SOCIAL HOST IMMUNITY: A NEW PARADIGM TO FOSTER RESPONSIBILITY

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I. INTRODUCTION

Although there have been efforts over the years to address the incalculable losses caused by drunk drivers on our roadways, the continued rate of incidents is staggering.[1] In the United States, thirty-six people die each day in crashes involving alcohol-impaired drivers.[2] In 2000, alcohol-involved crashes resulted in 16,792 fatalities, 513,000 nonfatal injuries, and a cost of close to $51 billion.[3] "Today alcohol is involved in 40% of traffic deaths."[4]

People involved in crashes with impaired drivers often pay with their lives, health, and emotional, physical, and financial well-being. This is not to say the impaired drivers suffer no consequences. In fact, civil and

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[1] *See* NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, UNITED STATES DEPARTMENT OF TRANSPORTATION, TRAFFIC SAFETY FACTS 2006 DATA: ALCOHOL-IMPAIRED DRIVING, FATAL CRASHES AND FATALITIES INVOLVING ALCOHOL-IMPAIRED DRIVERS 1 (Mar. 2008), *available at* http://www-nrd.nhtsa. dot.gov/Pubs/810801.PDF ("In 2006, 13,470 people were killed in alcohol-impaired-driving crashes. These alcohol-impaired-driving fatalities accounted for 32 percent of the total motor vehicle traffic fatalities in the United States.").

[2] NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL, CENTERS FOR DISEASE CONTROL AND PREVENTION, IMPAIRED DRIVING, http://www.cdc.gov/ MotorVehicleSafety/ Impaired_Driving/impaired-drv_factsheet.html (last visited Sept. 17, 2009).

[3] NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, UNITED STATES DEPARTMENT OF TRANSPORTATION, THE ECONOMIC IMPACT OF MOTOR VEHICLE CRASHES 2000 2 (May 2002), *available at* http://www-nrd.nhtsa.dot.gov/Pubs/ 809446.PDF. Alcohol-related crashes accounted for approximately 22% of all crash-related costs in the year 2000. *Id*.

[4] NATIONAL INSTITUTES OF HEALTH, UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES, FACT SHEET: ALCOHOL-RELATED TRAFFIC DEATHS, http://www.nih.gov/ about/researchresultsforthepublic/AlcoholRelatedTrafficDeaths.pdf (last visited Sept. 17, 2009).

criminal sanctions have long been in place.[5] However, these sanctions clearly have not had the desired effect of significantly reducing the incidents of impaired driving,[6] and additionally, they often fail to adequately compensate victims—and society—for the losses that occur. To that end, some jurisdictions have moved to recognize a cause of action in tort by injured parties against those who provide alcohol to the impaired driver.[7] The movement away from the common law doctrine of immunity for those who serve alcohol now includes people who serve in a commercial context, but only in a very few jurisdictions are those who serve in a social setting exposed to sanctions of any kind.[8]

Traditionally, exposure to liability is believed to modify behavior.[9] This belief is the lynchpin of most tort law liability theory and is often viewed as the "great equalizer," the mechanism for allocating risk among those who engage in an enterprise, benefit from it, and are situated in the best position to recompense those who suffer from the ill effects of that enterprise.[10] This article argues that the provider of alcohol, in a purely social context, should be exposed to liability, under limited and defined circumstances, for subsequent causally-related damages. Before discussing this need, Part II of this paper provides a historical backdrop of social host liability, beginning with a brief examination of liquor liability at common law and ending with the gradual extension of liability to

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[5] Traffic Safety Center at the University of California-Berkeley, *A History of the Science and Law Behind DUI*, ONLINE NEWSLETTER, Summer 2003, at 4, http://www.tsc.berkeley.edu/newsletter/Summer03/TSCNewsletter_Summer03.pdf ("In 1939, Indiana became the first state to enact a law that used blood alcohol concentration as a trigger for sanctions.").

[6] *See* H. Laurence Ross, *Social Control Through Deterrence: Drinking-and-Driving Laws*, 10 ANN. REV. SOCIOL. 21, 32 (1984).

[7] *See, e.g.*, ALA. CODE § 6-5-71 (2005) (providing a cause of action for a wife, child, parent, or person injured against individual who furnished the alcohol); CONN. GEN. STAT. ANN. § 30-102 (West 2003) (holding a seller of liquor liable for selling to an intoxicated person who subsequently injures another).

[8] *See* Marc E. Odier, Note, *Social Host Liability: Opening a Pandora's Box*, 61 IND. L.J. 85, 85–86 (1985).

[9] *See, e.g.*, Margo Schlanger, *Second Best Damage Action Deterrence*, 55 DEPAUL L. REV. 517, 517–18 (2006) ("Potential litigation can induce potential defendants to favor more cognizable or demonstrable care, and less cognizable or demonstrable harm.").

[10] *See* Brian L. Church, Note, *Balancing Corrective Justice and Deterrence: Injury Requirements and the Negligent Infliction of Emotional Distress*, 60 ALA. L. REV. 697, 701–02 (2009).

commercial hosts.[11] As will become apparent, courts have historically been loath to impose liability on social hosts for failing to use reasonable care to avoid injury to others who may be injured by an intoxicated guest.[12] Part III looks at the extension of liability to social hosts in four states. Part IV examines the arguments for and against extending liability to social hosts, with an eye toward extending liability in limited and well-defined circumstances.

Finally, this article concludes that in a limited number of circumstances, tort liability should be extended to social hosts who provide alcohol to an intoxicated guest that subsequently injures another person. This is justified not only as a foreseeable risk of injury to others that warrants imposing a common-law duty of care, but also as an allocation of liability that is supported by the staggering costs impaired driving imposes on all members of society.[13]

II. THE HISTORICAL DEVELOPMENT OF COMMERCIAL HOST LIABILITY

A. Generally

The basic divide of civil liability for serving alcohol to adults is whether the server is a licensed vendor (commercial host)—such as a bar serving alcohol to its patrons—or a non-commercial provider of alcohol (social host).[14] Commercial hosts are restricted by licensing and regulatory administrative agencies,[15] while social hosts have few, if any, similar constraints.[16] Commercial hosts are further restricted by virtue of their direct relationship with state liquor licensing authorities or Alcohol

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[11] This article defines a "commercial host" as an individual or business vendor and their respective agents that are licensed to sell alcohol in a commercial setting.

[12] *See* Shea v. Matassa, 918 A.2d 1090, 1096 (Del. 2007); Bankston v. Brennan, 507 So. 2d 1385, 1387 (Fla. 1987).

[13] *See supra* text accompanying note 3.

[14] *See, e.g.*, Marcum v. Bowden, 643 S.E.2d 85, 89 (S.C. 2007).

[15] An administrative agency is defined as "[a] governmental body with the authority to implement and administer particular legislation." BLACK'S LAW DICTIONARY 67 (8th ed. 2004). For example, to commercially sell liquor, beer, or wine in Florida, individuals or businesses must apply for a license from the Florida Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco. *See* FLA. STAT. §§ 561.02, 562.12 (2009) (stipulating the requirements).

[16] Odier, *supra* note 8, at 93.

Beverage Control Boards.[17] These authorities and boards act under the statutory authority to govern the sale and distribution of commercially sold alcoholic beverages "to persons in high risk classes," including minors and intoxicated persons.[18] Once the license is issued, state and local laws, ordinances, and administrative regulations must be followed to maintain the license.[19] In contrast, the social host is not subject to state licensing authorities and operates without governmental oversight.[20] The social host is free to serve alcohol with few restrictions. For example, even in states that do not *generally* recognize social host liability, the restrictions that do exist are imposed by statute and prescribe civil and criminal penalties on a social host for the provision of alcohol to minors.[21] Under these statutes,

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[17] *See* ALCOHOL AND TOBACCO TAX AND TRADE BUREAU, ABC BOARDS – ANITED STATES, CANADA, AND PUERTO RICO, http://www.ttb.gov/wine/control_ board.shtml (setting forth a comprehensive list of state Alcohol Beverage Control Boards).

[18] Odier, *supra* note 8, at 90 (noting that at the time of the article's writing only two courts had imposed liability on a non-commercial vendor); *see also* Kathy T. Graham, *Liability of the Social Host for Injuries Caused by the Negligent Acts of Intoxicated Guests,* 16 WILLIAMETTE L. REV. 561, 569–79 (1980). These Acts are adopted from the 1984 federal legislation imposing a national minimum drinking age requirement. *See* 23 U.S.C. § 158 (2006); DIVISION OF LEGAL ANALYSIS AND ENFORCEMENT, PACIFIC INSTITUTE FOR RESEARCH AND EVALUATION, ALCOHOL BEVERAGE CONTROL ENFORCEMENT: LEGAL RESEARCH REPORT 3 (Apr. 2003), *available at* http://www.nllea.org/reports/ ABCEnforcement LegalResearch.pdf ("In 1984, Congress enacted the National Minimum Drinking Age Law, which required that States–as a condition of receiving State highway funds–prohibit people under the age of twenty-one from purchasing or publicly possessing alcohol.").

[19] *See, e.g.*, WASH. ADMIN. CODE §§ 314-29-003 to 314-29-040 (2009) (prescribing the potential penalties liquor licensees face for violating a liquor law or rule, including suspension or cancellation of the liquor license).

[20] *See* Odier, *supra* note 8, at 93 (stating that the courts' refusal to impose civil liability on social hosts under the authority of alcoholic beverage control acts stems from the rationale that the statutes were designed to regulate the liquor industry and applied only to commercial vendors of alcohol).

[21] *E.g.*, FLA. STAT. § 856.015 (2009) (imposing criminal penalties on social hosts who serve alcohol to minors at "open house part[ies]"). *See also* Samuel Randall, Note, *Loco Parents: A Case for the Overhaul of Social-Host Liability in Florida*, 62 U. MIAMI L. REV. 939, 954–55 (2008) ("Relying on [the 'Open House Party'] statute, the First District Court of Appeal[s] recognized a cause of action . . . against a private social host for the first time in Florida history." (citing Newsome v. Haffner, 710 So. 2d 184, 185 (Fla. Dist. Ct. App. 1998))).

liability generally turns on whether the social host "knowingly" furnished the alcohol to those proscribed by statute.[22]

The potential for liability between social hosts and commercial vendors also varies.[23] For example, the duty to injured third parties as the result of drunk driving is substantially broader for a commercial host than for a social host.[24] Yet, as the next section provides, this has not always been the case.

B. The Common Law Approach to Commercial Host Liability

Historically, courts protected commercial vendors against liability when alcohol they provided to an intoxicated person contributed to an injury to a third party.[25] It was irrelevant whether the provider was selling or merely furnishing alcohol to an intoxicated person.[26] This is because neither the "seller" nor the "donor" was considered to have a duty to the individual being served or to the injured third party as a result of negligence on the part of the alcohol consumer.[27]

At common law, it was well settled that the *drinking* of the alcohol, rather than the providing of it, was the cause of any resulting injury.[28] Courts regularly held that no cause of action existed in tort against one who furnished intoxicating liquor.[29] Rather, the potential for liability attached to the person who voluntarily became intoxicated.[30] Courts reasoned that the proximate cause of the intoxication was not the

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[22] Diane Schmauder Kane, Annotation, *Social Host's Liability for Death or Injuries Incurred by Person to Whom Alcohol was Served*, 54 A.L.R.5th 313, 328 (1997).

[23] *See* RESTATEMENT (THIRD) OF TORTS: GEN. PRINCIPLES § 6 cmt. c (Discussion Draft 1999).

[24] *See* Kane, *supra* note 22, at 326–27.

[25] *Id.*; *see also* Wegleitner v. Sattler, 582 N.W.2d 688, 690 (S.D. 1998) ("At common law it is not a tort to either sell or give intoxicating liquor to ordinary able-bodied men, and it has been frequently held that . . . there can be no cause of action against one furnishing liquor in favor of those injured by the intoxication of the person . . . .").

[26] *See* Kane, *supra* note 22, at 326.

[27] *See id.* at 326–27.

[28] *See, e.g.*, Nolan v. Morelli, 226 A.2d 383, 386 (Conn. 1967).

[29] *See, e.g.*, Cruse v. Aden, 20 N.E. 73, 74 (Ill. 1889) (holding that the Illinois Dram Shop Act did not apply to persons who were not engaged in commercial vending of alcohol). The Illinois Supreme Court in *Aden* explained, "[I]t can be said safely that it is not anywhere laid down in the books that such act was even held at common law to be culpable negligence *that would impose legal liability for damages upon the vendor or donor of such liquor*." *Id*. at 74 (emphasis added).

[30] *See, e.g.*, *Nolan*, 226 A.2d at 386.

furnishing of the liquor, but the purchaser's consumption of liquor.[31] Because common law doctrines placed the responsibility on the individual consuming the alcohol,[32] the injured party was generally unable to recover from the individual furnishing the alcohol. There would be no recovery for injuries caused to third parties or to the consumer himself that resulted from an act occurring while the consumer was intoxicated.[33] Because courts typically viewed the imbibing of alcohol as a choice, it was the consumption of the liquor, not furnishing of it, that was considered the proximate cause of injury and therefore the basis for civil liability.[34]

In the 1950s, however, there was a growing dissatisfaction with this common law rule.[35] Courts became concerned with the rapid proliferation of drunk-driving related injuries.[36] This may have been an outgrowth of advanced automotive technology coupled with the rise of traffic and the sheer number of cars on the road. Additionally, the rejection of this common law approach may in part have been a function of the design and manufacturing of vehicles that would now travel for longer distances at higher speeds.[37] The losses caused by drunk drivers, which were tolerated when cars drove fewer miles at slower speeds, were no longer socially acceptable.

Courts also recognized an increase in the number of uncompensated victims.[38] The number of third parties injured or killed by intoxicated,

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[31] *Id.*; *see also* Wegleitner v. Sattler, 582 N.W.2d 688, 690 (S.D. 1998) ("[T]he *drinking of the liquor*, not the furnishing of it, *is the proximate cause of the injury*.").

[32] *See, e.g.*, *Wegleitner*, 582 N.W.2d at 690 ("The rule is based on the obvious fact that one cannot become intoxicated by reason of liquor furnished him if he does not drink it." (citing 45 AM. JUR. 2D *Intoxicating Liquors* § 553 (1969))).

[33] *See, e.g.*, Webb v. Regua Ltd. P'ship, 624 F. Supp. 471, 472 (E.D. Va. 1985).

[34] *E.g.*, *Wegleitner*, 582 N.W.2d at 690.

[35] Mary H. Seminara, Note, *When the Party's Over:* McGuiggan v. New England Telephone and Telegraph Co. *and the Emergence of a Social Host Liability Standard in Massachusetts*, 68 B.U. L. REV. 193, 194 (1988).

[36] *See, e.g.*, *id.*; Ashlock v. Norris, 475 N.E.2d 1167, 1169 (Ind. Ct. App. 1985).

[37] *See* Walter Adams & James W. Brock, *The Antitrust Vision and Its Revisionist Critics*, 35 N.Y.L. SCH. L. REV. 939, 954–57 (1990) (discussing automotive safety throughout the decades); *see also* Lawrence J. White, *The American Automobile Industry and the Small Car, 1945-1970*, 20 J. INDUS. ECON. 179, 180–81 (1972).

[38] *Cf.* Waynick v. Chicago's Last Dep't Store, 269 F.2d 322, 326 (7th Cir. 1959) (holding the proximate cause of third party injury was sale of liquor to an intoxicated person); Adamian v. Three Sons, Inc., 233 N.E.2d 18, 20 (Mass. 1968) (acknowledging that highway deaths are no longer outside the scope of foreseeable danger when an intoxicated

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judgment-proof drivers grew.[39] This brought a number of seriously harmed individuals with an inability to recover for damages to the public eye. The arguments that had previously placed the responsibility for an intoxicated driver's own injuries on his or her negligence clearly did not apply to the injured third parties, and political pressure rose to compensate these innocent victims.[40]

C. Courts Move to Expose Commercial Hosts to Civil Liability

Societal pressure and technological advancement forced courts to permit more causes of action against commercial hosts who served intoxicated guests that subsequently injured others.[41] Public policy acknowledged that an intoxicated, likely-to-drive person may foreseeably injure himself, herself, or others.[42] Although the individual who chose to drink and drive retained exposure to liability, courts readily began to recognize a duty to sell and serve responsibly.[43]

D. Dram Shop Acts

1. Keeping Tabs on the Bar: The Pendulum Swings Toward Liability

The Prohibition Era's failure to regulate consumption resulted in a shift in focus to the individual drinker.[44] In a response to this failure, Dram

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patron is given alcohol); *Ashlock*, 475 N.E.2d at 1169 (referring to "carnage" on public highways).

[39] *See* Seminara, *supra* note 35, at 194.

[40] *See* Kelly v. Gwinnell, 476 A.2d 1219, 1222 (N.J. 1984) ("In a society where thousands of deaths are caused each year by drunken drivers . . . the imposition of [a duty on social hosts] by the judiciary seems both fair and fully in accord with the State's policy.").

[41] *See generally, e.g.*, *Kelly*, 476 A.2d at 1222 (holding a social host liable for injuries inflicted on a third party as a result of the negligent operation of an automobile by his guest based on theories of fairness, public policy, and increasing societal consternation towards drunk driving); Rappaport v. Nichols, 156 A.2d 1, 10 (N.J. 1959) (holding a licensee liable for the consequences of a customer's negligent operation of his vehicle in order to better serve the public interest).

[42] *See Kelly*, 476 A.2d at 1224.

[43] *See, e.g.*, Fischer v. Cooper, 775 P.2d 1216, 1218 (Idaho 1989) ("[A] cause of action does lie against a licensed vendor of spirits for negligently continuing to serve alcoholic beverages to an obviously intoxicated adult." (citing Bergman v. Henry, 766 P.2d 729, 732 (Idaho 1988))).

[44] Odier, *supra* note 8, at 86.

Shop acts[45] were enacted to "cut off the supply of alcohol" in the "ale house."[46] In 1850, Wisconsin became the first state to impose statutorily-mandated penalties on innkeepers.[47] The Wisconsin statute called for the posting of a bond and conditioned the continued purveying of alcohol on a payment of damages to the community or to individuals sustained, "growing out of, or justly attributable to" the retail sale of intoxicating liquors.[48] This established another possible source of recovery for the injured party and created a predictable cost associated with negligent, irresponsible behavior on the part of licensees.

2. An Old Fashioned (Dram Shop) with a Twist: The Pendulum Swings Away from Liability

Of course, once established, liability against tavern proprietors was possible. By 2007, many states had enacted some type of Dram Shop act.[49] However, the legislative response toward extending Dram Shop liability has been to reign in court decisions that permit liability for sellers of alcohol.[50] New statutes expressly *limit* or *delineate* the exposure of those selling the alcohol.[51] In a balancing act, statutes now allow liability to be imposed on commercial hosts beyond what was permitted under early

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[45] The Marin Institute, *Alcohol 101: Dram Shop Liability and Legislation*, http://www.marininstitute.org/alcohol_policy/dramshop.htm (last visited Sept. 20, 2009) ("The term 'dram shop' comes from 18th century businesses in England that sold gin by the spoonful, called a dram. Dram shop laws hold retail establishments accountable for any harm—death, injury, or other damages—caused by an intoxicated patron.").

[46] Odier, *supra* note 8, at 86–87.

[47] *Id.* at 87.

[48] *Id.* at 87 n.15.

[49] *See* CAL. BUS. & PROF. CODE § 25602 (West 2009); COLO. REV. STAT. § 12-47-801 (2008); COLO. REV. STAT. § 13-21-103 (2008); MICH. COMP. LAWS § 436.1801 (2009); NEV. REV. STAT. § 41.1305 (2007).

[50] *See, e.g.*, CAL. BUS. & PROF. CODE § 25602(c) (West 2009) (stating that the legislation was adopted to abrogate the findings of three California cases in which the serving of alcoholic beverages was held to be the proximate cause of injuries to third parties).

[51] *See, e.g.*, COLO. REV. STAT. § 12-47-801(3)(a) (2008) (stating that a licensee is not liable unless he/she knowingly served an intoxicated or underage person); NEV. REV. STAT. §§ 41.1305(1)–(3) (2007) (serving alcohol is not the proximate cause of injuries to third parties).

common law, but at the same time also fashion statutory limits and protections for bars and bartenders.[52]

Except in limited circumstances, Dram Shop acts preclude a civil cause of action against bar owners for selling alcohol to intoxicated persons who later drive.[53] For example, in some states, the Dram Shop act allows a civil cause of action if the one being served is "known to be habitually addicted to the use of alcohol."[54] In other states, liability for the commercial host is recognized when the one being served is obviously intoxicated, yet continues to be provided alcohol by the licensee.[55] Most Dram Shop acts allow a cause of action if the one served is a minor, even if the minor did not receive the alcohol directly from the commercial host.[56] Courts have found that when a licensee serves a minor who foreseeably passes that alcohol along to another minor, the licensee then becomes responsible for injuries to both.[57]

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[52] *See, e.g.*, COLO. REV. STAT. § 12-47-801(3)(c) (2008) (capping civil liability of commercial vendors at $150,000); NEV. REV. STAT. §§ 41.1305(1)–(3) (2007) (limiting liability of commercial vendors to certain circumstances when person served is under twenty-one years of age).

[53] *See, e.g.*, CAL. BUS. & PROF. CODE § 25602 (West 2009) (prohibiting civil liability of persons who furnish alcohol to a habitual drunkard or an obviously intoxicated person). *See generally* Ling v. Jan's Liquors, 703 P.2d 731, 738–39 (Kan. 1985) (declining to extend Kansas criminal Dram Shop Act to include liability for third-party injuries); *but see* Rappaport v. Nichols, 156 A.2d 1, 10 (N.J. 1959) (finding liability for third-party injuries over twenty-five years earlier than *Ling*).

[54] *See, e.g.*, FLA. STAT. § 768.125 (2009) (permitting civil liability for furnishing alcohol to a habitual drunkard that injures a third party); WYO. STAT. ANN. § 12-5-502 (2009) (permitting third-party liability when written notice is given to liquor licensee that person is a habitual drunkard).

[55] *See* MASS. GEN. LAWS ch. 138, § 69 (2002) ("No alcoholic beverage shall be sold or delivered on any premises licensed under this chapter to an intoxicated person."); Knudsen v. Peickert, 221 N.W.2d 785, 787 (Minn. 1974) (delineating the "obviously intoxicated" standard).

[56] *See, e.g.*, O'Neale v. Hershoff, 634 So. 2d 644, 646 (Fla. Dist. Ct. App. 1993) ("[I]f vendor sells alcohol to minor A, and there are facts putting the vendor on notice that minor A will furnish the alcohol to minor B, then vendor 'sells or furnishes' alcohol to both A and B within the meaning of statute.").

[57] *Id.*

III. DEVELOPMENT OF SOCIAL HOST LIABILITY

A. The Common Law Approach to Social Host Liability

Commercial hosts are certainly not the only source of alcohol. In fact, other providers furnish liquor that contributes to death or injury on our roadways.[58] These providers are commonly referred to as social hosts because they are not regulated by an administrative agency.[59] They are, for example, the homeowners who provide alcohol to their guests at a dinner party or to friends at a backyard barbecue. At common law, social host liability for these types of engagements did not exist.[60] There was no general duty of reasonable conduct on the part of individuals for the irresponsible distribution of alcohol.[61] For example, regardless of the age or condition of the one being served by the social host, or the foreseeability of a resulting injury, there was no recognized duty for the social host to serve alcohol responsibly.[62] If no enumerated duty on the part of a potential defendant existed, then there could be no cause of action regardless of the nature of the conduct of the defendant or the harm caused to the plaintiff. This principle was employed in order to confine the scope of liability.

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[58] *See* McGuiggan v. New England Tel. & Tel. Co., 496 N.E.2d 141, 141–42 (Mass. 1986) (involving the death of a high school graduate following a graduation party where the parents provided alcohol to their guests).

[59] *See, e.g.*, Walker v. Children's Services, Inc., 751 S.W.2d 717, 720 (Tex. Ct. App. 1988) (distinguishing between a commercial host and a social host: "a liquor licensee is subject to regulation by both the Alcoholic Beverage Commission and the legislature.").

[60] *See McGuiggan*, 496 N.E.2d at 143 ("[T]he traditional view . . . has been that the drinker's voluntary consumption alone is the 'proximate' cause of the third party's injury and that a person who . . . gave liquor to an intoxicated adult drinker is not liable for subsequent injuries caused by his intoxication."); *see also* Manning v. Nobile, 582 N.E.2d 942, 948 (Mass. 1991) ("We are not aware of any case in any jurisdiction in which an intoxicated adult guest was permitted to recover from a social host for the guest's own injuries.").

[61] *See, e.g.*, Buckhart v. Harrod, 755 P.2d 759, 760 (Wash. 1988) (stating that a special relationship must be established to create a duty for social host liability). Any duty, owed by one party to another, which could result in a claim for damages had to be specifically identified based on a special relationship between a defendant and a plaintiff. *See* Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity, 485 P.2d 18, 21 (Or. 1971) (stating that the purpose of Oregon statute was to protect minors; not to protect third parties from injury).

[62] *See* Johnson v. Paige, 615 P.2d 1185, 1186 (Or. Ct. App. 1980) (rejecting the imposition of a duty on a social host not to serve alcohol to a visibly intoxicated person).

The concept of a general tort duty to act reasonably did not develop until negligence emerged as a separate theory of liability in the nineteenth century.[63] It was at this time that future Justice Oliver W. Holmes extolled the virtues of a broad, general duty to exercise reasonable care as "a duty of all the world to all the world."[64]

Most modern jurisdictions recognize a duty to use ordinary care and skill in avoiding harm to others.[65] The *Restatement of Torts* recognizes the common-law rule of duty: "[A]n actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm."[66] This concept of general duty evolved into a common tort principle.[67] It serves as the gatekeeper, posing the threshold question: "What is owed to whom" before liability is extended?[68]

The *Restatement* also acknowledges that the threshold for determining whether a defendant may be liable for injuries is whether a recognizable duty is owed to the plaintiff.[69] Even if one engages in negligent conduct, there is no cause of action if the actor owes no duty.[70] For example, even if a jury determined that a defendant's negligent conduct had caused an injury that would otherwise be compensable, public policy considerations may nevertheless preclude imposing liability on the defendant.

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[63] *See, e.g.*, William Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 12–13 (1953).

[64] Oliver Wendell Holmes, Jr., *The Theory of Torts*, 7 AM. L. REV. 652, 660 (1873).

[65] *See* Div. of Corr., Dep't of Health & Soc. Services v. Neakok, 721 P.2d 1121, 1125–26 (Alaska 1986) ("The general rule of negligence law is that a defendant owes a duty of care 'to all persons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous.'" (quoting Rodriguez v. Bethlehem Steel Corp., 525 P.2d 669, 680 (Cal. 1974))); Gazo v. City of Stamford, 765 A.2d 505, 509 (Conn. 2001) ("[E]very person has a duty to use reasonable care not to cause injury to those whom he reasonably could foresee to be injured by his negligent conduct, whether that conduct consists of acts of commission or omission.").

[66] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7 (Proposed Final Draft No. 1 2005).

[67] *See* G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 18 (Oxford University Press 2003) (1980).

[68] *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7 cmt. a (Proposed Final Draft No. 1 2005).

[69] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM (BASIC PRINCIPLES) § 7 (Tentative Draft No. 1 2001) ("Even if the defendant's conduct can be found negligent . . . and is the legal cause of the plaintiff's physical harm, the defendant is not liable for that harm if the court determines the defendant owes no duty to the plaintiff, either in general or relative to the particular negligence claim.").

[70] *Id.*

This is because modern courts have concluded that even though a general duty of care may exist, there are circumstances where a defendant's liability should be limited.[71] For example, in *Miller v. Wal-Mart Stores, Inc.*,[72] the Wisconsin Supreme Court held:

> Some of the public policy reasons for not imposing liability despite a finding of negligence as a substantial factor producing injury are: (1) The injury is too remote from the negligence; or (2) the injury is too wholly out of proportion to the culpability of the negligent tort-feasor; or (3) in retrospect it appears too highly extraordinary that the negligence should have brought about the harm; or (4) because allowance of recovery would place too unreasonable a burden on the negligent tort-feasor; or (5) because allowance of recovery would be too likely to open the way for fraudulent claims; or (6) allowance of recovery would enter a field that has no sensible or just stopping point.[73]

Limiting liability in those six situations remains the primary reason for limiting the duty of a defendant for what would otherwise be recognizable as negligent conduct.[74]

The *Restatement* asserts no duty is owed by a social host serving alcohol to her or his guests.[75] The *Restatement* recognizes, however, that a number of modern cases involve efforts to impose liability on social hosts for serving alcohol to their guests.[76] The drafters acknowledge, "[R]easonable juries could plausibly find negligence on the part of the drink-dispenser, and could also find that the negligence is a legal cause of

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[71] *See* Miller v. Wal-Mart Stores, Inc., 580 N.W.2d 233, 239–40 (Wis. 1998) (stating that on occasion, public-policy considerations can serve to limit the range of a defendant's liability).

[72] 580 N.W.2d 233 (Wis. 1998).

[73] *Id.* at 240 (quoting Morgan v. Penn. Gen. Ins. Co., 275 N.W.3d 660, 667 (Wis. 1979)).

[74] *See id.* at 239–40.

[75] RESTATEMENT (THIRD) OF TORTS: GEN. PRINCIPLES § 6 cmt. c (Council Draft No. 1, 1998).

[76] *Id.*; *see also* Vaughan v. Hair, 645 So. 2d 1177, 1181 (La. Ct. App. 1994); *but see* Jackson v. Cadillac Cowboy, Inc., 986 S.W.2d 410, 411 (Ark. 1999).

the resulting injury."[77] Nevertheless, in these situations, imposing liability is potentially problematic because of the impact on social relations.[78] It is for this reason the *Restatement* takes the position that it should be courts that, as a matter of law, address the issue as to when liability should be permitted and characterize the question as whether there is a duty owed by a defendant.[79]

When identifying courts' analysis of a no-duty rule for social hosts, the drafters of the *Restatement* specifically deny endorsing or rejecting a particular set of rules.[80] They do, however, support a court's decision to determine and analyze duty by utilizing and articulating general social norms of responsibility as the basis for making the determination.[81]

For the most part, a finding of no duty is unusual and typically grounded in the judiciary's desire to withhold liability due to special policy problems.[82] The *Restatement* analysis of social host liability centers on this very premise.[83] "There are . . . situations in which the requirements of negligence, legal causation, and physical harm can be satisfied, but in which, for reasons of principle or policy, the imposition of liability seems plainly troublesome. [J]udicial screening of the plaintiff's claim, under the heading of duty, is appropriate."[84] Courts remain particularly entrenched behind the *Restatement* analysis in denying social host liability.[85]

In social host cases, many courts have followed the no-duty rule, even when the facts and traditional tort analysis would ordinarily allow a cause of action.[86] Articulated public policy considerations used to support the no-duty rule include the impossibility of enforcement, a general recalcitrance to legitimize the moral policing of social relationships, and a view that imposing liability on social hosts would be anomalous as it

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[77] RESTATEMENT (THIRD) OF TORTS: GEN. PRINCIPLES § 6 cmt. c (Council Draft No. 1, 1998).

[78] *See* McGuiggan v. New England Tel. & Tel. Co., 496 N.E.2d 141, 145 (Mass. 1986).

[79] *See* RESTATEMENT (THIRD) OF TORTS: GEN. PRINCIPLES § 6 (Council Draft No. 1, 1998).

[80] *See id.*

[81] *See id.* at cmt. h.

[82] *Id.* § 6.

[83] *See id.* at cmt. c.

[84] *Id.* (discussing how the court is reluctant to impose liability due to problematic policy considerations).

[85] *See, e.g.*, McGuiggan v. New England Tel. & Tel. Co., 496 N.E.2d 141, 146 (Mass. 1986); Sampson v. MacDougall, 802 N.E.2d 602, 606 (Mass. App. Ct. 2004).

[86] *See, e.g.*, Culver v. McRoberts, 192 F.3d 1095, 1100–01 (7th Cir. 1999).

would effectively place a greater burden on a social hosts than the law places on trained, licensed, and regulated bartenders.[87] Furthermore, imposing liability would place unreasonable financial burdens on a homeowner, landlord, or tenant to adequately insure against liability that does not logically grow out of the occupation or possession of property.[88] Finally, it is not the judiciary's responsibility to set public policy.[89]

B. Four States Recognize Social Host Liability

As recognized by the Ventura County Behavioral Health Department, "Social host civil liability holds social hosts potentially responsible for the injuries to third parties caused by guests whom the hosts had served or had allowed to consume alcoholic beverages."[90] Courts in most states have considered allowing a cause of action against social hosts who provide alcohol to guests that later injure themselves or others.[91] However, even in limited circumstances, most have refused to do so.[92] For example, Florida's Dram Shop Act states that a purveyor of alcohol can be held liable when serving to one known to be habitually addicted to the use of alcohol;[93] yet courts in that state have held a social host has no liability for furnishing alcohol, even when the one being served is a known alcoholic.[94] Similarly, the District of Columbia imposes an obligation on commercial vendors of liquor when they serve alcohol to a person that is "intoxicated and reasonably likely to cause harm to others,"[95] but the court has never imposed that same duty on social hosts.[96]

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[87] *See* Shea v. Matassa, 918 A.2d 1090, 1097 (Del. 2007).

[88] *Id.*

[89] *See id.* ("The inability of a social host to control a guest once the guest leaves the host's home can lead to 'significant financial burdens.' . . . [T]he creation of a cause of action against a social host raises controversial and competing public policy issues . . . best addressed by the General Assembly . . . .").

[90] TRAINING, APPLIED RESEARCH, AND ALCOHOL AND DRUG PREVENTION DIVISION, VENTURA COUNTY BEHAVIORAL HEALTH DEPARTMENT, MODEL SOCIAL HOST LIABILITY ORDINANCE 5 (2005), *available at* http://www.ca-cpi.org/SIG_substitute/SIG_Documents/Resources/VCL_MSHLO_web2.pdf.

[91] *See* discussion *supra* Part III.A (discussing the common law approach to social host liability).

[92] *Id.*

[93] FLA. STAT. § 768.125 (2009).

[94] Dowell v. Gracewood Fruit Co., 559 So. 2d 217, 218 (Fla. 1990).

[95] Cartwright v. Hyatt Corp., 460 F. Supp. 80, 81 (D.D.C. 1978).

[96] *Id.*

In Montana, the state supreme court once acknowledged that refusing to allow a cause of action, even when innocent third-parties may be injured by drunk drivers, creates a problem, but it still declined to recognize any form of limited liability for social hosts.[97] In other states, courts have declined to allow a cause of action against social hosts for the stated reason that the legislature alone should make this determination.[98] In New York, the Nassau County Supreme Court enumerated a list of dangers that could follow should a cause of action against a social host should be allowed.[99] The court reasoned:

> [H]ow is a host at a social gathering to know when the tolerance of one of his guests has been reached? To what extent should a host refuse to serve drinks to those nearing the point of intoxication? Further, how is a host to supervise his guests' social activities? The implications are almost limitless as to situations that might arise when liquor is dispensed at a social gathering, holiday parties, family celebrations, outdoor barbecues and picnics, to cite a few examples. If civil liability were imposed on [the

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[97] Runge v. Watts, 589 P.2d 145, 146–47 (Mont. 1979), *overruled by* Nehring v. LaCounte, 712 P.2d 1329 (Mont. 1986). In explaining its refusal to extend liability to a social host, the Montana Supreme Court stated:

> "We are aware of the high incidence of automobile accidents attributable to intoxication. We also recognize that innocent third parties stand to suffer substantial harm in such situations. However, to hold purveyors of alcohol, especially social furnishers, liable for this harm would be contrary to the current state of Montana law and would infringe upon a matter more appropriately within the province of the legislature."

Id. at 147.

[98] *See, e.g.*, Halvorson v. Birchfield Boiler, Inc., 458 P.2d 897, 900 (Wash. 1969) ("It may be that the social and economic consequences of 'mixing gasoline and liquor' should lead to a rule of accountability by those who furnish intoxicants to one who becomes a tort-feasor by reason of intoxication, but such a policy decision should be made by the legislature . . . .").

[99] Edgar v. Kajet, 375 N.Y.S.2d 548, 552 (N.Y. Spec. Term 1975), *aff'd*, 389 N.Y.S.2d 631 (N.Y. App. Div. 1976), *superceded by* N.Y. GEN. OBLIG. LAW § 11-101 (2009) *as recognized in* D'Amico v. Christie 71 N.Y.2d 76, 83 (1987).

> defendant] herein, it could be similarly imposed on every host who, in a spirit of friendship, serves liquor.[100]

This view can be contrasted with California where the state supreme court has extended liability to social hosts.[101] This, however, was short-lived, as the legislature promptly and unambiguously superceded the holding by the passage of an explicit statute.[102]

Some jurisdictions have recognized a common law action against a social host in the limited situations when an adult host has served intoxicants to a minor.[103] Others have found potential exposure for social hosts when the individual served was under a special disability.[104] For example, a California court found a cause of action when a mentally disabled guest was served alcohol by a social host.[105]

Only four states have found circumstances under which a social host can be liable when serving alcohol to competent adult guests: New Jersey,[106] Massachusetts,[107] Connecticut,[108] and Oregon.[109] When

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[100] *Id.*

[101] Coulter v. Superior Court of San Mateo County, 577 P.2d 669, 673 (Cal. 1978).

[102] CAL. CIV. CODE § 1714(b) (West 2009) ("It is the intent of the legislature to abrogate the holdings in cases such as [Coulter v. Superior Court] and to reinstate the prior judicial interpretation of this section . . . namely that the furnishing of alcohol is not the proximate cause of injuries resulting from intoxication . . . ."). *See also* Cole v. City of Spring Lake Park, 314 N.W.2d 836, 839 (Minn.1982) ("The transcript of the floor debate in the State Senate on the proposed amendment to delete 'giving' from the Civil Damages Act clearly shows that the legislators knew . . . what results its application would produce, and purposefully proposed the amendment . . . so that this court's interpretation . . . would no longer be correct."). The Minnesota legislature mirrored the California legislature by enacting an amendment to abrogate further decisions where a social host was found liable to a third person injured as a result of intoxication from illegally furnished liquor. *See* Ross v. Ross, 200 N.W.2d 149, 150 (Minn. 1972).

[103] *See, e.g.*, Newsome v. Haffner, 710 So. 2d 184, 185 (Fla. Dist. Ct. App. 1998) (holding a social host might be liable for negligence per se if the social host allows minors to consume alcohol at an "open house party").

[104] *See, e.g.*, Cantor v. Anderson, 178 Cal. Rptr. 540, 546 (Cal. Ct. App. 1982) ("[W]here a social host knows his guest is one who *because of* some exceptional physical or mental condition should not be served alcoholic beverages and is or should be aware of the risks included in providing such person with alcohol, the host is not protected by . . . section 1714 . . . .").

[105] *See id.*

[106] *See* Kelly v. Gwinnell, 476 A.2d 1219, 1220 (N.J. 1984).

[107] *See* McGuiggan v. New England Tel. & Tel. Co., 496 N.E.2d 141, 146 (Mass. 1986).

[108] *See* Boehm v. Kish, 517 A.2d 624, 627 (Conn. 1986).

recognizing causes of action, these states apply similar logic to commercial hosts and social hosts: Anyone who negligently serves others may be subject to liability.[110]

For example, the New Jersey Supreme Court held that a social host could be liable for serving a guest when that guest was visibly intoxicated and later injured himself or others.[111] Massachusetts allowed a cause of action against a social host when the host continued to serve a guest, even after the host knew or should have known the guest was intoxicated.[112] Connecticut found a cause of action when the social host "willful[ly] and wanton[ly]" served an intoxicated guest.[113] The fourth state to extend liability, Oregon, did so when the guest was known to have a drinking problem and was also visibly intoxicated.[114]

IV. ARGUMENTS FOR AND AGAINST SOCIAL HOST EXPOSURE TO LIABILITY

A. Limiting Liability in Tort

The Wisconsin Supreme Court in *Miller v. Wal-Mart Stores, Inc*. enumerated a list of general public policy considerations as to why plaintiffs might, for public policy reasons alone, be barred from recovery in tort.[115] Public policy is relevant, but not dispositive. Other factors should be considered because the possibility of a drunk driver injuring others is not a miraculous revelation to those that provide alcohol. Social hosts should be liable for damage when they provide alcohol, at least in some contexts, because of the high costs on society.[116]

The court in *Miller* suggested that when an injury is too remote from the negligence, there should be no liability.[117] Whether or not an injury is too remote to extend liability is a factual question for the finder of fact, but one can certainly visualize circumstances when the injury is a direct and foreseeable consequence from negligent conduct on the part of a social

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[109] *See* Solberg v. Johnson, 760 P.2d 867, 871 (Or. 1988).

[110] *Kelly*, 476 A.2d at 1224.

[111] *Id.* at 1220.

[112] *McGuiggan*, 496 N.E.2d at 146.

[113] *Boehm*, 517 A.2d at 627.

[114] *Solberg*, 760 P.2d at 871.

[115] Miller v. Wal-Mart Stores, Inc., 580 N.W.2d 233, 240 (Wis. 1998) (citing Coffey v. Milwaukee, 247 N.W.2d 132, 140 (Wis. 1976)).

[116] *See, e.g.*, *Kelly*, 476 A.2d at 1222.

[117] *See Miller*, 580 N.W.2d at 240.

host. For example, consider the social host that encourages his or her guest to drink shot after shot of alcohol, knowing that the guest has a habit of driving drunk.

Consider the general negligence context of a car owner who has read about a local gang that initiates its members by having them steal cars and then run down innocent citizens. If the car owner leaves his car unattended and running in an area known to be frequented by gang members, a court might consider the car owner to be an enabler and responsible for injuries to third parties if injury occurs as a result of gang activity.[118] When a social host provides alcohol and then fails to prevent his or her guests from drinking and driving, the host is enabling the same type of danger if the social host knows the guest frequently drives drunk. Without a change in the law, a social host may provide alcohol knowing the end result may be death and destruction, but simply avoid liability by arguing that the injury is too remote from the negligence. Clearly this is not good public policy.

The second situation the *Miller* court considered exists where "the injury is . . . wholly out of proportion to the culpability of the negligent tort-feasor."[119] The level of egregious conduct compared to the resulting injury caused by the negligent serving of alcohol to a guest would be an issue to be determined by the fact finder. A jury could consider the relationship between guest and host, the type of alcohol served, the time frame, past history between guest and host, and even the physical characteristics of the guest. Furthermore, legislatures or courts could certainly define the level of negligence necessary to sustain a cause of action as they do in other contexts.

The third consideration cited by the *Miller* court was if "in retrospect it appears too highly extraordinary that the negligence should have brought about the harm."[120] This question is one of foreseeability. When applied to the context of a social host negligently serving alcohol to one who is about to drive, the question becomes whether it is foreseeable that the

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[118] *See, e.g.*, Hergenrether v. East, 393 P.2d 164, 167 (Cal. 1964) (finding an owner and employees negligent for leaving a vehicle unattended in an area known to be "frequented by persons having little respect for the law" with the keys in the ignition after the vehicle was stolen and later injured a third party in an accident); Kacena v. George W. Bowers Co., 211 N.E.2d 563, 568–69 (Ill. 1965) (finding a car dealership negligent for leaving cars unattended on adjacent streets in an area known to have a high incidence of thefts with the keys in them after a vehicle was stolen by a teenager who later injured a third party in an accident).

[119] *Miller*, 580 N.W.2d at 240.

[120] *Id.*

drunk guest who gets behind the wheel of a car or truck may cause injury or death to themselves or others? It is not credible to argue that the effects of alcohol and the dangers of a drunk driver on our roadways could be a surprise to those who serve it. The risks of drinking and driving are well known. The constant barrage of DUI ads that litter bus benches and billboards about the dangers associated with drinking and driving are hardly out of sight. One can hardly pick up a newspaper without reading about the death or serious bodily harm resulting from a drunk driver. It is common knowledge that at sporting events, the host frequently stops serving alcohol near the end of the event. There are often restrictions against fourth quarter, final period, or even second half beers, because drinking and driving is unacceptable in modern society. To counter any concern that a social host could not have anticipated injury to a third party, if the circumstances of a particular situation are determined by the finder of fact to have not been reasonably foreseeable, then there would be no liability just as there is no exposure in tort in other contexts.

Fourth, recovery should not be permitted when it would place an unreasonable burden on the negligent tort-feasor.[121] Imposing the burden on the tort-feasor to cover the costs of his or her negligence is much more reasonable than forcing an innocent third party to limit the covering of these costs in another manner. The tort-feasor, in this situation, can take steps to prevent an accident from happening. A social host is in the best situation to know that his or her guest is drunk and likely to drive. Is it too much to ask that the host provides the guest a place to rest and sober up or suggests an alternative driver? On the contrary, the innocent third party has no reasonable means to prevent himself or herself from being hit by a drunk driver. Unfortunately, wearing a seatbelt does not always prevent injuries caused by intoxicated persons' negligent driving. Public policy is well directed when it identifies and prevents unreasonable burdens, but the legislature must also look to the burden on society when innocent third parties are killed or injured from a preventable activity.

The fifth reason for limiting tort exposure is "because allowance of recovery would be . . . likely to open the way for fraudulent claims."[122] Fraudulent claims would be easily identified and prevented. Homeowners and hosts are already exposed to other forms of liability.[123] Courts permit judges and juries to determine when a claim is frivolous in these contexts.

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[121] *See id.*

[122] *Id.*

[123] *See, e.g.*, 62 AM. JUR. 2D *Premises Liability* § 397 (2005).

Extending trust in the system to encompass the negligent furnishing of alcohol by a social host allows an injured party to be whole, but still requires the four black-letter elements of negligence.[124] It is less likely that fraudulent claims would be associated with this type of claim than with those in other well-established contexts.

Finally, "allow[ing] . . . recovery would enter a field that has no sensible or just stopping point"; it creates a slippery slope.[125] Legislatures could draw bright lines at whatever point they choose, just as they have in Dram Shop acts. Any and all of the Dram Shop arguments could apply to those who provide alcohol in a social setting. For example, the one serving alcohol is in a much better position to evaluate the potential danger to the public than the innocent third party on the highways and prevent the drunk driver from driving. The public policy arguments against limited liability discussed above are not insurmountable.

B. Public Policy Arguments Specifically Against Social Host Liability

The first consideration to address in response to the arguments against social host liability is that there is an impossibility of enforcement. The fact that there may be difficulties with enforcing sanctions against negligent or illegal conduct should not be enough to justify what would otherwise be unacceptable behavior. Serving alcohol to minors by social hosts is proscribed both criminally and civilly in spite of the difficulty of enforcement.[126] Additionally, Dram Shop acts demonstrate that it is possible to enforce this type of liability; the difficulties when enforcing are not enough to negate the efficacy of these laws. Accordingly, although perhaps difficult to enforce, it would not be "impossible" to hold a social host responsible for negligent service of alcohol to adults.

Second is the general recalcitrance to legitimize the moral policing of social relationships. The issue is not about moral policing of social relationships, nor is the problem about drinking. The problem is providing alcohol to a person that drinks, drives, and injures a third party. If a social

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[124] *See, e.g.*, Greenberg v. Superior Court, 92 Cal. Rptr. 3d 96, 103 (Cal. Ct. App. 2009) ("In order to establish liability on a negligence theory, a plaintiff must prove duty, breach, causation and damages.").

[125] *Miller*, 580 N.W.2d at 240.

[126] *See, e.g.*, MICH. COMP. LAWS § 436.1801(3) (2009); WIS. STAT. ANN. § 125.035(4)(b) (West 2009); Linn v. Rand, 356 A.2d 15, 17 (N.J. Super. Ct. App. Div. 1976) (holding a social host who furnished excessive amounts of liquor to a minor, knowing the minor was about to drive a car, could be held liable for the intoxicated minor's negligent acts causing injury to third parties).

host and his or her guest want to share alcohol to the extent that both are seriously impaired, there still would be no liability until and unless someone is injured on the roadway. This article in no way suggests that alcohol cannot or should not be consumed and enjoyed. Instead, the true issue here is whether an individual has any duty to act reasonably so that others will not be injured.

Third, social hosts, unlike bartenders, are not experienced at recognizing signs of impairment and are not as capable as commercial hosts in handling the responsibilities of monitoring their guests' alcohol intake. Certainly, when comparing the two, social hosts are not required by law to undergo the same training as bartenders.[127] However, whether a social host acted reasonably is an issue of fact for a jury to decide. For example, the social host who attempts to prevent a drunk guest from leaving by grabbing the keys would not be liable if the guest snuck out the back door and used a hidden set of keys. In this situation, the social host recognized the danger and attempted to minimize it. Of course, it is possible that in spite of a social host acting responsible, a guest would still leave and injure someone. The resolution of whether a social host acted reasonably or responsibly would be decided by the trier of fact. Although people hold those with more experience and training to a higher standard,[128] it would still be reasonable to narrowly define the allowable scenarios under which, as a matter of law, a social host could be found liable for serving alcohol to a guest.

Finally, there is the concern whether the imposition of liability against a social host would place unreasonable financial burdens on a homeowner, landlord, or tenant to adequately insure against injuries that do not logically grow out of the occupation or possession of property. It is not clear that the financial burden that may be imposed on the homeowner is unreasonable, especially when compared to the burden placed inevitably on the innocent, injured third party. When comparing the two—the negligent social host and the innocent third party—imposing the costs of the negligent conduct on the innocent third party is the unreasonable outcome. Furthermore, there is absolutely no financial burden on the social host should he or she act responsibly by not disregarding

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[127] *See, e.g.*, WIS. STAT. ANN. § 125.04 (West 2009).

[128] *See, e.g.*, ARK. CODE ANN. § 3-3218 (2008). *See also* Jackson v. Cadillac Cowboy, Inc., 986 S.W.2d 410, 414 (Ark. 1999) ("[T]his high duty of care fixed by the General Assembly is on licensed vendors of alcohol, and we view the liability as confined to this group . . . .").

responsibility and facilitating injuries to third parties. The only burden on the social host is that he or she attempt to act reasonably and minimize the possibility of injury to a third party.

V. CONCLUSION

Legislatures and courts from many jurisdictions have considered whether to extend liability to hosts who negligently serve alcohol to guests in a purely social setting.[129] With the few previously noted exceptions, all have declined.[130] There are concerns raised about the chilling effect on those in social settings, the possibility of frivolous or fraudulent lawsuits, and the financial burden that would be placed on social hosts. All of these arguments for maintaining total immunity are valid, and those who seek to extend exposure to liability should have to overcome these important policy considerations. However, there are strong arguments that meet these policy concerns.

Almost every day people read or hear of a totally innocent third party who was driving safely and legally on one of our highways. This third party did not have an opportunity to consider or appreciate the social value derived when the nearby intoxicated driver was attending a party at a next-door neighbor's home. It is hard to imagine that this innocent driver would appreciate the value to society of unrestricted drinking, even in a purely social setting, at the time the impaired driver crossed into his or her path and caused the accident. The chilling effect on the social interactions between the host and his or her guests caused by considering the effects of alcohol served at the party pales in comparison to the chilling effect of death or permanent impairment to the innocent third party. Courts have found ways to deal with the dangers of frivolous or fraudulent lawsuits in far less egregious circumstances.[131] Likewise, a concern of financial burden on social hosts is no less of an economic impact than that faced by the innocent third party and their family. The time has come to give the social host cause to pause and provide another source for recovery to the innocent, injured party.

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[129] *See* discussion *supra* Part III (discussing the development of social host liability).

[130] *See* discussion *supra* Part III.B (discussing the four states who have recognized some form of social host liability).

[131] *See, e.g.*, Miller v. Wal-Mart Stores, Inc., 580 N.W.2d 233, 240–41 (Wis. 1998) (explaining how the court's holding will not open the door to fraudulent claims).