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Social Host Liability for the Negligent Acts of Intoxicated Guests

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SPECIAL PROJECT

SOCIAL HOST LIABILITY FOR THE NEGLIGENT ACTS OF INTOXICATED GUESTS

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INTRODUCTION

The mix of drinking and driving results in tragedy each year. Approximately 26,000 people die from alcohol-related highway accidents annually.[1] Seventy lives are lost each day; one death occurs every twenty-three minutes. The estimated cost of drinking and driving to society is somewhere between $21 and $24 billion each year.[2] Although these statistics are alarming, they should no longer be unfamiliar. Public awareness of the problem of drinking and driving has increased dramatically in recent years.[3] Private citizens have formed lobbies seeking tougher drunk driving laws, and organizations like the Automobile Club of America have proposed their

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1 *See* MOTHERS AGAINST DRUNK DRIVERS, A SUMMARY OF STATISTICS RELATED TO THE NATIONAL DRUNK DRIVING PROBLEM (citing National Highway Traffic Safety Administration and National Safety Council statistics) (1985).

2 *See* UNITED STATES PRESIDENTIAL COMMISSION ON DRUNK DRIVING, FINAL REPORT 1 (1983).

3 According to the Insurance Information Institute, in 1984 "signs appeared that the public [was] getting the message and attitudes [were] starting to change about drinking and driving." INSURANCE INFORMATION INSTITUTE, CONSUMER NEWS 1 (Dec. 3, 1984). Among those signs were a federal law penalizing states that fail to adopt a drinking age of 21 by October 1, 1983; President Reagan's proclamation of December 9-15, 1984, as "National Drunk and Drugged Driving Awareness Week;" and media events, such as the December 11, 1984, television special on Students Against Driving Drunk (SADD). *Id.* at 2.

own plans for getting drunk drivers off the road.[4]

According to one legal periodical, "1984 was the year the courts joined the legislatures in earnest in the 5-year-old crackdown on drunken driving."[5] Two recent Supreme Court decisions and one case in which the Supreme Court denied certiorari will facilitate police detection of drunk drivers and enforcement of the law.[6] In June of 1984, the United States Supreme Court held that police need not preserve for the defense a sample of a suspect's breath that was analyzed in breath-testing machines.[7] A month later, the Court

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4 The AAA has proposed an "integrated approach" to the problem of drinking and driving, including:

> (1) **Reasonable laws** that will encourage enforcement agencies to arrest DWI's, prosecutors to pursue the cases without plea bargaining to non-alcohol related offenses, and the judiciary to convict.
> (2) **Rehabilitation and reeducation programs** with required attendance for all first time DWI offenders as a supplement to other court actions, not as a substitute for them.
> (3) **Professional evaluations** and assignment to appropriate treatment for repeat DWI offenders until they are judged fit to return safely to the highways.
> (4) **Year round public information and education programs** to make drnnk driving an unacceptable social behavior and achieve greater community and citizen support.
> (5) **Alcohol and traffic information and education programs** established in kindergarten through 12th grades, the formative years for attitude and behavior in relation to DWI.
> (6) **Evalnation procedures** maintained to assure effective operation of all elements of the program.

AM. AUTO. ASS'N FOUND. FOR TRAFFIC SAFETY, DRUNK DRIVING: IS THERE AN ANSWER? (1983).

The AAA believes that its program will be more effective in dealing with the problems associated with drunk driving than the various "crackdown" approaches proposed by Mothers Against Drunk Drivers (MADD) and the Presidential Commission on Drunk Driving. The AAA argues that mandatory sentencing for convicted drunk drivers, police road blocks near local bars, and organized citizen monitoring of judges' courtrooms to insure sufficiently harsh sentences for alcohol-related traffic offenses will not be as effective as its proposals to reform the drinking driver and to prevent future drivers from drinking and driving. *See* Address by D. Malfetti, *DWI Countermeasures: Past, Present, and Future,* Am. Auto. Ass'n Traffic Safety Workshop (Nov. 7-9, 1982) (available as pamphlet printed by Am. Auto. Ass'n Traffic Safety Dep't). *See The Year in Law, 1984—The Top Ten Stories,* Nat'l L.J., Dec. 31, 1984, at 22. "Although defense attorneys had some court successes this year, federal and state judges in both civil and criminal cases have made drunken driving a more perilous act for drivers, bartenders, social hosts, and others." *Id.* One explanation for this judicial crackdown is the recent Presidential Commission on Drunk Driving report. The Commission's major concerus included the enforcement of drunk driving laws, the prosecution of drunk drivers, and the adjudication of Driving While Intoxicated (DWI) cases. *See* UNITED STATES PRESIDENTIAL COMMISSION ON DRUNK DRIVING, *supra* note 2, at 12.

5 *The Year in Law, 1984—The Top Ten Stories, supra* note 4, at 22.

6 *See* California v. Trombetta, 104 S. Ct. 2528 (1984); Berkemer v. McCarty, 104 S. Ct. 3138 (1984); Burg v. Municipal Court, 104 S. Ct. 2337 (1984).

7 California v. Trombetta, 104 S. Ct. 2528 (1984). In *Trombetta* the respondents submitted to a breath analysis test after being stopped for suspicion of drunken driving. *Id.* at 2531. Although preservation was technically feasible, the arresting officers did not

unanimously held that the circumstances surrounding the roadside questioning of a suspected drunken driver do not constitute "custodial interrogation"[8] for the purpose of applying the admissibility rules of *Miranda v. Arizona*.[9] The Court refused to hear a case that upheld a strict liability statute which made driving with a blood-alcohol content higher than a specified level a crime.[10]

State courts have also contributed to the "crackdown" against drunk drivers by approving certain methods used by police to detect drunken drivers. In *Romano v. Kimmelman*[11] the New Jersey Supreme Court ruled that breath-testing machines are "scientifically reliable and accurate."[12] In *People v. Scott*[13] the New York Court of Appeals approved the use of roadblocks to discover drunken drivers.

In addition to aiding the prosecution of drunken drivers, courts also made drinking more difficult for drivers. The recent campaign against drunk driving led to the New Jersey Supreme Court's deci-

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preserve the breath samples of the respondents. *Id.* at 2531 n.3. The respondents were subsequently charged with drunken driving. At trial the respondents argued that the court should have suppressed the intoxilyzer's test results because the breath samples would have impeached the test results. *Id.* at 2531.

The Court rejected the respondents' argument by holding that police do not violate the due process clause of the fourteenth amendment when they fail to preserve breath samples in drunk driving cases. *Id.* at 2532-34. The Court reasoned that "[t]he evidence to be presented at trial was not the breath itself but rather the Intoxilyzer results obtained from the breath samples." *Id.* at 2533. Furthermore, the Court noted that the authorities had not destroyed the breath samples in a calculated effort to circumvent due process. *Id.* at 2534.

8 Berkemer v. McCarty, 104 S. Ct. 3138, 3144-48 (1984). According to the Court, the typical roadside interrogation is not as "police dominated" as a station house interrogation because it is held in public. *Id.* at 3150. Consequently, the police are not required to read a suspected drunk driver his "Miranda" rights when he is interrogated. *Id.*

9 384 U.S. 436 (1966).

10 *See* Burg v. Municipal Court, 104 S. Ct. 2337 (1984). The Presidential Commission on Drunk Driving supported this position by recommending that all states "make it illegal per se to drive or be in possession of a car if an individual has a .10 blood alcohol content level or higher." *See* UNITED STATES PRESIDENTIAL COMMISSION ON DRUNK DRIVING, *supra* note 2, at 17.

11 96 N.J. 66, 474 A.2d 1 (1984).

12 *Id.* at 82, 474 A.2d at 9. The court held that the manufacturer's breathalyzers were scientifically reliable for the purposes of determining blood alcohol content. *Id.*

The Presidential Commission supports the use of breath tests and suggests that all states adopt "implied consent" laws. *See* UNITED STATES PRESIDENTIAL COMMISSION ON DRUNK DRIVING, *supra* note 2, at 15. Implied consent laws require suspected drunk drivers to take breath tests or face a presumption in court that they were driving while intoxicated. *Id.* (citing UNIF. VEHICLE CODE §§ 6-205.1 & 11-902 (1962)).

13 63 N.Y.2d 518, 473 N.E.2d 1, 483 N.Y.S.2d 649 (1984). The use of "safety checkpoints" has provoked some controversy. The Supreme Court has not yet addressed the issue, but the use of such checkpoints may not violate the fourth amendment if they are conducted in a "reasonable" fashion. *See* THE USE OF SAFETY CHECKPOINTS FOR DWI ENFORCEMENT, 3-10 (1983) (prepared by R. Compton & R. Engle for Nat'l Highway Traffic Safety Ad., U.S. Dep't of Transp.).

sion in *Kelly v. Gwinnell*,[14] allowing an injured third party's negligence action against a social host who served an adult guest beyond the point of visible intoxication knowing that the guest would soon be driving.[15] According to the court,

> [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.[16]

Although the New Jersey court was not the first to impose liability on a social host for the tortious conduct of his intoxicated guests,[17] no other decision imposing such liability has survived legislative review.[18] Moreover, most courts have refused to hold hosts liable because they believe that the intoxicated driver is at fault, not the social host.[19] Thus social host liability remains a controversial tool for reducing the incidence of drunk driving.[20]

The concept of social host liability raises many questions concerning the average person's ability to monitor and control a guest's consumption of alcohol and the extent to which society is willing to bear responsibility for drinking and driving. This Special Project addresses some of these questions.

Part I addresses the antecedents of host liability. It traces the early law imposing liability on the commercial purveyor of alcohol and explores the development of a parallel cause of action against the noncommercial purveyor.

Part II examines the recent New Jersey Supreme Court decision in *Kelly*. It considers the New Jersey court's historical development of social host liability and considers whether the responsibility for allocating liability properly lies with the courts or with the legislature. Finally, Part II discusses and evaluates the standard of conduct

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14 96 N.J. 538, 476 A.2d 1219 (1984).

15 *Id.*

16 *Id.* at 544-45, 476 A.2d at 1222 (footnotes omitted).

17 *See, e.g.*, Coulter v. Superior Ct. of San Mateo County, 21 Cal. 3d 144, 575 P.2d 664, 145 Cal. Rptr. 534 (1978); Williams v. Klemesrud, 197 N.W.2d 614 (Iowa 1972); Ross v. Ross, 294 Minn. 115, 200 N.W.2d 149 (1974); Wiener v. Gamma Phi Chapter of Alpha Tau Omega Frat., 258 Or. 632, 485 P.2d 18 (1971).

18 *See, e.g.*, CAL. BUS. & PROF. CODE § 25602(b), (c) (West Supp. 1984).

19 *See infra* notes 84-101, 164-77, 224-28 and accompanying text.

20 Immediately after *Kelly*, a New York Times editorial criticized the court's decision because of the difficulty in policing the drinking of one's guests. The editorial also posited that hosts may not be able to insure against liability and thus would face possible financial ruin. *See* N.Y. Times, June 30, 1984, at 22, col. 1.

the court imposed on New Jersey hosts and the policy justifications for the imposition of liability.

Part III analyzes the various theories of social host liability and considers whether any theory is appropriate. Part III also predicts how legislatures will respond to judicial activism in this area of the law. This Project concludes with some alternatives to the negligence standard the New Jersey Supreme Court recently imposed on social hosts.

I
THEORIES OF SOCIAL HOST LIABILITY

The New Jersey Supreme Court in *Kelly v. Gwinnell*[21] upheld a cause of action against a social host predicated on principles of ordinary negligence. The New Jersey Court held that the social host created an unreasonable risk of harm to the plaintiff, the driver of another car, by continuing to serve a visibly intoxicated guest who the host knew would be driving, that the risk created was foreseeable, and that the risk resulted in an equally foreseeable injury.[22] The *Kelly* decision is noteworthy because imposition of liability upon a social host occurs infrequently and does not flow exclusively from principles of ordinary negligence. Rather, state courts have relied on three different approaches when holding social hosts liable for injuries caused by their inebriated guests.

First, courts have applied dramshop acts[23] to social hosts. At common law the furnisher of intoxicating liquor was not liable for injuries caused by the drinker. The drinker was solely responsible because the courts deemed the excessive consumption of alcohol, not its sale or gratuitous transfer, as the proximate cause of any resulting injuries.[24] Dramshop acts, however, abrogated the common law rule with respect to tavern owners who sell or give away alcoholic beverages under a state liquor license. In some jurisdictions

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21 96 N.J. 538, 476 A.2d 1219 (1984). *See infra* Section II.

22 *Kelly*, 96 N.J. at 543-44, 476 A.2d at 1221-22.

23 In general, a dramshop act imposes civil liability on a tavern owner for harm caused by a person to whom the tavern owner furnished intoxicating liquor. Dramshop acts are legislative remedies because at common law an "able-bodied man" who drank intoxicating liquor was solely responsible for damage resulting from his intoxication. *See generally* McGough, *Dramshop Acts*, 1967 A.B.A. SEC. INS. NEGL. & COMPENSATION LIABILITY 448.

24 *See, e.g.*, Cruse v. Aden, 127 Ill. 231, 234, 20 N.E. 73, 74 (1889); State *ex rel.* Joyce v. Hatfield, 197 Md. 249, 78 A.2d 754 (1951); J. LAWSON, THE CIVIL REMEDY FOR INJURIES ARISING FROM THE SALE OR GIFT OF INTOXICATING LIQUORS 4-5 (20 THE BOOK OF MONOGRAPHS (1877)). Some jurisdictions have qualified the common law rule to allow a cause of action against a furnisher of alcoholic beverages where the furnisher gave or sold liquor to an intoxicated person knowing that he was in an unsafe and untrustworthy condition. *See, e.g.*, Nally v. Blandford, 291 S.W.2d 832 (Ky. 1956).

plaintiffs have successfully argued that these statutes create a cause of action against social hosts as well as against tavern owners.[25]

Second, plaintiffs have asserted liability based on a social host's violation of an alcoholic beverage control act.[26] Under this theory plaintiffs argue that the host's violation of a statutory duty is the proximate cause of their injuries. Courts typically regard the violation of a criminal statute, such as an alcoholic beverage control act, as presumptive evidence of negligence or as negligence per se.[27]

Finally, plaintiffs have argued that ordinary principles of negligence apply to social hosts who provide intoxicating liquor to their guests.[28] Under this theory a social host's conduct must conform to that of a reasonable person under like circumstances.[29] A breach of this duty occurs when the social host serves intoxicating drinks to an already inebriated guest,[30] thus creating an unreasonable risk of harm to the public. The host's negligence is actionable when the drunken guest causes a foreseeable injury to the plaintiff.[31]

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25 *See, e.g.,* Williams v. Klemesrud, 197 N.W.2d 614 (Iowa 1972) (scope of dramshop act included any person who sold or gave liquor to another); Ross v. Ross, 294 Minn. 115, 200 N.W.2d 149 (1972) (dramshop act covers noncommercial vendors who gratuitously furuish liquor). For cases denying the application of the dramshop act to social hosts, see, *e.g.,* DeLoach v. Mayer Elec. Supply Co., 378 So. 2d 733 (Ala. 1979) (dramshop act inapplicable to social host because there was no sale); Camille v. Berry Fertilizers, Inc., 30 Ill. App. 3d 1050, 1053, 334 N.E.2d 205, 207 (1975) ("[A]ny enlargement to extend liability to persons not engaged in the liquor business is the prerogative of the legislature."); Lover v. Sampson, 44 Mich. App. 173, 181, 205 N.W.2d 69, 73 (1972) ("[s]ince the dramshop act only applies to commercial vendors . . . [it] is wholly inapplicable to the instant case" involving social hosts); Gabrielle v. Craft, 75 A.D.2d 939, 940, 428 N.Y.S.2d 84, 86 (1980) ("The Dram Shop Act must be narrowly construed, and if liability is to be extended so as to impose liability upon that social host, it should be accomplished through the legislative process and not through the courts."). For discussion of social host liability under dramshop acts, see *infra* notes 84-140 and accompanying text.

26 An alcoholic beverage control act regulates the furnishing of intoxicating liquor. Typically, the act makes it illegal to serve a minor or intoxicated person. For a discussion of beverage control acts, see *infra* notes 130-37 and accompanying text.

27 *See, e.g.,* Brattain v. Herron, 159 Ind. App. 663, 674, 309 N.E.2d 150, 156 (1974) (violation of statute by a social host is negligence per se); Thaut v. Finley, 50 Mich. App. 611, 613, 213 N.W.2d 820, 821-22 (1973) (violation of statute is negligence per se even if it does not provide a civil remedy). *But cf.* Runge v. Watts, 180 Mont. 91, 93, 589 P.2d 145, 147 (1979) (beverage control acts "do not . . . create a civil cause of action"); *see also infra* notes 129-206 and accompanying text (discussing violation of beverage control act as basis for furuisher's liability).

28 This theory of liability was approved in Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984). *See infra* Section II.

29 *See infra* note 208 and accompanying text.

30 A plaintiff could also argue that service of alcohol to a minor, a mental incompetent, or a person unusually affected by alcohol creates an unreasonable risk of harm.

31 *See* Kelly v. Gwinnell, 96 N.J. 538, 544, 476 A.2d 1219, 1221-22 (1984) (discussed *infra* Section II); *see also* Coulter v. Superior Court, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978) (discussed *infra* notes 247-56 and accompanying text); Wiener v. Gamma Phi Chapter of Alpha Tau Omega Frat., 258 Or. 632, 485 P.2d 18 (1971)

A. Dramshop Acts as a Basis for Social Host Liability

1. *Historical Background*

Dramshop acts, first introduced into state codes in the nineteenth century,[32] were part of the nineteenth and early twentieth centuries' campaign for temperance.[33] Historians have referred to the temperance movement, active at both the state and federal levels, as a battle between the "wets" and the "dries."[34] The "wets" sought to defeat measures limiting or prohibiting the availability of alcohol. The "dries" supported such measures.[35] The temperance movement's crusade for "gallon laws,"[36] state prohibition,[37] and dramshop acts[38] indicates that the movement sought to cut off the supply of liquor rather than attempt to reform the individual drinkers.[39]

State "gallon laws" were aimed at destroying taverns by barring the sale of less than a prescribed quantity of liquor.[40] Statewide prohibition first appeared in Maine in 1851.[41] Thirty-three states

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(discussed *infra* notes 230-46 and accompanying text). *But see* Klein v. Raysinger, 298 Pa. Super. 246, 444 A.2d 753 (1982) (no cause of action under principles of ordinary negligence); Runge v. Watts, 180 Mont. 91, 93, 589 P.2d 145, 147 (1979) (beverage control acts "do not . . . create a civil cause of action").

32 *See generally* J. LAWSON, *supra* note 24.

33 *See* McGough, *supra* note 23, at 449.

34 *Id.*

35 *Id.*

36 *See generally* J. KROUT, THE ORIGINS OF PROHIBITION 285 (1925).

37 *See generally* E. CHERRINGTON, THE EVOLUTION OF PROHIBITION IN THE UNITED STATES OF AMERICA (1920); A. FEHLANDT, A CENTURY OF DRINK REFORM IN THE UNITED STATES (1904).

38 *See infra* notes 45-56 and accompanying text.

39 McGough, *supra* note 23, at 448.

40 G. CLARK, HISTORY OF THE TEMPERANCE REFORM IN MASSACHUSETTS, 1813-1883, at 39-40 (1888). In 1832 a bill was introduced in the Massachusetts legislature to prohibit the sale of "ardent spirits" in quantities less than 30 gallons. Although this "30 gallon law" failed to pass, the governor approved a "15 gallon law" in 1838. *Id.* Similar laws were enacted in other states. Tennessee and Mississippi, for example, enacted "1 gallon laws." McGough, *supra* note 23, at 448. In 1846 Maine passed a "28 gallon law." J. KROUT, *supra* note 36, at 290-91.

41 In 1843 the territorial legislature of Oregon adopted prohibition. The law was repealed in 1848. Three years later, Maine enacted the Dow Prohibition Law, which became the first statewide prohibition of alcoholic beverages. E. CHERRINGTON, *supra* note 37, at 135-36. The Dow Prohibition Law, moreover, served as a model for other states. Following Maine's lead, in 1852 the territory of Minnesota and the states of Rhode Island, Massachusetts, and Vermont passed prohibition bills similar to the Maine law. A. FEHLANDT, *supra* note 37, at 125; E. CHERRINGTON, *supra* note 37, at 136-37. The citizens of Michigan approved a "Maine law" in 1853. A. FEHLANDT, *supra* note 37, at 126. In 1854 Connecticut also enacted prohibition, a year after the governor vetoed similar legislation passed by the legislature. E. CHERRINGTON, *supra* note 37, at 137. New York, New Hampshire, Delaware, Indiana, and the territory of Nebraska also adopted prohibitory laws during the mid-1850s. *Id.* at 137-39; A. FEHLANDT, *supra* note 37, at 127-30.

had already followed suit when national prohibition became effective in January 1920.[42] The eighteenth amendment prohibited the "manufacture, sale, . . . transportation, . . . importation, [and] exportation" of intoxicating liquors within the United States and its territories.[43] Federal prohibition, however, was only a temporary victory for the reformers. After thirteen years the states ratified the twenty-first amendment, nullifying the eighteenth amendment and ending national prohibition.[44]

Prior to the advent of national prohibition states had begun to enact laws assigning civil liability to furnishers of intoxicating liquor for harm arising from the furnishing of that liquor.[45] These dramshop acts were similar in emphasis to "gallon laws" and prohibition because they concentrated on restricting the supply of liquor rather than reforming the individual drinker.[46] The imposition of civil liability, however, represented a unique approach to achieving this end. According to a commentator writing in 1877,

> [t]he seller of intoxicating liquors is made responsible for the injurious results of his sales on the same principle as common carriers, bailees and agents are liable for the negligent conduct of their affairs. The statutes but extend a well-known principle of the common law, that one shall be held to strict account for the consequences of his acts, and the application of an ancient maxim that there is no wrong without its appropriate remedy.[47]

The common law, nevertheless, did not impose civil liability upon furnishers of intoxicating liquor[48] because the injury was considered too remote from the sale or furnishing of the liquor.[49] Thus, when a plaintiff relies on a dramshop act in order to impose liability on a tavern owner or social host, the cause of action "is purely a creature of the statutes."[50]

The Indiana dramshop act, enacted in 1853, represents a proto-

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42 D. PICKETT, C. WILSON & E. SMITH, THE CYCLOPEDIA OF TEMPERANCE PROHIBITION AND PUBLIC MORALS 1 (Supp. 1917 ed.).

43 U.S. CONST. amend. XVIII.

44 U.S. CONST. amend. XXI, § 1.

45 *See infra* notes 46-56 and accompanying text.

46 Although dramshop acts do not restrict the sale of liquor in the same manner as "gallon laws" and prohibition, the imposition of civil liability creates a disincentive to supply liquor and thereby affects its availability.

47 J. LAWSON, *supra* note 24, at 4-5.

48 *Id.* at 5.

49 *See supra* note 24 and accompanying text.

50 J. LAWSON, *supra* note 24, at 5. The Supreme Court upheld the constitutionality of dramshop acts in Bartemeyer v. Iowa, 85 U.S. (18 Wall.) 129 (1873). The court rejected the argument that selling liquor is one of the privileges and immunities of being a United States citizen and held that state legislatures may regulate items injurious to society.

type of present-day dramshop acts.[51] The statute read in part:

> Any . . . person, who shall be injured in person, or property, or means of support, by any intoxicated person, or in consequence of the intoxication . . . of any person, shall have a right of action . . . against any person, and his sureties on the bond aforesaid, who shall, by retailing spirituous liquors, have caused the intoxication of such person, for all damages sustained, and for exemplary damages.[52]

The Indiana dramshop act thus excluded social hosts from civil liability for damages arising from the gratuitous furnishing of intoxicating liquor. Maine and Connecticut enacted similar dramshop laws that restricted the cause of action to the seller or retailer of intoxicating liquors.[53]

Not all dramshop acts, however, distinguished between the sale and the gift of intoxicating liquors. Seven states, for example, enacted broad dramshop acts that could be construed as imposing civil liability on both sellers and givers of alcoholic beverages.[54] The Illinois dramshop act provided a cause of action "against any person . . . who shall, by selling, or giving, intoxicating liquors, have caused the intoxication."[55] Similarly, the New York dramshop act created a cause of action "against any person or persons who shall, by selling or giving away intoxicating liquors, [have] caused the intoxication in whole or in part."[56]

Thus, the earliest dramshop acts could be categorized by their broad or narrow language. A dramshop act such as New York's arguably created a cause of action against a social host, but an act such as Maine's, which included the word "sell" but not "give," indicated that the legislature deliberately refused to extend liability to social hosts. Although many states repealed their dramshop acts after the repeal of national prohibition, those acts that remain can still be categorized on this basis.

2. *Contemporary Dramshop Acts*

Currently ten states have broadly worded dramshop acts,[57] creating a cause of action against any person who sells or gives away

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51 J. LAWSON, *supra* note 24, at 7; McGough, *supra* note 23, at 449.

52 J. LAWSON, *supra* note 24, at 7 n.12 (quoting Act of Mar. 4, 1853, sec. 10).

53 *See id.* at 7-9.

54 The seven states were Illinois, Iowa, Kansas, Michigan, New York, Ohio, and Wisconsin. *Id.* at 9.

55 *Id.* at 9 n.19 (quoting ILL. REV. STAT. ch. 43, § 9 (1874)).

56 *Id.* at 12 n.19 (quoting 1873 N.Y. Laws ch. 646, § 1).

57 ALA. CODE § 6-5-71 (1975); Liquor Control Act, ILL. REV. STAT. ch. 43, § 135 (1975); ME. REV. STAT. ANN. tit. 17, § 2002 (1964); MICH. COMP. LAWS ANN. § 436.22 (Supp. 1985); 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 1982); R.I.

intoxicating liquor.[58] The reference to "any person" suggests that the dramshop acts could be applied to social hosts as well as retailers of liquor.[59] Moreover, the inclusion of the terms "giving," "furnishing," or "assisting in procuring" implies that the statutes do not limit the act of furnishing liquor to a sale involving an expectancy of profit.[60] Except for Rhode Island,[61] the broad dramshop acts provide for recovery of damages for injury to "person," "property," or "means of support."[62] Of the states with broad dramshop acts, only Illinois limits the amount of recoverable damages.[63]

Narrowly tailored dramshop acts remain in several other states. The Connecticut dramshop act expressly limits the cause of action to a seller of intoxicating liquor, thereby denying a cause of action against a social host.[64] The Wyoming dramshop act also denies social host liability by limiting the cause of action to licensees and permittees.[65] In Colorado, a cause of action accrues if a person who "sells or gives away" intoxicating liquors has notice that the recipi-

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GEN. LAWS § 3-11-1 (1976); UTAH CODE ANN. § 32-11-1 (Supp. 1983); VT. STAT. ANN. tit. 7, § 501 (1972).

58 *See, e.g.*, ALA. CODE § 6-5-71 (1975) ("right of action against any person who shall [sell, give, or otherwise dispose of liquors or beverages]"); Liquor Control Act, ILL. REV. STAT. ch. 43, § 135 (1975) ("right of action . . . against any person who [sells or gives] alcoholic liquor"); ME. REV. STAT. ANN. tit. 17, § 2002 (1964) (same as Illinois); N.Y. GEN. OBLIG. LAW § 11-101 (McKinney 1978 & Supp. 1984-85) ("right of action against any person who . . . unlawfully [sells or assists] in procuring liquor").

59 The possibility of such an interpretation prompted the Iowa legislature to amend its dramshop act so that only a "licensee or permitee" could be liable for injuries caused by intoxicated patrons. IOWA CODE § 123.92 (1977). For a discussion of cases in which plaintiffs successfully applied dramshop acts against social hosts, see *infra* notes 102-26 and accompanying text.

60 A New York court has interpreted the words "give away" as manifesting a legislative purpose to include only those instances when a licensee provides a drink "on the house." Kohler v. Wray, 114 Misc. 2d 856, 857-58, 452 N.Y.S.2d 831, 833 (Sup. Ct. 1982).

The Minnesota dramshop act, formerly broad in scope, was amended in 1977 to limit the cause of action by requiring an illegal sale or barter of liquor before civil liability may attach. MINN. STAT. ANN. § 340.95 (West Supp. 1984). The Minnesota legislature's action was in partial response to a Minnesota Supreme Court decision construing its dramshop act to apply to a social host. *See* Ross v. Ross, 294 Minn. 115, 200 N.W.2d 149 (1972) (discussed *infra* at notes 112-23 and accompanying text).

61 R.I. GEN. LAWS § 3-11-1 (1976) (omitting any reference to means of support).

62 *See supra* note 57. Moreover, several of these acts provide for recovery of "other" damages. *See, e.g.*, ME. REV. STAT. ANN. tit. 17, § 2002 (1964) ("injured in person, property, means of support or otherwise"); MICH. COMP. LAWS ANN. § 436.22 (Supp. 1984-1985) (same as Maine); N.Y. GEN. OBLIG. LAW § 11-101 (McKinney 1978 & Supp. 1984-1985) (same as Maine and Michigan).

63 In Illinois recovery of damages for injury to person or property is limited to $15,000. Recovery for injury to means of support is limited to $20,000. Liquor Control Act, ILL. REV. STAT. ch. 43, § 135 (1975). Connecticut also limits the amount recoverable under its dramshop act, but its act is not "broad-form" because its language apparently denies a cause of action against a social host. *See infra* text accompanying note 64.

64 CONN. GEN. STAT. § 30-102 (1985).

65 WYO. STAT. § 12-5-502 (1984).

ent is a habitual drunkard.[66] This language suggests that social hosts would be liable for furnishing liquor to a known habitual drunkard. In Georgia, a parent has a right of action "against any person who shall sell or furnish alcoholic beverages to" a minor without the parent's permission.[67]

3. *Recovery Under Dramshop Acts*

Two situations commonly arise in which furnishers of intoxicating liquor may be liable for civil damages. First, a court could hold a furnisher accountable for injuries sustained by the consumer of the intoxicating liquor. Second, a court could hold a furnisher liable to a third person injured as a result of the intoxicated person's conduct.[68]

Injured drinkers have not been successful in using dramshop acts to recover damages from the furnisher of the liquor because most courts have held that these acts do not provide a cause of action to the intoxicated person.[69] Courts often have imposed this limitation despite broad statutory language creating a right of action for "any person" injured.[70] In *Brooks v. Cook*[71] a saloon patron sued a saloonkeeper to recover money stolen by a pickpocket while the patron was intoxicated.[72] The court found that the intoxicated person was the person most likely to be injured and bring suit, but it dismissed the case because the statute did not "distinctly and unequivocally"[73] give the intoxicated person a right of action.[74] The court reasoned that because the statute listed only persons "who stand . . . in special relations" to the intoxicated person, it ex-

66 COLO. REV. STAT. § 13-21-103 (1973).

67 GA. CODE ANN. § 51-1-18 (1982).

68 *See generally* Graham, *Liability of the Social Host for Injuries Caused by the Negligent Acts of Intoxicated Guests*, 16 WILLAMETTE L.J. 561 (1980).

69 McGough, *supra* note 23, at 451-52.

70 *See supra* note 57 and accompanying text. The Connecticut and Rhode Island acts limit the cause of action to a person injured by the intoxicated person. CONN. GEN. STAT. § 30-102 (1985) ("intoxicated person . . . thereafter injures the person or property of another"); R.I. GEN. LAWS § 3-11-1 (1976) ("person in a state of intoxication commits any injury to the person or property of another").

71 44 Mich. 617, 7 N.W. 216 (1880).

72 *Id.* at 617, 7 N.W. at 216.

73 *Id.* at 618, 7 N.W. at 216-17 (quoting state law).

74 *Id.* at 618-19, 7 N.W. at 217. The "police act" provided in part:

> [E]very wife, child, parent, guardian, husband or other person, who shall be injured in person and property or means of support, by an intoxicated person . . . or by reason of the selling, giving or furnishing any . . . intoxicating . . . liquors to any person, shall have a right of action . . . against any person or persons who shall, by selling or giving any intoxicating . . . liquor, have caused or contributed to the intoxication of such person . . . .

Id. at 618, 7 N.W. at 216-17.

cluded the intoxicated party from bringing suit.[75] Other jurisdictions have followed *Brooks* and denied a cause of action to intoxicated persons[76] on the ground that the drunkard should not "recover when he or she was as culpable as the furnisher" of the liquor.[77]

Dramshop acts directly address the second situation involving the liability of a furnisher of liquor to an injured third person. Thus, dramshop acts provide a cause of action against a seller of liquor for injured third parties and their families.[78]

To establish a prima facie case under a dramshop act, a plaintiff must establish the following elements:[79]

1. An intoxicating liquor must be involved;[80]
2. The defendant must transfer the liquor;[81]
3. The transferee must consume the liquor;
4. The transferee must become intoxicated, or the drink must contribute to an existing state of intoxication;
5. The intoxicated transferee must cause an actionable injury to the plaintiff;
6. The intoxication must have a causal connection to the plaintiff's injury;[82]
7. The plaintiff must be entitled to bring suit under the dramshop act.[83]

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75 *Id.* at 619, 7 N.W. at 217.

76 *See, e.g.*, Holmes v. Rolando, 320 Ill. App. 475, 51 N.E.2d 786 (1943) (citing Brooks v. Cook, 44 Mich. 617, 7 N.W. 216 (1880)); Moyer v. Lo Jim Cafe, Inc., 19 A.D.2d 523, 523, 240 N.Y.S.2d 277, 279 (1963) (per curiam) ("[T]he cause of action . . . is limited to a third party injured or killed by the intoxicated person."), *aff'd*, 14 N.Y.2d 792, 200 N.E.2d 212, 251 N.Y.S.2d 30 (1964).

77 Graham, *supra* note 68, at 583.

78 The intoxicated person's family members often suffer injury to their means of support. *See, e.g.*, Benes v. Campion, 186 Minn. 578, 244 N.W. 72 (1932) (spouse sued when husband permanently incapacitated after three drinks of defendant's moonshine); Fest v. Olson, 138 Minn. 31, 163 N.W. 798 (1917) (widow sued tavern owner who illegally sold liquor to decedent and proximately caused his drowning); *see also* Cruse v. Aden, 127 Ill. 231, 20 N.E. 73 (1889) (wife of deceased drinker sued social host under Illinois dramshop act for injury to her means of support; discussed *infra* notes 87-93 and accompanying text).

79 12 AM. JUR. TRIALS *Dram Shop Litigation* 729, 738 (1966).

80 States have different definitions of what constitutes an intoxicating liquor. *Compare, e.g.*, R.I. GEN. LAWS § 3-1-1 (1976) (3.2 beer is not an intoxicating liquor) *with* CONN. GEN. STAT. § 30-1 (1985) (3.2 beer is an intoxicating liquor).

81 A transfer may involve selling, giving, procuring, furnishing, or other means of provision. *See supra* note 58 and accompanying text.

82 The intoxication need not be the proximate cause of the injury. There need only be a causal connection between the fact of intoxication and the injury. McGough, *supra* note 23, at 454.

83 Most dramshop acts require that the furnishing of liquor be unlawful. *See, e.g.*, ALA. CODE § 6-5-71 (1975); N.D. CENT. CODE § 5-01-06 (Supp. 1983); VT. STAT. ANN. tit. 7, § 501 (1972). *But see* ILL. REV. STAT. ch. 43, § 135 (1975).

4. *Case Law Under Dramshop Acts*

a. *Dramshop Acts Held Inapplicable to Social Hosts.* With few exceptions courts have held that dramshop acts do not apply to social hosts.[84] Even when the act's language is broad enough to include social hosts, courts have confined their application to tavern owners. In denying a cause of action against social hosts, courts have reasoned that either the legislature did not intend to include the social host within the purview of the dramshop act[85] or that the act was penal in character, not remedial or compensatory.[86]

The Illinois Supreme Court, in *Cruse v. Aden,*[87] was one of the first courts to refuse to extend liability under a dramshop act to a social host. In *Cruse* the decedent became intoxicated and suffered fatal injuries when he was thrown from his horse after consuming two drinks. The lower court found that the defendant had given the decedent liquor out of "courtesy and politeness, and not for any pay, profit, benefit, or advantage."[88] The decedent's wife sued the defendant under the dramshop act to recover damages for injury to her means of support.[89] The Illinois Supreme Court noted that it was not a tort at common law to sell or give intoxicating liquor to a strong and able-bodied man; hence, the dramshop act necessarily provided the only possible cause of action.[90] Despite the broad language in the act,[91] the court denied the plaintiff's claim by reading the statute in light of the whole act. The court stated that "[b]oth the general title, 'Dram-Shops,' and the title of the act itself, indicate . . . the statute [was] aimed at dram-shops, and at those who are engaged . . . in the liquor traffic."[92] The court reasoned further that despite the language providing a cause of action against "any persons selling or giving" intoxicating liquors, the courts are not confined to the literal meaning of the words, but may enlarge or

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84 *See infra* notes 87-101 and accompanying text. For the four cases in which state courts have applied dramshop acts to social hosts, see *infra* notes 102-26 and accompanying text.

85 *See infra* notes 87-93, 100-01 and accompanying text.

86 *See infra* notes 94-99 and accompanying text.

87 127 Ill. 231, 20 N.E. 73 (1889).

88 *Id.* at 233, 20 N.E. at 74.

89 *Id.* at 232, 20 N.E. at 73.

90 *Id.* at 234, 20 N.E. at 74-75.

91 The act provided in part:

> [E]very . . . person . . . injured in person or property or means of support by an intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action . . . against any person . . . who shall, by selling *or giving* intoxicating liquors, have caused the intoxication . . . .

Id. at 235, 20 N.E. at 75; Dram-Shops Act § 9, ILL. REV. STAT. ch. 43, § 9 (1874).

92 127 Ill. at 236, 20 N.E. at 75. The title of the act read: "An act to provide for the licensing of and against the evils arising from the sale of intoxicating liquors."

restrict them according to the true intent of the act.[93]

In a more recent Illinois case, *Miller v. Owens-Illinois Glass Co.*,[94] an appellate court again denied a right of action against a social host under the dramshop act.[95] In *Miller*, the plaintiffs suffered injuries when struck by an automobile driven by an employee of the defendant. The driver had attended a company picnic on the defendant's premises. A second defendant sponsored the picnic.[96] The driver had been served alcoholic beverages at the picnic and was intoxicated at the time of the accident.[97] Neither defendant was engaged in the liquor business nor licensed to do business as a liquor dealer.[98]

The *Miller* court, unlike the court in *Cruse*, did not rely solely upon legislative intent to deny a cause of action against the social host. Instead, the court noted that although the act was remedial in purpose, the Illinois courts had held it to be penal in character, therefore requiring a strict construction of the act's language.[99] Accordingly, the absence of explicit statutory reference to social hosts controlled, and the court denied the plaintiffs' cause of action. To bolster its conclusion, the court, without discussing the legislative history or other evidence of legislative intent, stated, "This court does not believe that the legislature ever intended to enact a law that makes social drinking . . . and the giving of drinks . . . to another, such conduct as to render the giver or host liable under the Dram Shop Act."[100] The court held that the act applies only to the business of purveying alcoholic liquors for profit and dismissed as

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93 *Id.* at 239, 20 N.E. at 77 (quoting Castner v. Walrod, 83 Ill. 171 (1876)). Other courts have similarly relied on legislative intent to deny a cause of action against a social host under a dramshop act. *See, e.g.*, DeLoach v. Mayer Elec. Supply Co., 378 So. 2d 733, 734 (Ala. 1979) (requirement of prohibited sale not satisfied when employee, who attended open house hosted by employer, could be called into service by employer to help at open house); LeGault v. Klebba, 7 Mich. App. 640, 643, 152 N.W.2d 712, 713 (1967) (strict construction indicates that legislature intended dramshop act to cover only licensees); Kohler v. Wray, 114 Misc. 2d 856, 858, 452 N.Y.S.2d 831, 833 (Sup. Ct. 1982) (Dramshop act requirement of a prohibited sale not met when social hosts requested to "chip in" to buy beer because no pecuniary gain expected). *But cf.* Guitar v. Bieniek, 68 Mich. App. 82, 85-86, 238 N.W.2d 205, 206-07 (1975) (criticizing *LeGault* and applying liberal construction of act to reach rental hall that had charged for setting up keg of beer).

94 48 Ill. App. 2d 412, 199 N.E.2d 300 (1964).

95 *Id.* at 423-24, 199 N.E.2d at 306.

96 The second defendant was a voluntary organization of the first defendant's employees. *Id.* at 413-14, 199 N.E.2d at 301.

97 *Id.*

98 *Id.* at 418, 199 N.E.2d at 301-02.

99 *Id.* at 420, 199 N.E.2d at 305; *see also* Camille v. Berry Fertilizers, Inc., 30 Ill. App. 3d 1050, 1053, 334 N.E.2d 205, 207 (1975) (dramshop act is penal in character and must be strictly construed); *cf.* LeGault v. Klebba, 7 Mich. App. 640, 643, 152 N.W.2d 712, 713 (1967) (although dramshop act is remedial, it will be strictly construed).

100 48 Ill. App. 2d at 423, 199 N.E.2d at 306.

"far fetched" any contention that the defendants had a pecuniary interest in the picnic.[101]

b. *Dramshop Acts Held Applicable to Social Hosts.* Courts in Iowa and Minnesota have interpreted their dramshop acts to allow an injured party to maintain a cause of action against a furnisher not engaged in the liquor business.[102] Following the decisions, both the Iowa and Minnesota legislatures amended their dramshop acts to bar a right of action against a nonlicensee.[103] Despite the legislative nullification of these cases, an analysis of the Iowa and Minnesota courts' rationale will illustrate how dramshop acts can be applied to nonlicensees.

In *Williams v. Klemesrud*[104] the Iowa Supreme Court upheld a right of action under the Iowa dramshop act against a defendant not engaged in the liquor business. The defendant had purchased vodka for a minor friend[105] who consumed the liquor, became intoxicated, and crashed his automobile into another vehicle, causing the plaintiff's injuries.[106]

The court based its decision on the Iowa dramshop act which at that time provided:

> Every . . . person who shall be injured in person or property . . . by an intoxicated person . . . shall have a right of action . . . against *any person* who shall, by selling or giving to another contrary to the provisions of this title any intoxicating liquors, cause the intoxication of such person, for all damages actually sustained. . . .[107]

The court read "any person" to include the defendant,[108] rejecting the defendant's contention that "any person" was restricted to those engaged in the liquor business. Furthermore, the court held that the act was remedial or compensatory in character, not penal.[109] Consequently, the court was free to abandon a strict construction of the statute[110] and conclude that the dramshop act

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101 *Id.*; *see also* Heldt v. Brei, 118 Ill. App. 3d 798, 800, 455 N.E.2d 842, 844 (1983) (following *Miller* analysis that dramshop act is penal and must be strictly construed).

102 Williams v. Klemesrud, 197 N.W.2d 614 (Iowa 1972); Ross v. Ross, 297 Minn. 115, 200 N.W.2d 194 (1972).

103 Iowa: Liquor and Beer Control Act of 1971, IOWA CODE ANN. § 123.92 (West Supp. 1982); Minnesota: amended in 1977, MINN. STAT. ANN. § 340.95 (West Supp. 1982); *see also infra* notes 125-26 and accompanying text.

104 197 N.W.2d 614 (Iowa 1972).

105 *Id.* at 615. Defendant's friend was 20 years old, and Iowa law prohibited the provision of liquor to a person under age 21. *Id.*

106 *Id.*

107 *Id.* (quoting IOWA CODE ANN § 129.2 (West 1949) (emphasis added)).

108 *Id.*

109 *Id.* at 615-16.

110 *Id.* The *Williams* court emphasized the character of the dramshop act. If the court had determined that the act was penal in character, a strict construction would

created a right of action against the defendant.[111]

In *Ross v. Ross*[112] the Minnesota Supreme Court extended liability to a social host. The defendants illegally purchased liquor for a minor[113] whose subsequent intoxication proximately caused his death when he drove off the road.[114] The Minnesota dramshop act was similar to the Iowa statute at issue in *Williams*. The Minnesota act provided in pertinent part: "Every . . . person who is injured . . . by the intoxication of any person, has a right of action . . . against any person who, by illegally selling, bartering or giving intoxicating liquors, caused the intoxication of such person, for all damages sustained."[115] The *Ross* court found that the "[d]efendant's argument that the act was adopted as a part of the control of the sale of liquor by licensed vendors [was] not . . . supported by the evidence"[116] or by the language of the act which provided a cause of action against "any person."[117] The court concluded that "the legislature intended to create a new cause of action against every violator whether in the liquor business or not."[118]

Like the Iowa court in *Williams,*[119] the Minnesota court held that

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have precluded extending liabilty to the defendant in the absence of specific statutory language to that effect. By holding the Iowa act to be remedial or compensatory, the court was able to distinguish Miller v. Owens-Illinois Glass Co., 48 Ill.App. 2d 412, 199 N.E.2d 300 (1964), discussed *supra* notes 94-101 and accompanying text, and other Illinois cases cited by the defendant which had interpreted the Illinois dramshop act as penal in character. *Id.* at 615.

111 The court also rejected the defendant's contention that the Liquor Control Act of 1934 repealed the dramshop act. *Id.* at 616. The court stated that the dramshop act was repealed after the events complained of occurred and that the legislature had enacted a law limiting civil liability to licensees and permittees. The court stated, however, that the new law was not applicable to the case. *Id.*

112 294 Minn. 115, 200 N.W.2d 149 (1972).

113 *Id.* at 116, 200 N.W.2d at 150.

114 *Id.*

115 MINN. STAT. ANN. § 340.95 (West 1972), amended version at MINN. STAT. ANN. § 340.95 (West Supp. 1984).

116 294 Minn. at 118-19, 200 N.W.2d at 151. The court reasoned that the act was included in a chapter concerning intoxicating liquor in general and made no reference to prior provisions specifically regulating the sale of liquor. The court also stated that if the act was confined to liquor vendors, "it [seemed] likely [the dramshop act] would have been included as an amendment to the statute requiring a bond . . . or" as a section of the act initially providing for a bond by the licensee, as was done in 1858 and 1905. *Id.* at 119, 200 N.W.2d at 151.

117 *Id.* The court acknowledged that when the dramshop act was passed in 1911 the problems of drunk driving were not the menace they are today. The court stated, however, that the development of the widespread use of cars does not evidence a legislative intent not to apply the dramshop to social hosts; rather, it demonstrates only that the legislature envisaged a limited application of the act to social hosts and that this "is not a reason for . . . misapplying legislative intent 60 years later." *Id.*

118 *Id.* at 121, 200 N.W.2d at 152-53.

119 *See supra* notes 104-11 and accompanying text.

a person not engaged in liquor traffic could be sued under the state dramshop act. The *Ross* court, however, did not emphasize the remedial or compensatory character of the act and the need for a liberal construction.[120] Instead, the court based its analysis on legislative intent, stating that the search for legislative intent "is the only subject of our inquiry."[121]

The *Ross* court also noted that although its previous decisions had imposed strict liability through dramshop acts on a licensee because a licensee "can best bear the loss occasioned by a violation of law regulating the business or activity, even though the violation was unintentional or did not involve any deviation from the standard of due care,"[122] it was the legislature's prerogative to amend the act and allow a social host to plead the defense of due care.[123] Thus, until the legislature acted, social hosts who provided liquor illegally would be held to a standard of strict liability.

Both the Minnesota and Iowa dramshop acts have been amended, effectively reversing the decisions in *Ross* and *Williams*.[124] The Minnesota legislature simply omitted the word "giving" and left the injured person with a cause of action against any person who illegally sells or barters intoxicating liquors.[125] The Iowa legislature repealed its dramshop act and enacted a new one limiting the act to causes of action against licensees and permittees who give or sell intoxicating liquors.[126]

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120 The court did note, however, that it had previously construed the act as both penal and remedial and that the act was to be liberally construed. 294 Minn. at 120, 200 N.W.2d at 152.

121 *Id.* at 117, 200 N.W.2d at 150. The Minnesota Supreme Court distinguished Miller v. Owens-Illinois Glass Co., 48 Ill. App. 2d 412, 199 N.E.2d 300 (1964), discussed *supra* notes 94-101 and accompanying text, by noting that the Illinois dramshop act applied to all cases of damage resulting from intoxication and was not restricted to illegal sales. *Ross*, 294 Minn. at 121, 200 N.W.2d at 152. Minnesota's dramshop act, on the other hand, applied only to illegal sales. *Id.* The *Ross* court thus concluded that the Illinois legislature did not intend to apply its dramshop act to social hosts because to do so "would open the floodgates of litigation." *Id.* If the Minnesota act applied to all cases of damage resulting from intoxication, the court might have found a different legislative intent. *Id.*

122 294 Minn. at 120, 200 N.W.2d at 152 (citing Dahl v. Northwestern Nat. Bank, 265 Minn. 216, 220, 121 N.W.2d 321, 324 (1963)).

123 *Id.* The concurrence added that strict liability of social hosts under the dramshop act would not advance the remedial objective of the act in a suit against uninsured private individuals. *Id.* at 124-25, 200 N.W.2d at 155 (Rogosheske, J., concurring specially). Hence, only the penal objective would be advanced by applying the act to social hosts. With some prescience, the concurrence added, "[i]nevitably, attempts will now be made to amend the statute, or our construction of it, and to inject into it the element of fault or proof of negligence." *Id.* at 126, 200 N.W.2d at 155.

124 *See supra* note 103 and accompanying text.

125 *See supra* note 115 and accompanying text; MINN. STAT. ANN. § 340.95 (West Supp. 1982).

126 IOWA CODE ANN. § 123.92 (West Supp. 1982).

Thus, plaintiffs attempting to base social host liability on dramshop acts have generally been unsuccessful. Courts consistently deny recovery, reasoning either that the legislature never intended the dramshop act to apply to social hosts or that the dramshop act is penal and therefore must be strictly construed. Where courts have entertained such actions, legislatures have promptly amended the acts to extend liability only to licensees.

B. Negligence as a Basis for Social Host Liability

Plaintiffs have sought a right of action against social hosts under two negligence-based theories of liability. One theory involves a social host's violation of an alcoholic beverage control act. Plaintiffs argue that a violation of an alcoholic beverage control act constitutes negligence per se or presumptive evidence of the negligence of the social host.[127]

The second theory of social host liability rests upon principles of ordinary negligence. A plaintiff's case depends upon a showing that the social host, by furnishing intoxicating liquor to the guest, created a foreseeable and unreasonable risk of injury which actually materialized into a foreseeable injury to the plaintiff.[128] The plaintiff must also show that the social host's actions proximately caused the plaintiff's injuries.

1. *Violation of an Alcoholic Beverage Control Act as a Basis for Social Host Liability*

Social host liability may be predicated upon the violation of alcoholic beverage control acts.[129] Alcoholic beverage control acts regulate the furnishing and sale of intoxicating liquors.[130] The acts generally prohibit sales[131] or gifts[132] of intoxicating liquors to minors[133] and inebriated persons.[134] Such statutes exist in every jurisdiction,[135] and their violation generally results in a misdemeanor

127 *See infra* notes 129-206 and accompanying text.

128 *See infra* notes 207-56 and accompanying text.

129 Graham, *supra* note 68, at 562.

130 *Id.*

131 *See, e.g.*, ALA. CODE § 28-7-21 (Supp. 1984); ARK. STAT. ANN. § 48-529 (1977); D.C. CODE ANN. § 25-121 (1981).

132 *See, e.g.*, IND. CODE ANN. §§ 7.1-5-10-14, 7.1-5-10-15 (Burns 1984); IOWA CODE § 123.46 (1977); KAN. STAT. ANN. § 41-715 (1981).

133 *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 4-241, 4-244(9) (Supp. 1984); COLO. REV. STAT. § 12-47-128(1)(a) (1978); CONN. GEN. STAT. § 30-86 (1985).

134 *See, e.g.*, DEL. CODE ANN. tit. 4, § 711 (1975 & Supp. 1984); IDAHO CODE § 23-929 (1977); MD. ANN. CODE art. 2B, § 118 (1984); *see also* ALA. CODE § 28-7-21 (Supp. 1984) (bars furnishing alcohol to insane persons, habitual drunkards, and persons of known intemperate habits, as well as minors and persons visibly intoxicated); NEB. REV. STAT. § 53-180 (1978) (prohibits service of alcohol to the mentally incompetent).

135 ALA. CODE, § 28-7-21 (Supp. 1984); ALASKA STAT. §§ 04.16.030, 04.16.051

offense.[136] The rationale for these statutes is that consumption of alcohol by minors and inebriated persons poses an unacceptable risk of danger to the general public.[137]

The *Restatement (Second) of Torts* defines negligence as "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm."[138] Absent a statutory standard, the benchmark for conduct is that of a reasonable person under like circumstances.[139] Courts, however, often adopt more precise standards of conduct from relevant legislative enactments. For example, courts may look to a statute for a standard of care even though the statute does not provide a civil remedy.[140]

As was the case with dramshop actions, injured third parties or the consumers of the liquor usually bring negligence suits against

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(1980); ARIZ. REV. STAT. ANN. §§ 4-241, 4-244 (Supp. 1984); ARK. STAT. ANN., § 48-529 (1977); CAL. BUS. & PROF. CODE § 25602 (West Supp. 1984); COLO. REV. STAT. § 12-47-128 (1978 & Supp. 1984); CONN. GEN. STAT., § 30-86 (1985); DEL. CODE ANN. tit. 4, §§ 711, 713 (1975 & Supp. 1984); D.C. CODE ANN. § 25-121 (1981); FLA. STAT. ANN. § 562.11 (West Supp. 1984); GA. CODE ANN. § 5A-9901.1 (Supp. 1982); HAWAII REV. STAT. § 281-78 (1976); IDAHO CODE, § 23-929 (1977); ILL. REV. STAT. ch. 43, § 131 (1975); IND. CODE ANN. §§ 7.1-5-7-8, 7.1-5-10-14, 7.1-5-10-15 (Burns 1984); IOWA CODE § 123.46 (1977); KAN. STAT. ANN., § 41-715 (1981); KY. REV. STAT. ANN. § 244.080 (Baldwin 1984); LA. REV. STAT. ANN. § 14:91 (West 1974); ME. REV. STAT. ANN. tit. 28, § 303 (Supp. 1984); MD. ANN. CODE. art. 2B, § 118 (1984); MASS. ANN. LAWS ch. 138, §§ 34, 69 (1981 & Supp. 1984); MICH. COMP. LAWS ANN. §§ 436.29, 436.33 (1978 & Supp. 1984); MINN. STAT. ANN. § 340.73 (West 1972 & Supp. 1984); MISS. CODE ANN. §§ 67-1-81, 67-1-83 (Supp. 1984); MO. REV. STAT. § 311.310 (1978); MONT. CODE ANN. §§ 16-6-304, 16-6-305 (1983); NEB. REV. STAT. § 53-180 (1978); NEV. REV. STAT. § 202.055 (1981); N.H. REV. STAT. ANN. § 175:6 (Supp. 1983); N.J. STAT. ANN. § 33:1-77 (West Supp. 1984); N.M. STAT. ANN. § 60-7A-16 (Supp. 1981); N.Y. ALCO. BEV. CONT. LAW § 65 (McKinney 1970 & Supp. 1984); N.C. GEN. STAT. §§ 18B-302, 18B-305 (1983); N.D. CENT. CODE § 5-01-09 (1975); OHIO REV. CODE ANN. §§ 4301.22, 4301.69 (Page 1982); OKLA STAT. ANN. tit. 37, § 537 (West Supp. 1984); OR. REV. STAT. § 471.410 (1983); PA. CONS. STAT. ANN. § 4-493 (Purdon 1969 & Supp. 1984); R.I. GEN. LAWS §§ 3-8-1, 3-8-6 (Supp. 1984); S.C. CODE ANN. § 61-3-990 (Law Co-op Supp. 1983); S.D. CODIFIED LAWS ANN. § 35-4-78 (1977); TENN. CODE ANN. § 57-4-203 (Supp. 1984); TEX. ALCO. BEV. CODE ANN. §§ 101.63, 106.03 (Vernon 1978 & Supp. 1984); UTAH CODE ANN. §§ 32-7-14, 32-7-15 (1974); VT. STAT. ANN. tit. 7, § 658 (Supp. 1984); VA. CODE § 4-62 (1983); WASH. REV. CODE ANN. §§ 66.44.200, 66.44.270 (1962); W. VA. CODE § 60-3-22 (1984); WIS. STAT. ANN. § 125.07 (West Supp. 1984); WYO. STAT. § 12-6-101 (1981).

136 *See, e.g.*, CAL. BUS. & PROF. CODE § 25602 (West Supp. 1984); FLA. STAT. ANN. § 562.11 (West Supp. 1984); GA. CODE ANN. § 5A-99901.1 (Supp. 1982).

137 Graham, *supra* note 68, at 572.

138 RESTATEMENT (SECOND) OF TORTS § 282 (1965) (Negligence Defined).

139 *See infra* note 208 and accompanying text.

140 *See* RESTATEMENT (SECOND) OF TORTS § 285(c) (1965). "Even where a legislative enactment contains no express provision that its violation shall result in tort liability, and no implication to that effect, the court may . . . adopt the requirements of the enactment as the standard of conduct necessary to avoid liability for negligence." *Id.* at comment c.

Section 286 of the *Restatement* provides:

The court may adopt as the standard of conduct of a reasonable man the

furnishers of alcoholic beverages. If the third party did not contribute to his own injuries,[141] he simply must show that a cause of action arises under the beverage control act against the social host.[142] When the drinker himself is injured, however, the furnisher of liquor can usually assert a contributory or comparative negligence defense. Thus, even if the drinker succeeds in establishing a cause of action under a beverage control act,[143] a court may deny all or part of the claim.[144]

a. *Statutory Violations Applied to Licensees.* Courts more readily recognize violations of beverage control acts as a basis for negligence claims against licensees than against social hosts.[145] Much of the reasoning in the licensee cases applies to cases involving social hosts, however, and because the courts which have adopted this theory of social host liability did so relying upon licensee cases, it is useful at the outset to discuss cases involving licensee liability under a beverage control act.

Although many state courts in licensee actions have refused to adopt a beverage control act as the standard of conduct,[146] several

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requirements of a legislative enactment . . . whose *purpose* is found to be exclusively or in part

(a) to protect a *class of persons* which includes the one whose interest is invaded, and

(b) to protect the *particular interest* which is invaded, and

(c) to protect that interest against the *kind of harm* which has resulted, and

(d) to protect that interest against the *particular hazard* from which the harm results.

RESTATEMENT (SECOND) OF TORTS § 286 (1965) (emphasis added).

141 This Project focuses on the issue of social host liability for the injuries to third parties; a discussion of contributory or comparative negligence of a third party injured as a result of an intoxicated person's conduct is beyond its scope. The reader should be aware that in the case of an injured drinker who alleges that his host was negligent, questions of contributory or comparative negligence will arise.

142 For a discussion of third parties alleging a cause of action in negligence for violation of a beverage control act, see *infra* notes 145-206 and accompanying text.

143 A court, however, could conclude that a drinker may not maintain a negligence claim under a beverage control act. Then the issue of contributory or comparative negligence would not be reached. *See, e.g.*, Noonan v. Golick, 19 Conn. Supp. 308, 112 A.2d 892 (1955) (beverage control act does not protect injured drinker).

144 For example, in Schelin v. Goldberg, 188 Pa. Super. 341, 348, 146 A.2d 648, 651-52 (1958), the Superior Court of Pennsylvania held that contributory negligence could bar an injured drinker's recovery. The court, however, went on to conclude that in this case, contributory negligence could not bar recovery by the drinker because the beverage control act in question sought "to protect a class of persons from their inability to exercise self-protective care." *Id.* at 652; *see also* Soronen v. Olde Milford Inn, Inc., 46 N.J. 582, 218 A.2d 630 (1966), discussed *infra* at notes 289-95 and accompanying text. The *Schelin* and *Soronen* rationale for failing to recognize the contributory negligence defense has been extended to bar a comparative negligence defense. *See* Rhyner v. Madden, 188 N.J. Super. 544, 457 A.2d 1243 (1983).

145 *See infra* notes 148-63 and accompanying text.

146 In negligence actions against licensees, some courts have refused to adopt a bev-

jurisdictions have used such a standard.[147] In these states, licensees who violate beverage control acts are subject to liability, and the plaintiff must only prove legal cause and the absence of defenses.

In *Vesely v. Sager*,[148] for example, the California Supreme Court held that a presumption of negligence arose against the defendant licensee from the violation of section 25602 of the California Business and Professions Code.[149] In *Vesely* the defendant served a patron large quantities of alcoholic beverages knowing that the patron could not exercise the same degree of control over his consumption as the average person.[150] Moreover, the defendant knew that the patron had to drive down a steep, narrow, and winding mountain road.[151] After leaving the defendant's lodge, the patron attempted to drive down the road, veered into the opposite lane, and struck the plaintiff's car, causing personal injuries and property damage to the plaintiff.[152]

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erage control act as the standard of due care, following instead the common law rule of proximate cause. This approach requires the legislature to impose civil liability on licensees through dramshop acts before plaintiffs may proceed with a negligence action. These courts have justified their holdings on the following grounds: (1) at common law, the consumption of liquor, rather than its sale, proximately causes any harm; *e.g.*, Meade v. Freeman, 93 Idaho 389, 462 P.2d 54 (1969); Yoscovitch v. Wasson, 98 Nev. 250, 645 P.2d 975 (1982); Griffin v. Sebeck, 90 S.D. 692, 245 N.W.2d 481 (1976); (2) the legislature did not intend to impose civil liability on tavern owners through the beverage control act in question; *e.g.*, Meade v. Freeman, 93 Idaho 389, 462 P.2d 54 (1969); Holmes v. Circo, 196 Neb. 496, 244 N.W.2d 65 (1976); Hamm v. Carson City Nugget, Inc., 85 Nev. 99, 450 P.2d 358 (1969); Griffin v. Sebeck, 90 S.D. 692, 245 N.W.2d 481 (1976); (3) the extension of liability to tavern owners would create a flood of litigation; *e.g.*, Hamm v. Carson City Nugget, Inc., 85 Nev. 99, 450 P.2d 358 (1969); (4) in jurisdictions with a dramshop act, some courts have concluded that the dramshop act is the exclusive remedy; *e.g.*, Busser v. Noble, 22 Ill. App. 2d 433, 161 N.E.2d 150 (1959); Rowan v. Southland Corp., 90 Mich. App. 61, 282 N.W.2d 243 (1979); Fitzer v. Bloom, 253 N.W.2d 395 (Minn. 1977); and (5) it is the province of the legislature to impose civil liability on furnishers of alcohol; *e.g.*, Alsup v. Garvin-Wienke, Inc., 579 F.2d 461 (8th Cir. 1978) (applying Missouri law); Meade v. Freeman, 93 Idaho 389, 462 P.2d 54 (1969); Holmes v. Circo, 196 Neb. 496, 244 N.W.2d 65 (1976); Yoscovitch v. Wasson, 98 Nev. 250, 645 P.2d 975 (1982); Griffin v. Sebeck, 90 S.D. 692, 245 N.W.2d 481 (1976).

147 *See infra* notes 148-63 and accompanying text. For a discussion of Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959), a leading case on the application of a beverage control act against a licensee in a negligence action, see *infra* notes 273-88 and accompanying text.

148 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971). The California legislature explicitly abrogated the *Vesely* decision in 1978; *see infra* notes 200-01 and accompanying text.

149 *Id.* at 165, 486 P.2d at 159-60, 95 Cal. Rptr. at 631-32. Section 25602 stated: "Every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any habitual or common drunkard or to any obviously intoxicated person is guilty of a misdemeanor." CAL. BUS. & PROF. CODE § 25602 (West 1964) (amended at CAL. BUS. & PROF. CODE § 25602 (West Supp. 1984)).

150 5 Cal. 3d at 157-58, 486 P.2d at 154, 95 Cal. Rptr. at 626.

151 *Id.*

152 *Id.*

The plaintiff brought a negligence action against the licensee.[153] The California Supreme Court rested its decision on two grounds. First, the court concluded that the common law rule of proximate cause was unsound because the intervening causes of the injury, consumption of the liquor, resulting intoxication, and driving down the mountain road, were reasonably foreseeable at the time of the defendant's conduct.[154] The court reasoned that it should not invoke strict rules of proximate cause in cases involving the furnishing of alcohol.[155] Second, the court held that under California evidence law, the violation of a statute raises a presumption of negligence.[156] Thus, in the court's view, the central question was whether the licensee, because of a criminal statute, owed a duty of care to the plaintiff.[157] The court concluded that section 25602 did impose such a duty of care upon the licensee because one of the legislative purposes in enacting the statute was to protect the people of the state.[158] Hence, the plaintiff only needed to establish that he was "within the class of persons" section 25602 sought to protect and that his injuries "resulted from an occurrence that the statute was designed to prevent."[159]

Most courts adopting a beverage control act as the standard of due care agree with the *Vesely* rationale that the common law rule of proximate cause is unsound[160] and that a beverage control act should be adopted as the standard of due care because the legislature intended the act to protect the public.[161] Courts also reason

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153 *Id.* at 153, 486 P.2d at 151, 95 Cal. Rptr. at 623.

154 *Id.* at 163-64, 486 P.2d at 158-59, 95 Cal. Rptr. at 630-31.

155 *Id.* at 163, 486 P.2d at 158, 95 Cal. Rptr. at 630.

156 *Id.* at 165, 486 P.2d at 159-60, 95 Cal. Rptr. at 631-32. Section 669 of the California Evidence Code stated in pertinent part:

> The failure of a person to exercise due care is presumed if:
> (1) He violated a statute, ordinance, or regulation of a public entity;
> (2) The violation proximately caused death or injury to person or property;
> (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and
> (4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

CAL. EVID. CODE § 669 (West 1964) (amended version at CAL. EVID. CODE § 669 (West Supp. 1985)).

157 5 Cal. 3d at 164, 486 P.2d at 259, 95 Cal. Rptr. at 631.

158 *Id.* at 165, 486 P.2d at 159, 95 Cal. Rptr. at 631.

159 *Id.*, 486 P.2d at 159-60, 95 Cal. Rptr. at 631-32.

160 *See, e.g.*, Waynick v. Chicago's Last Dep't Store, 269 F.2d 322 (7th Cir. 1959); Elder v. Fisher, 247 Ind. 598, 217 N.E.2d 847 (1966); Trail v. Christian, 298 Minn. 101, 213 N.W.2d 618 (1973); Berkeley v. Park, 47 Misc. 2d 381, 262 N.Y.S.2d 290 (Sup. Ct. 1965).

161 *See, e.g.*, Marusa v. District of Columbia, 484 F.2d 828 (D.C. Cir. 1973); Waynick v. Chicago's Last Dep't Store, 269 F.2d 322 (7th Cir. 1959); Nazareno v. Urie, 638 P.2d

that civil liability will encourage the licensee to monitor the intoxication level of patrons, thereby reducing the crime and injury traceable to alcohol abuse,[162] or that it is not unfair to hold a licensee liable when the licensee has the privilege of operating an establishment for profit.[163]

b. *Statutory Violations Applied to Social Hosts.* In cases involving social hosts, courts have been reluctant to adopt a beverage control act as the standard of due care.[164] In these states, a third party cannot maintain a cause of action based on negligence against a social host. For example, in *Manning v. Andy,*[165] the Pennsylvania Supreme Court refused to hold a social host liable for a third party's injuries.[166] Acknowledging that a Pennsylvania licensee who violated a beverage control act might be liable for a third party's injuries,[167] the court nevertheless refused to extend such liability to the defendant social host. The opinion stated that courts should not impose civil liability on persons who gratuitously furnish alcohol.[168]

The lack of remuneration to the social host is one of several reasons why courts refuse to impose liability on social hosts. In *Chastain v. Litton Systems, Inc.,*[169] the District Court for the Western District of North Carolina held that in the absence of a controlling North Carolina statute or case, the common law rule of proximate cause shields the social host from liability.[170] The court reasoned that the statutes which specify where alcoholic beverages may legally be furnished could not be extended to social hosts.[171]

The Oregon Supreme Court has also held a beverage control act inapplicable to a negligence claim against a social host.[172] The court reasoned that the Oregon beverage control act at issue sought

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671 (Alaska 1981); Alesna v. LeGrue, 614 P.2d 1387 (Alaska 1980); Elder v. Fisher, 247 Ind. 598, 217 N.E.2d 847 (1966); Trail v. Christian, 298 Minn. 101, 213 N.W.2d 618 (1973); Berkeley v. Park, 47 Misc. 2d 381, 262 N.Y.S.2d 290 (Sup. Ct. 1965).

162 *See, e.g.,* Marusa v. District of Columbia, 484 F.2d 828 (D.C. Cir. 1973); Alesna v. LeGrue, 614 P.2d 1387 (Alaska 1980).

163 *See, e.g.,* Alesna v. LeGrue, 614 P.2d 1387 (Alaska 1980).

164 *See infra* notes 165-77 and accompanying text.

165 454 Pa. 237, 310 A.2d 75 (1973).

166 *Id.* at 239, 310 A.2d at 76.

167 *Id.*

168 *Id. See also* Runge v. Watts, 180 Mont. 91, 94, 589 P.2d 145, 147 (1979) ("there has been greater justification for imposing liability on a commercial purveyor than on a social purveyor").

169 527 F. Supp. 527 (W.D.N.C. 1981).

170 *Id.* at 531; *see also* Runge v.Watts, 589 P.2d 145 (Mont. 1979).

171 527 F. Supp. at 531.

172 Wiener v. Gamma Phi Chapter of Alpha Tau Omega Frat., 258 Or. 632, 485 P.2d 18 (1971). The beverage control act provided that "no one other than . . . parent or guardian shall . . . give or otherwise make available any alcoholic liquor to a person under the age of 21 years." OR. REV. STAT. § 471.410(2) (amended version at OR. REV. STAT. § 47.410 (1983)).

to protect minors from the vice of alcoholic beverages, not third parties from injury resulting from the acts of intoxicated minors.[173] Hence, the court refused to adopt the beverage control act as a basis for the host's liability because the plaintiff was not a member of the class protected by the statute, the plaintiff's particular interest was not of the type protected by the act, the plaintiff's injury was not of the type the statute sought to prevent, and the particular hazard from which the plaintiff's harm resulted was not the type of hazard the act sought to prevent.[174]

In another case, *Hulse v. Driver*,[175] the Court of Appeals of Washington refused to adopt a statutory prohibition against serving alcohol to minors as a basis for social host liability to an injured third party.[176] The court stated that the issue of the civil liability of social hosts raises policy questions that the legislature should answer " 'after full investigation, debate and examination of the relative merits of the conflicting positions.' "[177]

Despite judicial reluctance to impose civil liability on social hosts, a minority of states have abrogated the common law rule and adopted a beverage control act as the standard of due care.[178] Courts in these states have predicated social host liablity on the premise that the legislature, in enacting a beverage control act, intended to protect the general public.

In *Brattain v. Herron*[179] the defendant social host furnished alcoholic beverages to her minor brother and his friend. After an afternoon of drinking, the two visitors left to drive home. En route the defendant's brother collided with a pick-up truck, killing all three of its passengers.[180]

The plaintiffs sued the social host, alleging that the violation of an Indiana beverage control act which prohibited furnishing liquor to minors constituted negligence per se and served as a basis for civil liability.[181] After a jury verdict in favor of the three plaintiffs,

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173 258 Or. at 638, 485 P.2d at 21.

174 *See supra* note 140.

175 11 Wash. App. 509, 524 P.2d 255 (1974).

176 *Id.* at 513-14, 524 P.2d at 257-58.

177 *Id.* (quoting Halvorson v. Birchfield Boiler, Inc., 76 Wash. 2d 759, 765, 458 P.2d 897, 900 (1969)) (emphasis omitted); *see also* Runge v. Watts, 589 P.2d 145 (Mont. 1979).

178 *See infra* notes 179-205 and accompanying text.

179 159 Ind. App. 663, 309 N.E.2d 150 (1974).

180 *Id.* at 665-66, 309 N.E.2d at 152.

181 *Id.* at 671-72, 309 N.E.2d at 155. The act read in part:

> 12-600. Minors; Habitual drunkards; Houses of ill fame; Sales prohibited.
>
> No alcoholic beverages shall be sold, bartered, exchanged, given, provided or furnished, to any person under the age of twenty-one

the defendant social host appealed.[182]

In affirming the trial court, the appellate court followed the rationale of the Indiana Supreme Court in *Elder v. Fisher*,[183] a case involving the same beverage control act, but there applied to a licensee.[184] The *Brattain* court, after noting that the act was not confined to vendors of liquor, extended the *Elder* decision to hold the defendant social host liable.[185] The court concluded that the common law rule of proximate cause was unsound and that proximate cause required only that the injury arise as a natural and probable result of the negligent act.[186] Moreover, the court added, the negligent act " 'need[ed] not be the only proximate cause.' "[187]

In *Coulter v. Superior Court of San Mateo County*,[188] the California Supreme Court held that section 25602 of the California Business and Professions Code provided a basis for the civil liability of a social host.[189] In *Coulter* the plaintiff suffered injuries when the car in which he was a passenger collided with a roadway abutment.[190] The

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years. . . . Any person guilty of violating this paragraph shall be punished.

IND. CODE § 7-1-1-32(10) (1971). The act has since been repealed and the section relating to the furnishing of alcoholic beverages to minors is now § 7.1-5-7-8. IND. CODE ANN. § 7.1-5-7-8 (Burns 1984).

182 159 Ind. App. at 665, 309 N.E.2d at 151.

183 247 Ind. 598, 217 N.E.2d 847 (1966); for references to *Elder*, see *supra* notes 160-61 and accompanying text.

184 247 Ind. at 603, 217 N.E.2d at 850-51. In *Elder* the Supreme Court held that the act "was desigued to protect the people of the state" and that the plaintiff was a member of that class of protected persons. *Id.* at 603, 217 N.E.2d at 850. Hence, "an allegation of the violation of this statute [was] an allegation of negligence." *Id.* at 603, 217 N.E.2d at 851.

185 159 Ind. App. at 674, 309 N.E.2d at 156. The court stated: "We see no distinction between one who sells alcoholic beverages to a minor and one who gives alcoholic beverages to a minor. The Legislature has provided that either of these actions is a violation of the statute." *Id.* Other courts, also citing a legislative intent to protect the public, have adopted beverage control acts as a basis for social host liability. *E.g.*, Thaut v. Finley, 50 Mich. App. 611, 213 N.W.2d 820 (1973); Lover v. Sampson, 44 Mich. App. 173, 204 N.W.2d 69 (1972). In *Lover*, a case involving the violation of a statute prohibiting the furnishing of liquor to minors, the court decided that because the common law rnle of proximate cause applied to "able-bodied men," the rule did not apply to cases involving minors. Thus, the court left open the possibility that the common law rule of proximate cause would still apply in negligence actions involving adults.

186 159 Ind. App. at 673-74, 309 N.E.2d at 156 (citing Elder v. Fisher, 247 Ind. at 605, 217 N.E.2d at 852).

187 *Id.* at 673, 309 N.E.2d at 156 (quoting Elder v. Fisher, 274 Ind. at 606, 217 N.E.2d at 852). For a more recent Indiana appeals court decision holding a social host liable under a state liquor dispensation law, see Ashlock v. Norris, 475 N.E.2d 1167 (Ind. App. 1985).

188 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978).

189 *Id.* at 152, 577 P.2d at 673, 145 Cal. Rptr. at 538. For the text of § 25602, see *supra* note 149.

190 21 Cal. 3d at 147, 577 P.2d at 671, 145 Cal. Rptr. at 536.

driver of the car was intoxicated at the time of the accident.[191] The plaintiff alleged that an apartment manager and the owners and operators of the apartment complex had negligently served the driver large quantities of alcoholic beverages.[192] The negligence claim was grounded upon a violation of section 25602[193] and upon principles of ordinary negligence.[194]

The court first declared the common law rule of proximate cause unsound,[195] noting that " 'it is clear that the furnishing of an alcoholic beverage to an intoxicated person may be a proximate cause of injuries inflicted by that individual upon a third person.' "[196] The court proceeded to hold that the defendant's alleged violation of section 25602 could be the basis for social host liability[197] because the legislature enacted the statute to protect the general public. The court stated that the term "every person" was intended to include social hosts and that the legislature's failure to amend the statute after the *Vesely* decision[198] indicated that the legislature intended to impose a duty of care on all furnishers of alcohol.[199]

Several months after the *Coulter* decision, the Califoruia legislature amended section 1714 of the California Civil Code and section 25602 of the California Business and Professions Code.[200] The amendments specified that the consumption, not the service, of alcoholic beverages proximately causes third party injuries.[201]

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191 *Id.* at 148, 577 P.2d at 671, 145 Cal. Rptr. at 536.

192 *Id.*

193 *See infra* notes 195-201 and accompanying text.

194 For a discussion of the ordinary negligence claim, see *infra* notes 247-56 and accompanying text.

195 21 Cal. 3d at 149, 577 P.2d at 671, 145 Cal. Rptr. at 536 (citing Vesely v. Sager, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971), discussed *supra* notes 148-59 and accompanying text).

196 *Id.* at 149, 577 P.2d at 671, 145 Cal. Rptr. at 536 (quoting Vesely v. Sager, 5 Cal. 3d at 164, 486 P.2d at 159, 95 Cal. Rptr. at 631).

197 *Id.* at 152, 577 P.2d at 673, 145 Cal. Rptr. at 538. The court noted that in *Vesely* it had expressly reserved the question whether a social host could be subject to civil liability under § 25602. *Id.* at 149, 577 P.2d at 672, 145 Cal. Rptr. at 537.

198 *See supra* text accompanying notes 148-59.

199 21 Cal. 3d at 150-52, 577 P.2d at 672-73, 145 Cal. Rptr. at 537-38.

200 CAL. CIV. CODE § 1714(b) (West 1985) (responsibility for wilful acts and negligence; contributory negligence). Subsection (b) declared that the holdings in Vesely v. Sager, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971), discussed *supra* at notes 148-59 and accompanying text; Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215, *cert. denied*, 429 U.S. 859 (1976), cited *infra* at notes 252-53 and accompanying text; and *Coulter*, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978), were abrogated in favor of the common law rule of proximate cause.

CAL. BUS. & PROF. CODE § 25602(c) (West Supp. 1984) (sales to drunkard or intoxicated person; offense; civil liability). Subsection (c) similarly abrogated the holdings in *Vesely*, *Bernhard*, and *Coulter*.

201 CAL. CIV. CODE § 1714(b) (West 1985); CAL. BUS. & PROF. CODE § 25602(c)

As in *Coulter*, a federal district court in *Giardina v. Solomon*[202] predicated the liability of a defendant fraternity on the Pennsylvania legislature's intent to protect third parties.[203] The court's decision, however, was a deliberate contravention of the Pennsylvania Superior Court decision in *Manning v. Andy*.[204] The federal court reasoned that the Pennsylvania Supreme Court would not adopt the lower court's holding because the Pennsylvania Supreme Court "would consider of primary importance the fact that a significant interest served by the criminal statute would also be served by imposition of civil liability. . . ."[205]

Thus a majority of courts have refused to predicate social host liability on the violation of a beverage control act, reasoning that the social host derived no profit from furnishing liquor, the consumption of liquor was a supervening cause in the chain of events leading to a third party's injuries, the legislature did not intend to apply beverage control acts to social hosts, the plaintiff was not a member of the class protected by the beverage control act, or that the legislature, not the judiciary, should impose liability on social hosts. Nevertheless, a few courts have accepted a violation of a beverage control act as a basis for social host liability.[206] They reason that because such laws are intended to protect the general public, a violation of the act is presumptive evidence of the social host's negligence.

2. *Ordinary Negligence as a Basis for Social Host Liability*

A plaintiff's claim based upon principles of ordinary negligence differs from a claim based on the violation of a beverage control act.

(West Supp. 1984). Subsequent to these amendments, in Cantor v. Anderson, 126 Cal. App. 3d 124, 178 Cal. Rptr. 540 (1981), a California appeals court stated that the amendments had returned California to the old rule of proximate cause; that is, a furnisher of alcohol could be liable to a third party only if the intoxicated person was "unable to voluntarily resist its consumption. . . ." *Id.* at 130, 178 Cal. Rptr. at 544. The person must have been deprived of will power or responsibility for his conduct when the furnisher served the alcohol. *Id.* In cases involving the voluntary consumption of alcohol, however, the consumption proximately causes any resulting injuries.

202 360 F. Supp. 262 (M.D. Pa. 1973).

203 *Id.* at 263.

204 218 Pa. Super. 902, 279 A.2d 267 (1971).

205 *Giardina*, 360 F. Supp. at 264. Contrary to the federal court's expectation, the Pennsylvania Supreme Court in Manning v. Andy, 454 Pa. 237, 310 A.2d 76 (1973), discussed *supra* at notes 165-68 and accompanying text, held that a social host could not be liable for civil damages under the beverage control act.

206 On March 20, 1985, the Iowa Supreme Court held that a trial court improperly dismissed a claim against a social host predicated on a state liquor dispensation law. Citing Kelly v. Gwinnel, 96 N.J. 538, 476 A.2d 1219 (1984), with approval, the Iowa court determined that the plaintiffs' petition was sufficient to permit the introduction of evidence on the claim. *See* Clark v. Mincks, 364 N.W.2d 226 (Iowa 1985). The state law at issue was IOWA CODE § 123.49(1) (1977).

In the latter, the beverage control act supplies the standard of due care,[207] while under ordinary negligence, the standard of conduct is that of a reasonable person under like circumstances.[208] At common law, however, the furnisher of intoxicating liquors was not liable for the harm caused by an intoxicated person.[209] The common law rule held that the voluntary consumption of intoxicating liquor by an able-bodied man was the proximate or legal cause of the plaintiff's injuries.[210] Thus, even if a furnisher of alcohol had acted negligently, the doctrine of intervening cause shielded social hosts from liability.[211]

a. *Ordinary Negligence Applied to Licensees.* Recognizing that the furnisher of alcohol may act negligently, and that only the common law rule of intervening cause barred a cause of action in negligence, some courts have abrogated the common law rule and held that the furnishing of alcohol may be the legal cause of harm. In *Colligan v. Cousar,*[212] one of the earliest of such cases, an intoxicated driver struck and injured the plaintiff pedestrian in Indiana.[213] The defendant operated a taveru in Illinois and had allegedly served liquor to both occupants of the automobile.[214] The plaintiff brought suit in Illinois on two counts, the first based on the Illinois dramshop act and the second based on principles of ordinary negligence.[215]

The principle of extraterritoriality prevented the court from applying the Illinois dramshop act to a claim arising in Indiana.[216] Indiana law also controlled the negligence count.[217] However, because Indiana common law had no authoritative statements on the maintenance of a negligence claim against a tavern owner, the court resorted to Illinois law. It concluded that if Illinois had not enacted a dramshop act, Illinois common law would have allowed a cause of action based on principles of negligence against a tavern owner.[218] The court justified its result by noting, "We must pre-

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207 *See supra* notes 129-40 and accompanying text.

208 RESTATEMENT (SECOND) OF TORTS § 283 (1964) ("Conduct of a Reasonable Man: The Standard").

209 *See supra* note 24 and accompanying text.

210 *Id.*

211 *See* RESTATEMENT (SECOND) OF TORTS § 281(c) (1964).

212 38 Ill. App. 2d 392, 187 N.E.2d 292 (1963).

213 *Id.* at 395, 187 N.E.2d at 293.

214 *Id.*

215 *Id.* at 394-95, 187 N.E.2d at 293. The court stated that negligence could properly be based on either the violation of the beverage control act or "without considering the statute, on a duty imposed on every person not to do an act the consequences of which were known to him or could reasonably be anticipated, and which resulted in harm to another." *Id.* at 401, 187 N.E.2d at 296.

216 *Id.* at 396-400, 187 N.E.2d at 294-96.

217 Indiana applied *lex loci delecti. Id.* at 401, 187 N.E.2d at 296.

218 *Id.* at 414, 187 N.E.2d at 302.

sume that the common law of Indiana . . . was the same as the common law of Illinios."[219]

The court stated that the negligent furnishing of alcohol to an intoxicated person can be the legal cause of an injury suffered by a third person.[220] The court restated its definition of legal cause:

> The injury must be the natural and probable result of the negligent act or omission and be of such a character as an ordinarily prudent person ought to have foreseen as likely to occur as a result of the negligence, although it is not essential that the person charged with negligence should have foreseen the precise injury which resulted from his act.[221]

The court held that when a tavern owner serves alcohol to an intoxicated person with knowledge that he is likely to drive an automobile, injuries to a pedestrian are reasonably foreseeable.[222] Hence, if the tavern owners acted as the complaint alleged, their negligent conduct would be the legal cause of the injury, and the plaintiff could maintain a cause of action in negligence.[223]

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219 *Id.*

220 *Id.*

221 *Id.* at 413, 187 N.E.2d at 302 (quoting Neering v. Illinois Cent. R.R., 383 Ill. 366, 380, 50 N.E.2d 497, 503 (1943)).

222 *Id.* at 414, 187 N.E.2d at 302.

223 *Id.* For other cases holding that the conduct of a negligent licensee could be the legal cause of injuries arising from an intoxicated person's conduct, see Nazareno v. Urie, 638 P.2d 671 (Alaska 1981); Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215, *cert. denied,* 429 U.S. 859 (1976); Alegria v. Payonk, 101 Idaho 617, 619 P.2d 135 (1980); Blamey v. Brown, 270 N.W.2d 884 (Minn. 1978) (dramshop act inapplicable because no illegal sale, but ordinary negligence claim may be maintained against licensee).

The common law rule that service of alcohol by a taveru owner is not the legal cause of a plaintiff's injuries, however, continues to be the rule in a number of states. *See, e.g.,* Alsup v. Garvin-Wienke, Inc., 579 F.2d 461 (8th Cir. 1978) (applying Missouri law); Profitt v. Canez, 118 Ariz. 235, 575 P.2d 1261 (1977); Marchiondo v. Roper, 90 N.M. 367, 563 P.2d 1160 (1977). Tavern owners in these states are free from liability for injuries their intoxicated patrons cause unless there is a dramshop act expressly creating such liability. *See supra* notes 45-56 and accompanying text. The judicial reluctance to apply principles of ordinary negligence to tavern owners has been justified on several grounds, including: (1) at common law, the consumption of liquor, rather than its sale, was the proximate cause of injuries arising from an intoxicated person's conduct, *e.g.,* Alsup v. Garvin-Wienke, Inc., 579 F.2d 461, 463 (8th Cir. 1978) (applying Missouri law); Pratt v. Daly, 55 Ariz. 535, 538, 104 P.2d 147, 148 (1940); Holmes v. Circo, 196 Neb. 496, 501, 244 N.W.2d 65, 68 (1976); Parsons v. Jow, 480 P.2d 296, 397 (Wyo. 1971); (2) the extension of liability to tavern owners is a legislative concern, *e.g.,* Profitt v. Canez, 118 Ariz. 235, 236, 575 P.2d 1261, 1262 (1977); Holmes v. Circo, 196 Neb. 496, 505, 244 N.W.2d 65, 70 (1976); Marchiondo v. Roper, 90 N.M. 367, 368-69, 563 P.2d 1160, 1161-62 (1977); Griffin v. Sebeck, 245 N.W.2d 481, 486 (S.D. 1976); Parsons v. Jow, 480 P.2d 396, 397-98 (Wyo. 1971); (3) the extension of liability to tavern owners is against public policy, *e.g.,* Alsup v. Garvin-Wienke, Inc., 579 F.2d 461 (8th Cir. 1978); and (4) in jurisdictions with dramshop acts, some courts have stated that the dramshop act is the exclusive remedy, *e.g.,* Rowan v. Southland Corp., 90 Mich. App. 61, 68-69, 282 N.W.2d 243, 246 (1979).

b. *Ordinary Negligence Applied to Social Hosts.* As in the cases involving licensees, many states adhere to the common law rule that the gratuitous furnishing of alcohol is not the legal cause of a plaintiff's injuries.[224] The judicial hesitancy to apply principles of ordinary negligence to the social host is attributable to several factors. For example, in *Runge v. Watts*[225] the Supreme Court of Montana affirmed the dismissal of a negligence claim against the defendant social host because a social host, unlike a commercial vendor, lacks pecuniary motives and because a commercial vendor can more easily monitor patrons' level of intoxication.[226] Moreover, the court stated that a judicial extension of civil liability to purveyors of alcohol, especially social hosts, "would infringe upon a matter more appropriately within the province of the legislature."[227] The court, therefore, concluded that the minor driver's excessive drinking, rather than the provision of alcohol, proximately caused the accident.[228]

The courts of Oregon and California,[229] however, have not been reluctant to apply principles of ordinary negligence to the social host. The highest court in both states has rejected the common law rule that the voluntary consumption of alcohol proximately causes any injuries resulting to third parties.

The first case to hold a social host liable under a theory of ordi-

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224 *See infra* notes 225-29 and accompanying text.

225 180 Mont. 91, 589 P.2d 145 (1979).

226 *Id.* at 93, 589 P.2d at 147; *see also* Miller v. Moran, 96 Ill. App. 3d 596, 421 N.E.2d 1046 (1981); Klein v. Raysinger, 504 Pa. 141, 470 A.2d 507, 510-11 (1983) (consumption, not furnishing, of alcohol is proximate cause of injuries). *But see* Kelly v. Gwinnell, 96 N.J. 538, 548, 476 A.2d 1219, 1224 (1984) ("liability proceeds from the duty of care that accompanies control of the liquor supply" and not from the motive for providing the liquor).

227 180 Mont. at 93, 589 P.2d at 147. Montana did not have a dramshop act extending liability to licensees. *Id.* Given the court's holding that a greater justification exists for imposing liability on licensees, the absence of a dramshop act imposing such licensee liability helps explain the court's reluctance to impose liability on social hosts. *See also* Cartwright v. Hyatt Corp., 460 F. Supp. 80, 81-82 (D.D.C. 1978); Halvorson v. Birchfield Broiler, Inc., 76 Wash. 2d 759, 765, 458 P.2d 897, 900 (1969) ("such a policy decision should be made by the legislature after full investigation, debate and examination of the relative merits of the conflicting positions"). *But see* Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984), discussed *infra* Section II.

228 180 Mont. at 93, 589 P.2d at 147. The court did note that a cause of action could be brought against a furnisher of alcohol if " 'the person to whom the liquor was sold or given was in such a state of helplessness . . . as to be deprived of his willpower or responsibility for his behavior.' " *Id.* at 93, 589 P.2d at 146-47 (quoting 45 AM. JUR. 2d INTOXICATING LIQUORS § 554 (1969)). *E.g.*, LeGault v. Klebba, 7 Mich. App. 640, 152 N.W.2d 712 (1967); Kohler v. Wray, 114 Misc. 2d 856, 452 N.Y.S.2d 831 (Sup. Ct. 1982); Tarwater v. Atlantic Co., 176 Tenn. 510, 144 S.W.2d 746 (1940); Halvorson v. Birchfield Boiler, Inc., 76 Wash. 2d 759, 458 P.2d 897 (1969).

229 For a discussion of New Jersey cases applying ordinary negligence to social hosts, see *infra* notes 307-17 and accompanying text.

nary negligence was *Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity*.[230] In *Weiner* the defendant Alpha Tau Omega hosted a fraternity party at the University of Oregon.[231] The plaintiff attended the party and later departed in an automobile driven by a minor who had also attended the party. The minor driver crashed into a building, injuring the plaintiff.[232]

The plaintiff sued the fraternity member who had arranged for the purchase and provision of alcoholic beverages at the party, the owners and operators of the ranch where the party was held, the fraternity, and the chapter of the fraternity.[233] The plaintiff predicated the fraternity member's liability on two grounds, common law negligence[234] and the violation of the Oregon alcoholic beverage control act.[235]

Although the court refused to hold the fraternity member liable under principles of ordinary negligence, it explicitly rejected the rule that furuishing alcohol in a social setting can never give rise to social host liability.[236] The court explained that liability should not extend to one who merely supplies, but does not serve, the liquor, "even where the one supplying the alcohol might have reason to believe that the host is likely to make an unwise choice in dispensing it to others."[237] Thus, although the defendant may have acted unreasonably under the circumstances, the court held that a person must have direct control over the decision to serve alcohol before liability for injuries inflicted by inebriated guests may attach.[238]

The court also dismissed the claims against the owners and operators of the ranch because these defendants had merely provided the premises for the party.[239] The court refused to impose a duty

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230 258 Or. 632, 485 P.2d 18 (1971) (discussed *supra* notes 172-74 and accompanying text).

231 *Id.* at 636, 485 P.2d at 20.

232 *Id.* at 636-37, 485 P.2d at 20.

233 *Id.* at 635-36, 485 P.2d at 19-20. The trial court had quashed the service of summons on the individual chapter of the fraternity. The appellate court, having recently held that such an order is unappealable, dismissed plaintiff's appeal as to the fraternity chapter and proceeded on the appeal against the remaining defendants. *Id.* at 643-44, 485 P.2d at 23.

234 *Id.* at 638, 485 P.2d at 21. The court noted that none of the defendants could be liable under the Oregon dramshop act which allowed a cause of action only by a wife, husband, parent, or child of an intoxicated person or habitual drunkard. *Id.* at 638 n.2, 485 P.2d at 21 n.2 (citing OR. REV. STAT. § 30.730). The Oregon dramshop act was repealed in 1979. OR. REV. STAT. § 30.730 (1983).

235 258 Or. at 643-44, 485 P.2d at 23-34 (discussed *supra* notes 172-74 and accompanying text).

236 *Id.* at 639-40, 485 P.2d at 21-22.

237 *Id.* at 640, 485 P.2d at 22.

238 *Id.*

239 *Id.* at 641, 485 P.2d at 22.

on them to protect guests or third parties[240] or to supervise the party.[241]

As to the defendant fraternity the court held that the plaintiff had stated a cause of action under common law negligence.[242] After first acknowledging that ordinarily a social host is not liable for a third party's injuries resulting from a guest's intoxication, the court stated that "[t]here might be circumstances in which the host would have a duty to deny his guest further access to alcohol."[243] For example, if the host serves an individual especially likely to act unreasonably, liability could ensue.[244] The court explained that in this case the driver's status as a minor coupled with the allegation that the fraternity should have known the minor would have to drive home could demonstrate that the fraternity's behavior was unreasonable.[245] According to the court, the fraternity's status as a host and direct dispenser of alcohol created a duty to refuse to serve alcohol to any guest whose circumstances would render service unreasonable.[246]

The California Supreme Court in *Coulter v. Superior Court of San Mateo County*[247] similarly held that a plaintiff may bring an action against a social host based on principles of ordinary negligence. In *Coulter* the plaintiff sued an apartment manager and the owners and operators of the apartment complex,[248] alleging that the defendants had negligently served alcoholic beverages to the driver of the car in which the plaintiff was a passenger.[249] In addition, the plaintiff alleged a violation of section 25602 of the California Business and

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240 *Id.*

241 *Id.*

242 *Id.* at 643, 485 P.2d at 23.

243 *Id.* at 639, 485 P.2d at 21.

244 *Id.* The court noted that persons likely to act unreasonably included those already severely intoxicated, those the host knew were unusually affected by alcohol, and minors. *Id.*

245 *Id.* at 643, 485 P.2d at 23.

246 *Id.* In 1979 the Oregon legislature limited the *Wiener* holding by defining the circumstances that will trigger social host liability. Section 30.955 provides that a social host may be liable for a guest's injurious acts if the host provided alcoholic beverages when the guest was visibly intoxicated. OR. REV. STAT. § 30.955 (1983). Section 30.960 provides that a social host may be liable for damages caused by a minor on a showing that he failed to request identification or should have determined that the identification was altered and did not accurately describe the person served the alcohol. OR. REV. STAT. § 30.960 (1983).

247 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978). The California legislature expressly abrogated *Coulter* when it amended § 1714 of the Civil Code and § 25602 of the Business & Professions Code. *See supra* note 200.

248 *Id.* at 148, 577 P.2d at 671, 145 Cal. Rptr. at 536.

249 *Id.*

Professions Code.[250]

The court concluded that the furnishing of alcoholic beverages may be the proximate cause of injuries to third parties.[251] Addressing the issue of the negligence of the social host, the court extended an earlier holding[252] that a licensee may be liable to third parties for injuries resulting from an intoxicated patron's conduct.[253] The court emphasized the foreseeability of injuries to third parties,[254] noting that the service of alcohol to an obviously intoxicated guest who the social host knows will be driving constitutes a "fail[ure] to exercise reasonable care."[255] The court believed that reducing "potential . . . human suffering which attends the presence on the highways of intoxicated drivers" justified the imposition of civil liability on social hosts, despite its tempering effect on "the spirit of conviviality at some social occasions."[256]

In sum, courts that have applied principles of ordinary negligence to social hosts emphasize the foreseeability of the events leading to a third party's injuries. The consumption of liquor resulting in intoxication and the guest's driving while intoxicated are all reasonably foreseeable at the time of the social host's furnishing of the liquor. In arguing that these intervening causes are reasonably foreseeable, courts have effectively abrogated the common law rnle that the consumption of liquor is a supervening cause of a third party's injuries. More recently, in *Kelly v. Gwinnell,*[257] the New Jersey Supreme Court held that principles of ordinary negligence create social host liability for injuries to a third party resulting from an intoxicated guest's behavior.[258]

II

RECENT DEVELOPMENT—*KELLY V. GWINNELL*

In *Kelly v. Gwinnell,*[259] the Supreme Court of New Jersey held that a social host who directly serves liquor to an adult social guest,

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250 For a discussion of the negligence claim based on a statutory violation and the legislative response, see *supra* notes 188-201 and accompanying text.

251 21 Cal. 3d at 149, 577 P.2d at 671, 145 Cal. Rptr. at 536 (citing Vesely v. Sager, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971), discussed *supra* notes 148-59 and accompanying text).

252 Bernard v. Harrah's Club, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215, *cert. denied,* 429 U.S. 859 (1976).

253 *Id.* The *Bernard* decision extended the *Vesely* decision which held a California licensee liable in a negligence action for violation of § 25602 of the California Business and Professions Code.

254 21 Cal. 3d at 152-53, 577 P.2d at 674, 145 Cal. Rptr. at 539.

255 *Id.* at 153, 577 P.2d at 674, 145 Cal. Rptr. at 539.

256 *Id.* at 154, 577 P.2d at 675, 145 Cal. Rptr. at 540.

257 96 N.J. 538, 476 A.2d 1219 (1984).

258 *See infra* notes 325-448 and accompanying text.

259 96 N.J. 538, 476 A.2d 1219 (1984).

when he knows that the guest is intoxicated and will soon be driving, is liable for injuries to third parties which result from the guest's operation of a motor vehicle while intoxicated.[260] The decision is significant for several reasons. First, in an apparent attempt to restrict potential liability, the court articulated a number of prerequisites to liability. Such an approach is unusual in a case based solely on common law negligence grounds.[261] Second, the court expressly left open the possibility of extending liability to social hosts in other circumstances.[262] Finally, the decision made New Jersey the only state to impose social host liability solely on common law negligence grounds.[263] The court's action also raises questions about the propriety of judicial, rather than legislative, imposition of liability.

This section traces the common law development of social host liability in New Jersey. It then examines the approach of the *Kelly* court, focusing on the court's prerequisites to imposing liability. The section concludes that although these factors provide certainty and guidance for a social host's behavior, the opinion leaves a large "gray area" where liability remains unpredictable.[264] Finally, the section evaluates the propriety of judicial activism in this area of the law, finding such activism appropriate.

A. Background

1. *Actions Against Tavern Owners Based on Negligence Principles and Statutory Violations in New Jersey*

In 1922, during national prohibition,[265] the New Jersey legislature enacted a dramshop law[266] which "imposed strict [civil] liability for compensatory and punitive damages upon unlawful sellers of alcoholic beverages."[267] In 1934, following the repeal of prohibi-

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260 *Id.* at 559, 476 A.2d at 1230.

261 *See* Fischer, *Tort Law: Expanding the Scope of Recovery Without Loss of Jury Control,* 11 HOFSTRA L. REV. 937, 941 (1983) (in most negligence cases, judge and jury share functions: judge defines standard of conduct and jury tests defendant's conduct against that standard).

262 96 N.J. at 556, 476 A.2d at 1228.

263 *See* cases cited *infra* note 278.

264 *See* Fischer, *supra* note 261, at 940 (argues that predictability should give way to flexibility in some cases).

265 The eighteenth amendment to the United States Constitution, which became effective in 1920, prohibited the manufacture, sale, transportation, importation, and exportation of intoxicating liquors within the United States. U.S. CONST. amend. XVIII. For a discussion of the circumstances and events leading up to its passage, see *supra* notes 32-44 and accompanying text.

266 A civil damages law or dramshop act creates civil liability against the seller or furnisher of alcoholic beverages for injuries resulting from the drinker's intoxication. *See generally supra* notes 45-67 and accompanying text (tracing historical development of dramshop acts).

267 Rappaport v. Nichols, 31 N.J. 188, 200, 156 A.2d 1, 8 (1959) (citing 1921 N.J.

tion,[268] the legislature repealed the dramshop law[269] and replaced it with the Alcoholic Beverage Control Act.[270] This act regulates the sale of alcoholic beverages to the public but, unlike the repealed statute, does not impose civil liability on sellers of alcohol for injuries to patrons or third parties.[271] Violators of the act's provisions face criminal misdemeanor charges.[272]

Despite the absence of a New Jersey statute, case law concerning the imposition of civil liability on furnishers of alcohol has developed rapidly over the past twenty-five years. In 1959 the Supreme Court of New Jersey held in *Rappaport v. Nichols*[273] that the repeal of the state's dramshop law did not preclude tort claims against liquor licensees based on common law negligence principles.[274] In *Rappaport* an intoxicated minor drove an automobile and collided with a vehicle driven by the plaintiff's husband, causing his death.[275] The plaintiff alleged that the defendant tavern owners had caused the accident by unlawfully and negligently selling and serving alcoholic beverages to an apparently intoxicated minor.[276]

The court acknowledged that an overwhelming majority of jurisdictions adhered to the common law rule that a liquor vendor could not be held liable for the acts of an intoxicated patron.[277]

Laws ch. 257, at 628). The Civil Damages Law provided that "a right of action . . . shall accrue to, or on account of any person who shall be injured in person, property, means of support, . . . or by reason of the intoxication of, or the sale of any intoxicating liquor to any person, in violation of law." 1922 N.J. Laws ch. 257, at 628-9, repealed 1934.

268 The twenty-first amendment to the United States Constitution repealed nationwide prohibition. U.S. CONST. amend. XXI. *See supra* note 44 and accompanying text.

269 1934 N.J. Laws ch. 32, at 104.

270 1933 N.J. Laws ch. 436, at 1180 (current version at N.J. STAT. ANN. §§ 33:1-5.4 to 33:1-93.10 (West Supp. 1984)). All states and the District of Columbia have alcoholic beverage control acts. For a compilation of these acts, see *supra* notes 62-67, 70.

271 N.J. STAT. ANN. § 33:1-77 (West Supp. 1984).

272 *Id.* at §§ 33:1-5.4 to -93.10.

273 31 N.J. 188, 156 A.2d 1 (1959).

274 *Id.* at 201, 156 A.2d at 8.

275 *Id.* at 192-93, 156 A.2d at 3.

276 *Id.* at 192, 156 A.2d at 4. Under the applicable New Jersey law, anyone who sold any alcoholic beverage to a minor was guilty of a misdemeanor. N.J. STAT. ANN. § 33:1-77 (West Supp. 1984).

Also in effect at that time was Regulation No. 20, Rule 1 of the Division of Alcoholic Beverage Control, which prohibited liquor licensees from selling, serving, or delivering any alcoholic beverage to a minor or "to any person actually or apparently intoxicated." N.J. Div. of Alcoholic Beverage Control Regulation No. 20, rule 1 (current version at N.J. ADMIN. CODE tit. 13, § 13:2-23.1 (1984).

277 The traditional common law rule has been stated as follows:

> It is generally held, in the absence of statute to the contrary, that there can be no cause of action against one furnishing liquor in favor of those injured by the intoxication of the person to whom it has been so furnished . . . so long as the person to whom the liquor was sold or given was not in such a state of helplessness or debauchery as to be deprived of his willpower or responsibility for his behavior.

These jurisdictions typically reasoned that the consumption of liquor, rather than its sale or furnishment, proximately caused such injuries to third parties.[278] The *Rappaport* court rejected this rationale, holding that a jury could reasonably find the defendant tavern owners negligent and their negligence the proximate cause of the accident.[279] The court reached this result by applying traditional negligence principles and relying on the defendants' violation of the New Jersey Alcoholic Beverage Control Act.[280]

Under the *Rappaport* court's rationale, a tavern owner who serves alcohol to a minor or visibly intoxicated patron should foresee an unreasonable risk of harm to third parties.[281] The court viewed the patron's subsequent negligent operation of a motor vehicle as an intervening cause. Nevertheless, this intervening event would not break the chain of causation if defendants should have reasonably anticipated the risk that the intoxicated patron would operate a motor vehicle.[282]

The *Rappaport* court also pointed to New Jersey's statute prohibiting the sale of alcohol to minors[283] and an administrative

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45 AM. JUR. 2D *Intoxicating Liquors* § 554 (1969) (footnotes omitted). The traditional reasoning given for this rule was that the consumption of the liquor and not the furnishing of it was the proximate cause of the injury. For recent cases applying this reasoning, see Runge v. Watts, 180 Mont. 91, 589 P.2d 145 (1979); Halvorson v. Birchfield Boiler, Inc., 76 Wash. 2d 759, 438 P.2d 897 (1969); *see also supra* notes 48-50 and accompanying text (discussing traditional common law rule of nonliability).

278 Those jurisdictions which imposed civil liability for negligence in the sale of alcohol did so through the interpretation of existing civil damages or dramshop statutes. *See supra* notes 102-23 and accompanying text.

At the time of the *Rappaport* decision, only two decisions imposed civil liability in the absence of a dramshop statute. In Schelin v. Goldberg, 188 Pa. Super. 341, 146 A.2d 648, a Pennsylvania court allowed a complaint based on negligence against a tavern which had served a visibly intoxicated patron who later assaulted the plaintiff. The assault complained of in *Schelin* occurred shortly after the Pennsylvania legislature had repealed that state's civil liability act of 1854. In Waynick v. Chicago's Last Dep't Store, 269 F.2d 322 (7th Cir. 1959), the Seventh Circuit Court of Appeals, apparently applying Michigan law, refused to dismiss a complaint based on common law negligence where the Illinois defendants unlawfully sold alcoholic beverages to intoxicated persons who were later involved in a collision in Michigan which injured the plaintiffs. Both the *Schelin* and the *Waynick* courts relied on the existence of alcohol licensing statutes in their respective states.

279 31 N.J. at 203-04, 156 A.2d at 9.

280 *Id.* at 202-04, 156 A.2d at 8-10.

281 *Id.* at 202, 156 A.2d at 8. The court stressed that the risk of harm to members of the traveling public was foreseeable because "traveling by car to and from the tavern is so commonplace and accidents resulting from drinking are so frequent." *Id.*; *see also* McKinney v. Foster, 391 Pa. 221, 225, 137 A.2d 502, 504 (1958) (court took judicial notice of fact that because great numbers of persons, including minors and adults, drive automobiles, it was foreseeable that one illegally served with intoxicants might negligently drive automobile).

282 31 N.J. at 203-04, 156 A.2d at 9.

283 *See* N.J. STAT. ANN. § 33:1-77 (West Supp. 1984) ("Anyone who sells any alco-

regulation prohibiting sales to minors and intoxicated persons.[284] The court stated that "these . . . 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."[285] The court adopted the requirements of the statute and administrative regulations as defining the standard of care applicable to licensed sellers in a civil action brought by a third party.[286] The plaintiff could introduce defendants' violation of the statute and regulations as evidence of negligence, but each of the defendants could "assert that it did not know or have reason to believe that its patron was a minor, or intoxicated when served, and that it acted as a reasonably prudent person would have acted at the time and under the circumstances."[287] Although the *Rappaport* court stressed

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holic beverage to a person under the legal age for purchasing alcoholic beverages is a disorderly person.").

284 N.J. Div. of Alcoholic Beverage Control Regulation No. 20, Rule 1 (current version at N.J. ADMIN. CODE tit. 13, § 13:2-23.1 (1984)). These regulations prohibit licensees from selling, serving or delivering any alcoholic beverage to a minor or "to any person actually or apparently intoxicated." N.J. ADMIN. CODE tit. 13, § 13:2-23.1 (1984). Violation of these provisions may subject the licensee to suspension or revocation of the license or to criminal charges. *See* N.J. STAT. ANN. § 33:1-31 (West Supp. 1984).

285 31 N.J. at 202, 156 A.2d at 8. The court may have based its broad construction of the statute and regulation on the section addressing the interpretation of the liquor provisions which states: "This chapter is intended to be remedial of abuses inherent in liquor traffic and shall be liberally construed." N.J. STAT. ANN. § 33:1-73 (West 1940). As a general matter of tort law, penal provisions designed to protect the class of persons which includes the plaintiff against the risk of the type of harm which has occurred as a result of a violation of the provision are considered appropriate laws upon which to base a civil cause of action. Thus, the creation of a civil cause of action in *Rappaport* follows directly from the court's finding of a broad protected class. *See* W. PROSSER & W. KEETON, THE LAW OF TORTS § 36 (5th ed. 1984); Koloff, *Torts of the Intoxicated: Who Should Be Liable?*, 15 COLUM. J.L. & SOC. PROBS. 33, 43-48 (1979).

Other courts have construed similar alcoholic beverage control provisions as protecting a much narrower class of persons. A narrow construction precludes the use of such provisions as a standard of conduct in claims brought by third persons. In Wiener v. Gamma Phi Chap. of Alpha Tau Omega Frat., 258 Or. 632, 485 P.2d 18 (1971), the Supreme Court of Oregon narrowly construed an Oregon statute providing that "no person other than his parent or guardian shall give or otherwise make available any alcoholic liquor to any person under the age of 21 years." *Id.* at 638, 485 P.2d at 21 (quoting OR. REV. STAT. § 471.410(2) (1979)). The court stated: "We think that the desigu of [the statute] was to protect minors from the vice of drinking alcoholic beverages; it was not the purpose of the statute to protect third persons from injury resulting from the conduct of inebriated minors . . . ." *Id.*

286 31 N.J. at 202-03, 156 A.2d at 9.

287 *Id.* at 203, 156 A.2d at 9. Under New Jersey law, the violation of a statute constitutes evidence of negligence. In light of all of the evidence, the trier of fact may reject a finding of negligence even when there has been a violation of a statute. Shatz v. TEC Technical Adhesives, 174 N.J. Super. 135, 415 A.2d 1188 (1980). The majority of jurisdictions consider an unexcused violation of a statute to establish negligence conclusively. W. PROSSER & W. KEETON, *supra* note 285, § 36. This doctrine is commonly referred to as negligence "per se." Under this doctrine a party's violation of a statute constitutes negligence as a matter of law when the plaintiff is in the class of persons the

that its decision only applied to unlawful and negligent service by liquor vendors,[288] the court's broad language left open the possibility of future expansions of liability based on common law negligence principles.

Such an expansion took place seven years later in *Soronen v. Olde Milford Inn*.[289] In *Soronen* the New Jersey Supreme Court held that a tavern owner may be civilly liable for injuries suffered by an adult patron as a result of the patron's own intoxication.[290] The *Soronen* case involved the death of an intoxicated patron who fell while in the defendant's tavern.[291] The decedent's wife instituted a wrongful death action, claiming that the tavern unlawfully served liquor to her husband when he was visibly intoxicated. The court ruled that the tavern had breached its duty if it served the decedent while he was visibly intoxicated "in the sense that [the Inn's bartender] knew or should have known of the [patron's] condition from the attendant circumstances."[292]

Having resolved the questions of forseeability and causation in *Rappaport*, the *Soronen* court focused on the defendant's affirmative defense: the decedent's intoxication constituted contributory negligence which should bar the claim. The court rejected this contention, holding that a tavern owner may not assert the defense of contributory negligence when he has violated a statute enacted "to protect a class of persons from their inability to exercise self-protective care."[293] Moreover, the licensee's duty not to serve intoxicated persons would be meaningless if it could be avoided merely by pointing to the patron's intoxication.[294] Thus, *Soronen* expanded liability under the Alcoholic Beverage Control Act by permitting intox-

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statute is designed to protect and the harm that has occurred is the type of harm the statute was designed to avoid. *Id.*

288 31 N.J. at 205, 156 A.2d at 10.

289 46 N.J. 582, 218 A.2d 630 (1966).

290 *Id.* at 594, 218 A.2d at 637.

291 *Id.* at 584, 218 A.2d at 632.

292 *Id.* at 594, 218 A.2d at 637. As in *Rappaport*, the court applied an objective standard, in that it did not require actual knowledge of the patron's intoxication. The court remanded the case to the trial court because the jury instructions permitted a finding of negligence even though the jury was not satisfied that the patron exhibited signs of intoxication such that the defendant either knew or should have known of the decedent's intoxicated condition. *Id.*

293 *Id.* at 590, 218 A.2d at 635 (quoting RESTATEMENT OF TORTS § 483 (1934)). The court ruled that the prohibition against serving intoxicated persons set forth in the New Jersey Administrative Code had the full force of law for purposes of deciding the contributory negligence question. *Id.*

294 *Id.* at 589, 218 A.2d at 634. The *Soronen* court relied in part on Galvin v. Jennings, 289 F.2d 15 (3d Cir. 1961), a federal appellate court decision applying New Jersey law. In *Galvin* the plaintiff alleged that he was served liquor while visibly intoxicated and was later injured in an accident. The court held that contributory negligence would not apply in a case involving the violation of a statute intended to protect the plaintiff from

icated patrons, as well as innocent third parties, to bring civil actions against tavern owners.[295]

In *Anslinger v. Martinsville Inn*[296] the Appellate Division of the New Jersey Superior Court, the state's second highest court, refused to extend *Rappaport* and *Soronen* and dismissed a cause of action against a corporate defendant which hosted a social affair for its employees and business associates.[297] Anslinger, a guest at what the court described as a "quasi-business" event, became intoxicated, drove away, and was killed in an automobile accident.[298] The administratrix of Anslinger's estate argued that the hosts of the "quasi-business" affair should be held to the same standard of conduct as licensed tavern owners and therefore should be liable for injuries suffered by a person to whom they served alcoholic beverages.[299]

The court rejected the plaintiff's claim, stating that imposition of liability on business enterprises for the actions of their guests at social affairs would require a considerable extension of the *Rappaport* decision.[300] Furthermore, the court reasoned that such an extension would raise "extremely difficult questions of deciding what

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the very condition alleged as contributory negligence. *Id.* at 19. *Soronen,* 46 N.J. at 591, 218 A.2d at 635-36.

295 In Aliulis v. Tunnel Hill Corp., 59 N.J. 508, 284 A.2d 180 (1971), the New Jersey Supreme Court extended the *Soronen* holding to a case involving injuries to a third party passenger after the driver had purchased liquor at a tavern in violation of provisions prohibiting sales to minors. The defendant alleged that the plaintiff's contributory negligence in riding with the intoxicated driver should be a complete bar to recovery. The court held that because of the late hour, and because the plaintiff had no other means of transportation, "any contributory negligence should not be available as a defense to a tavern keeper." *Id.* at 511, 284 A.2d at 182. The court refused, however, to rule that a seller of alcoholic beverages to minors or intoxicated persons may never assert a defense of contributory negligence. *Id.*

See also Rhyner v. Madden, 188 N.J. Super. 544, 457 A.2d 1243 (1983) (public policies advanced in *Soronen* would extend to cases decided under New Jersey comparative negligence act, which became effective in 1973).

296 121 N.J. Super. 525, 298 A.2d 84 (N.J. Super. Ct. App. Div. 1972), *cert. denied,* 62 N.J. 334, 301 A.2d 449 (1973).

297 The defendants in *Anslinger* included the inn where the decedent attended a dinner meeting on the night he died, a corporation whose employees and guests occupied a table at that meeting, and the business club that sponsored the meeting. *Id.* at 529, 298 A.2d at 86.

298 *Id.* at 529, 298 A.2d at 86.

299 The plaintiff argued that corporate businesses that serve alcoholic beverages in the course of their business should be held to the same standard of conduct as licensed tavern owners because both occupations create risks and the resulting injuries can be widely spread through price adjustments. *Id.* at 534, 298 A.2d at 88.

300 *Id.* Although the *Rappaport* decision contained broad language based upon general concepts of negligence, the court in that case had explicitly limited the decision to liquor licensees who "have long been under strict obligation not to serve minors and intoxicated persons." *Rappaport,* 31 N.J. at 206, 156 A.2d at 10.

is business and what is social."[301] In addition, the court ruled that the decedent's voluntary intoxication completely barred any recovery against the "quasi-business" host.[302]

The administratrix also claimed that the tavern where the event took place was liable because it served the decedent alcoholic beverages in violation of the administrative regulation[303] prohibiting the sale of alcoholic beverages to intoxicated persons. In response, the court ruled that the administrative regulation did apply to the tavern's method of providing whole bottles of liquor from which the guests served themselves.[304] Although such a method of service may not give a tavern's employees as great an opportunity to observe a customer's condition as they would have if they served each drink individually, the court did not wish to enable a licensee to escape liability simply by adopting this method of service.[305] Nevertheless, the court did not hold the inn liable because the plaintiff failed to show that the defendants knew or should have known that the decedent was intoxicated when he was served.[306]

2. *Liability of the Social Host Based Solely on Negligence Principles*

In *Linn v. Rand*[307] the Superior Court of New Jersey further extended *Rappaport* by holding that a social host who serves alcohol to a visibly intoxicated minor may be liable for injuries to third parties caused by the minor's acts.[308] In *Linn* the minor guest allegedly hit a pedestrian with her car soon after leaving the defendant's home.[309] The *Linn* court discarded the traditional distinction be-

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301 121 N.J. Super. at 534, 298 A.2d at 88.

302 *Id.*, 298 A.2d at 88-89.

303 N.J. Div. of Alcoholic Beverage Control, Regulation No. 20, Rule 1 (current version at N.J. ADMIN. CODE tit. 13, § 13:2-23 (1984)).

304 121 N.J. Super. at 530, 298 A.2d at 87. The regulation made it unlawful for a licensed liquor dealer to "sell, serve or deliver . . . any alcoholic beverage, directly or indirectly . . . to any person actually or apparently intoxicated, or permit or suffer the consumption of any alcoholic beverage by any such person in or upon the licensed premises." N.J. Div. of Alcoholic Beverage Control, Regulation No. 20, Rule 1 (current version at N.J. ADMIN. CODE tit. 13, § 13:2-23.1 (1984)).

305 In dicta the court stated that the defendant inn would have a duty to its customers even if the regulation were not so broadly worded: "Permitting consumption by an intoxicated person would, we think, be the equivalent of serving him." 121 N.J. Super. at 532, 298 A.2d at 87.

306 The court stated that "there was no proof that his conduct was of a rowdy or boisterous nature while he was in the Inn, or that he acted in such a manner as to draw attention of the Inn's employees to anything unusual in his condition." *Id.* at 533, 298 A.2d at 88.

307 140 N.J. Super. 212, 356 A.2d 15 (N.J. Super. Ct. App. Div. 1976).

308 *Id.* at 219, 356 A.2d at 19.

309 *Id.* at 214, 356 A.2d at 19. The court based its reversal of the grant of summary judgment for the defendant in *Linn* in part on its opinion that "the record was wholly inadequate for a decision on the merits by the summary judgment route" in which all of the facts must be judged in the light most favorable to the plaintiff. *Id.* at 220, 356 A.2d

tween a social host and a licensee, stating that "[i]t makes little sense to say that the licensee in *Rappaport* [was] under a duty to exercise care, but give immunity to a social host who may be guilty of the same wrongful conduct merely because he is unlicensed."[310] The court ignored explicit statements in the *Rappaport* opinion limiting liability to holders of liquor licenses, stating that nothing in *Rappaport* or its progeny specifically barred social host liability as a matter of law.[311] The court distinguished *Anslinger* on the grounds that the decedent in that case was contributorily negligent and the claim was brought on behalf of an adult.[312] *Linn* stands as the first New Jersey case extending liability to a social host and the first case extending liability in the absence of an underlying statute or regnlation.[313]

In *Figuly v. Knoll*[314] a New Jersey trial court extended *Linn* to a social setting in which the intoxicated guest was an adult. The defendant host in *Figuly* had previously worked as a commercial bartender and knew his guest from that work.[315] The defendant considered his guest "an alcoholic or close to it" and admitted he could recognize various stages of intoxication when this particular guest manifested them.[316] The court found "no reasonable basis for limiting the holding of *Linn* to minors" and ruled that the defendant could be held liable for injuries caused by the guest.[317] The

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at 19-20. The record in *Linn* did not reveal the age of the intoxicated guest, the amount of alcohol furnished to her, or any evidence pertaining to the social host's knowledge of the guest's physical condition. *Id.* at 215, 356 A.2d at 16-17.

310 *Id.* at 217, 356 A.2d at 18.

311 *Id.* at 216, 356 A.2d at 17. The *Linn* holding was actually rather narrow. The court stated that a successful plaintiff must prove that the intoxicated guest was a minor; that the social host knew the guest was a minor, knew the guest intended to drive a car, and nevertheless served alcoholic beverages in an amount that caused the guest to become unfit to drive; that it was reasonably foreseeable that the guest might injure herself or others; and that the host's negligence was a proximate cause of the accident and the plaintiff's injuries. *Id.* at 217, 356 A.2d at 18.

312 *Id.* at 219-20, 356 A.2d at 19.

313 The *Linn* court, of course, could not rely on the Alcoholic Beverage Control Act or the applicable regulations because these promulgations apply to licensees, not hosts who gratuitously furnish liquor. Because the *Linn* case involved a claim brought by an innocent third party rather than by the intoxicated guest, the court was not faced with the question of whether the contributory negligence of the guest in becoming intoxicated would bar an action brought by the guest against the social host. Thus, the court's statement that the plaintiff must prove that it was reasonably foreseeable that the guest "might injure herself or others" must be read as dicta.

314 185 N.J. Super. 477, 449 A.2d 564 (N.J. Super. Ct. Law Div. 1982).

315 *Id.* at 479, 449 A.2d at 564.

316 *Id.*

317 *Id.* at 480, 449 A.2d at 565. The court cited Coulter v. Superior Court of San Mateo County, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978), as support for its holding. In *Coulter* the California Supreme Court held that a social host who furnishes alcohol to an obviously intoxicated person may be held accountable to third parties who are injured as a result of that person's intoxication. The California legislature

Figuly case was not appealed; thus the New Jersey Supreme Court did not address the question of social host liability until its decision in the case of *Kelly v. Gwinnell.*

B. *Kelly v. Gwinnell*

On January 11, 1980, Donald Gwinnell left his home to assist Joseph Zak in removing Zak's truck from the mud. The men were not successful, and Gwinnell drove Zak home. Zak invited Gwinnell into his house and offered Gwinnell a drink.[318] According to Gwinnell and the Zaks, Gwinnell consumed two or three drinks while at the Zaks' home.[319] Less than ten minutes after Gwinnell left the Zaks' home, Gwinnell's automobile entered Marie Kelly's lane of traffic and injured her in a head-on collision. A blood test performed on Gwinnell after the accident revealed that his blood had an alcohol content of 0.286 percent.[320]

Kelly filed a complaint against Gwinnell and his employer, who in turn filed a third party complaint against the Zaks. The plaintiff subsequently amended her complaint to include the Zaks as defendants. The trial court granted the Zaks' motion for summary judgment, concluding that as a matter of law a social host was not liable for injuries caused by an adult social guest who became intoxicated

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specifically abrogated the *Coulter* decision over four years before the *Figuly* decision. *See infra* note 322.

318 Kelly v. Gwinnell, 190 N.J. Super. 320, 321, 463 A.2d 387, 388 (N.J. Super. Ct. App. Div. 1983), *rev'd,* 96 N.J. 538, 476 A.2d 1219 (1984).

319 *Kelly,* 96 N.J. at 541, 476 A.2d at 1220. Gwinnell stated that he consumed two or three scotches on the rocks. Joseph Zak stated that Gwinnell had two drinks, each consisting of a shot of scotch and two ice cubes. Catherine Zak also stated that Gwinnell had two drinks while in their home. Brief and Appendix for Defendants-Respondents at 2, *Kelly,* 96 N.J. 538, 476 A.2d 1219 (1984). The plaintiff contended that Gwinnell had more than two or three drinks. *See infra* note 320.

320 96 N.J. at 541, 476 A.2d at 1220. New Jersey law makes it illegal for a person with a blood alcohol concentration equal to or above 0.10% to operate a motor vehicle. N.J. STAT. ANN. § 39:4-50 (West Supp. 1984). At trial Kelly's expert chemist testifed that, based on a reading of 0.286%, Gwinnell may have consumed up to 13 drinks and that he would have been showing "unmistakable signs of intoxication" while at the Zaks' home. 96 N.J. at 541, 476 A.2d at 1220.

The blood alcohol concentration (BAC) resulting from consumption of a given number of drinks varies with, inter alia, the weight of the individual, the rate of drinking, the presence or absence of food in the stomach, and the concentration of alcohol in the drink. A 150-pound person who consumes three to five ounces of liquor within a short period of time could have a BAC between 0.05 and 0.08%.

A concentration of alcohol greater than 0.05% in an automobile driver's blood significantly increases the probability that the driver will be involved in an accident. The probability that the driver will be involved in an accident increases exponentially as the drinker's BAC level rises. A driver with a 0.06% BAC level is twice as likely as a sober driver to have an accident. When the BAC increases to 0.10%, the driver is six times as likely to be involved in an accident. At 0.15% or more, the accident involvement risk multiplies by 25. *See* Cramton, *The Problem of the Drinking Driver,* 54 A.B.A. J. 995, 996 (1968).

while at the social host's home.[321] The appellate division affirmed, refusing to extend *Rappaport* and *Linn*.[322] The court noted the economic problems inherent in extending liability to persons who make no profit from their service of alcohol[323] and concluded that "any change in the law is best left to the judgment of the legislature."[324]

In a six to one decision, the New Jersey Supreme Court reversed, holding that a host who directly serves liquor to an adult social guest after the host knows the guest is intoxicated and will soon be driving is liable for injuries to third parties caused by the guest's drunken driving.[325] Writing for the majority, Chief Justice Wilentz found that the "elements of a cause of action for negligence [were] clearly present."[326] The court asserted that Zak could have foreseen that Gwinnell would be incapable of driving safely if Zak continued to serve him drinks.[327]

The majority next considered whether a social host should have a duty to prevent the risk that a guest might cause injury by driving while intoxicated. Acknowledging that the question involved public policy and value judgments, the court noted the high number of deaths and extensive damage caused each year by drunk drivers[328]

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321 96 N.J. at 541-42, 476 A.2d at 1220-21.

322 190 N.J. Super. at 325-26, 463 A.2d at 390-91. The court acknowledged that two jurisdictions had judicially recognized a cause of action against a social host serving alcoholic beverages to an adult. *Id.* at 323, 463 A.2d at 389. The California Supreme Court had permitted such a cause of action in Coulter v. Superior Court of San Mateo County, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978). That decision remained in effect for only eight months before the California legislature abrogated it. *See* CAL. BUS. & PROF. CODE §§ 25602, 25602.1 (West Supp. 1985); CAL. CIV. CODE § 1714(b) (West Supp. 1985).

In Wiener v. Gamma Phi Chap. of Alpha Tau Omega Frat., 258 Or. 632, 639, 485 P.2d 18, 21 (1971), the Supreme Court of Oregon ruled that "[t]here might be circumstances in which the host would have a duty to deny his guest further access to alcohol." There are no reported Oregon cases holding a social host liable for serving alcoholic beverages to an adult; however, in 1979 the Oregon legislature enacted a statute which permits a plaintiff to sue a private host who serves alcoholic beverages to a social guest when that guest is visibly intoxicated. OR. REV. STAT. § 30.995 (1984).

323 190 N.J. Super. at 324-35, 463 A.2d at 390.

324 *Id.* at 324, 463 A.2d at 390. The opinion of the appellate division did not mention the decision of Figuly v. Knoll, 185 N.J. Super. 477, 449 A.2d 564, which had extended common law liability to a social host when the guest was an adult. *See supra* notes 314-17 and accompanying text.

325 96 N.J. at 548, 476 A.2d at 1224. The court held the host and guest jointly liable to the injured third party. *Id.* at 559, 476 A.2d at 1230. The court declined, however, to resolve any right of contribution or indemnification questions between the host and the guest, directing the trial court to determine that issue on remand. *Id.* at 549 n.8, 476 A.2d at 1224 n.8. The trial court never resolved this issue because the parties settled following the supreme court's decision. *See* N.Y. Times, Feb. 21, 1985, at A1, col. 6.

326 96 N.J. at 544, 476 A.2d at 1222. The court described these elements as "an action by defendant creating an unreasonable risk of harm to plaintiff, a risk that was clearly foreseeable, and a risk that resulted in an injury equally foreseeable." *Id.*

327 *Id.*

328 *Id.* at 545 n.3, 476 A.2d at 1222 n.3. The court relied on data provided by the

and concluded that such a duty was "both fair and fully in accord with the State's policy."[329]

The court next reviewed *Rappaport, Soronen,* and *Linn* and asserted that its decision in *Kelly* was "a fairly predictable expansion of liability in this area."[330] The court relied heavily on *Linn* because the *Linn* court had imposed a common law duty on a social host that arose independent of the statute and regulation prohibiting sales of liquor to a minor.[331]

The court rejected the argument that the legislature is the only proper body to determine whether liability should be imposed on social hosts.[332] Noting that the determination of the scope of duty in negligence cases has traditionally been a judicial function, and that the legislature had not objected to the court's earlier expansions of liability, the court asserted that "we assume that our decisions are found to be consonant with the strong legislative policy against drunken driving."[333] The court also cited the absence of a dramshop act in New Jersey to support its decision, reasoning that the existence of a dramshop act holding only licensees liable would

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New Jersey Division of Motor Vehicles, which established that from 1978 to 1982 there were 5,755 highway fatalities in New Jersey. Alcohol was involved in 2,746 or 47.5% of these deaths. Of the 629,118 automobile accident injuries for the same period, 131,160 or 20.5% were alcohol related. The societal cost for New Jersey alcohol-related highway deaths for this period was estimated as $1,149,516,000.00, based on statistics and documents obtained from the New Jersey Division of Motor Vehicles. The total societal cost figure for all alcohol-related accidents in New Jersey in 1981 alone, including deaths, personal injuries and property damage, was $1,594,497,898.00. *Id.* (citing NEW JERSEY DIVISION OF MOTOR VEHICLES, SAFETY, SERVICE, INTEGRITY, A REPORT ON THE ACCOMPLISHMENTS OF THE NEW JERSEY DIVISION OF MOTOR VEHICLES 45 (Apr. 1, 1982 through Mar. 31, 1983)). These New Jersey statistics are consistent with nationwide figures. *Id.* (citing PRESIDENTIAL COMMISSION ON DRUNK DRIVING, FINAL REPORT 1 (1983)).

329 *Id.* at 545, 476 A.2d at 1222.

330 *Id.* at 556, 476 A.2d at 1228.

331 96 N.J. at 547, 476 A.2d at 1223. The court deemphasized the factual differences between *Linn* and *Kelly,* stating that:

> The entire rationale of the [*Linn*] opinion is that there is no sound reason to impose liability on a licensee and not on a social host. There is not a word nor the slightest implication in the opinion suggesting that the underlying purpose of the decision was to protect minors.

Id. at 556 n.14, 476 A.2d at 1228 n.14.

The *Kelly* court overruled the portion of Anslinger v. Martinsville Inn, 121 N.J. Super. 525, 298 A.2d 84 (N.J. Super. Ct. App. Div. 1972), *cert. denied,* 62 N.J. 334, 301 A.2d 449 (1973), which held that policy considerations should preclude the imposition of liability on hosts in social or quasi-business settings. 96 N.J. at 548 n.8, 476 A.2d at 1224 n.8.

332 96 N.J. at 552-56, 476 A.2d at 1226-28. Courts in other states that have considered the issue of social host liability have concluded that only the legislature should impose it. *See, e.g.,* Camille v. Berry Fertilizers, Inc., 30 Ill. App. 3d 1050, 1053, 334 N.E.2d 205, 207 (1975); Gabrielle v. Craft, 75 A.D.2d 939, 940, 428 N.Y.S. 84, 86 (1980). For a discussion of the propriety of judicial action in the *Kelly* case, see *infra* notes 417-48 and accompanying text.

333 96 N.J. at 553, 476 A.2d at 1226. *See infra* notes 441-45 and accompanying text.

evince a legislative intent to preclude the imposition of liability on social hosts.[334]

The court argued that its decision would make fair compensation to innocent victims of drunk driving more likely and would also tend to deter drunk driving. The court expressly refused, however, to condition its decision on statistical proof that the fear of liability would deter social hosts from serving alcohol in an irresponsible manner.[335] The court did not think a legislative study of the deterrent and compensatory effects of its decision was necessary.[336] Finally, the court noted that if the legislature disagreed, it could nullify the decisions.[337]

Although the *Kelly* decision extended liability, the court placed two specific limits on social host liability: the host must directly serve a guest, and liability is limited to injuries resulting from the guest's drunken driving.[338] The court refused to speculate on the potential applicability of the decision to other social situations. Instead, the court indicated that it would approach new situations by weighing "if necessary and if legitimate, the societal interests alleged to be inconsistent with the public policy considerations that are at the heart of today's decision."[339]

In dissent Justice Garibaldi criticized the majority for acting with "scant knowledge and little care for the possible negative consequences of its decision."[340] The dissent maintained that imposition of social host liability represented "a radical departure from prior law, with . . . extraordinary effects on the average citizen."[341] As such, this extension of liability should have been imposed only after an in-depth review by the legislature.[342] Furthermore, the extension was inappropriate in light of continuing legislative activity in "creating duties and remedies to protect the public from drunk drivers."[343] Noting that the legislature had recently passed a bill subjecting a social host to criminal penalties for serving alcohol to a minor, the dissent maintained that the absence of a parallel provision applicable to a social host who served an adult guest demonstrated the legislature's intent not to impose liability on social hosts.[344]

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334 96 N.J. at 554, 476 A.2d at 1227.
335 *Id.* at 551-52, 476 A.2d at 1226.
336 *Id.* at 558, 476 A.2d at 1229.
337 *Id.* at 555, 476 A.2d at 1227.
338 *Id.* at 559, 476 A.2d at 1230.
339 *Id.* at 556, 476 A.2d at 1228.
340 *Id.* at 563, 476 A.2d at 1232 (Garibaldi, J., dissenting).
341 *Id.* at 561, 476 A.2d at 1231 (Garibaldi, J., dissenting).
342 *Id.* at 563, 476 A.2d at 1232 (Garibaldi, J., dissenting).
343 *Id.* at 569, 476 A.2d at 1235 (Garibaldi, J., dissenting).
344 *Id.* Justice Garbaldi believed that the existence of state statutes or regulations

The dissent reminded the majority that the court had based its earlier decisions imposing tort liability on licensees on the violation of explicit statutes and regulations.[345] According to the dissent, the majority's imposition of liability ignored relevant distinctions between social hosts and licensees.[346] First, a social host does not have the experience of a commercial licensee in assessing a person's level of intoxication.[347] The dissent criticized the majority for relying on the results of Gwinnell's blood alcohol concentration test to conclude that the Zaks must have known that Gwinnell was intoxicated. Because the effects of a particular concentration of alcohol in the blood vary from person to person, the dissent concluded that an elevated blood alcohol level after an accident did not necessarily indicate that Gwinnell was obviously intoxicated while at the Zak's home.[348]

Second, the dissent contended that a social host has less control over the serving of liquor than a commercial establishment because guests frequently prepare drinks for themselves or other gnests.[349] In addition, a commercial bartender does not usually drink on the job, whereas a host will often drink with the guests, reducing his ability to determine when a guest is intoxicated. Justice Garibaldi stated that "[i]t would be anomalous to create a rule of liability that social hosts can deliberately avoid by becoming drunk themselves."[350] Furthermore, the dissent raised questions which the majority left unanswered regarding the extent to which a host must go to avoid liability: "Is the host obligated to use physical force to restrain an intoxicated guest from drinking and then from driving? . . . What is the result when the host tries to restrain the gnest

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imposing criminal penalties on a particular class of persons represented "significant enough evidence of legislative policy to impart knowledge of foreseeable risk on the provider of the alcohol and to fashion a civil remedy for negligently creating that risk." *Id.* at 561, 476 A.2d at 1231 (Garibaldi, J., dissenting). Thus, she would approve the creation of a civil cause of action when an underlying statute or regulation defined the standard of conduct to be followed.

Accordingly, Justice Garibaldi agreed with the imposition of social host liability in *Linn*, *see supra* notes 307-13 and accompanying text, despite the absence of a relevant statute or regulation, because of legislative action in that area. She noted that "the distinction I draw [between *Linn* and *Kelly*] is based on the clearly and frequently expressed legislative policy that minors should not drink alcoholic beverages . . . and on the fact that minors occupy a special place in our society and traditionally have been protected by state regnlation from the consequences of their own immaturity." 96 N.J. at 561 n.1, 476 A.2d at 1230-31 n.1 (citation omitted).

345 96 N.J. at 561, 476 A.2d at 1231; *see supra* notes 276-95 and accompanying text.

346 96 N.J. at 565-68, 476 A.2d at 1233-35.

347 *Id.* at 565-66, 476 A.2d at 1233.

348 *Id.*, 476 A.2d at 1233-34.

349 *Id.* at 566, 476 A.2d at 1234. The dissent noted that patrons in a bar or restaurant are typically served directly by a bartender or waiter. *Id.*

350 *Id.* at 567, 476 A.2d at 1234.

but fails? Is the host still liable?"[351]

The most significant difference between a social host and a commercial licensee, according to the dissent, is the social host's inability to defray the cost of liability.[352] The dissent disagreed with the majority's unsubstantiated contention that homeowner's insurance would cover such liability.[353] Furthermore, even if insurance would cover such liability, many homeowners and renters do not have and cannot afford homeowner's insurance, especially with the potential increase in premiums that the decision could cause.[354]

C. Analysis

A striking aspect of the *Kelly* decision is the specificity with which the court delineated the scope of social host liability. In an apparent attempt to limit the scope of liability, the court established several prerequisites to liability. The jury must find certain facts before it may consider the reasonableness of the defendant's conduct. This approach differs from a typical negligence case where the jury simply evaluates the defendant's conduct to determine whether it was reasonable.[355] This section examines the court's criteria and concludes that although they may provide more certainty than a reasonable person standard, the criteria are not defined with sufficient clarity to preclude future expansion of liability.

1. *Elements of the* Kelly *Rule*

a. *Service to a Visibly Intoxicated Guest.* According to *Kelly,* a social host may be liable only when he has served alcohol to a visibly intoxicated guest.[356] In prior decisions the court indicated that the visibly intoxicated requirement was satisfied if the defendant knew or should have known of the drinker's intoxicated condition when the service was made.[357] The *Kelly* court abandoned this standard and instead required that the social host possess actual knowledge of the gnest's intoxication.[358] The court did not, however, specify the factors to be considered to determine whether the visibly intoxi-

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351 *Id.* at 567-68, 476 A.2d at 1234. The dissent also noted that a social host does not have a bouncer or other enforcer to prevent difficulties that may arise when the host requests that an intoxicated person stop drinking or refrain from driving home. *Id.* at 567, 476 A.2d at 1234.

352 *Id.* at 568, 476 A.2d at 1234-35.

353 *Id.*

354 *Id.* at 568, 476 A.2d at 1235. For a discussion of the effect of the *Kelly* decision on insurance premiums, see *infra* notes 481-97 and accompanying text.

355 Fischer, *supra* note 261, at 941.

356 96 N.J. at 556, 476 A.2d at 1228.

357 *See* Soronen v. Olde Milford Inn, 46 N.J. 582, 218 A.2d 630, 636 (1966). *See also* Rappaport v. Nichols, 31 N.J. 188, 202, 156 A.2d 1, 9 (1959).

358 *See Kelly,* 96 N.J. at 548, 476 A.2d at 1224.

cated requirement has been met. Consequently, the court left it to future cases and lower courts to set standards for the application of this requirement, leaving open the possibility of an expansion of liability through the adoption of a lenient standard.

The *Kelly* court's application of the visibly intoxicated standard is troubling. The court appears to have relied only on the results of Gwinnell's post-accident blood alcohol concentration test. The court determined that a jury could reasonably conclude that the Zaks "continued to serve [Gwinnell] even after he was visibly intoxicated."[359] The court failed to consider Gwinnell's physical appearance or behavior in order to determine whether his intoxicated condition was in fact visible to the Zaks. Instead, the court merely inferred knowledge from the results of the blood alcohol test.

Other jurisdictions have required evidence that the guest or patron exhibited "outward manifestations" of intoxication.[360] These jurisdictions believe it is inequitable to hold a provider of alcohol responsible for serving alcohol to an intoxicated person unless the provider has sufficient notice of the person's intoxicated condition. For example, in *People v. Johnson,*[361] the Supreme Court of California held that a liquor seller would not be civilly liable under the obviously intoxicated standard unless the patron disclosed symptoms readily apparent to anyone having normal powers of observation.[362] In *Anslinger v. Martinsville Inn*[363] the New Jersey Appellate Division required outward signs of intoxication. The *Anslinger* court dismissed the plaintiff's claim against a tavern owner because the plaintiff did not produce any evidence that the patron's behavior drew the attention of the Inn's employees.[364]

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359 *Id.* at 543, 476 A.2d at 1221-22.

360 *See* Note, *One More for the Road: Civil Liability of Licensees and Social Hosts For Furnishing Alcoholic Beverages to Minors,* 59 B.U.L. REV. 725, 734-35 (1979) (survey of the actual manifestation requirement); Comment, *Negligence Actions Against Liquor Purveyors: Filling the Gap in South Dakota,* 23 S.D.L. REV. 227, 246-48 (1978) (recommending that courts adopt the "outward manifestation" test of intoxication when applying statutes prohibiting the sale of liquor to inebriates).

361 81 Cal. App. 2d Supp. 973, 185 P.2d 105 (1947).

362 *Id.* at 975, 185 P.2d at 106. *See also* Samaras v. Department of Alcoholic Bev. Control, 180 Cal. App. 2d 842, 844, 5 Cal. Rptr. 856, 858 (1960) (watery eyes, slumped position at bar, incoherent yelling, hysterical laughing, and spitting on floor are sufficient outward manifestations of intoxication); People v. Smith, 94 Cal. App. 2d Supp. 975, 210 P.2d 98 (1949) (evidence that customer spoke loudly, spilled beer, and had poor balance, flushed face, and bloodshot eyes sufficient to sustain finding that he was "obviously" intoxicated); Jardine v. Upper Darby Lodge No. 1973, Inc., 413 Pa. 626, 629, 198 A.2d 550, 552 (1964) (unsteadiness, poor coordination, bloodshot eyes, thick speech sufficient to find defendant visibly intoxicated).

363 121 N.J. Super. 525, 298 A.2d 84 (1972), *cert. denied,* 62 N.J. 334, 301 A.2d 449 (1973). For a more complete discussion of this case, see *supra* notes 296-306 and accompanying text.

364 121 N.J. Super. at 533, 298 A.2d at 88; *see also* Comment, *Social Host Liability for*

Some courts have been particularly concerned with the proper application of the visibly intoxicated standard. In *Cartwright v. Hyatt Corp.*[365] the United States District Court for the District of Columbia disallowed a cause of action by an injured party against a cocktail lounge which had served drinks to the intoxicated patron who caused the accident. The court dismissed the claim despite testimony that the driver appeared obviously intoxicated after the accident and that a post-accident blood alcohol test revealed a concentration of 0.29 percent.[366] The court observed that although the post-accident findings constituted evidence that the patron was intoxicated shortly before the accident, they did not show that the patron appeared to be intoxicated to those who served the drinks.[367] In *Shelby v. Keck*[368] the Supreme Court of Washington rejected test results as an indication of obvious intoxication. The court dismissed an action brought against a cocktail lounge, holding that "[e]ven if [the patron] had consumed more than two drinks, his state of sobriety must be judged by the way he appeared to those about him, not by what a blood alcohol test later revealed."[369]

The need to protect society against drunk drivers must be balanced against the unfairness of imposing high recoveries on social hosts. As one commentator has noted, the courts "must establish a reasonable standard of care, so that the social host is not burdened with inequitable obligations, and is given some protection against frivolous lawsuits."[370] The *Kelly* court's application of the visibly intoxicated standard does not accomplish these ends because the court relied on the results of a post-accident blood alcohol concentration test which did not necessarily demonstrate that the Zaks knew Gwinnell was intoxicated.[371]

The court's superficial analysis of this issue arose in the context of the court's review of the trial court's grant of summary judgment in favor of the Zaks. The standard of review of this stage was highly

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Furnishing Alcohol: A Legal Hangover?, 10 PAC. L.J. 95, 103 (1979) (warns that after-the-fact assessments of visible intoxication create risk of "objective review of subjective decision").

365 460 F. Supp. 80 (D.D.C. 1978).

366 *Id.* at 83.

367 *Id.*

368 85 Wash. 2d 911, 541 P.2d 365 (1975).

369 *Id.* at 915, 541 P.2d at 369. *Accord* McNally v. Addis, 65 Misc. 2d 204, 216, 317 N.Y.S.2d 157, 170-71 (1970) (no inference that patron appeared intoxicated at time of sale drawn from blood alcohol level of .28%). *See generally* Note, *supra* note 360, at 734-38 (persons found to be legally intoxicated by blood alcohol test frequently are not obviously intoxicated).

370 Keenan, *Liquor Liability in California*, 14 SANTA CLARA L. REV. 46, 69 (1973). The author concludes that the visibly intoxicated standard, when applied strictly, meets these goals.

371 *See supra* note 359 and accompanying text.

favorable to the plaintiff.[372] The procedural posture does not, however, justify the court's failure to advise the lower courts how to apply the visibly intoxicated standard. If lower courts follow *Kelly*'s approach and fail to examine whether the guest exhibited outward signs of intoxication, social hosts could be held liable without knowledge of their guest's intoxication. Imposition of liability in these circumstances would be unjust because the host could not have foreseen the harm to third parties absent actual knowledge of the guest's intoxication. Because the *Kelly* decision gives little guidance to lower courts concerning the proper application of the visibly intoxicated standard, it has created uncertainty and the potential for expansion of the scope of liability.

b. *Knowledge that the Guest Will Soon Be Driving a Motor Vehicle.* The *Kelly* court expressly predicated liability on the host's knowledge that the intoxicated guest would be operating a motor vehicle shortly after consuming alcoholic beverages.[373] The court's requirement of actual knowledge differs significantly from the standard in its earlier decisions. In *Rappaport,* for example, the court did not examine whether the tavern owner knew that the intoxicated guest would be driving. The *Rappaport* court found that the risk of harm to third parties was foreseeable because "traveling by car to and from the tavern [was] so commonplace and accidents resulting from drinking [were] so frequent."[374] The *Kelly* court's restrictive approach to this issue demonstrates the court's desire to impose more limited liability on social hosts than on tavern owners.

c. *The Direct Service Requirement.* The *Kelly* court expressly limited liability to situations where a host directly serves alcoholic beverages to a guest.[375] This limitation apparently precludes liability in cases where the host merely provides liquor but does not directly serve it to the guest.[376] Under a strict application of the direct service requirement, a social host who provides an open bar from which guests serve themselves would not be liable.

Because the direct service requirement allows hosts to circumvent liability with ease, it may be susceptible to modification in future decisions. One commentator believes that a distinction between a host who selects a self-service arrangement and a host

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372 *Kelly,* 96 N.J. at 543, 476 A.2d at 1221.

373 *Id.* at 559, 476 A.2d at 1230.

374 31 N.J. at 202, 156 A.2d at 8 (citing *National Safety Council, Accident Facts* 49 (1959)).

375 96 N.J. at 559, 476 A.2d at 1230.

376 The host could also avoid liability by requiring guests to provide their own liquor. Commentators agree that a host will not be liable for the consequences of a guest's intoxication if the guest served himself. *See* Note, *supra* note 360, at 742 nn.125, 129; Comment, *supra* note 360, at 236; Comment, *supra* note 364, at 107.

who directly provides alcohol serves no valid purpose.[377] If courts abandon the direct service requirement, the host of a self-service party will have a duty to prevent visibly intoxicated guests from serving themselves. Failure to do so would subject the host to the same liability as if he had directly served the guest.

The *Anslinger*[378] court expressed a willinguess to impose such a duty on those licensed to serve alcohol, such as tavern owners. In *Anslinger* the licensee provided bottles of liquor at each table from which the guests served themselves.[379] The court, in dicta, noted that even though the self-service scheme may not permit the same opportunities for observing the customer's condition as if each drink were served individually, a licensee cannot escape liability simply by adopting this method of service.[380]

Whether the New Jersey courts will employ a less rigid direct service requirement in the future remains uncertain in light of the *Kelly* holding. If courts permit hosts to escape liability by providing a self-service bar, many hosts will opt for such an arrangement, thus curtailing the deterrent effects of the *Kelly* decision. In order to fulfill the policy aims of *Kelly,* a modification of this prerequisite to liability seems inevitable.

d. *Conduct Required to Fulfill Duty.* The duty imposed on social hosts by the *Kelly* court is a duty to "reasonably oversee the serving of liquor."[381] An open question is exactly what actions the host must take to satisfy this legal obligation. The decision permits the host to serve the guest up to the point of intoxication without incurring liability,[382] but service after that point creates potential liability

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377 Note, *supra* note 360, at 743. The author concedes that a social host who chooses a self-service arrangement may not be able to directly observe guests. A social host who chooses this method, however, should be required to take additional precautions to prevent intoxicated guests from serving themselves. *Id.*

378 121 N.J. Super. 525, 298 A.2d 84 (1972), *cert. denied,* 62 N.J. 334, 301 A.2d 449 (1973).

379 *Id.* at 532, 298 A.2d at 86.

380 *Id.*, 298 A.2d at 87. Courts in other jurisdictions have imposed liability on providers of alcohol in the absence of direct service. *See, e.g,* Peterson v. Jack Donelson Sales Co., 4 Ill. App. 3d 792, 281 N.E.2d 753 (1972) (licensee who provided unattended beer truck at picnic held liable under Illinois dramshop act). *But see* Wiener v. Gamma Phi Chap. of Alpha Tau Omega Frat., 258 Or. 632, 485 P.2d 18 (1971) (lessors of hall for fraternity party not liable for injuries resulting from intoxicated minor's automobile accident because lessors did not have control over dispensation of alcohol).

381 96 N.J. at 557, 476 A.2d at 1229.

382 *See* Note, *Commercial and Social Host Liability for Dispensing Alcoholic Beverages,* 16 WILLAMETTE L.J. 191, 195 (1979) ("No liability attaches to the host who served an intoxicated guest who appeared sober when served even if the guest became visibly intoxicated after having been served." (citing Campbell v. Carpenter, 279 Or. 237, 243, 566 P.2d 893, 897 (1977)); *see also* Comment, *supra* note 364, at 104 n.80 (no liability attaches to bartender who serves patron up to point of intoxication).

if the host knows that the guest will drive.[383] In order to fulfill this duty, a host must assess the effect each drink will have on the guest.[384] Moreover, a host may not notice the condition of a guest until after the guest has become visibly intoxicated. If the guest attempts to depart while in this state, the host may be faced with a choice between detaining the guest and risking liability by permitting the guest to drive away.[385] Consequently, the host's duty may extend to physically restraining guests from driving.[386] Because the social host in *Kelly* made no attempt to stop the guest from driving, the extent of the host's duty to restrain a guest remains unclear.

Justice Garibaldi's dissenting opinion raises serious questions about a host's ability to fulfill the duty once the host becomes aware that a particular guest is intoxicated. Garibaldi notes that "[w]e should not iguore 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."[387] In response to this argument, one commentator contends that "temporary unpopularity seems a small price to pay in return for a meaningful cause of action for those injured in alcohol related accidents."[388] Another commentator points out that a social host has several advantages over licensees in fulfilling his legal obligation; the host can permit an intoxicated guest to stay overnight or can have a sober guest escort the intoxicated guest home.[389] The commercial licensee is less likely to have these options available to him.

e. *Harm for Which a Host May Be Liable.* The *Kelly* court explicitly limited the social host's liability to injuries to third parties resulting from the operation of a motor vehicle by an intoxicated guest.[390]

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383 *See Kelly*, 96 N.J. at 556, 476 A.2d at 1228; *see also supra* notes 373-74 and accompanying text.

384 In Kindt v. Kauffman, 57 Cal. App. 3d 845, 850, 129 Cal. Rptr. 603, 606 (1976) a California appellate court highlighted one of the problems with the obvious intoxication requirement by noting that "what is patent when the drinker falls off his bar stool may have been only latent 60 seconds earlier."

385 One commentator has argued that an intoxicated person who is refused alcohol by a host is not likely to remain at the host's home, thus "one who refuses to serve a drink to avoid the risk of civil liability may only hasten the placing of an intoxicated and dangerous person behind the wheel of an automobile." Note, *supra* note 360, at 737.

386 One commentator has suggested that a host who affirmatively acts to prevent an obviously intoxicated guest from driving may conceivably be subject to charges of false imprisonment. *See* Comment, *supra* note 364, at 105.

387 96 N.J. at 567, 476 A.2d at 1234 (Garibaldi, J., dissenting).

388 Comment, *supra* note 360, at 236.

389 Keenan, *supra* note 370, at 69.

390 96 N.J. at 559, 476 A.2d at 1230. The court noted that because law enforcement officers investigate auto accidents and make routine determinations as to whether the drivers and occupants are intoxicated, limiting social host liability to automobile accidents would prevent unsubstantiated claims against social hosts. Emphasizing the blood alcohol tests, the court stated that "[t]he availability of clear objective evidence estab-

Other jurisdictions have extended the liability of liquor purveyors to harm caused by other acts of the intoxicated party, such as deaths or injuries caused by the negligent or intentional discharge of a gun[391] and injuries resulting from assault and battery.[392] Recovery for these types of harm would not be possible under the *Kelly* holding.[393] In addition, many jurisdictions, including New Jersey, have permitted an intoxicated party who injured himself to recover from a licensee who continued to serve the party after he became intoxicated.[394] The *Kelly* holding restricts social host liability to injuries incurred by third parties, thus precluding recovery by the intoxicated guest for self-inflicted injuries.

2. *Additional Factors Affecting Liability*

The *Kelly* court's formulation of the social host liability rule does not provide hosts with sufficient guidance as to what conduct will subject them to liability. The court expressly reserved the opportunity to extend social host liability to other circumstances when appropriate.[395] The court acknowledged that it did not face a case involving a drunken host, a party where many guests congregated, a

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lishing intoxication will act to weed out baseless claims and to prevent this cause of action from being used as a tool for harassment." *Id.*

391 Marusa v. District of Columbia, 484 F.2d 828, 833 (D.C. Cir. 1973) (tavern owner liable for injuries resulting from intoxicated patron's intentional shooting of third party); Taggart v. Bitzenhofer, 33 Ohio St. 2d 35, 294 N.E.2d 226 (1973) (tavern owner liable for shooting death where bartender served intoxicated patron who had placed pistol on bar and threatened to shoot); Prevatt v. McClennan, 201 So. 2d 780, 780-81 (Fla. Dist. Ct. App. 1967) (tavern owner liable for injuries to third party resulting from negligent shooting by intoxicated person).

392 Morrissey v. Sheedy, 26 App. Div. 2d 683, 683, 272 N.Y.S.2d 430, 431-32 (1966) (cause of action lies against tavern owner who served intoxicated patron who thereafter assaulted another patron).

393 In Griesenbeck v. Walker, 199 N.J. Super. 132, 488 A.2d 1038 (N.J. Super. Ct. App. Div. 1985), the New Jersey Superior Court, citing *Kelly,* refused to hold social hosts liable to third parties for injuries which did not result from the guest's drunken driving. In *Griesenbeck* the intoxicated guest, after arriving home, allegedly caused a fire by leaving a cigarette burning in a sofa. The court reasoned that the hosts could not be expected to foresee the sequence of events which led to the deaths and injuries. *Id.* at 136, 488 A.2d at 1042.

394 *E.g.*, Soronen v. Olde Milford Inn, 46 N.J. 582, 218 A.2d 630 (1966) (recovery permitted for wrongful death of plaintiff's husband who died as a result of injuries incurred in fall in defendant's tavern). *See supra* notes 289-95 and accompanying text; *see also* Ramsey v. Anctil, 106 N.H. 375, 211 A.2d 900 (1965) (tavern liable for injury caused when patron slammed his fist on bar and severed nerve in his hand).

See generally Keenan, *supra* note 370, at 73; Note, *Dram Shop Liability—A Judicial Response,* 57 CALIF. L. REV. 995, 1005 (1969) [hereinafter cited as Note, *Judicial Response*]; Note, *Beyond the Dram Shop Act: Imposition of Common-Law Liability on Purveyors of Liquor,* 63 IOWA L. REV. 1282, 1294 (1978); Note, *Liquor Vendor Liability for Injuries Caused By Intoxicated Patrons—A Question of Policy,* 35 OHIO ST. L.J. 630, 642-43 (1974) [hereinafter cited as Note, *A Question of Policy*].

395 96 N.J. at 556, 476 A.2d at 1228.

host busily occupied with other responsibilities, or guests who served each other.[396] Analysis of these four possible situations reveals some of the questions that the *Kelly* court left unanswered and highlights several factual variables that may affect the outcome of future cases.

As Justice Garibaldi noted in her dissent, social hosts frequently drink with their guests, thus reducing their ability to evaluate a guest's level of intoxication.[397] The dissent suggested that social hosts could evade liability by becoming drunk themselves.[398] In response to such an argument, one commentator has suggested that a host's duty not to serve alcohol to a visibly intoxicated guest necessarily places an obligation on the host to effectively supervise the guest's consumption of alcohol.[399] A host, therefore, must limit his own consumption of alcohol in order to retain the ability to supervise his guests and properly assess their level of sobriety. It does not seem unreasonable nor inconsistent with the policy and rationale of the *Kelly* rule to place this additional obligation on one who engages in an activity which creates a risk to public safety. Furthermore, this obligation would prevent the host from deliberately becoming intoxicated to evade the responsibility imposed by the *Kelly* decision.

The court also recognized two other common situations in which its rule may not apply: a large social gathering with many guests in attendance and a gathering where the host is busy with other responsibilities and consequently has little face-to-face contact with the guests.[400] A host's ability to supervise the amount of liquor consumption by his guests will obviously be diminished in these situations because he will not necessarily be in a position to observe or restrain every guest who chooses to have a drink.[401] No case has yet imposed social host liability for serving an adult under such circumstances, and an extension of liability to these circumstances would place a heavy burden on the host of a large party, who would most likely need assistance in order to adequately supervise all of the guests in attendance. The outcome of such cases may depend upon

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396 *Id.*

397 *Id.* at 566-67, 476 A.2d at 1234 (Garibaldi, J., dissenting). Justice Garibaldi stated that the Zaks drank with their guest, but the majority opinion does not mention this fact. *Id.*

398 *Id.*

399 Keenan, *supra* note 370, at 69. Keenan states that "undoubtedly, such a duty . . . places additional obligations upon the social host in order to effectively police the [alcohol] consumption of his guests. The host, for example, should not permit himself to become intoxicated." *Id.*

400 96 N.J. at 556, 476 A.2d at 1228.

401 Note, *Extension of the Dramshop Act, New Found Liability of the Social Host,* 49 N.D.L. REV. 67, 80 (1972).

a close examination of the particular circumstances of the case and the imposition of liability in these circumstances would require a modification of the direct service requirement.

Curiously, the final factual setting which the *Kelly* court failed to resolve is the situation where guests serve alcoholic beverages to each other.[402] The court's failure to resolve this situation is somewhat surprising because the direct service requirement appears to absolve the host under these circumstances. By including a situation where guests serve one another as a potential variable to be considered in future cases, the court cast even more doubt on the direct service requirement and further increased the uncertainty engendered by its decision.[403]

3. *Policy Justifications*

The *Kelly* court advanced two policy considerations to justify its decision to impose liability on social hosts. First, the court believed that its decision would increase the likelihood that victims of drunk drivers would be fairly compensated for their injuries.[404] Although some authorities contend that the compensatory effects of social host liability are minimal because the injured party has a direct remedy against the intoxicated driver[405] and the *Kelly* court did not offer any empirical evidence in support of its argument,[406] the court's argument is well founded. Drunk drivers are not always sufficiently insured to fully compensate those injured by their negligence.[407] Allowing recovery against a social host as well as the intoxicated driver provides a greater opportunity for complete recovery.[408]

Second, the court asserted that the rule would advance the goal of deterring drunken driving.[409] The court placed less emphasis on the goal of deterrence than that of compensation, however, because it had "no assurance that [the rule would] have any siguificant [de-

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402 *Kelly*, 96 N.J. at 556, 476 A.2d at 1228.

403 *See supra* notes 377-80 and accompanying text.

404 96 N.J. at 551, 476 A.2d at 1226.

405 *See, e.g.* Olsen v. Copeland, 90 Wis. 2d 483, 280 N.W.2d 178, 181 (1979) ("The problem presented by this issue is not one of the adequate remedies for an injured plaintiff.").

406 The court admitted that it did not know how often the victim would require compensation from the host in order to be made whole. 96 N.J. at 558, 476 A.2d at 1229.

407 *See* Note, *Judicial Response*, *supra* note 394, at 996.

408 Comment, *supra* note 360, at 232 ("shifting the responsibility from a negligent driver, who may have no insurance or only the statutory minimum coverage, to liquor suppliers who have greater access to larger amounts of insurance, would clearly increase the chances of recovery") (footnote omitted). *See also* Note, *A Question of Policy*, *supra* note 394, at 648 (availability of compensation from tavern owners would assure compensation for the acts of intoxicated person).

409 96 N.J. at 551, 476 A.2d at 1226.

terrent] effect."[410] Perhaps the court underestimated the deterrent effects of the decision. The fear of economic liability is likely to induce hosts to take greater care in serving alcoholic beverages at social gatherings.

The *Kelly* decision holds the host and the intoxicated guest jointly and severally liable.[411] The host's potential liability should not reduce the deterrent effect on the drinker, however, because the drinker remains liable for the full damage award. Even if the addition of a defendant who may share the burden of compensating the victim were to reduce the deterrent effect upon the drinker, the overall deterrent effect increases when both parties are held liable.[412] It is probable that when "[t]wo parties polic[e] alcohol consumption, each with the power to stop it, [they] increase the probability that abuses will be prevented."[413]

An examination of the operation of the *Kelly* rule, however, indicates that the decision may only deter drunk driving in the most severe cases of intoxication. *Kelly* does not require that the host determine whether the guest has reached the point of legal intoxication. Rather, civil liability arises only if the social host continues to serve alcohol to a guest who already appears visibly intoxicated.[414] A person will often be legally intoxicated and suffer impaired driving abilities well before his intoxication is apparent to others.[415] Under *Kelly,* if the guest departs prior to reaching the point of visible intoxication, the host is not liable for injuries to third parties resulting from the guest's drunken driving. Consequently, social host liability, as formulated by the *Kelly* court, will help prevent only the most dangerous guests from driving while intoxicated.[416]

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410 *Id.*

411 96 N.J. at 559, 476 A.2d at 1230.

412 Note, *supra* note 360, at 731 & n.49 (courts considering dual civil liability have found overall increase in deterrence).

The deterrent effects of *Kelly* may be particularly strong because New Jersey has no statutory provision imposing criminal sanctions on social hosts who serve adult guests. In states which have such a statute, the deterrent effect of a civil cause of action would merely add to the deterrent effects of the criminal provision.

413 *Id.* at 731 (footnote omitted).

414 *Kelly,* 96 N.J. at 556, 476 A.2d at 1228.

415 The level of legal intoxication in New Jersey and in most states is .10% or more by weight of alcohol in the blood. N.J. STAT. ANN. § 39:4-50(a) (West Supp. 1984). Expert testimony presented in Ewing v. Cloverleaf Bowl, 20 Cal. 3d 389, 398, 572 P.2d 1155, 1158, 143 Cal. Rptr. 13, 17 (1978) demonstrated that a casual observer can normally detect sigus of intoxication only when the level of alcohol in the person's blood exceeds .20%. *See* Note, *supra* note 401, at 80.

416 Because of the uncertainty of the *Kelly* rule, the decision could have a chilling effect on host behavior, adding to the deterrent effect. This is because risk-averse hosts may stop serving alcohol well before their guests are visibly intoxicated.

4. *Judicial Imposition of Social Host Liability*

The court's imposition of social host liability without a statutory basis constitutes one of the most controversial aspects of the *Kelly* decision. The decision provoked charges that the court infringed on the legislative domain[417] and prompted the introduction of a bill and a resolution in the New Jersey legislature.[418] With the exception of *Linn v. Rand*[419] and *Figuly v. Knoll*,[420] each New Jersey decision imposing civil liability prior to *Kelly* involved a violation of an alcoholic beverage control statute or regulation.[421] Although these enactments provided for criminal liability only, the court deemed their existence as a sufficient indication of legislative policy to form the basis for the imposition of civil liability on commercial licensees.[422] The *Kelly* court did not attempt to extend statutory or regu-

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417 New Jersey State Bar president William J. Brennan III said that the court might be infringing on the legislature by "substituting its view of what's best for New Jersey for that of the elected representatives." Nat'l L.J., Nov. 5, 1984, at 39, col. 3.

418 Senate Bill No. 2122 may have been derived from one of the dissent's alternative suggestions. S. 2122, 201 Leg., 1st Sess. (N.J. 1984). The bill states that a social host would only be liable if he or she "willfully and knowingly, manifesting extreme indifference to the rights of others, served the alcoholic beverages to a person who was visibly intoxicated in his presence, and who he knew or should have known would operate a motor vehicle reasonably soon thereafter."

Senate Concurrent Resolution No. 116 would establish "a commission to study the duties, responsibilities and liabilities of private and licensed servers of alcohol beverages" and to "recommend ways to reduce alcohol-related accidents and provide compensation for victims of these accidents." S. Con. Res. 116, 201 Leg., 1st Sess. (N.J. 1984).

Assembly Bill No. 43, introduced prior to *Kelly*, would exempt "social hosts from civil liability for injuries caused by adult consumers of alcoholic beverages served by them." A.43, 201 Leg., 1st Sess. (N.J. 1984). It would not preclude the imposition of civil liability on licensees or anyone who served a minor. Thus, this bill would implicitly approve of the liability imposed in *Rappaport*, 31 N.J. 188, 156 A.2d 1, *Soronen*, 46 N.J. 582, 218 A.2d 630, and *Linn*, 140 N.J. Super. 212, 356 A.2d 15, but would overrule *Kelly*.

419 140 N.J. Super. 212, 356 A.2d 15 (1976). In *Linn* there was no applicable criminal restriction from which the court could derive a duty. That case, however, involved service of alcoholic beverages to a minor. The dissent in *Kelly* argued that *Linn* could be distinguished from *Kelly* because "minors occupy a special place in our society and traditionally have been protected by state regulation from the consequences of their own immaturity." *Kelly*, 96 N.J. at 561 n.1, 476 A.2d at 1230-31 n.1 (Garibaldi, J., dissenting).

420 185 N.J. Super. 477, 449 A.2d 564 (1982). *Figuly* can be distinguished in part because the host had previously worked as a bartender and knew the effects of alcohol upon persons. *See supra* notes 314-17 and accompanying text.

421 *See, e.g.*, Aliulis v. Tunnel Hill Corp., 59 N.J. 508, 284 A.2d 180 (1971); Soronen v. Olde Milford Inn, 46 N.J. 582, 218 A.2d 630 (1966); Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959).

422 Other jurisdictions have grounded civil liability in the violation of administrative or penal provisions regulating alcohol. *See supra* notes 129-206 and accompanying text.

Judicial imposition of civil liability based upon criminal statutes, however, is not universally accepted. Many jurisdictions hold that the purpose of the restrictions is to regulate the business of selling intoxicants and not to create a civil remedy or impose a duty on the part of the provider of alcoholic beverages toward injured third parties.

latory coverage to social hosts; instead, the court based its decision solely on common law negligence principles.[423]

The fundamental question faced by the court in *Kelly* was whether the defendant owed a duty of care to the plaintiff not to serve liquor to a visibly intoxicated guest.[424] According to Prosser, "the problem of duty is as broad as the whole law of negligence, and . . . no universal test for it ever has been formulated."[425] Courts generally consider many factors in determining whether to create a duty.[426]

In support of its decision, the *Kelly* court relied primarily on the strong legislative policy against drunk driving.[427] The court also sensed a change in social attitudes and drinking customs, noting that "society . . . has finally recoguized that it must change its habits and do whatever is required . . . in order to stop the senseless loss inflicted by drunken drivers."[428] The dissent's arguments against the imposition of a duty and the rejection of a similar cause of action by nearly every other jurisdiction in the country demonstrate that although the goal itself may not be controversial, authorities disagree about the appropriate means to accomplish the goal.

a. *Legislative Intent.* The majority in *Kelly* advanced three arguments to support its claim that the decision comports with legislative policy. First, the court noted the absence of a dramshop act in New Jersey. The existence of an act imposing civil liability only on licensees would indicate a legislative intent not to impose liability on others, such as social hosts.[429] Second, the court observed that the legislature had recently strengthened the state's criminal sanctions against drunken drivers.[430] Third, the New Jersey judiciary had continued to expand the liability of a server of alcoholic beverages since the landmark decision in *Rappaport.*[431] Because the legislature was aware of these decisions and had not disapproved them, the court concluded that the decision did not contravene legislative policy.[432]

The majority interpreted the absence of a dramshop act as evi-

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Note, *Social Host Liability for Injuries Caused by the Acts of an Intoxicated Guest,* 59 N.D.L. REV. 445, 462-69 (1983).

423 96 N.J. at 545-47, 476 A.2d at 1222-23.

424 The New Jersey Supreme Court had removed problems of proximate causation as a bar to liability in Rappaport v. Nichols, 31 N.J. 199, 156 A.2d 1 (1959). *See supra* text accompanying note 282.

425 W. PROSSER & W. KEETON, *supra* note 285, § 53.

426 *See id.*

427 96 N.J. at 545, 476 A.2d at 1222.

428 *Id.* at 558-59, 476 A.2d at 1229.

429 *Id.* at 554, 476 A.2d at 1227.

430 *Id.* at 545, 476 A.2d at 1222.

431 *Id.* at 553, 476 A.2d at 1226.

432 *Id.*

dence that the imposition of liability on social hosts would not contradict legislative policy. Courts in other jurisdictions, however, have construed the enactment of an alcoholic beverage control act without a civil liability provision as evidence of legislative intent not to impose civil liability.[433] In *Holmes v. Circo*[434] the Nebraska Supreme Court noted that the Nebraska legislature had repealed a dramshop act in 1935 and enacted the Nebraska Liquor Control Act in its place.[435] The Liquor Control Act regulated the sale of alcoholic beverages to the public, but did not impose civil liability on sellers of alcohol for injuries to patrons or third persons. The court in *Holmes* ruled that the enactment of the Liquor Control Act, and the repeal of the dramshop act, indicated a legislative intent to bar a civil cause of action.[436]

The *Kelly* court, however, correctly viewed civil liability as an area of legislative silence rather than legislative preemption. The New Jersey legislature repealed its civil liability provision when it repealed the entire liquor code at the end of prohibition.[437] The dramshop act established broad liability, imposing strict liability on sellers of alcohol and subjecting them to compensatory and punitive damages.[438] Thus, it is unclear whether the legislature would have abolished the more limited liability now imposed by *Kelly*. In addition, the repeal did not expressly preclude common law negligence causes of action.[439] Consequently, the repeal of the dramshop act does not indicate a legislative intent to bar all civil liability.[440]

Faced with legislative silence on civil liability, the *Kelly* majority looked to the state's criminal provisions for an indication of legislative intent. The *Kelly* court reasoned that the legislature's strong criminal sanctions against drunk driving supported the court's decision to create a new civil cause of action.[441] The dissent rejected this argument, pointing to a bill passed by the legislature in 1984 which imposed a criminal penalty on a social host who serves alcohol to a minor.[442] Because the legislature did not enact a similar

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433 Some courts in states without dramshop acts have based their rejection of liability on the argument that their legislatures are aware of the existence of dramshop acts in other states. The absence of such statutes in these states would therefore reveal legislative intent to preclude judicial action in this area. *See* Keenan, *supra* note 370, at 48-49.

434 196 Neb. 496, 244 N.W.2d 65 (1976).

435 *Id.* at 498-99, 244 N.W.2d at 67.

436 *Id.* at 504, 244 N.W.2d at 70. *See also* Halvorson v. Birchfield Boiler, Inc., 76 Wash. 2d 759, 761, 458 P.2d 897, 898 (1969) (similar interpretation of more recent repeal of dramshop act).

437 *See supra* notes 269-72 and accompanying text.

438 *See supra* note 267 and accompanying text.

439 *See supra* note 274 and accompanying text.

440 Koloff, *supra* note 285, at 43.

441 96 N.J. at 545, 476 A.2d at 1222.

442 *Id.* at 569, 476 A.2d at 1235.

provision imposing criminal liability on social hosts who serve adult guests, the dissent argued that the creation of a civil cause of action against social hosts who serve alcohol to adult guests contravened legislative intent.[443]

Neither the majority nor the dissent successfully invoked the legislature's intent. The New Jersey legislature has simply not spoken on the topic of civil liability for social hosts, and legislative silence does not reliably indicate legislative intent.[444] The absence of a criminal statute prohibiting social hosts from serving visibly intoxicated adult guests does not necessarily mean that the legislature disapproves of civil liability. Neither does the legislature's imposition of strict sanctions on drunk drivers indicate that the legislature would approve of social host liability as an alternative means of deterrence.

The majority's final argument, that the legislature had not responded adversely to the judiciary's earlier expansions of liability in the same general area, is weak for several reasons. First, *Kelly* siguificantly expands social host liability beyond the liability imposed in earlier New Jersey decisions. Consequently, the lack of adverse legislative reaction to those decisions may not accurately predict the legislative reaction to this decision. Second, the argument that legislative inaction constitutes tacit approval of the judicial status quo requires the questionable assumption that legislatures review court decisions to insure conformity with current legislative values.[445] Thus, whether the New Jersey legislature will support the *Kelly* decision remains an open question.

b. *Legitimacy of Judicial Action.* Despite its tenuous legislative intent arguments, the New Jersey Supreme Court acted within its authority when deciding *Kelly*. Many authorities support the *Kelly* court's assertion that "[d]eterminations of the scope of duty in negligence cases has traditionally been a function of the judiciary."[446] This statement also holds true for the issue which *Kelly* decided. The New Jersey courts had been expanding the civil liability of liquor providers for over twenty-five years.[447] During this time, the New Jersey legislature enacted no legislation concerning such civil liability. Thus, the court did not invade a legislative domain. Fi-

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443 *Id.*

444 Note, *Judicial Response, supra* note 394, at 1008-09.

445 Williams, *Statutes as Sources of Law Beyond Their Terms in Common Law Cases,* 50 GEO. WASH. L. REV. 554, 567 (1982).

446 96 N.J. at 552, 476 A.2d at 1226. *See, e.g.*, Greene, *The Thrust of Tort Law Part II: Judicial Law Making,* 64 W. VA. L. REV. 115, 117 (1962); Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law,* 48 MINN. L. REV. 265, 285 (1963).

447 *See supra* notes 265-317 and accompanying text (tracing development of civil liability for sellers and servers of alcoholic beverages in New Jersey).

nally, the court recognized that if the legislature does not agree with the decision, it has the power to abrogate or modify it.[448]

III
CHOOSING A SYSTEM OF LIABILITY

The first section of this Project discussed dramshop acts,[449] beverage control acts,[450] and ordinary negligence principles[451] as methods of imposing liability on social hosts. This section of the Project will examine the merits of each. Part A will discuss the cost of insurance under the three choices of liability. Part B will then examine problems with the negligence standard adopted in *Kelly v. Gwinnell*. Next, part C will attempt to predict the legislative response to each method. Finally, part D will present alternatives to the negligence standard established by the courts.

A. The Cost of Insurance Under the Three Methods of Liability

An important goal of imposing liability is to reduce the costs associated with accidents.[452] Courts have expressed concern that social host liability will lead to higher insurance costs.[453] Hosts may find it less expensive to insure against liability under a negligence standard than under a dramshop act. How social host liability under a beverage control act would affect insurance rates is less clear, however. This section attempts to determine which method of liability is the least expensive to insure under.

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448 *Kelly*, 96 N.J. at 555, 476 A.2d at 1227.

449 *See supra* notes 102-26 and accompanying text.

450 *See supra* notes 129-206 and accompanying text.

451 *See supra* notes 207-56 and accompanying text.

452 *See* Schmalz, *Superfunds and Tort Law Reforms—Are They Insurable?*, 38 BUS. LAW. 175, 179 (1982). According to Professor Calabresi, "it [is] axiomatic that the principal function of accident law is to reduce the sum of the costs of accidents and the cost of avoiding accidents." G. CALABRESI, THE COSTS OF ACCIDENTS (1970). Other scholars agree that accident cost reduction is an aim of tort law. *See* C. MORRIS & C.R. MORRIS, JR., MORRIS ON TORTS 246-53 (1953); W. PROSSER, LAW OF TORTS 148-49, 659-60 (4th ed. 1971); Henderson, *Extending the Boundaries of Strict Products Liability: Implications of the Theory of the Second Best*, 128 U. PA. L. REV. 1036, 1038 n.7 (1980) (citing 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 12.4 (1956)).

There is no evidence that adopting a stricter standard of care will prevent accidents. Professor Posner suggests that a choice between strict liability and negligence will not affect the *number* of accidents because individuals will adopt accident prevention methods only if the methods are cost effective. Regardless of whether the individual is held to a strict liability or negligence standard this cost-benefit analysis will be the same. R. POSNER, ECONOMIC ANALYSIS OF LAW § 6.11, at 137-38 (2d ed. 1977). *But see* Calabresi & Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1074-76 (1972) (attributing trend towards strict liability to its superior ability to minimize sum of accident and avoidance costs).

453 *See infra* notes 470-71 and accompanying text.

1. *Insurance Under a Dramshop Act*

Most social hosts who are exposed to liability will purchase insurance for protection against large losses.[454] As the probability of loss increases, however, the cost of insurance approaches the cost of the loss.[455] At some point, "loss becomes so certain that either the insurer withdraws the protection or the cost of the premium becomes prohibitive, or both."[456] Dramshop acts impose strict liability on hosts[457] and are therefore likely to result in higher premiums than would occur under a negligence regime. According to one expert, "strict liability systems . . . can easily run out of control. They can make it impossible for private insurers to provide high-limit liability coverage at reasonable cost."[458]

The experience of tavern owners with strict liability under a beverage control act can help predict how it might affect a social host's ability to insure. Before the California state legislature abrogated both social host and tavern owner liability,[459] tavern owners were concerned that the liability imposed on them under a beverage control act would put them out of business due to the high cost of insurance.[460] Between approximately 1971 and 1979, for example, one California tavern owner's premium climbed from $10,000 to $190,000.[461] About one-third of California's 25,000 tavern owners chose to risk liablity rather than pay the high premium.[462]

Even if a tavern owner does have dramshop liability insurance, the policy may not cover all claims. A tavern owner's policy may exclude coverage when the insured has violated a beverage control act.[463] Some policies relieve the insurer of liability if the insured sold or gave alcohol to a minor.[464] Others exclude coverage of inju-

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454 *See generally* M. GREENE, RISK AND INSURANCE 58 (3d ed. 1973) (potential loss to insured must warrant cost of protection).

455 *Id.*

456 *Id.* According to Greene, "if the chance of loss is greater than 50%, the insurer finds it impossible to offer the protection because the premium becomes too great to be worth it to the insured." *Id.* at 58-59.

457 *See supra* notes 57-67 and accompanying text.

458 Schmalz, *supra* note 452, at 192. Schmalz contends that some critics of the tort liability system advocate strict liability because it compensates more tort victims by reducing the burden of proof at trial and eroding the proximate cause requirement. Schmalz argues that "such a course . . . risks unmanageable costs and insurance crises." *Id.* at 178-79.

459 *See supra* notes 188-201 and accompanying text.

460 *See* Note, *California Liquor Liability: Who's to Pay the Costs,* 15 CAL. W.L. REV. 490, 531 (1980).

461 Note, *supra* note 360, at 745 n.146.

462 *Id.* Proponents of the California bill immunizing tavern owners and social hosts argued that passage of the bill would decrease insurance rates for both groups. *Id.* at 745 n.148.

463 7A J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4507, at 331 (1979).

464 *Id.* at 330.

ries resulting from sales to habitual drunkards.[465] If policies go so far as to "exclude injuries resulting from wilful and wanton acts of the insured, a huge number of instances in which tavern keepers or owners would be rendered liable would be excepted thereby."[466] Each tavern owner's coverage and exclusions will depend on his specific policy; thus, it may be misleading to generalize as to the extent of coverage. Policies available to social hosts, however, are likely to contain similar exclusions, leaving the insured exposed to some risks. Because social hosts as a group serve fewer drinks than tavern owners, they will probably experience fewer accidents per insured; as a result, cost spreading would lower social host premiums. Also, an injured third party is more likely to sue the tavern owner because his business is more likely to have the resources to cover the judgment.[467] The host is a less likely target, especially if it is known that he has few assets or is uninsured. Thus, social hosts' premiums would not escalate as fast as tavern owners' premiums under a strict liability scheme.

Commentators generally agree, however, that social host liability should not be imposed by dramshop acts.[468] Whereas tavern owners can pass the cost of insurance to their customers in the form of higher prices, social hosts cannot. Some courts have cited this factor as a reason for immunizing social hosts from liability.[469] In *Lowe v. Rubin*[470] the Appellate Court of Illinois refused to create a common law negligence cause of action against a social host because

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465 *Id.*

466 *Id.*

467 Some states require tavern owners to post bonds or carry liability insurance. *See supra* notes 57-67 and accompanying text.

468 *See* Graham, *supra* note 68, at 568 (arguing for negligence standard); *see also* Note, *supra* note 422, at 458 (noting that courts find extension of strict liability to social hosts unfair); Note, *supra* note 401, at 80 (listing factors weighing against social host liability); Comment, *supra* note 364, at 115.

469 The focus of this discussion is on selecting the most cost effective method of liability, not whether liability should be imposed at all. The reasoning of the cases cited is applicable because, if courts are reluctant to hold social hosts to a negligence standard because of their inability to pass on the cost of insurance, they will be even more reluctant to hold hosts to the stricter standard of dramshop acts.

One commentator disagrees with the proposition that it is fair to hold tavern owners and social hosts to different liability standards merely because tavern owners can pass on the higher premium costs to their customers. *See* Note, *supra* note 360, at 745. He argues that neither group can afford the cost of insurance. "[T]he inability of either group to afford insurance coverage suggests that liability should not attach at all, rather than that licensees should be held liable while hosts should not." *Id.* This argument only addresses whether to impose liability on social hosts. If, however, courts and legislators are choosing a method of liability, a tavern owner's ability to pass on the cost of insurance is a useful distinction. The author also argues that it is the *availability* of insurance, not the ability to spread its cost, which is the more important element in the decision to impose liability. *Id.* at 745 n.149.

470 98 Ill. App. 3d 496, 424 N.E.2d 710 (1981).

the social host, unlike the tavern owner, " 'receives no pecuniary gain for providing alcoholic beverages to his guest and will have to personally absorb the cost of insurance or other security.' "[471] Similarly, the California Supreme Court in *Cory v. Shierloh*[472] acknowledged that "licensees are in a better position to defray the costs of liability and insurance than the usual 'social host' or other unlicensed provider."[473]

2. *Insurance Under a Beverage Control Act*

Although the cost of social host liability insurance would be higher under a dramshop act than a negligence standard, insurance rates might not be higher under a beverage control act than under a negligence standard. In general, beverage control acts forbid the sale or gift of intoxicating liquor to minors or obviously intoxicated persons.[474] Courts have interpreted these criminal misdemeanor statutes as establishing the duty of care for civil liability.[475] Courts generally hold that violation of the statutes is negligence per se.[476]

Some courts have not allowed the defendant to assert the defense of due care once a violation of the statute is shown.[477] Courts that recognize no excuses for the violation are in effect applying a strict liability standard, although they "not infrequently continue, out of habit, to speak of the violation as 'negligence per se.' "[478] Prohibiting the defense of due care makes it easier for plaintiffs to prevail at trial. Thus, insurance would be more expensive for social hosts when a beverage control act, rather than a negligence standard, imposed liability.

Some courts, however, hold that beverage control act violations are only rebuttable evidence of negligence.[479] These cases are, therefore, almost indistinguishable from cases decided under com-

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471 *Id.* at 499, 424 N.E.2d at 713 (quoting DeMoulon & Whitcomb, *Social Host's Liability in Furnishing Alcoholic Beverages*, 27 FED'N INS. COUNS. Q. 347, 357 (1977)).

472 29 Cal. 3d 430, 629 P.2d 8, 174 Cal. Rptr. 500 (1981).

473 *Id.* at 441, 629 P.2d at 14, 174 Cal. Rptr. at 506. *Cory* upheld the constitutionality of the 1978 amendments to California's liquor laws. The amendments immunized social hosts from liability and created a limited cause of action against licensees who furnish alcohol to minors. *See infra* text accompanying note 581.

474 *See supra* notes 129-37 and accompanying text.

475 Note, *supra* note 422, at 459; *see also supra* notes 145-63 and accompanying text.

476 Note, *supra* note 422, at 459-60; *see, e.g.*, Brattain v. Herron, 159 Ind. App. 663, 309 N.E.2d 150 (1974) (violation is negligence per se); *see also supra* notes 138-44 and accompanying text.

477 *See* W. PROSSER & W. KEETON, *supra* note 285, at 227; *see also* Note, *Social Host Liability for Furnishing Liquor—Finding a Basis for Recovery in Kentucky*, 3 N. KY. L. REV. 229, 238 (1976) (discussing violation of liquor control statute as basis for social host liability).

478 W. PROSSER & W. KEETON, *supra* note 285, at 227.

479 *See id.*; *see also, e.g.*, Adamian v. Three Sons, Inc., 353 Mass. 498, 233 N.E.2d 18 (1968) (violation of statute is some evidence of defendant's negligence).

mon law negligence principles.[480] Thus, whether hosts will face higher insurance premiums under a beverage control act than under a negligence standard will depend on the effect given to statutory violations as proof of negligence. To the extent that it is easier to prove the defendant's negligence, insurance premiums will be higher.

3. *Insurance Under Ordinary Negligence Principles*

Of the three methods of imposing social host liability, courts should choose negligence as the most cost effective. Dramshop acts set too high a standard, and beverage control acts were designed to regulate licensees rather than social hosts.[481] Even under a negligence standard, however, insurance may still be too expensive or unavailable.

In *Coulter v. Superior Court of San Mateo County*[482] the Supreme Court of California cited insurance as a factor supporting the imposition of social host liability.[483] The court assumed that "insurance coverage (doubtless increasingly costly) will be made available to protect the social host from civil liability."[484] The New Jersey Supreme Court in *Kelly v. Gwinnell*[485] also discussed the insurance issue. Responding to the concern that the extent of potential liability may be disproportionate to the fault of the host, the court as-

480 *See, e.g,* Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959). In *Rappaport* the New Jersey Supreme Court stated that a violation of the state's beverage control act was admissible as "evidence of the defendants' negligence." *Id.* at 203, 156 A.2d at 9. The court held that each of the defendants was "at liberty to assert that it did not know or have reason to believe that its patron was a minor." *Id.* Thus, the court allowed the defense of due care, as it would have in any other negligence case. *See also* Linn v. Rand, 140 N.J. Super. 212, 356 A.2d 15 (Super. Ct. App. Div. 1976) (plaintiff must show that defendant knew or should have known that patron was a minor). *Cf.* Deeds v. United States, 306 F. Supp. 348 (D. Mont. 1969) (violation of criminal statute is negligence per se, but court considered intent, proximate cause, and defenses of contributory negligence and assumption of risk).

481 *See, e.g.,* Manning v. Andy, 454 Pa. 237, 310 A.2d 75 (1973) (only licensed persons engaged in sale of intoxicants can be held liable under beverage control statute); Hulse v. Driver, 11 Wash. App. 509, 524 P.2d 255 (1974) (refusing to apply beverage control statute to social setting).

482 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978); *see also supra* notes 188-94 and accompanying text.

483 *Id.* at 153, 577 P.2d at 674, 145 Cal. Rptr. at 539.

484 *Id.* The *Coulter* court adopted a portion of the reasoning of Rowland v. Christian, 69 Cal. 2d 108, 113, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100 (1968), as support for using the availability of insurance, in addition to foreseeability, as a factor in determining the existence of a duty to third persons. The *Rowland* court used the assumed existence of insurance to determine whether a possessor of land should receive immunity. The *Rowland* court maintained that "there is no persuasive evidence that applying ordinary principles of negligence law to the land occupier's liability will materially reduce the prevalence of insurance due to increased cost or even substantially increase the cost." *Id.* at 118, 443 P.2d at 567-68, 70 Cal. Rptr. at 103-04.

485 96 N.J. 538, 476 A.2d 1219 (1984).

sumed that homeowner insurance would cover social host liability.[486] The majority acknowledged, however, that homeowners and apartment dwellers would have to pay an additional premium for such coverage.[487]

The dissent in *Kelly* strongly challenged the majority's assumption that insurance would be readily available.[488] Justice Garibaldi stated that "many homeowners and apartment renters may not even have homeowner's insurance" and those that do may not be able to afford the increased premium.[489]

Justice Garibaldi's challenge to the majority's assumption that social hosts can insure against liability is persuasive if one looks at the experience of tavern owners. If, as with tavern owners, premiums become increasingly costly, many social hosts may choose to remain uninsured.[490] Even if reasonably-priced insurance is initially available, affordable rates which are also profitable for the insurer may disappear once plaintiffs begin to win large judgments.[491] Insurance companies will not continue to sell the insurance if it is no longer profitable.[492] As one commentator put it, "[s]o long as control of the actual availability of insurance lies almost wholly in the hands of the insurers, . . . all assumptions are precarious."[493] Furthermore, predicting the expense and availability of social host liability insurance will remain difficult until juries deliver judgments against hosts.

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486 *Id.* at 549-50, 476 A.2d at 1225.

487 *Id.* at 550 n.9, 476 A.2d at 1225 n.9.

488 *Id.* at 568, 476 A.2d at 1234-35 (Garibaldi, J., dissenting). The dissent made this objection despite the parties' acknowledgement that homeowners' insurance would cover social host liability. *Id.* at 550 n.9, 476 A.2d at 1225 n.9. The majority's assumption that homeowners' insurance will cover host liability is correct. *See* Ins. Information Inst. Fact Sheet at 6 (Aug. 1984). Most policies, however, exclude "business pursuits," so the social host may need additional coverage if he or she is entertaining customers or clients at home. *Id.* Furthermore, insurers might withdraw social host liability if plaintiffs recover large verdicts. *See supra* notes 454-58 and accompanying text.

489 96 N.J. at 568, 476 A.2d at 1235 (Garibaldi, J., dissenting).

490 *See* Comment, Coulter v. Superior Court of San Mateo County *and Its Legislative Abrogation: The Common Law Liability of the Social Host,* 23 ST. LOUIS U.L.J. 612, 627 (1979).

491 One commentator has noted the conflict between a public policy imposing liability on the assumption that insurance exists and the private financial interests of the insurers. He further argues that because courts assume defendants have insurance, more cases come into courts than the courts can handle. In addition, because liability insurance coverage often promotes settlement, the tort rules imposed will be only suggestive and not determinative. *See* Smith, *The Miscegenetic Union of Liability Insurance and Tort Process in the Personal Injury Claims System,* 54 CORNELL L. REV. 645, 680-81 (1969).

492 *See supra* note 454 and accompanying text.

493 Smith, *supra* note 491, at 681. The assumption seems even more precarious in the cases of apartment renters. A 1981 survey showed that while only 5% of homeowners carry no insurance, 70% of renters are completely uninsured. *See* Ins. Information Inst. 1983-84 Ins. Facts at 13 (1983).

At the present time, insurance is not prohibitively expensive for the average host. One author claims that a comprehensive umbrella liability policy is readily available with premiums ranging from $70 a year for a $1 million in coverage to $250 for $8 million in coverage.[494]

Choosing the most cost effective system of social host liability is difficult. Insurance premiums would be lower under a negligence stanadard than under strict liability or a dramshop act standard. The experience of tavern owners indicates that a strict liability standard will make insurance more expensive for hosts.[495] A beverage control act standard would also be more costly than a negligence standard.[496] Although some commentators believe insurance would become too expensive even under a negligence standard, inexpensive policies covering host liability are currently available.[497] Future availability of inexpensive liability insurance for social hosts will largely depend on the losses insurers incur as claims are settled or litigated.

B. The Common Law Negligence Standard

If courts and legislatures place liability on social hosts, they are likely to choose the common law negligence standard of care.[498] Three court decisions illustrate how courts may use ordinary negligence principles to impose social host liability. In *Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity*[499] the Oregon Supreme Court held that "[t]here might be circumstances in which the host would have a duty to deny his guest further access to alcohol."[500] Seven years later, in *Coulter v. Superior Court of San Mateo County*,[501] the California Supreme Court delineated a standard of care by holding that a social host who serves an obviously intoxicated guest who he knows will be driving creates a "*reasonably foreseeable* risk of injury to those on the highway."[502] In *Kelly v. Gwinnell*[503] the New Jersey

494 *What if You're Sued for a Million?*, CHANGING TIMES, Dec. 1984, 83, 84. According to the author, an umbrella policy includes auto and homeowner or tenant liability insurance in amounts prescribed by the insurer. Currently the policies are inexpensive because the insurers have not had to satisfy many claims. *Id.* If an individual does not have auto or residential insurance, he may obtain a comprehensive personal liability policy for $50-$90 with $500,000 in coverage. *Id.* at 86.

495 *See supra* notes 454-73 and accompanying text.

496 *See supra* notes 474-80 and accompanying text.

497 *See supra* notes 468, 494 and accompanying text.

498 *See* Graham, *supra* note 68, at 588; Note, *supra* note 422, at 475.

499 258 Or. 632, 485 P.2d 18 (1971).

500 *Id.* at 639, 485 P.2d at 21.

501 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978).

502 *Id.* at 153, 577 P.2d at 674, 145 Cal. Rptr. at 539 (emphasis in original).

503 96 N.J. 538, 476 A.2d 1219 (1984). For a detailed analysis of *Kelly*, see Section II.

Supreme Court held that a social host who *directly* served liquor to an adult guest, knowing both that the guest was *visibly* intoxicated and that he would be driving, was liable for injuries inflicted on a third party as a result of the guest's negligent operation of a motor vehicle while intoxicated.[504]

The *Coulter* court did not expressly require direct service as a prerequisite to liability, but it held that allegations that the defendant merely aided, abetted, and encouraged the guest to drink in excess failed to state a claim.[505] All three courts failed to address the myriad situations a host might face in attempting to satisfy the standard of care. As the *Kelly* majority stated,

> We are not faced with a party where many guests congregate, nor with guests serving each other, nor with a host busily occupied with other responsibilities and therefore unable to attend to the matter of serving liquor, nor with a drunken host. We will face those situations when and if they come before us . . . .[506]

This section of the project will analyze some of the concerns relating to a negligence standard.

Some courts have refused to impose liability on social hosts because of the problems hosts might face in satisfying their duty of care. In *Edgar v. Kajet*[507] a New York court refused to apply New York's dramshop act[508] to a social host who served alcohol to a visibly intoxicated guest, knowing the guest would soon be driving.[509] The court questioned the "visibly" or "obviously" intoxicated requirement, indicating that a social host might not know when one of his guests had reached his level of tolerance.[510] The court also questioned the host's general ability to supervise his guests' social activities.[511] Other courts and commentators have criticized the di-

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504 96 N.J. at 556, 476 A.2d at 1228.

505 21 Cal. 3d at 155, 577 P.2d at 676, 145 Cal. Rptr. at 541. The court also required some "affirmative" action by the host in serving the guest. *Id.* at 148, 155, 577 P.2d at 671, 676, 145 Cal. Rptr. at 536, 541.

506 96 N.J. at 556, 476 A.2d at 1228 (citation omitted).

507 84 Misc. 2d 100, 375 N.Y.S.2d 548 (Sup. Ct. 1975).

508 *See* N.Y. GEN. OBLIG. LAW § 11-101 (McKinney 1978 & Supp. 1984).

509 84 Misc. 2d at 103, 375 N.Y.S.2d at 552. The court did not consider applying any other standard of liability to the host.

510 *Id.*

511 *Id.* The Court stated, "The implications are almost limitless as to situations that might arise when liquor is dispensed at a social gathering, holiday parties, family celebrations, outdoor barbeques and picnics . . . ." *Id.* One Wisconsin court refused to impose liability on a tavern owner, fearing that such a precedent could lead to social host liability. *See* Garcia v. Hargrove, 46 Wis. 2d 724, 176 N.W.2d 566 (1970). The *Garcia* court stated in dicta that "extending liability to the noncommercial vendor would result in great social pressure being applied to such individuals and require their policing the activities of friends and social guests." *Id.* at 734, 176 N.W.2d at 570. The court questioned how successfully hosts could accomplish this task. *Id.*

rect service and "obviously intoxicated" requirements,[512] pointing out that the courts adopting these standards have not clearly defined how to apply them.

1. *The Direct Service Requirement*

Courts imposing liability on social hosts have not clarified how to apply the direct service requirement in certain situations. One commentator has characterized the requirement as an invitation for social hosts to avoid liability.[513] If a host required his guests to bring their own alcohol to the party, most courts would not require the host to act affirmatively to control his guests' consumption of the alcohol.[514] Further, hosts may set up self-service bars, or they may be too busy to supervise their guests' consumption. In *Kelly* and *Coulter,* the hosts directly and continually served their intoxicated guests.[515] Thus, the *Kelly* and *Coulter* courts correctly found that the respective hosts had the opportunity to observe their guests' consumption of alcohol. Neither court, however, addressed situations in which a host had difficulty monitoring his guests.

Two cases involving licensees illustrate how courts have applied the direct service requirement. In *Peterson v. Jack Donelson Sales Co.*[516] an Illinois appellate court found that the defendant licensee was negligent in providing an unattended beer truck for a company picnic. Even though the defendant did not physically serve the beer, the court concluded that he controlled its distribution.[517] The court held the defendant liable under the Illinois dramshop act.[518] A New Jersey superior court faced a similar problem in *Anslinger v. Martinsville Inn.*[519] In *Anslinger* the licensee placed bottles of alcohol on a table for self-service. Finding the licensee not liable because the patron was not visibly intoxicated,[520] the court stated in dicta that "a

512 *See infra* notes 513-33 and accompanying text.

513 *See* Comment, *supra* note 364, at 107.

514 *Id.*; *see also* Coffman v. Kennedy, 74 Cal. App. 3d 28, 37, 141 Cal. Rptr. 267, 272 (1977); Calrow v. Appliance Indus., Inc., 49 Cal. App. 3d 556, 568-69, 122 Cal. Rptr. 636, 643 (1975).

515 *See Kelly,* 96 N.J. at 548, 476 A.2d at 1224; *Coulter,* 21 Cal. 3d at 152-53, 577 P.2d at 674, 145 Cal. Rptr. at 539. For additional analysis of the direct service requirement, see *supra* notes 375-80 and accompanying text.

516 4 Ill. App. 3d 792, 281 N.E.2d 753 (1972).

517 *Id.* at 796-97, 281 N.E.2d at 756.

518 Liquor Control Act § 14, ILL. REV. STAT. ch. 43, § 135 (1975). Although dramshop acts apply strict liability principles to the furnisher, they usually require the plaintiff to show that the defendant "furnished" alcohol to the patron or guest. Therefore, it is useful to examine how courts have defined "furnishing" when applying dramshop acts to purveyors of alcohol.

519 121 N.J. Super. 525, 298 A.2d 84 (App. Div. 1972), *cert. denied,* 62 N.J. 334, 301 A.2d 449 (1973).

520 *Id.* at 533, 298 A.2d at 88.

licensee cannot absolve himself from all responsibility simply by adopting this method of service."[521] One commentator has argued that the *Anslinger* court's dicta should be extended to social hosts.[522] Thus, when a host sets up a "fix-your-own" drink bar, he assumes the risk of being unable to monitor his guests' behavior.[523]

Requiring a host to directly serve each guest may be unrealistic under some circumstances. For example, the host may have a large party, making it practically impossible for him to directly serve each guest. The *Peterson* and *Anslinger* cases suggest that because courts hold licensees liable even absent direct service, social hosts may also be liable without direct service. On the other hand, these cases also support the conclusion that the courts should hold the licensee to a higher standard in controlling alcohol.[524] Courts will more readily apply strict liability principles to the licensee because he is making a profit and can better absorb the costs of liability.[525]

2. *The Visibly Intoxicated Requirement*

By requiring direct service as an element of social host liability, the *Kelly* court implicitly made it easier for the host to observe his guest and determine whether he is intoxicated. As the court observed in *Edgar v. Kajet*,[526] however, a host may not know when his guest is intoxicated. One commentator contends that a host has no criteria to rely on in making a decision whether to serve his guest.[527] As this commentator notes, "a state of obvious intoxication is a condition that is very susceptible to after-the-fact interpretations. . . . [T]he determination that an individual is obviously intoxicated [is] not so obvious after all."[528]

A comparison of the relative abilities of tavern owners and social hosts to observe "obvious" intoxication is inconclusive. A tavern owner, unlike a social host, may have more experience in

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521 *Id.* at 532, 298 A.2d at 87.

522 *See* Note, *supra* note 360, at 743.

523 *Id.*

524 *See supra* notes 468-73 and accompanying text.

525 Excusing social hosts from liability for self-serve bars may lead to more accidents. If hosts know that they will escape liability if they arrange a self-serve bar, they may exercise even less control over a guest's consumption. As Professor Henderson states, "[w]henever a proposed boundary extension distinguishes among substitutable activities, consumers at the margin will move away from the . . . activities included within the boundaries of . . . liability, the prices of which more adequately reflect their true accident costs, and toward the excluded substitutes, the prices of which do not." *See* Henderson, *supra* note 452, at 1037-38 (citation omitted). Thus, guests may drink more at a self-serve bar, increasing the risk of an accident.

526 84 Misc. 2d 100, 375 N.Y.S.2d 548 (Sup. Ct. 1975). *See supra* text accompanying note 510.

527 *See* Comment, *supra* note 364, at 103.

528 *Id.* (citations omitted).

observing the signs of intoxication and thus may more readily determine the appropriate time to cut off the supply of alcohol. In addition, a social host might drink with his guests and thus not be sober enough to recognize his guests' obvious intoxication. Because the commercial purveyor does not usually drink with his customer, he can better monitor the customer's drinking.[529] In many instances, however, the tavern owner may have more difficulty observing his customers' degree of intoxication. For example, one patron may order a pitcher of beer for many others, or a cocktail waitress may serve different individuals throughout the course of an evening. Some taverns get so crowded that bartenders never have face-to-face encounters with many customers.

In *People v. Johnson*[530] a California court considered the responsibility placed on a tavern owner to detect obvious intoxication. The defendant violated California's Alcoholic Beverage Control Act by serving a customer who was "obviously intoxicated." The court found that the law required the tavern owner "to use his powers of observation to such extent as to see that which is easily seen and to hear that which is easily heard, under the conditions and circumstances then and there existing."[531] Although *Johnson* was a criminal case, courts imposing civil liability on tavern owners have defined the tavern owner's duty similarly.[532]

Despite its problems, the obvious intoxication standard provides the best definition of the host's duty for courts holding social hosts liable for the torts of their gnests. A lower standard would be unfair because "[o]nly at the point of 'obvious intoxication' would a reasonable person know that a drinker who may drive threatens her own safety and the safety of [others]."[533]

3. *The Deterrent Effect of the Negligence Standard*

The *Kelly* decision may help deter drunk driving in New Jersey.[534] According to John F. Vasallo, Jr., director of the New Jersey Alcoholic Beverage Control Division, many hosts are altering the way they manage social events.[535] One homeowner reportedly collects the car keys of his guests when they arrive at his home. He returns keys only to those who he is convinced are fit to drive; the

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529 *Id.*

530 81 Cal. App. 2d Supp. 973, 185 P.2d 105 (1947).

531 *Id.* at 975, 185 P.2d at 106.

532 *See* Note, *supra* note 360, at 734; *see, e.g.*, Weiner v. Trasatti, 19 Ill. App. 3d 240, 244, 311 N.E.2d 313, 317 (1974).

533 Note, *supra* note 360, at 735.

534 Sullivan, *Jersey Hosts Keeping Drunks from Driving*, N.Y. Times, Dec. 30, 1984, § 1, at 1, col. 2.

535 *Id.* at 16, col. 1.

other guests must ride home with someone else or spend the night.[536] One individual reported going to an affair that had a reputation as a "knockdown and dragout party" and was surprised to find that no one got intoxicated and that people were making sure that others had rides home.[537] Despite the evidence that the host liability rule may deter drunk driving, New Jersey remains the only state to impose liability on a social host for serving an adult beyond the point of obvious intoxication.

One commentator argues that finding social hosts negligent for serving an obviously intoxicated guest does nothing to prevent accidents because impairment of driving ability occurs at relatively low levels of blood alcohol concentration.[538] A host, however, can observe "obvious intoxication" only when a guest has a high blood alcohol content.[539] The host, therefore, may satisfy his duty of care under the *Kelly* and *Coulter* rule, yet fail to prevent his guest from driving with his faculties impaired.

Although it is true that one's driving abilities are impaired before one is obviously intoxicated,[540] this criticism fails to account for the added difficulties of requiring a host to stop service at a point when his guest's intoxication may not even be discernable. In addition, the social implications of a lower cut-off standard would be far more acute than the standard imposed by the *Kelly* court. As for accident prevention, the *Kelly* standard may not be as efficacious as a more stringent standard, but it will help to keep some of the worst offenders off the road.

Social host liability as imposed by the *Kelly* decision fails to achieve its full deterrent potential because it is limited to a narrow factual situation. The court provided no guidance as to the duty of care expected of a social host in other situations.[541] A social host may have difficulty refusing an additional drink to an obviously in-

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536 *Id.*

537 *Id.* at 16, col. 3.

538 *See* Note, *supra* note 360, at 735-38. According to another commentator, detectable impairment of driving ability occurs at a blood alcohol concentration (BAC) of .05. Cramton, *supra* note 320, at 996 (citing study conducted by Professor Borkenstein of Indiana University). The American Medical Association has stated that there is no evidence indicating that "at levels of 0.10 percent . . . and above there is not a severe, significant and dangerous deterioration in driving abilities." AMA, ALCOHOL AND THE IMPAIRED DRIVER 59 (1968).

539 *See* Note, *supra* note 360, at 736; *cf.* Ewing v. Cloverleaf Bowl, 20 Cal. 3d 389, 572 P.2d 1155, 143 Cal. Rptr. 13 (1978) (expert testimony that at BAC of .20 or higher casual observer could detect that person is drunk).

540 A driver with a BAC of .06 is twice as likely to have an accident as a sober driver. Cramton, *supra* note 320, at 996. When the BAC reaches .10, the legal level of intoxication in most states, *see supra* note 320, the driver is six times as likely to have an accident. Finally, at a .15 BAC level, the risk multiples by 25. *Id.*

541 *See supra* text accompanying note 506.

toxicated guest,[542] either because the guest is a friend or because the guest is antagonistic.[543] In some situations, a host might need a bouncer to enforce his decision to stop the flow of alcohol.[544] If a guest refused to stop drinking and then helped himself, a court should not hold the host liable under the *Kelly* standard because the host did not directly serve the guest after he was visibly intoxicated. *Kelly* does not indicate, however, whether the host has a duty to make every effort to prevent such a guest from driving. After the host stops serving his guest, the guest is likely to leave the party. If the host tries to stop his guest from leaving, the guest may have a claim for false imprisonment.[545] Even a brief restraint of the plaintiff's freedom may give rise to the tort of false imprisonment.[546] The problem of potential liability for false imprisonment is more serious in cases where the guest is able to prove that he was not visibly intoxicated.

Some state legislatures have responded to these concerns by overruling courts that impose social host liability. Thus, a choice between competing theories of liability involves not only an analysis of the merits of each alternative, but also a prediction of how state legislatures will respond to the selection. The following section of the project examines how legislatures have responded to the court-imposed social host liability through application of dramshop acts, beverage control acts, and ordinary negligence principles.

C. Legislative Response

1. *Legislative Response to Social Host Liability Under a Dramshop Act*

Past experience indicates that most legislatures would reverse a court's application of a dramshop act to a social host. Some courts have refused to extend their states' acts,[547] reasoning in part that

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542 *See* Comment, *supra* note 364, at 104; *see also* Graham, *supra* note 68, at 580 (arguing for flexible standard of social host liability under which court can consider that host is not trained to detect intoxication).

543 *See* Comment, *supra* note 364, at 104.

544 *Id.*

545 *See id.* at 105.

546 *See* W. PROSSER & W. KEETON, *supra* note 285, § 11, at 53. "[T]here may be liability although the defendant believed in good faith that the arrest was justified, or that the defendant was acting for the plaintiff's own good." *Id.* (citations omitted).

547 *See, e.g.*, Delouch v. Mager Elec. Supply Co., 378 So. 2d 733 (Ala. 1979). In *Delouch* the Alabama Supreme Court refused to extend the state's dramshop act to an electric company that served alcohol to an intoxicated employee who subsequently injured a policeman in an auto accident. *Id.* at 734. The court limited application of the act to those who derived a profit from the furnishing of alcohol, *id.* at 735, despite the act's broad language that "[e]very . . . person . . . injured . . . by any intoxicated person . . . shall have a right of action against *any person* who shall by selling, *giving* or

the legislature did not intend to cover social hosts. Of the two jurisdictions that have extended their dramshop acts to social hosts, one was later reversed by the legislature,[548] and the other was limited to the case at hand because the legislature had already amended the dramshop act to cover only licensees.[549]

In *Ross v. Ross*[550] the Minnesota Supreme Court held that the state's dramshop act applied to every violator whether or not he was in the liquor business.[551] The defendant in *Ross* purchased alcohol for his minor brother, resulting in the minor's intoxication and subsequent death in an automobile accident.[552] At the time *Ross* was decided, Minnesota's dramshop act provided that "Every . . . person who is injured . . . by the intoxication of any person, has a right of action . . . against any persons who, by illegally selling, bartering or giving intoxicating liquors, caused the intoxication of such person."[553] The court stressed the language "any person" and reasoned that if the legislature had intended to confine the statute's

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otherwise disposing of to another, contrary to the provisions of law, any liquors . . . cause the intoxication of such person," ALA. CODE § 6-5-71 (1975) (emphasis added).

Illinois courts have interpreted their dramshop act similarly. In Cruse v. Aden, 127 Ill. 231, 20 N.E. 73 (1889), the plaintiff sued the defendant after her husband was thrown off his horse and died. The plaintiff alleged that the defendant had provided two drinks to her husband. The drinks were given as "an act of mere courtesy and politeness, and not for any pay, profit, benefit, or advantage." *Id.* at 233, 20 N.E. at 74. The plaintiff argued that the Illinois dramshop act held that "all persons, though not engaged in the liquor traffic, can be held liable for selling or giving intoxicating drinks to another, thereby . . . causing intoxication and injury." *Id.* at 233, 20 N.E. at 74.

The *Cruse* court refused to apply the act. It began its analysis by quoting the state constitution: " 'No Act hereafter passed shall embrace more than one subject, and that shall be expressed in the title.' " *Id.* at 235, 20 N.E. at 75 (quoting ILL. CONST. art. IV, § 13). The title of the act was "Dram Shop"; therefore, it would be unconstitutional to extend it to social hosts. *Id.* Furthermore, other portions of the dramshop act explicitly referred to licensees and permittees. *Id.* at 236, 20 N.E. at 76. Finally, the court believed that the legislature would not reasonably have intended to cover a host who "at his own table at his private residence, gave a glass of wine to a guest as an act of hospitality." *Id.* at 236, 20 N.E. at 76.

Seventy-five years later, an Illinois court had another opportunity to extend its dramshop act to a social host. In Miller v. Owens-Illinois Glass Co., 48 Ill. App. 2d 412, 199 N.E.2d 300 (1964), the plaintiffs were injured in a collision with an intoxicated driver who had just come from a company picnic on Owens-Illinois Glass Co.'s property. The court stated, "This court does not believe that the legislature ever intended to enact a law that makes social drinking of intoxicating liquors and the giving of drinks of intoxicating liquors to another, such conduct as to render the giver or host liable under the Dram Shop Act." *Id.* at 423, 199 N.E.2d at 306. The court believed that the legislative intent was to regulate the business of selling, distributing, manufacturing, and wholesaling alcoholic liquors for profit. *Id.* According to the court, extension of the act was the task of the legislature. *Id.* at 422, 199 N.E.2d at 306.

548 *See infra* notes 550-57 and accompanying text.

549 *See infra* text accompanying notes 558-64.

550 294 Minn. 115, 200 N.W.2d 149 (1972).

551 *Id.* at 116, 200 N.W.2d at 150.

552 *Id.*

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

application to liquor vendors, it would have included language to that effect.[554] The court believed that because Minnesota's statute only applied to the illegal sale or furnishing of liquor,[555] application of the statute to nonlicensees would not result in a flood of litigation.[556]

The Minnesota legislature responded five years later by amending the dramshop act to restrict liability to "any person who, by illegally selling or bartering intoxicating liquors . . . caused the intoxication of that person."[557] The amendment deleted the word "giving" from the statute. Thus, although social host liability may be viable under alternative theories, the Minnesota legislature believed applying a dramshop act was inappropriate.

In *Williams v. Klemesrud*[558] the Iowa Supreme Court imposed liability through its dramshop act[559] on a twenty-one year old college student who gave vodka to his minor friend. The minor became intoxicated and later drove his car into the plaintiff, causing him serious injury.[560] At the time the incident occurred, Iowa's dramshop act provided that: "Every . . . person who shall be injured in person or property . . . by any intoxicated person . . . shall have a right of action . . . against any person who shall, by selling or giving to another contrary to the provision of this title any intoxicating liquors, cause the intoxication of such person."[561] The court dismissed the defendant's argument that the statute was intended to apply only to commercial vendors, stating, "We have rejected rules of strict construction which would limit the scope of the act and thus impair the remedy and advance the mischief sought to be corrected."[562]

The court imposed liability under the act even though the Iowa legislature had recently amended the Liquor and Beer Control Act to limit civil liability to licensees and permittees.[563] The court ig-

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554 294 Minn. at 118, 200 N.W.2d at 151.

555 In this case, the brother violated MINN. STAT. ANN. § 340.73 (West 1972) by giving alcohol to a minor.

556 294 Minn. at 121, 200 N.W.2d at 152. The court distinguished the Illinois court's interpretation of its dramshop act in *Miller* by noting that liability under the Illinois dramshop act did not require an illegal sale. The court probably would not have applied Minnesota's dramshop act to the case if an illegal sale were not a prerequisite to liability under the act. *Id.*

557 Act of June 2, 1977, ch. 390, § 1, 1977 Minn. Laws 887 (codified at MINN. STAT. ANN. § 340.95 (West Supp. 1984)).

558 197 N.W.2d 614 (Iowa 1972).

559 IOWA CODE § 129.2 (1966) (repealed 1971).

560 197 N.W.2d at 615.

561 *Id.* (quoting IOWA CODE § 129.2 (1966)).

562 *Id.* (citations omitted).

563 Iowa Beer and Liquor Control Act of 1971, ch. 131, § 92, 1971 Iowa Acts 244, 274 (codified at IOWA CODE § 123.92 (1977)).

nored the amendment because the case arose before its effective date.[564] Nevertheless, the new act clearly reflects the legislature's intent that the Iowa dramshop act not apply to social hosts.

On balance, future extension of dramshop acts to social hosts seems unlikely. If courts decide that strict liability under a dramshop act is appropriate for social hosts, they risk reversal by the legislature. Dramshop acts were so named because their purpose was to regulate and control the major source of dangerous intoxication: the local tavern and other licensees.[565] Because licensees benefit financially from the furnishing of alcohol, it is appropriate to hold them as insurers against their patrons' excesses. Application to social hosts, however, may be contrary to the legislature's intent.

2. *Legislative Response to Social Host Liability Under a Beverage Control Act*

It is more difficult to predict how a legislature might respond to court-imposed liability on a social host pursuant to a beverage control act.[566] Although many courts have imposed civil liability on a licensee through application of a beverage control act,[567] few courts have applied the statutes in actions against social hosts.[568]

In *Brattain v. Herron,*[569] for example, the Indiana Court of Appeals imposed liability on a social host, who served a minor intoxicating liquor.[570] The minor was later involved in a collision which killed the occupants of the other vehicle.[571] Applying the Indiana

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564 197 N.W.2d at 616.

565 *See supra* notes 45-56 and accompanying text.

566 *See supra* notes 130-37 and accompanying text.

567 *See, e.g.,* Prevatt v. McClennan, 201 So. 2d 780 (Fla. Dist. Ct. App. 1967) (finding tavern owner negligent per se for violating beverage control statute); Pike v. George, 434 S.W.2d 626 (Ky. 1968) (liquor store violated beverage act by selling to minor); Adamian v. Three Sons, Inc., 353 Mass. 498, 233 N.E.2d 18 (1968) (finding barroom owner's sale of liquor to intoxicated individual to be proximate cause of third party's injuries under beverage control act); Rappaport v. Nicbols, 31 N.J. 188, 156 A.2d 1 (1959) (finding licensee liable under beverage control act); Berkeley v. Park, 47 Misc. 2d 381, 262 N.Y.S.2d 290 (Sup. Ct. 1965) (denying motion to dismiss civil liability claim against vendor brought under dramshop act and beverage control act); Campbell v. Carpenter, 279 Or. 237, 566 P.2d 893 (1977) (finding tavern owner negligent for violating statute prohibiting sale to obviously intoxicated person). Some beverage control acts explicitly apply only to licensees. *See infra* notes 569-97 and accompanying text.

568 *See, e.g.,* Coulter v. Superior Court of San Mateo County, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978) (applying Business & Professions Code to social host as well as licensee); Brattain v. Herron, 159 Ind. App. 663, 309 N.E.2d 150 (1974) (nonlicensee negligent per se under beverage control act); Giarnear v. Solomon, 360 F. Supp. 262 (M.D. Pa. 1973) (finding legislature intended acts to apply to noncommercial furnishers).

569 159 Ind. App. 663, 309 N.E.2d 150 (1974).

570 *Id.* at 665, 309 N.E.2d at 152.

571 *Id.* at 666, 309 N.E.2d at 152.

Beverage Control Act,[572] the court found that the host had violated the statute by allowing the minor to consume alcohol without objection. The court held that violation of the statute was negligence per se.[573] According to the court, the legislature had sought to protect the citizens of Indiana from injuries caused by minors who consume alcoholic beverages. The court saw "no distinction between one who sells alcoholic beverages to a minor and one who gives alcoholic beverages to a minor."[574] The Indiana legislature has not overturned this 1974 decision.

Another court's imposition of social host liability under a beverage control act did not survive legislative review. In *Coulter v. Superior Court*[575] the owners of an apartment complex continued to serve a guest "extremely large quantities" of alcohol although they knew she had reached the point of obvious intoxication and that she would be driving home.[576] The court based the defendant's liability on both a beverage control act[577] and common law negligence principles.[578] The *Coulter* court relied on the "every person" language of the statute to infer a legislative intent to include social hosts as well as licensees under the statute.[579] The court further noted that the legislature had "clearly expressed its desire that the Alcoholic Beverage Control Act shall be liberally construed to accomplish its stated purposes of 'protection of the safety, welfare, health, peace, and morals of the people of the State.' "[580] Within one year the

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572 At the time of the accident, the Indiana Beverage Control Act read in pertinent part: "No alcoholic beverages shall be sold, bartered, exchanged, given, provided or furnished, to any person under the age of twenty-one (21) years . . . . Any person guilty of violating this paragraph shall be punished . . . ." IND. CODE § 7-1-1-32(10) (1971) (current version at IND. CODE ANN. § 7.1-5-7-8 (Burns 1984)).

573 159 Ind. App. at 674, 309 N.W.2d at 156.

574 *Id.*

575 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978).

576 *Id.* at 148, 577 P.2d at 671, 145 Cal. Rptr. at 536.

577 At the time of the decision, California's statute provided that "[e]very person who sells, furnishes, gives, or causes to be sold, furnished, or given away any alcoholic beverage to . . . any obviously intoxicated person is guilty of a misdemeanor." CAL. BUS. & PROF. CODE § 25602 (West 1964).

578 For an analysis of the court's imposition of liability through common law negligence principles, see *supra* notes 247-56 and accompanying text.

579 21 Cal. 3d at 151, 577 P.2d at 672, 145 Cal. Rptr. at 537. The court concluded that the legislature must have intended "any person" to apply to noncommercial purveyors of alcohol as well as licensees. *Id.*

580 *Id.* at 151, 577 P.2d at 673, 145 Cal. Rptr. at 538. The California Supreme Court's confident interpretation of legislative intent is dubious. According to one commentator, "[i]n the ordinary case inquiries into legislative intent are pure fiction, concocted for the purpose. The obvious conclusion must usually be that when the legislators said nothing about [finding civil liability based on a criminal statute], they either did not have the suit in mind at all, or deliberately omitted to provide it." *See* W. PROSSER & W. KEETON, *supra* note 285, § 36, at 221 (footnote omitted).

California legislature expressly overruled the *Coulter* decision.[581]

The different reactions of the California and Indiana legislatures make it difficult to predict how other legislatures will react to the imposition of social host liability under a beverage control act. Nevertheless, social host liability under these statutes may fare no better than under the dramshop acts. Legislatures may decide that the beverage control acts, like the dramshop acts, impose too high a standard of care for a social host.

3. *Legislative Response to Common Law Negligence*

The third alternative for imposing liability is common law negligence. Although some courts, including the *Kelly* court, have used this method, not all legislatures have supported the choice. This section will discuss the legislative response in some jurisdictions and the possible response in New Jersey to the negligence standard.

In *Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity*,[582] the defendant fraternity served alcohol to a minor, resulting in his intoxication. The minor was later involved in a car accident in which the plaintiff, a passenger in the minor's car, was injured. The court held that there was a potential cause of action under general negligence principles. According to the court, social host liability may arise "where the host 'has reason to know that he is dealing with persons whose characteristics make it especially likely that they will do unreasonable things.' "[583]

In 1979 the Oregon legislature narrowed the *Wiener* decision by passing a statute limiting a social host's liability to situations where the host serves a "visibly intoxicated" guest.[584] The court's standard allowed the trier of fact to evaluate the circumstances of each case and decide whether the particular social host should be liable.[585] The new statute is similar to the standard adopted by the *Kelly* court. To date, no court in Oregon has imposed liability on a social host whose guest was an adult.

After *Coulter v. Superior Court* imposed liability based partly on common law negligence,[586] the California legislature reinstated the

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581 Act of Sept. 19, 1978, ch. 969, 1978 Cal. Stat. 2903.

582 258 Or. 632, 485 P.2d 18 (1971).

583 *Id.* at 639, 485 P.2d at 21. The court noted as examples persons already "severely intoxicated," the young, or those who the host knows are unusually affected by alcohol as protected groups. *Id.*

584 Act of July 25, 1979, ch. 801, § 2, 1979 Or. Laws 1091 (codified at OR. REV. STAT. § 30.955 (1979)). The statute reads in full: "No private host is liable for damages incurred or caused by an intoxicated social guest unless the private host has served or provided alcoholic beverages to a social guest when such guest was visibly intoxicated." OR. REV. STAT. § 30.955.

585 *See* Graham, *supra* note 68, at 582.

586 *See supra* text accompanying notes 498-502.

old common law rule that "consumption rather than the sale of alcoholic beverages was the proximate cause of injuries sustained by [a] third party."[587] The legislature believed that a person who drinks is responsible for his or her own acts.[588] As the sponsor of the bill said, " 'somehow, we have gone beyond the theory of personal responsibility, that is, that the individual must himself be held accountable for his actions. To shift the blame to [social hosts] is to fail to hold the individual accountable.' "[589] Supporters of the legislation reinstating the common law rule believed that homeowner's insurance premiums would rise considerably if the bills were not passed.[590] As one commentator noted,

> [b]y reverting to the traditional argument of lack of proximate causation, the legislature demonstrated that it, and presumably the majority of Californians, simply did not want to permit the court to force dramatic changes in social behavior by imposing an unwanted duty of care on the social host or on the tavern owner to observe guests and patrons carefully to determine when and if they should be refused further service of alcohol . . . .[591]

In *Kelly v. Gwinnell*[592] the New Jersey Supreme Court imposed a common law negligence standard on a social host similar to that imposed in *Coulter*.[593] In response to the dissent's criticism that the legislature and not the courts should decide the issue,[594] the *Kelly* majority stated, "if the Legislature differs with us on issues of this kind, it has a clear remedy."[595] Two bills recently introduced in the New Jersey legislature would establish a committee to investigate the issues raised by *Kelly*[596] and would limit the cause of action against a social host to those circumstances in which the host acted "willfully and wantonly."[597] A third, Assembly Bill No. 43, introduced prior to *Kelly*, would immunize hosts from liability under all circumstances.[598]

The purpose of Assembly Bill No. 43 is "to exempt social hosts from civil liability for injuries caused by adult consumers of alco-

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587 *See* Comment, *California Liquor Liability: Who's to Pay the Costs?*, 15 CAL. W.L. REV. 490, 493 (1980) (footnotes omitted).

588 *See id.* at 523.

589 *Id.* at 531 (quoting press release from Ruden S. Ayala, California State Senator (Aug. 17, 1978)).

590 *Id.*

591 Comment, *supra* note 490, at 630.

592 96 N.J. 538, 476 A.2d 1219 (1984).

593 *See supra* notes 188-201 and accompanying text.

594 96 N.J. at 560-61, 476 A.2d at 1230-31.

595 *Id.* at 555, 476 A.2d at 1227.

596 *See* S. Con. Res. 116, 201 Leg., 1st Sess. (N.J. 1984).

597 *See* S. 2122, 201 Leg., 1st Sess. (N.J. 1984).

598 *See* A. 43, 201 Leg., 1st Sess. 43 (N.J. 1984).

holic beverages served by them."[599] The proposed legislation distinguishes between social hosts and licensees. Because a license is a privilege and not a right, licensees have a strict obligation not to serve intoxicated persons in order to fulfill their assumed responsibility to the public. Social hosts, however, are not as responsible for their guests' drinking habits as are the guests themselves. Thus, the bill immunizes social hosts from liability for adult guests.[600] The legislature did not act on this bill because the Assembly Judiciary Committee sought to study the problem further.[601]

Almost immediately after the *Kelly* decision, legislative interest in social host liability sparked the introduction of legislation in the New Jersey Senate. On July 30, 1984, Senator Orechio introduced a resolution to establish a commission to study the issue, recognizing that "the *Kelly* decision was without precedent anywhere in the nation."[602] According to the proposed resolution, the decision raised questions regarding: the ability of the host to discover intoxicated behavior; the methods a host must use to discover intoxicated behavior; the extent to which a host must monitor and restrain the behavior of the guest; and the cost and extent of coverage of homeowner's and renter's insurance for liability imposed on the private hosts.[603] The proposed resolution recognized that the *Kelly* court failed to consider the problems a social host might face in conforming to the court's standard.[604]

On September 13, 1984, Senate Bill No. 2122 was introduced.[605] The bill's stated purpose was to "substantially limit the scope of host liability recently created by the New Jersey Supreme Court in *Kelly v. Gwinnell*."[606] The proposed legislation would only allow liability if the social host "willfully and knowingly, manifesting extreme indifference to the rights of others, serve[d] a visibly intoxicated person, knowing in all likelihood that the gnest would be driving a car within a reasonable period of time."[607] The bill requires that there be "corroborating evidence" in addition to any evidence that the guest had a high blood-alcohol content in order to prove that the guest was visibly intoxicated. According to this bill, "it seems grossly unfair to hold hosts responsible except in extreme

599 *Id.*
600 *Id.*
601 Telephone interview with Robert Hollenbeck, New Jersey Assemblyman (Nov. 5, 1984).
602 S. Con. Res. 116, *supra* note 596.
603 *Id.*
604 *See supra* note 506 and accompanying text.
605 S. 2122, *supra* note 597.
606 *Id.* at 2.
607 *Id.* at 3.

circumstances."[608]

D. Alternatives to the Current Negligence Standard

Given the legitimate concerns of commentators, courts, and legislatures regarding social host liability, a different standard of liability is warranted. Under the current standard, as announced in *Kelly v. Gwinnell*,[609] plaintiffs may prevail too easily against social hosts. Plaintiffs should have to prove more than ordinary negligence because the intoxicated driver is primarily at fault for third party injuries. Furthermore, it is unfair to hold the host to an ordinary negligence standard because the direct service and obviously intoxicated requirements provide little guidance for the host.[610] Accordingly, courts should replace the current standard of care with a gross negligence standard.

The court or jury should consider the totality of circumstances in determining whether a host has been grossly negligent. One commentator has identified five relevant factors:

(1) the host's opportunity to view the appearance and the conduct of the guest;
(2) the host's knowledge of the number of drinks a guest has consumed;
(3) the host's knowledge of the guest's capacity to consume alcohol;
(4) the host's knowledge that the guest will be driving home after the gathering; and
(5) the precautions the host has taken to control the disbursement of beverages.[611]

The gross negligence standard would absolve the host from liability where control was impossible. A host, however, should not necessarily be able to avoid liability at a small gathering by setting up a self-service bar. The trier of fact should look at all the circumstances to determine if the host was grossly negligent.

The hosts in *Kelly* breached the gross negligence standard. According to the court, the hosts gave their guest as many as thirteen drinks.[612] The hosts should have been able to control their guest's consumption because it was a small, intimate gathering. In addition to serving the guest beyond the point of visible intoxication, the hosts "accompanied [him] outside to his car, chatted with him and watched as [he] drove off to go home."[613] Presented with these

608 *Id.*
609 *See supra* text accompanying note 506.
610 *See supra* notes 498-546 and accompanying text.
611 *See* Note, *supra* note 401, at 82.
612 96 N.J. at 541, 476 A.2d at 1220.
613 *Id.*

facts, a court or jury could conclude that the hosts were grossly negligent in taking no precautions to guarantee the guest's or others' safety.

In addition to arguing for a gross negligence standard,[614] the dissent in *Kelly* suggested that imaginative legislative drafting could "result in a solution that [would] further the goals of reducing injuries related to drunk driving and adequately compensating the injured party, while imposing a more limited liability on the social host."[615] Accordingly, the dissent proposed

> funding a remedy for the injured party by contributions from the parties most responsible for the harm caused, the intoxicated motorists; making the social host secondarily liable by requiring a judgment against the drunken driver as a prerequisite to suit against the host; limiting the amount that could be recovered from a social host; and requiring a finding of wanton and reckless conduct before holding the social host liable.[616]

The dissent did not explain how the fund or secondary liability would work.[617] It is difficult to speculate how courts or legislatures would apportion liability between the host and driver because no court imposing social host liability has confronted the issue.[618]

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614 *Id.* at 568-70, 476 A.2d at 1230-36 (Garibaldi, J., dissenting).

615 *Id.* at 569, 476 A.2d at 1235.

616 *Id.* at 569-70, 476 A.2d at 1235; *see* Comment, *supra* note 364, at 116. According to Prosser and Keeton,

> [t]he usual meaning assigned to "willful," "wanton," or "reckless," according to taste as to the word used, is that the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences.

W. PROSSER & W. KEETON, *supra* note 285, § 34, at 213 (footnotes omitted). The authors note the difficulty of proving that the defendant acted willfully. Thus,

> [t]he willful requirement . . . breaks down and receives at best lip service, where it is clear from the facts that the defendant, whatever his state of mind, has proceeded in disregard of a high and excessive degree of danger, either known to him or apparent to a reasonable person in his position.

Id. at 213-14. Thus, the standard proposed by the dissent is very similar to the gross negligence standard.

617 96 N.J. at 569, 476 A.2d at 1235. Although a complete discussion of the issue is beyond the scope of this Special Project, a state could establish a fund to provide compensation for victims of drunk driving who are unable to collect against either the driver or the host. Fines collected from violations of alcoholic beverage control acts could provide a source of revenue for a fund. In addition, states could earmark tax revenues from the sale of alcohol for a victims' compensation fund. One commentator estimates that government receives "in the form of tax revenues to the extent of less than 17 cents, and perhaps as little as 12 cents, for each dollar of alcohol-related costs it bears." *Oversight into the Administration of State and Local Court Adjudication of Driving While Intoxicated: Hearing Before the Subcomm. on Courts of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 115 (1981) (statement of Prof. Leonard G. Schifrim).

618 The *Kelly* court declined to address the joint tortfeasor issue. 96 N.J. at 549 n.8,

CONCLUSION

The proposed gross negligence standard for social host liability has several advantages over a dramshop act, a beverage control act, or a simple negligence standard. First, insurance premiums would be lowest under the gross negligence standard. Presumably, the cost of insurance under a dramshop act or in jurisdictions which treat beverage control act violations as "negligence per se" would be higher. Similarly, premiums under the *Kelly* standard should be higher than under the gross negligence standard because hosts can be liable if they serve only one drink beyond the point of visible intoxication.

Second, the proposed negligence standard recognizes the variety of circumstances which may confront a social host and the difficulties he may have in fulfilling his duty of care.

Third, a legislature is not likely to reverse the proposed standard. Legislatures should not reverse the proposed standard for being too inclusive because the standard would result in social host liability only in extreme circumstances where even the strongest opponents would likely agree that such liability is appropriate.

Finally, the proposed standard recognizes the true culprit in the war against drinking and driving: the driver. All efforts should be made to hold the driver liable. In the event, however, that a host is grossly negligent, society has an interest in holding the host liable to reduce the risk that such behavior would occur again.

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476 A.2d at 1224 n.8. It did state that any right of contribution or indemnification between [Zak and Gwinnell] would have to be determined by the trial court on remand. *Id.* Whether a host would be liable for the entire injury to the third person or only a portion might depend on whether the "harm" is "divisible" or "indivisible." *See* RESTATEMENT (SECOND) OF TORTS §§ 875-8868 (1979).