Brattain,* the defendant had provided her minor brother and his minor friend with alcohol, which they consumed in the defendant's home. Subsequently, while driving an automobile, defendant's brother was involved in a collision with a pickup truck. The three men in the truck and the passenger in the minor's car were killed. In considering whether the complaint against the defendant stated a cause of action, the Indiana Court of Appeals discussed the previous Indiana Supreme Court decision of *Elder v. Fisher,*[104] in which the court had applied

95. MICH. COMP. LAWS ANN. § 436.29 (West 1982).

96. 47 Mich. App. 542, 209 N.W.2d 695 (1973).

97. *See* BLACK'S LAW DICTIONARY 521 (5th ed. 1979) (defining the term as "the expression of one thing is the exclusion of another").

98. 47 Mich. App. at 547, 209 N.W.2d at 697-98.

99. 50 Mich. App. at 614, 213 N.W.2d at 822.

100. 44 Mich. App. 173, 205 N.W.2d 69 (1972).

101. *Id.* at 183, 205 N.W.2d at 74. The *Lover* court's reasoning on this point appears quite tenuous. The court contrasts the present case with that of Jones v. Bourrie, 369 Mich. 473, 120 N.W.2d 236 (1963), wherein the court held that a common law cause of action would arise upon a violation of the penal provisions governing alcoholic beverages. In *Jones,* the plaintiff was denied relief under this theory since the action was against a tavern owner and the dram shop act provided the exclusive remedy. The *Lover* court reasoned that since defendants therein were not tavern owners, subject to the dram shop act, "the statutes governing the use and consumption of alcoholic beverages . . . were not only pertinent, but also indispensable to the maintenance of the [suit]." 44 Mich. App. at 183, 205 N.W.2d at 74. In view of the weakness of the court's analysis, the validity of the *Thaut* court's reliance on *Lover* casts considerable doubt on the soundness of that decision.

102. 50 Mich. App. at 613, 213 N.W.2d at 822.

103. 159 Ind. App. 663, 309 N.E.2d 150 (1974).

104. 247 Ind. 598, 217 N.E.2d 847 (1966).

the state's control act[105] to impose civil liability on a noncommercial vendor who had sold alcohol to a minor. The minor in *Elder* had consumed alcohol provided to him by the defendant; he became intoxicated and, as a result of his intoxication, drove his vehicle into the plaintiff's ward. The court examined the statute,[106] which prohibits the furnishing, through sale or otherwise, of alcoholic beverages to minors, and concluded that an allegation of the violation of the statute would constitute a statement of a negligence cause of action.[107] Extending the rationale of *Elder* to the situation at bar, the *Brattain* court said that:

> [t]he statute indicates that *any person* who gives, provides, or furnishes alcoholic beverages to a minor is in violation of the statute. The rationale behind the *Elder* case is that our Legislature has sought to protect the citizens of Indiana from the dangers of minors who would consume alcoholic beverages.[108]

The court concluded that no valid distinction could be drawn between a person who sells alcoholic beverages to a minor and one who gives alcoholic beverages to a minor.[109]

Elder and *Brattain* were later extended to permit recovery against sellers of alcohol for the injuries caused by their adult customers when the seller knew the customers to be intoxicated but nonetheless served them alcohol.[110] The Indiana Court of Appeals recently extended the rationale of the control act cases to its ultimate limit.[111] *Ashlock v. Norris*[112] recognized a cause of action against a gratuitous furnisher of alcoholic beverages to a person who subsequently struck and killed a jogger with her automobile.[113] The court recounted the previous Indiana decisions which recognized that the state liquor laws created a duty upon suppliers of alcohol.[114] The court conceded that "all these decisions, except *Brattain,* have been litigated against either an establishment engaged in the business of selling alcoholic beverages or the bartender allegedly involved in the sale,"[115] but purported to justify its unprecedented action by invoking the observation made by the *Brattain* court that the legislature chose to draw no distinction between one who sells in violation of the liquor laws and one who gives or furnishes in violation

105. IND. CODE ANN. § 7-1-1-32(10) (West 1971), now IND. CODE ANN. § 7.1-5-7-8 (West 1982).
106. *Id.*
107. 247 Ind. at 603, 217 N.E.2d at 851.
108. 159 Ind. App. at 674, 309 N.E.2d at 156.
109. *Id.*
110. Elsperman v. Plumb, 446 N.E.2d 1027 (Ind. App. 1983); Parrett v. Lebamoff, 408 N.E.2d 1344 (Ind. App. 1980).
111. *See* Ashlock v. Norris, 475 N.E.2d 1167 (Ind. App. 1985).
112. *Id.*
113. *Id.* at 1168.
114. *Id.* at 1169.
115. *Id.*

thereof.[116] The court also focused on the statutory language, namely that "the legislature has specifically defined 'person' to include any 'natural person' . . . and has made the statutory proscription applicable to a person, rather than to a 'permittee.' "[117]

After concluding that "the plain language of the statute prohibits a person from giving alcoholic beverages to an intoxicated person where the donor knows the other person is intoxicated,"[118] the court expressed its recognition of the need to determine "whether the legislature intended to, and whether sound public policy supports, the extension of civil liability to family, friend or acquaintance who merely furnishes 'one more drink' to an intoxicated person.' "[119] The extent of the court's policy analysis, however, was its expression that "[c]onsidering the carnage on our public highways involving intoxicated drivers, the answer to both questions may be 'yes.' Certainly the legislature had ample time to respond to either *Elder* or *Brattain* if it desired to do so."[120] The court's reliance upon the two factors, the serious problems with drunk driving and the legislature's inaction, alone, does not respond to the many policy concerns respecting the imposition of liability upon non-commercial hosts who serve to adults. First, stating one of the purported objectives of the means under consideration as sufficient basis for the implementation of the means is tautological and analytically unsound. Second, the legislature's failure to respond to the *Elder* and *Brattain* decisions does not provide a basis for the conclusion that the legislature intended to provide for liability of the type embraced in *Ashlock,* since both decisions involved provision of alcohol to a minor. The legislative silence may permit the implication that the legislature sanctioned the imposition of liability when adults provide alcohol to minors, but since the legislature has never had occasion to pass upon the question of the extension of liability when the furnishee is an adult, the legislative silence does not warrant the inference that the lawmaking body would condone such action.[121]

The Supreme Court of Iowa also judicially created a cause of action against gratuitous furnishers of alcohol to adults, who subsequently cause injury or death.[122] *Clark v. Mincks,*[123] involved the provision of beer to an adult guest at a cookout. The intoxicated guest left the social gathering and soon thereafter the vehicle which she was driving "flipped onto its side and

116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* (footnotes omitted).
121. The court's statement of the policy considerations set forth in the California opinion of Coulter v. Superior Court, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978), casts additional doubt upon the soundness of the court's analysis. The court fails to point out that the *Coulter* decision was expressly overruled by the California legislature five months after it was handed down.
122. *See* Clark v. Mincks, 364 N.W.2d 226 (Iowa 1985).
123. *Id.*

continued rolling over."[124] The intoxicated driver and a child passenger were killed in the accident. The parents of the decedent child brought an action against the hosts of the cookout which the deceased driver had attended.[125] The district court sustained the hosts' motion to dismiss for failure to state a claim, on the ground that no cause of action existed against social hosts for the injuries flowing from the provision of intoxicants to a guest.[126] The supreme court began its inquiry by noting that two problems exist with respect to an action of this type against a social host: "whether a cause of action can exist at all outside the dramshop context and, if so, whether [the court] should reject such a cause of action in the social setting for policy reasons."[127] After summarizing the precedent in the area of liability predicated on violation of the state's control act,[128] the court concluded that a common law cause of action could arise from a sale in violation of the statute.[129] The court then embarked on a discussion respecting the policy implications of extending the action to include social providers, [130] observing that "[a] number of forceful arguments can be made both for and against liability of the social host."[131] Although the court failed to set forth an independent evaluation of the policy considerations, it apparently determined, without stating, that those in favor of the imposition of host liability outweigh those in opposition. The court concluded that since its prior decisions had based "common-law liability broadly on breach of statute, without any indication of an exception for the social host,"[132] the district court erred in granting the motion to dismiss the complaint.[133]

Application of alcoholic beverage control acts as a means of imposing

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124. *Id.* at 227.

125. The complaint also named as defendants the owner, the estate of the deceased driver, and a passenger in the van. The appeal involved only the claims against the hosts and the passenger, the latter of which was resolved in the passenger's favor. *Id.*

126. *Id.* at 227-28.

127. *Id.* at 228.

128. IOWA CODE ANN. § 123.49(1) (West 1983).

129. 364 N.W.2d at 229.

130. *Id.* at 229-31.

131. *Id.* at 230. The court quoted at length from the opinions of Edgar v. Kajet, 84 Misc. 2d 100, 375 N.Y.S.2d 548 (Sup. Ct. 1975), *aff'd,* 55 A.D.2d 597, 389 N.Y.S.2d 631 (1976) (discussing the policy arguments against social host liability) and Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984) (discussing the policy arguments in favor of social host liability). 364 N.W.2d at 230.

132. 364 N.W.2d at 231.

133. Specifically, the court held that:

> [a] motion to dismiss should be overruled by virtue of section 123.49(1) of the Code when the allegations of the petition are such that the plaintiff could introduce substantial evidence showing (1) the guest was intoxicated, (2) the host personally was actually aware the guest was intoxicated, (3) the host then made beer (or other intoxicating beverages) available to the guest, (4) the guest drank the beer (or beverages), (5) the guest, while intoxicated, then operated a motor vehicle, and (6) by reason of the intoxication, the guest operated the vehicle in a manner which caused injury to (or the death of) the plaintiff (or the plaintiff's decedent).

Id.

liability on noncommercial suppliers of alcohol appears to be an increasingly accepted doctrine in tort law.[134] A survey of the case law on the matter reveals, however, the extent to which courts will apply penal laws to civil actions. Until the recent decisions of *Ashlock v. Norris*[135] and *Clark v. Mincks*,[136] every reported case[137] resulting in the imposition of civil liability on a noncommercial supplier of alcohol involved the provision of alcohol to a minor.[138] The practical significance of this limitation is clear: minors occupy a special place in our society due to their inability adequately to conduct their own affairs and to protect themselves from the consequences of their own immaturity. The strong public policy of protecting minors is evidenced by the different standards applied to minors in the areas of criminal law and contract law. In order to protect the minor, as well as the general public, from the minor's inability to rationally conduct his affairs, courts apply more stringent standards to those who provide alcohol to the minor. The objective of the approach is to discourage behavior by adults which contributes to the minor's inability to structure his conduct appropriately.

To be sure, many of the same concerns are present when a noncommercial supplier provides alcohol to an intoxicated adult as when he provides alcohol to a minor. An intoxicated adult certainly poses a serious threat both to his own well-being and to that of those with whom he comes into contact. Unlike a minor, however, whose status of minority the law recognizes to be a valid mitigator of responsibility, an adult who voluntarily becomes intoxicated must nonetheless bear the burden of responsibility for his actions.[139] The higher level of accountability which our society demands of adults, vis-a-vis children, provides a sound framework for understanding the higher judicial and legislative standards applied to individuals who serve alcohol to minors. In any event, the purpose of this Note is not to derogate the established policy of imposing liability when minors are involved; the purpose is to examine the underlying tenets of the policy and the direction in which the law in this area is evolving, as well as to suggest limits which courts should place on the evolutionary process.

C. *Common Law Negligence Principles As a Basis for Social Host Liability*

In states where the legislatures have not enacted, or have repealed, dram shop acts, or where courts have refused to construe existing dram shop acts

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134. *See supra* text accompanying notes 87-133.
135. 475 N.E.2d 1167 (Ind. App. 1985).
136. 364 N.W.2d 226 (Iowa 1985).
137. The one additional exception is Coulter v. Superior Court, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534, which was promptly overruled by the California legislature.
138. *See supra* text accompanying notes 94-109.
139. *See, e.g.*, IND. CODE ANN. § 35-41-3-5 (Burns 1985).

or control acts to impose liability on social hosts, injured parties have sometimes attempted to use common law tort principles to establish social host liability.[140] Most courts have rejected this theory on the ground that the consumption, rather than the provision, of alcohol is the proximate cause of the injury.[141] Some courts have, however, abrogated the old common law rule and have allowed plaintiffs to state a cause of action against social hosts under common law principles.[142]

1. Cause of Action Denied

Pennsylvania is among the jurisdictions refusing to allow recovery against a social host in the absence of a statutory prohibition.[143] The Pennsylvania Supreme Court, in *Klein v. Raysinger,*[144] found conclusive the fact that, while some other states had recognized a common law action against a social host, they had done so only in the limited situations where an adult host had served intoxicants to a minor[145] or to a person who had a special disability.[146] The plaintiffs in *Klein* sustained injuries when the vehicle in which they were riding was struck by a vehicle operated by an intoxicated person.[147] The plaintiffs brought a negligence action against the people who had gratuitously served the driver alcohol at a time when the latter was visibly intoxicated.[148] The supreme court held that "the great weight of authority supports the view that in the case of an ordinary able-bodied man it is the consumption of the alcohol, rather than the furnishing of the alcohol which is the proximate cause of any subsequent occurence"[149] and that the rule of nonliability accords with the recognized rule of the common law.[150]

An attempt on the part of an injured third party to fit his case into one of the implicit exceptions of the common law rule failed in *Halvorson v. Birchfield Boiler, Inc.*[151] In that case, an intoxicated motorist struck and severely injured the plaintiff, who was standing in the parking lane of a street. The plaintiff brought an action against the motorist's employers alleging that they were negligent in furnishing liquor to the already intoxicated

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140. *See infra* text accompanying notes 143-206.
141. *See infra* text accompanying notes 143-62.
142. *See infra* text accompanying notes 163-206.
143. *See* Klein v. Raysinger, 504 Pa. 141, 470 A.2d 507 (1983).
144. *Id.*
145. *See* Burke v. Superior Court, 129 Cal. App. 3d 570, 181 Cal. Rptr. 149 (1980); Brattain v. Herron, 159 Ind. App. 663, 309 N.E.2d 150 (1974); Thaut v. Finley, 50 Mich. App. 611, 213 N.W.2d 820 (1973).
146. *See* Cantor v. Anderson, 126 Cal. App. 3d 124, 178 Cal. Rptr. 540 (1982).
147. 504 Pa. at 146, 470 A.2d at 508.
148. *Id.* at 143, 470 A.2d at 508. The complaint also named the driver of the vehicle as a party defendant.
149. *Id.* at 148, 470 A.2d at 510.
150. *Id.*
151. 76 Wash. 2d 759, 458 P.2d 897 (1969).

employee at a company Christmas party, knowing that the employee was intoxicated and unable to properly operate a vehicle.[152] The complaint also alleged that the defendants were negligent for allowing the employee to continue to consume liquor, knowing him to be an alcoholic, and thereafter permitting him to drive away from the party in his automobile.[153] The Washington Supreme Court stated the general rule of nonliability[154] and rejected the plaintiff's argument that the case fell within the implicit exception of the common law rule on the ground that the employee's alcoholism rendered him not an "ordinary able-bodied man."[155] The court noted that "[t]here may be good reason to place the licensed vendor of liquor[156] under a burden. . .[but that this case involved] a social event involving many people where liquor is available, but not sold in the sense of an individual order or procurement to or from a person in a position to adjudge the physical condition of each guest."[157]

The Montana Supreme Court took a similar approach in the case of *Runge v. Watts*[158] by dismissing a complaint against a social host who had served alcohol to a minor.[159] The intoxicated minor was the driver of an automobile which collided with the automobile in which the plaintiff was a passenger. The court emphasized the greater justifications for imposing liability on a commercial supplier than on a social host and, pointing out that the legislature had not even provided for the liability of commercial suppliers, expressed its reluctance to extend liability to persons serving alcoholic beverages in a social setting.[160] Montana law thus immunizes from liability all social hosts, even those who serve alcohol to minors.

The foregoing presentation illustrates that many courts have strictly adhered to the common law rule of nonliability of gratuitous providers of

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152. *Id.* at 761, 458 P.2d at 898.

153. *Id.*

154. *Id.* at 762, 458 P.2d at 899 (citing Hall v. Budagher, 76 N.M. 591, 417 P.2d 71 (1966) and Cole v. Rush, 45 Cal. 2d 345, 289 P.2d 450 (1955)).

155. *Id.* at 763-64, 458 P.2d at 900.

156. Washington repealed its dram shop act in 1955.

157. 76 Wash. 2d at 764, 458 P.2d at 900. The court also distinguished the instant case from Brockett v. Kitchen Boyd Motor Co., 264 Cal. App. 2d 69, 70 Cal. Rptr. 136 (1968), wherein the California Court of Appeals imposed liability on an employer for damages to third persons who sustained injuries caused by an employee of the defendant, after the employee had become intoxicated at a Christmas party hosted by the defendant. Said the *Halvorson* court of *Brockett:*

> the court recognized the general common law rule . . . but found that there was a special relationship between the employer and employee; that the employer had *directed* the drunken *minor* employee to his car; and *instructed* him to drive home. Thus the employer had, in effect, placed himself in a position of accepting responsibility and was in control of the situation. Liability was found on the basis that the employer had actually induced the improper operation of the automobile. We find no such relationship or control in the instant case.

76 Wash. 2d at 763, 458 P.2d at 899 (emphasis in original).

158. 180 Mont. 91, 589 P.2d 145 (1979).

159. *Id.*

160. *Id.* at 91, 589 P.2d at 147.

alcohol.[161] That rule, albeit not universally accepted,[162] evinces two significant virtues. First, it is easily applied and provides a clear guideline. Second, and probably more important, the rule conforms to the notion that every adult of sound mind is responsible for his own actions. The rule expressly excepts minors and persons with special disabilities, but charges every adult drinker with the duty to monitor his own intake or to take other precautionary measures, such as giving his car keys to a sober friend, so that his actions do not cause injury to other persons.

2. Cause of Action Stated

One of the leading cases in which a court imposed liability under common law tort principles is *Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity.*[163] In *Wiener,* a college fraternity hosted a party at which it served alcohol to its guests. The plaintiff was injured when the car in which she was a passenger, driven by a minor who had become intoxicated at the fraternity party, collided with a building. The complaint alleged that the fraternity[164] was negligent in providing alcohol to a minor, knowing that the minor thereafter would be operating a motor vehicle.[165] The Oregon Supreme Court found that the fraternity's status as host and its direct involvement

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161. *See also* Cartwright v. Hyatt Corp., 460 F. Supp. 80 (D.D.C. 1978) (refusing to extend to the social host the duty to refrain from providing alcohol); Manning v. Andy, 454 Pa. 237, 310 A.2d 75 (1975) (refusing to impose liability on nonlicensed persons who furnished intoxicants for no remuneration); Behnke v. Pierson, 21 Mich. App. 219, 175 N.W.2d 303 (1970) (holding that, outside the civil damage statute, no action was available against those who gave intoxicants to a person who later caused injury).

162. *See infra* text accompanying notes 163-206.

163. 258 Or. 632, 485 P.2d 18 (1971).

164. The complaint also alleged negligence on the part of the owners of the ranch where the party was held and the individual fraternity member who purchased the alcohol. The trial court sustained demurrers filed by each of these defendants and the supreme court affirmed the judgment entered in favor of the ranch owners and the purchaser of the alcohol. *Id.* at 637, 485 P.2d at 20-21.

165. Specifically, the complaint charged the fraternity with negligence:

> (1) In causing and permitting intoxicating beverages to be served to Blair, a minor, when defendant knew or should have known Blair was a minor; that defendant knew that Blair had driven an automobile to the premises, that he would necessarily be required to return to Eugene, and that after consuming quantities of alcoholic beverages his driving upon the highways would constitute an unreasonable hazard and risk of harm to plaintiff.
>
> (2) In failing to ascertain and to warn plaintiff of the intoxicated condition of Blair.
>
> (3) In failing to properly supervise the function being held . . . so as to have prevented minors from being permitted to consume alcoholic beverages and so as to have prevented guests at that function from being transported.
>
> (4) In failing to provide a safe means of transportation from the party when defendant knew, or in the exercise of reasonable care should have known, that such transportation was necessary.

See id. at 637, 485 P.2d at 20-21.

in serving the alcohol were sufficient considerations to establish a duty on the part of the fraternity to refuse to serve alcohol to a guest when under the circumstances it would be unreasonable to permit him to drink.[166] Since the guest was a minor and the plaintiff alleged that the fraternity ought to have known that the minor would be operating a vehicle after the party, the court reasoned, a jury could conclude that the fraternity's behavior was unreasonable.[167]

The California Supreme Court also addressed the issue of social host liability under common law negligence principles. In *Coulter v. Superior Court,*[168] the plaintiff brought a negligence action against the owner and manager of an apartment complex for serving large quantities of alcohol to an individual whose subsequent acts led to the plaintiff's injuries.[169] Although the court found that the defendants' violation of the state's control act[170] provided a sound basis for the plaintiff's recovery, it also addressed the defendants' liability under common law tort principles.[171]

The court reasoned that the service of intoxicating liquor to an obviously intoxicated person by one who knows that the person thereafter intends to operate a motor vehicle creates a reasonably foreseeable risk of injury to those on the highway.[172] After finding that the elements of a common law tort claim were present, the court examined some of the policy considerations relevant to such liability.[173] The only negative concern acknowledged by the court, however, was that "the spectre of civil liability may temper the spirit of conviviality at some social occasions, especially when reasonably observant hosts decline to serve further alcoholic beverages to those guests who are obviously intoxicated and perhaps becoming hostile."[174] Not surprisingly, the court concluded that, balanced against "the serious hazard to the lives, limbs, and property of the public at large, and the great potential for human suffering which attends the presence on the highways of intoxicated drivers,"[175] the concerns with dampening the spirit of conviviality must give way to liability. Apparently recognizing the weakness of the court's policy analysis the California legislature expressly abrogated the *Coulter* decision less than six months after it was handed down.[176]

Three years after the legislature overruled *Coulter,* the California Court of Appeals nonetheless used common law principles to permit a cause of

166. *Id.* at 643, 485 P.2d at 23.
167. *Id.*
168. 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978).
169. *Id.* at 148, 577 P.2d at 671, 145 Cal. Rptr. at 537.
170. CAL. BUS. & PROF. CODE § 25602 (Supp. 1978). *See supra* notes 87-93 and accompanying text.
171. 21 Cal. 3d at 152, 577 P.2d at 673, 145 Cal. Rptr. at 537.
172. *Id.* at 152-53, 577 P.2d at 674, 145 Cal. Rptr. at 538.
173. *Id.* at 154, 577 P.2d at 675, 145 Cal. Rptr. at 538.
174. *Id.*
175. *Id.*
176. *See supra* note 93.

action against a social host in *Cantor v. Anderson.*[177] The plaintiff in *Cantor,* who maintained a home for developmentally disabled people, was injured by one of the residents who had become intoxicated at the home of neighbors. The plaintiff charged that the act of serving alcoholic beverages to the resident constituted negligence since the neighbors had full knowledge of his disability.[178] The court of appeals explained that the purpose of the amendment to the California Business and Professions Code[179] was to return the state to the common law rule stated in *Cole v. Rush.*[180] The court further explained that the return to the common law carried with it a return to the limitations of the rule.[181] The common law rule, which recognizes no cause of action against one who provides alcohol to an ordinary man, left open the possibility of imposing liability on one who provides alcohol to one who does not meet the description of an "ordinary man." The *Cantor* court strictly applied the rule and, seizing on the implicit exception, concluded that it did not preclude liability of a social host for furnishing alcohol to his guest who, because of some physical or mental condition, should not be served alcohol.[182]

A sequence of New Jersey cases[183] recently has culminated in a far-reaching extension of social host liability.[184] *Linn v. Rand*[185] abrogated the common law immunity of the social host. In *Linn,* a pedestrian was injured when she was hit by a car which was driven by a minor who had become intoxicated from alcohol served to her while a guest at the home of a friend. The Superior Court, Appellate Division, held that the host could be held liable for the negligent acts of his intoxicated minor guest if the plaintiff could prove that the host served the guest knowing that she was a minor and would thereafter operate a motor vehicle, and that the minor's intoxication was the proximate cause of the accident.[186] Refuting the distinction between liability of a tavern owner and liability of a social host, the court stated that "[i]t makes little sense to say that the licensee in *Rappaport*[187] is under a duty to exercise care, but give immunity to a social host who may be guilty of the same wrongful conduct merely becuase he is unlicensed."[188] The court thus held that "the forward-looking and far-reaching philosophy expressed in *Rappaport* should also be applicable to negligent

177. 126 Cal. App. 3d 124, 178 Cal. Rptr. 540 (1981).
178. *Id.* at 126, 178 Cal. Rptr. at 541.
179. *See supra* note 93.
180. 45 Cal. 2d 345, 289 P.2d 450 (1955).
181. *See supra* note 93.
182. 126 Cal. App. 3d at 132, 178 Cal. Rptr. at 547.
183. *See generally* Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959); *see supra* notes 64-69 and accompanying text.
184. Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984).
185. 140 N.J. Super. 212, 356 A.2d 15 (Super. Ct. App. Div. 1976).
186. *Id.* at 217, 356 A.2d at 18.
187. 31 N.J. 188, 156 A.2d 1 (1959).
188. 140 N.J. Super. at 217, 356 A.2d at 18.

social hosts and should not be limited to holders of liquor licenses and their employees."[189]

The New Jersey Supreme Court recently extended the *Rappaport-Linn* analysis to permit a cause of action against a social host for the negligent acts of his intoxicated, *adult* guest.[190] Not since the decision in *Coulter v. Superior Court,*[191] which was subsequently overruled by the legislature, had a court permitted an action against a social host when the intoxicated guest was not a minor or an incompetent. The plaintiff in *Kelly v. Gwinnel*[192] was seriously injured when the car she was driving was struck by a car driven by the intoxicated Gwinnell. Gwinnell had previously been served alcohol by his friends, the Zaks, at their home. The trial court granted summary judgment to that portion of the plaintiff's negligence action naming the Zaks as defendants.[193] The trial court found, as a matter of law, that a host is not liable for the negligence of an adult guest who has become intoxicated while at the host's home.[194] On interlocutory appeal, the state supreme court reversed,[195] holding that a host who serves liquor to an adult social guest, knowing both that the guest is intoxicated and will thereafter be operating a motor vehicle, can be held liable for the injuries resulting from the guest's negligence.[196] The court's recognition of the claim rested on the usual elements of a negligence action.[197]

After finding that the action by the defendant created an unreasonable, foresecable risk of harm to the plaintiff, which risk resulted in an injury equally foreseeable, the court addressed the question of whether the host-defendant owed a duty to the plaintiff to prevent the risk of injury. The court noted that, generally, the justice of imposing a duty to prevent the

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189. *Id.* at 216, 356 A.2d at 17-18.

190. *See* Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984).

The *Rappaport-Linn* rationale had previously been extended in this manner in a trial court decision which was not appealed. In Figuly v. Knoll, 185 N.J. Super. 477, 449 A.2d 564 (1982), the Superior Court of New Jersey, Law Division, Monmouth County, denied a motion for summary judgment filed by the defendant social host. The court stated that:

> There is no reasonable basis for limiting the holding of *Linn* to minors, and this court finds it to be the law of this State that a social host who furnishes alcoholic beverages to any obviously intoxicated person under circumstances which create a reasonable foreseeable risk of harm to others may be held legally responsible to those third persons who are injured when that harm occurs.

Id. at 480, 449 A.2d at 565.

191. 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978).

192. 96 N.J. 538, 476 A.2d 1219 (1984).

193. *Id.* at 542, 476 A.2d at 1221. Kelly brought a negligence action against Gwinnell and his employer, who then sued Zak and his wife in a third-party action. Kelly thereafter amended her complaint to include the Zaks as direct defendants. *Id.* at 541-42, 476 A.2d at 1220.

194. *Id.* at 542, 476 A.2d at 1220-21.

195. *Id.* at 560, 476 A.2d at 1230.

196. *Id.* at 548, 476 A.2d at 1224. In a strong dissent, Justice Garibaldi attacked the court's decision on the ground that, in view of the intricacy of the issue, and the far-reaching implications of the rule, the determination as to whether social host liability is appropriate should be left to the legislature after careful study and examination.

197. *Id.* at 544, 476 A.2d at 1222.

risk of injury is so clear that the negligence cause of action is assumed to exist based simply on the actor's creation of an unreasonable risk of foreseeable harm resulting in injury.[198] The court stated that in this case, however, "more" was needed: "more" being a value judgement based on an analysis of public policy.[199] In this regard, the court reasoned that:

> [i]n a society where thousands of deaths are caused each year by drunken drivers, where the damage caused by such deaths is regarded increasingly as intolerable, where liquor licensees are prohibited from serving intoxicated adults, and where long-standing criminal sanctions against drunken driving have recently been significantly strengthened . . . the imposition of such a duty by the judiciary seems both fair and fully in accord with the State's policy.[200]

The only precedent to which the court was able to point for support of its decision was *Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity*.[201] The court's reliance on that case is unfounded, however, since *Wiener* involved the provision of alcohol to a minor and *Kelly* involved the provision of alcohol to an adult.

Although not entirely clear from the tenor of its opinion, the court stated that the goal of its decision was to achieve fair compensation of victims who are injured as the result of drunk driving.[202] The court failed, however, to explain the way in which the decision will effectuate that goal, but merely asserted unequivocally that "the imposition of the duty certainly will make fair compensation more likely."[203] The court further emphasized that the imposition of a duty was both consistent with and supportive of the social goal of reducing the incidence of drunk driving.[204] Confusingly, however, the opinion elsewhere states that "[w]hile the rule in this case will tend also to deter drunken driving, there is no assurance that it will have any significant effect."[205] The court's failure to demonstrate the way in which these social policies will be served by this rule of liability becomes even more troubling when the court uses the successful achievement of those social policies as its primary argument in favor of establishing the duty on the part of the social host. Equally troubling is the court's failure to suggest any workable limits on the host's duty. Indeed, the court's repeated statement that its holding is limited to the situation in which a host *directly* serves alcohol to his intoxicated guest suggests that the court itself recognizes the unmanageability of the rule and is attempting to confine its rationale to the specific

198. *Id.*
199. 96 N.J. 538, 476 A.2d 1219 (citing Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928)).
200. 96 N.J. at 544-45, 476 A.2d at 1222.
201. 258 Or. 632, 485 P.2d 18.
202. 96 N.J. at 551, 476 A.2d at 1226.
203. *Id.*
204. *Id.* at 545, 476 A.2d at 1222.
205. *Id.* at 551, 476 A.2d at 1226.

fact pattern presented in *Kelly*.[206] For example, the court fails to discuss whether the duty attaches to a host who places a six-pack of beer in front of his guest, indicating that the guest is to help himself, or whether, in order for the duty to attach, the host must personally hand the guest the drink once the latter has reached the point of intoxication.

II. Policy Implications Respecting Social Host Liability

As the foregoing presentation reveals, courts are split as to their willingness to impose civil liability on a social host for the injuries caused by his intoxicated guests. Some courts strictly adhere to the old common law principle that the consumption, rather than the provision, of alcohol is the proximate cause of the resulting harm, and accordingly refuse to charge the host with any duty of care respecting the alcohol consumption of his guests.[207] Other courts have indicated a willingness to abrogate the strict common law rule and hold that injury to third persons due to the negligence of an intoxicated, driving guest is a foreseeable event, and therefore that the host may be held accountable for the injury inflicted by his guests.[208] Still others have predicated liability on the basis of violation of criminal statutes prohibiting the furnishing of alcohol to certain specified classes of persons.[209] Many courts, however, have refused to borrow these statutes, primarily because they have found them to be inapposite since they were designed to regulate the liquor industry, not private individuals.[210] A handful of courts have even based liability on dram shop acts, although this theory presently appears to be obsolete.[211] Virtually every case which has imposed liability on a social host involved provision of alcohol to a minor or an incompetent. To date, only three cases, all very recent, have recognized a cause of action against a social host for the injurious acts of his intoxicated *adult* guest.[212]

Considering the interplay between alcohol and social activity within our society, a rule of host liability will likely have a profound impact on human behavior. Any informed decision as to the propriety of such a rule, therefore, necessitates an examination of the relevant policy considerations.

A preliminary concern centers on the host's ability to determine the point at which a guest has reached his level of alcohol tolerance. Contrasting the host's ability to gauge the level of a person's intoxication with that of a commercial vendor illustrates the concern. A vendor, by the very nature of

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206. See *infra* text accompanying notes 213-24 for a discussion suggesting that such a confinement is not possible.

207. *See supra* text accompanying notes 143-62.

208. *See supra* text accompanying notes 163-206.

209. *See supra* text accompanying notes 87-134.

210. *See supra* text accompanying notes 78-86.

211. *See supra* text accompanying notes 36-49.

212. Ashlock v. Norris, 475 N.E.2d 1167 (Ind. App. 1985); Clark v. Mincks, 364 N.W.2d 226 (Iowa 1985); Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984).

his business, encounters alcohol-consuming people on a daily basis. From his experience, the vendor develops an ability to gauge various levels of alcohol-induced impairment. A private host, by contrast, generally will have neither the ability to recognize subtle degrees of impairment, nor the ready means by which to develop such ability. To nonetheless charge the host with a duty to develop expertise in this area would be to saddle him with a difficult, if not insurmountable, burden. Of course, courts could apply a less stringent standard of reasonableness to the private individual than to the commercial vendor. To impose upon a host a duty to develop even some expertise, however, would be to require him to take affirmative action when he has no resources available to allow him to do so. Proponents of the duty have not indicated how a private host, so charged, is to develop the requisite expertise at recognizing impairment levels. It may be that a would-be host would be required to visit a local tavern to observe patrons over a period of time. Similar inquiry might focus on the prospective host's attendance at an "impairment recognition" class, or on the individual's perusal of a book on the subject of intoxication, precedent to serving alcoholic refreshments to his friends. These hypotheticals illustrate the difficulties inherent in the decision to charge a private citizen with the duty to develop expertise at recognizing the level of another person's intoxication.

The host's own impairment may also present a problem respecting his ability to determine the impairment level of his guests. Common experience shows that a host will often imbibe along with his guests, which naturally may lead to a lessening of the host's ability to determine the intoxication level of his guests. The issue of whether the host's impairment and accompanying inability to effectivcly monitor the intoxication level of his guests should be a factor in the determination of the host's liability is not easily resolved. To require the host to refrain from drinking at his own gathering, or even to restrict his intake, would constitute a far-reaching governmental intrusion into the host's affairs.[213] As the dissenting justice in *Kelly v. Gwinnell*[214] aptly notes, however, "[i]t would be anomalous to create a rule of liability that social hosts can deliberately avoid by becoming drunk themselves."[215] The problem becomes even more complex when one considers that a guest who has reached his tolerance level may not exhibit outward signs of intoxication until sometime much later. Indeed, experts estimate that it may take twenty to thirty minutes for alcohol to reach its highest level in the bloodstream.[216]

Even if a host is capable of judging the level of his guest's impairment, the nature of the social setting may present additional concerns. The functions

213. Such intrusion may raise fifth amendment right to privacy issues that would be beyond the scope of this Note.

214. 96 N.J. 538, 476 A.2d 1219.

215. *Id.* at 545, 476 A.2d at 1234 (Garibaldi, J., dissenting).

216. AMERICAN MEDICAL ASSOCIATION, ALCOHOL AND THE IMPAIRED DRIVER 15-16 (1968).

of a host at a social event may preclude him from directing his attention to each guest for more than brief, intermittent periods of time. Accordingly, the host may find it difficult, if not impossible, to monitor the amount of alcohol being consumed by each guest and the accompanying levels of impairment. Perhaps supporters of host liability would respond to these concerns by maintaining that a host's inattention to his guest's level of intoxication would relieve him of responsibility, or, as expressed by the majority opinion in *Kelly,*[217] that a host would be held liable only if he directly served alcohol to an intoxicated guest. Despite the apparent logic of these contentions, close examination reveals that each is seriously flawed.

As with the problem of a drinking host, a rule which the host could avoid simply by inattention would be anomalous. Indeed, to impose the duty on the host, yet permit him to escape its reach so easily, would appear actually to encourage the host to be inattentive. This would, in effect, render the rule of social host liability a nullity. No rational host would take measures to ensure the effective monitoring of his guests' intake if the action will subject him to liability. The rule of liability, to have any meaningful effect, must charge the host with a duty not only to refrain from serving alcohol to a guest whom he perceives to be intoxicated, but also to effectively monitor and perceive the level of intoxication of each guest. Viewed under scrutiny, the rule of social host liability imposes a much more onerous duty than what is apparent on its face.

The contention that the imposition of a duty not to serve an intoxicated guest is fair because it renders the host liable only if he directly serves the guest also fails under scrutiny. In the context of a social gathering, the "service" of alcohol to guests may take many forms. Conduct that one person believes to be direct service may to another person consitute only indirect service. Consider a social gathering at which the host places upon a table a tray of glasses filled with champagne. When an intoxicated guest thereafter removes one of the glasses of his own volition, has the host directly served the guest? To maintain that such an attenuated provision constitutes direct service of alcohol to the guest seems extraordinarily harsh. If the purpose of the rule of liability is to prevent the provision of alcohol to an intoxicated person, however, no logical justification exists for distinguishing between periodically handing a fresh drink to guests and opening up a liquor cabinet to guests.

Although the concerns presented in the preceding discussion could be left for resolution by the court or jury on a case-by-case basis, the mere recognition of a cause of action will modify the behavior of alcohol-serving citizens. Even if some hosts are able to successfully challenge the claims made against them, a successful challenge will involve the costs of litigation and lost time. Simply creating a situation in which hosts may be forced to

217. 96 N.J. 538, 476 A.2d 1219.

defend themselves will induce changes in behavior. Since many of the same policy concerns will arise by the mere recognition of a cause of action, the argument that the judge and jury resolve the concerns on a case-by-case basis does not respond to the numerous policy implications of a decision to place a duty of this kind on a private individual.

The special relationship of host to guest also raises several problems with respect to a decision to provide a cause of action against social hosts. At a social gathering, unlike at a gathering in a commercial establishment, most of the people in attendance generally will be friends, family members, business associates, or at least acquaintances of the host. Justice Garibaldi illustrates the significance of this relationship in his dissenting opinion in *Kelly v. Gwinnell,*[218] in which he stated:

> It is easy to say that a social host can just refuse to serve the intoxicated person. However, due to a desire to avoid confrontation in a social environment, this may become a very difficult task. . . . We should not ignore the social pressures of requiring a social host to tell a boss, client, friend, neighbor, or family member that he is not going to serve him another drink.[219]

In our society, significant benefits often result from alcohol-related social gatherings. When a host, because of a legal duty to do so, tells a guest that he will not serve him another drink, a certain stymieing of beneficial activity may result. Perhaps the guest will refuse to continue with business negotiations, or will no longer look favorably upon the friendship previously shared with the host. Whatever the actual consequences, a decision to recognize a cause of action against a social host would diminish the value of the host's activity.

The social pressures become even more pronounced when the host attempts to enforce his refusal to serve the guest another drink. It is not clear what actions the host would be required or permitted to take in order to enforce his decision not to serve the guest another drink, and thereby protect himself from the risk of liability. One commentator suggests that a host who misjudges the situation and restrains his guest could be liable for false imprisonment or battery.[220] Even assuming that clear guidelines could be established regarding the length to which a host must/may go in rebuking his persistent guest, problems exist concerning the host's ability to control his guest. A vendor has ultimate control over the dispensing of his alcohol. If he decides that a patron has had enough to drink, he can simply refuse to sell to that patron. Although the patron may become abusive or even violent, the vendor has the resources available to resolve the situation. The vendor may, for example, receive assistance from other personnel or customers of the estab-

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218. *Id.*
219. *Id.* at 545, 476 A.2d at 1234.
220. Comment, *Social Host Liability*, 10 PAC. L.J. 95, 105-06 (1978).

lishment or, if necessary, call upon the police. Conversely, a social host confronted with a persistent guest generally will not have similar resources available to him. If the host and his guest are the only ones present, a duty on the part of the host would allow him to rely only on his own ability to control the guest's conduct. Even if others are present to assist the host, the nature of the social gathering may cause those in attendance to refrain from exerting physical force upon one another or to call upon the police to resolve the conflict. Although it might appear that since the dispute is between friends, the need for physical force would be lessened, the element of control does not become an issue until the drunk person, absent force, refuses to acquiesce to the host's decision. In addition, the relationship between host and guest may not reduce the conflict since the guest may be in an irrational state of mind due to his inebriation.

One of the most compelling considerations is the pecuniary impact that the recognition of social host liability would have on private individuals. Unlike the commercial vendor, who can spread the cost of liability among his customers by increasing his sales prices, the host probably would have to bear the entire cost himself. Even assuming that the host's homeowner's policy would cover the costs of his guest's negligently inflicted injuries, the host would have to incur the cost of the increased premiums, since he has no way to spread the costs. In the event that the homeowner's policy would not cover the liability, or if the host could not afford the premiums, his choices would be twofold: refrain from entertaining with alcohol or risk incurring the expenses of litigation and an adverse judgment. Although tort law commonly requires people to make choices respecting their conduct, the imposition of social host liability would significantly restrict private autonomy. In order to escape the risk of liability, a private individual would be required to refrain from engaging in conduct heretofore accepted as common practice in our society.[221]

In addition to the inherent unfairness of the rule of social host liability, a means-end inquiry reveals its futility. The rule of liability seeks to discourage hosts from serving alcohol to inebriated guests. The *act* sought to be guarded against is not the service of alcohol to intoxicated guests. The discouragement of that activity is the *means* by which to accomplish the objective of dealing with the problem of drunk driving. Apart from the physical harm that the guest may suffer from the introduction of excessive amounts of alcohol into his bloodstream, the act of serving alcohol to an

221. The divergent interests of the vendor and host in supplying alcohol is also relevant. A vendor sells alcohol for profit, whereas a host provides alcohol to his guests as an act of hospitality. The host neither expects, nor receives, pecuniary gain from the activity; indeed, he may incur considerable expense in procuring the spirits. The implication is not that one who sells alcohol for profit is culpable, but rather that the motivation for one's act, here providing alcohol, should be considered in determining the level of responsibility that society will require of the actor.

intoxicated person is not per se harmful. Proponents of the rule contend that it will serve to reduce the incidence of driving drunk and also afford better compensation to victims when guests do drive drunk. Although both objectives are sound, the imposition of social host liability cannot further either goal. Were the rule of liability to be applied to the host who serves his guest the specific drink, without which the guest would not become intoxicated, perhaps a rule of liability would be more efficacious.

An example will illustrate the problem: suppose that *H* invites several friends to his home one evening for cocktails. Among those invited is *G* who, previous to arriving at *H's* home, had consumed five beers. With five beers in his bloodstream, *G* is legally, and obviously, intoxicated. Upon *G's* arrival, *H* offers him a drink, which *G* accepts. Shortly thereafter, while driving home, *G* injures *V*. Since *G* was already intoxicated when *H* served him the drink, it would be anomalous to hold *H* liable for *V's* injuries. A rule of social host liability would nonetheless impose upon *H* the pecuniary burden of the harm caused by *G*. Although *H's* service may have contributed to the degree of danger presented by *G's* operation of a motor vehicle, it did not create the danger. The law cannot modify human behavior unless those whom the law burdens are capable of controlling the targeted conduct. To impose liability on *H* will not serve to modify *G's* behavior since *G* was already intoxicated when *H* acted. In other words, *G* would still have been intoxicated and would still have constituted a hazard to those on the highways if *H* had refrained from serving him alcohol.

In addition to being unavailing, requiring *H* to bear the pecuniary burden of the harm cause by *G* would be unjust. As the example illustrates, a host's contribution to the danger presented by his intoxicated guest is minimal. Under the rationale of the rule, however, *H* would be liable for an amount greatly in excess of his proportionate responsibility for the harm.

> Underlying the whole body of tort law is an awareness that the need for compensation, alone, is not a sufficient basis for an award. When a plaintiff receives a defendant's payment in satisfaction of a judgment obtained in court, loss is not compensated in the sense that it is somehow made to disappear. It is only shifted: To the extent that the plaintiff gains, the defendant loses.
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> . . . An award is not to be made unless there exists some reason other than the mere need of the victim for compensation.[222]

Since the need for compensation on the part of the victim of a drunk driver, standing alone, is not a sufficient reason to justify the imposition of liability on the host, some other reason must be shown to exist. The only other rationale which proponents offer in support of the rule is the need to deter drunk driving. The foregoing analysis reveals, however, that the deterrent

222. GREGORY, CASES AND MATERIALS ON TORTS 75 (3d ed. 1977).

effect of the rule can be of no significant value. These observations cast serious doubt on the propriety of a rule of social host liability.

Finally, the refusal to recognize a cause of action against social hosts will not constitute an injustice on the part of drunk-driving victims. Traditionally, victims have sought recovery from the drunk drivers themselves.[223] Such an arrangement places the responsibility upon the actual tortfeasor, and "[w]hile it is commendable to provide a remedy to parties injured in alcohol-caused accidents, it is important to keep responsibility as nearly as possible on the drinking driver,"[224] in order to effect changes in behavior and to place some limit on liability. Although social host liability would provide an additional party against whom a victim could seek compensation, a social host is only an individual, incapable of spreading the cost of liability and therefore no more likely to be solvent than the drunk driver. Any requirement that could be placed on the host, such as a requirement that he carry "host liability" insurance, could as easily be placed on the guest/driver. The victim would thus stand in no worse position than if the host were liable, and the cost of liability would be borne by the actual tortfeasor, thereby creating the optimal incentive for the drinker to modify his behavior.

CONCLUSION

Although courts and legislatures should continually seek new and effective methods of dealing with the problem of drunk driving, a decision to recognize a cause of action against a social host who serves alcohol to an adult guest would be fraught with inadequacies. Close examination of the policy implications reveals that not only would the rule of liability fail to achieve its intended objectives, it would impose unreasonable burdens on the social host. Courts and legislatures should refuse to extend the rationale of the vendor and minor cases to permit a cause of action against a private host who serves alcoholic beverages to an adult guest.

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223. *See* Miller v. Moran, 96 Ill. App. 3d 596, 600, 421 N.E.2d 1046, 1049 (1981).
224. Comment, *supra* note 220, at 106.