Social Host Liability for Guests Who Drink and Drive: A Closer Look at the Benefits and the Burdens

Derry D. Sparlin Jr.
NOTES

SOCIAL HOST LIABILITY FOR GUESTS WHO DRINK AND DRIVE: A CLOSER LOOK AT THE BENEFITS AND THE BURDENS

In recent years, citizens have placed increasing pressure on courts and legislatures to eliminate drunk driving. While almost every state legislature has responded by strengthening criminal sanctions, many state courts have reacted by expanding the scope of civil liability for accidents caused by drunken driving. In addition to holding the intoxicated drivers liable, courts in many jurisdictions have imposed civil liability on the tavern owners and bartenders who served liquor to these drivers when the danger of serving drinks was reasonably foreseeable. Although these owners and bartenders were not liable under common law, many recent

1. See, e.g., War on Alcohol Abuse Spreads to New Fronts, U.S. News & World Rep., Dec. 24, 1984, at 63 (noting the "citizens' revolt" from alliances between public officials, police, distillers, bartenders, and "hundreds of thousands of angry, often bereaved citizens"); Outrage over Drunk Driving, People Weekly, July 25, 1983, at 18 (documenting the heavy political pressure on state legislatures); see also South Dakota v. Neville, 459 U.S. 553, 558 (1983) (noting the history of Supreme Court rulings expressing dismay with the scope of the drunk driving problem).

2. See War on Alcohol Abuse Spreads to New Fronts, supra note 1, at 63 ("Virtually every state has toughened its drunk-driving laws in recent years—223 new statutes in all."); Outrage over Drunk Driving, supra note 1, at 18 (noting that, since 1980, virtually every state has strengthened its laws concerning drinking and driving); see also Kelly v. Gwinnell, 96 N.J. 538, 545, 476 A.2d 1219, 1222 (1984) (noting recent governmental responses to the problem in New Jersey).

3. The majority of jurisdictions now have some form of legal rule imposing civil liability on third persons who help cause alcohol-related accidents. See infra notes 6 & 19-20 and accompanying text; see also War on Alcohol Abuse Spreads to New Fronts, supra note 1, at 63 (stating that, in thirty-six states, tavern owners can be liable for damages if they could have taken steps to prevent a drinker from driving).


decisions have abrogated the common law rule of nonliability. The common law doctrine now has become the minority rule.\(^6\)

---


Not all of the other thirteen jurisdictions adhere to the common law rule completely. Six of these jurisdictions have dram shop statutes that impose liability in certain situations. See CONN. GEN. STAT. ANN. § 30-102 (1975); ILL. ANN. STAT. ch. 43, § 135, § 6-21 (Smith-Hurd Supp. 1988); MO. ANN. STAT. § 537.053(3) (Vernon Supp. 1986); N.D. CENT. CODE § 5-01-06 (Supp. 1985); R.I. GEN. LAWS § 3-11-1 (Supp. 1985); UTAH CODE ANN. § 32A-14-1 (Supp. 1985). In three of these six jurisdictions, courts have rejected liability beyond the relief provided by the statute, see Nelson v. Steffens, 170 Conn. 356, 365 A.2d 1174 (1976); Ruth v. Benvenuti, 114 Ill. App. 3d 404, 449 N.E.2d 209 (1983); Thoring v. Bottansek, 350 N.W.2d 586 (N.D. 1984), while courts in two of the six jurisdictions, Rhode Island and Utah, have not ruled on the matter. In the sixth jurisdiction, Missouri, the dram shop statute replaced the common law liability imposed by the Missouri Court of Appeals in Carver v. Schaefer, 647 S.W.2d 570 (Mo. Ct. App. 1983), which the Missouri legislature expressly abrogated in Mo. ANN. STAT. § 537.053(1)-(2) (Vernon Supp. 1986). In the remaining seven jurisdictions, six courts have decided expressly not to abandon the common law rule, see Carr v. Turner,
Recently, victims of alcohol-related accidents have argued that courts also should extend this doctrine of liability to social hosts who serve liquor gratuitously to guests who subsequently drive while intoxicated. The courts, however, have been reluctant to accept this argument. Courts in only nine jurisdictions have recognized social host liability. The effect of these decisions is tempered somewhat by language in many of the opinions that restricts liability to limited circumstances involving particularly wrongful conduct. State legislatures in three of these nine jurisdictions effectively have overturned the decisions that imposed liability by modifying their statutes either to eliminate liability or to limit liability to specific situations, leaving only six jurisdictions that currently impose liability.


9. See, e.g., Kelly v. Gwinnell, 96 N.J. 538, 559, 476 A.2d 1219, 1230 (1984) (liability limited “to the situation in which a host directly serves a guest”); Winslow v. Brown, 125 Wis. 2d 327, 333 n.2, 371 N.W.2d 417, 421 n.2 (1985) (stating that Wisconsin court’s decision in Koback v. Crook, establishing social host liability, was “limited to active negligence causing the intoxication”).

In addition, five of these decisions—Sutter, Longstreth, Ross, Wiener, and Koback—involving minor guests rather than adult guests. Many of these five decisions included express refusals to extend liability to hosts serving adult guests. See, e.g., Longstreth v. Gensel, 423 Mich. 675, 377 N.W.2d 804, 809 (1985); Koback v. Crook, 123 Wis. 2d 259, 277-78, 366 N.W.2d 857, 866 (1985) (Babitch, J., concurring).

10. CAL. CIV. CODE § 1714(b)-(c) (1985); CAL. BUS. & PROF. CODE § 25602(b)-(c) (West Supp. 1985); MINN. STAT. ANN. § 340.95 (West Supp. 1985); OR. REV. STAT. §§ 30.955, .960 (1985). Courts in these jurisdictions have recognized the severe limiting effect that these
Despite the negative response of state legislatures to the first three judicial attempts to impose social host liability, the New Jersey Supreme Court decided in 1984 to extend liability to a host who had served a guest approximately thirteen drinks during a short visit before letting the guest drive away.\textsuperscript{11} Courts in Georgia, Indiana, Iowa, Michigan, and Wisconsin quickly followed the New Jersey court's lead, extending liability to social hosts whose conduct seemed less blameworthy than the conduct involved in the New Jersey case.\textsuperscript{12} Courts in Arizona, Florida, Minnesota, Missis-

enactments have had on the courts' earlier decisions extending liability. See, e.g., Cory v. Shierloh, 29 Cal. 3d 430, 629 P.2d 8, 174 Cal. Rptr. 500 (1981); Holmquist v. Miller, 367 N.W.2d 468 (Minn. 1985).

The Iowa legislature also repudiated an attempt by that state's supreme court to impose social host liability based on a dram shop statute. See Iowa Code Ann. § 123.92 (West Supp. 1985) (amending Iowa Code Ann. § 123.2 (West 1949) (effectively overruling Williams v. Kleneurud, 197 N.W.2d 614 (Iowa 1972), in which the Iowa Supreme Court had relied on section 123.2 to justify social host liability). The Iowa Supreme Court, however, reimposed social host liability several years later based on negligence principles. Clark v. Mincks, 364 N.W.2d 226 (Iowa 1985) (en banc). The dissenting judge in Clark argued unsuccessfully that the court's action ignored the legislative intent underlying the amendment of the old law. See id. at 232-33 (McGiverin, J., dissenting in part and concurring in part).

The recent extension of liability to New Jersey social hosts also may be in danger of legislative abrogation. See Boutwell v. Sullivan, 469 So. 2d 526, 529 n.2 (Miss. 1985); Sullivan, Jersey Hosts Keeping Drunks from Driving, N.Y. Times, Dec. 30, 1984, § 1, at 1, col. 2 (noting the introduction of a bill in the New Jersey legislature that would insulate social hosts from liability); see also Special Project, Social Host Liability for the Negligent Acts of Intoxicated Guests, 70 Cornell L. Rev. 1058, 1137-38 (describing three proposed bills that would overturn, or at least limit, Kelly).

In New Mexico, the state legislature's response to a decision imposing civil liability on a tavern owner left open the possibility of social host liability in limited situations:

No person who has gratuitously provided alcoholic beverages to a guest in a social setting may be held liable in damages to any person for bodily injury, death or property damage arising from the intoxication of the social guest unless the alcoholic beverages were provided recklessly in disregard of the rights of others, including the social guest.


sippi, and Missouri, however, refused in 1985 to follow the New Jersey court's lead.\textsuperscript{13} The sudden emergence of so many social host liability decisions, as well as the continually mounting political pressure to act against drunk driving,\textsuperscript{14} indicates that social host liability will be an important and hotly contested issue in the next few years.

This Note examines the wisdom of expanding liability to include social hosts. After reviewing the evolution of the doctrine imposing liability on tavern owners, the Note focuses on social hosts. It examines both specific legal arguments and general policy considerations relevant to the social host liability issue, and contrasts these legal arguments and policies with the considerations that prompted courts to extend liability to tavern owners.

The Note concludes that a rule holding social hosts liable for damages caused by the drunken driving of their guests is unwise. Although a general extension of liability to social hosts might have some impact on the problem of drunk driving, the extent of that impact is highly speculative. In fact, the limited experience of states that have experimented with social host liability indicates that its effects are minimal. This minimal impact is significantly outweighed by the risk of unjust results and the heavy burden that potential liability places upon social hosts. General policy considerations also weigh against imposition of liability. Instead of imposing liability on social hosts, states should rely on measures that can deal far more effectively with drunk driving and that do not have the serious disadvantages associated with social host liability.

**The Development of Civil Liability**

Under common law, courts did not hold third persons liable for injuries resulting from accidents caused by drunk drivers.\textsuperscript{15} Courts justified this general rule of nonliability by suggesting that


\textsuperscript{14} See supra note 1.

individuals should be responsible for their own torts and that the driver's drinking of liquor, not the tavern's selling of it, proximately caused any resulting injury. The sale of the liquor, according to these courts, was too remote from the injury to be the proximate cause.

Today, the common law rule of nonliability no longer applies in most states to the owners and operators of drinking establishments. Some state legislatures have overturned the rule by enacting laws, usually known as "dram shop statutes" or "civil damage acts," which expressly impose civil liability on tavern owners. In addition, courts in most states have overruled the common law rule and now hold tavern owners liable for accident damages caused by their drunken patrons, based on traditional negligence principles.

Dram Shop Statutes

Many dram shop statutes include broad language easily capable of application both to social hosts and to tavern owners. Most courts, however, have read these statutes narrowly. These courts have ruled that the legislatures intended the statutes to cover only commercial dispensers, and not social hosts.

20. Courts in thirty-seven jurisdictions have abrogated the common law rule of nonliability with respect to tavern owners. See supra note 6.
21. See Special Project, supra note 10, at 1067-68 (noting ten such broadly worded statutes); see, e.g., ILL. ANN. STAT. ch. 43, ¶ 135, § 6-21 (Smith-Hurd Supp. 1986) ("Every person who is injured in person or property by any intoxicated person, has a right of action in his or her own name, severally or jointly, against any person who by selling or giving alcoholic liquor, causes the intoxication of such person.").
Despite this trend, courts in two jurisdictions came to the opposite conclusion, temporarily extending the coverage of dram shop statutes to social hosts. In *Ross v. Ross*, the Minnesota Supreme Court considered a statute that extended civil liability to "any person who, by illegally selling, bartering, or giving intoxicating liquors, caused the intoxication" of the person who injured the plaintiff. The court held that this law applied to an individual who had purchased liquor for his younger brother. In *Williams v. Klemesrud*, the Iowa Supreme Court similarly interpreted a dram shop statute to apply to an individual who was not a tavern owner. The court read the statute's reference to "any person who shall, by selling or giving to another contrary to the provisions of this title, any intoxicating liquors" as including an individual who had supplied a bottle of vodka to a minor.

Neither decision, however, resulted in a permanent extension of civil liability to social hosts. Both state legislatures quickly amended their statutes, deleting references to "giving" liquor. Through these amendments, both legislatures clarified their intent to hold only commercial dispensers, and not private social hosts, civilly liable under these laws.

The importance of dram shop statutes has declined in recent years, not only because of the tendency toward narrow interpretation illustrated by the court decisions and by the actions of the Iowa and Minnesota legislatures, but also because of the repeal of

---

24. 294 Minn. 115, 200 N.W.2d 149 (1972).
25. MINN. STAT. ANN. § 340.95 (West 1972).
26. 294 Minn. at 121-22, 200 N.W.2d at 152-53. The younger brother had become intoxicated, had driven, and had been killed in the resulting accident. *Id.* at 116, 200 N.W.2d at 150.
27. 197 N.W.2d 614 (Iowa 1972).
28. IOWA CODE ANN. § 129.2 (West 1949).
29. 197 N.W.2d at 615. The minor had become drunk and had caused an automobile accident that seriously had injured the other driver. *Id.*
30. See IOWA CODE ANN. § 123.92 (West Supp. 1985) (amending IOWA CODE ANN. § 129.2 (West 1949) by limiting application of the statute to licensees and permittees); MINN. STAT. ANN. § 340.95 (West Supp. 1986) (amending MINN. STAT. ANN. § 340.95 (West 1972) by eliminating the word "giving"). In Iowa, however, the court later extended liability to social hosts based on common law negligence principles. Clark v. Mincks, 364 N.W.2d 226 (Iowa 1985) (en banc); see supra note 10.
dram shop statutes in many states.\textsuperscript{31} Court decisions based on judicially-created negligence principles have been far more significant in the development of tavern owner liability. Because legislatures have resisted the extension of civil liability to third parties,\textsuperscript{32} these judicially-created principles probably will continue to be the primary avenue for imposition of social host liability.

\textit{Negligence Theory}

Courts in most jurisdictions have abrogated the common law rule of nonliability, at least to a limited extent, by applying traditional negligence principles.\textsuperscript{33} These courts have based their decisions on two primary rationales. Some courts have relied on tavern owners’ violations of criminal statutes either to provide evidence of negligence or to establish negligence per se.\textsuperscript{34} Other courts have justified liability under general negligence principles by emphasizing the tavern owners’ ability to foresee danger to the motoring public.\textsuperscript{35}


32. See \textit{supra} note 10.

33. See \textit{supra} note 6. The decision to apply negligence principles has not been limited to states without dram shop legislation. See, e.g., Berkeley v. Park, 47 Misc. 2d 381, 262 N.Y.S.2d 290 (1965). \textit{But see} Holmquist v. Miller, 367 N.W.2d 468, 471 (Minn. 1985) (dram shop statute provides exclusive remedy and preempts any action based on negligence principles).

34. See, e.g., Waynick v. Chicago’s Last Dep’t Store, 269 F.2d 322 (7th Cir. 1960), cert. denied, 362 U.S. 903 (1960); Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959).

Negligence Based on Violations of Criminal Statutes

Development of Tavern Owner Liability

Every state has a body of law regulating the service of alcoholic beverages, usually imposing criminal sanctions on individuals who supply liquor to minors or to obviously intoxicated persons. These statutes usually are broad enough to apply to situations in which drunken drivers have caused accidents. As a result, many plaintiffs looking to recover from tavern owners or social hosts have argued that the criminal violations committed by these parties in supplying the liquor constitute actionable negligence. These plaintiffs have contended either that these criminal violations are negligence per se or that they are evidence of negligence.

Originally, courts uniformly rejected these arguments, holding that the legislatures did not create these criminal statutes to protect potential accident victims or to create private rights of action. Instead, the courts determined that the legislatures intended primarily to protect minors, intoxicated persons, and others specifically mentioned in the statutes. In 1959, however, the New Jersey Supreme Court accepted a plaintiff’s negligence arguments in the landmark case of Rappaport v. Nichols.

36. For a complete listing of the applicable criminal statutes in the fifty states, see Special Project, supra note 10, at 1076 n.135.

37. See, e.g., CAL. BUS. & PROF. CODE § 25658(a) (West Supp. 1985) ("Every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor."); WIS. STAT. ANN. § 125.07(2) (West Supp. 1985) ("No person may procure for, sell, dispense, or give away alcoholic beverages to a person who is intoxicated.").

38. Courts disagree concerning the effect of statutory violations on the existence of negligence. Some courts hold that any time the legislature intended a statute to protect a particular class, a violation of the statute constitutes negligence per se as to members of that class and harms that the legislature intended to prevent. See, e.g., Martin v. Herzog, 228 N.Y. 164, 126 N.E. 814 (1920). Other courts hold that such a statutory violation creates a rebuttable presumption of negligence. See, e.g., Shulins v. New England Ins. Co., 360 F.2d 781 (2d Cir. 1966). A few other courts hold that statutory violations may be considered only as evidence of negligence. See, e.g., Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1, 9 (1959).

39. See, e.g., Hitson v. Dwyer, 61 Cal. App. 2d 803, 143 P.2d 952 (1943) (disapproved in Vesely v. Sager, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971)). In some jurisdictions with dram shop statutes, courts have justified these holdings by finding that the legislature intended to create an exclusive remedy when it passed a dram shop act. See Knierim v. Izzo, 2 Ill. 2d 73, 174 N.E.2d 157 (1961); Holmquist v. Miller, 367 N.W.2d 468 (Minn. 1985).

40. 31 N.J. 188, 156 A.2d 1 (1959). In another case decided earlier that year, a federal court also accepted an argument that a criminal violation constituted negligence per se.
In *Rappaport*, an older friend had accompanied a minor to several public bars, where he had purchased alcoholic drinks for the minor. The minor had become intoxicated and, while driving home, had collided with another vehicle. The driver of the other vehicle had died in the collision. In the wrongful death suit that followed, the decedent's estate named as codefendants the minor, the older friend, and the bar owner.\[^{41}\]

The court abandoned the common law rule of nonliability, refusing to find, as a matter of law, that the bar owner's negligent conduct of serving a minor was not the proximate cause of the automobile accident and the death.\[^{42}\] The court reasoned that the legislature could not have intended the broadly worded applicable criminal statute\[^{43}\] to protect only minors and intoxicated persons. The legislature, according to the court, also must have intended this statute to protect the general public.\[^{44}\] Because of this perceived legislative intent, the court deemed any violation of the applicable criminal statute admissible evidence of negligence in a civil suit.\[^{45}\] Although New Jersey had repealed its dram shop statute in 1934,\[^{46}\] the court did not interpret that repeal as a legislative attempt to eliminate a private remedy. Instead, the court viewed the legislative intent underlying the passage of the criminal statute as distinct from the intent underlying the dram shop legislation.\[^{47}\]

Since *Rappaport*, many courts have followed New Jersey's lead. These courts either have followed the reasoning in *Rappaport* that a tavern owner's criminal violations could be submitted to a jury as evidence of negligence,\[^{48}\] or have held that such criminal violations

Waynick v. Chicago's Last Dep't Store, 269 F.2d 322 (7th Cir. 1959), *cert. denied*, 362 U.S. 903 (1960).

41. 31 N.J. at 192-93, 156 A.2d at 3.
42. Id. at 204, 156 A.2d at 9.
44. 31 N.J. at 201-02, 156 A.2d at 8.
45. Id. at 203, 156 A.2d at 9.
46. See supra note 31.
47. 31 N.J. at 201, 156 A.2d at 8.
constitute negligence per se.\textsuperscript{49} Extension of these theories to social hosts, however, has been slow.

\textit{Application to Social Hosts}

Thirteen years after \textit{Rappaport}, California became the first state to extend these doctrines of liability to a social host. In \textit{Brockett v. Kitchen Boyd Motor Co.},\textsuperscript{50} several plaintiffs sued an employer\textsuperscript{51} for serving liquor to a minor employee who later had injured the plaintiffs in an automobile accident.\textsuperscript{52} In its initial consideration of \textit{Brockett}, the California Court of Appeal applied the traditional nonliability rule, stating that the rule was "unquestionably established" in California law.\textsuperscript{53} In 1971, however, the California Supreme Court overturned the common law rule of nonliability in a case involving a tavern owner who had served a minor.\textsuperscript{54} The California Court of Appeal then reheard \textit{Brockett}, and held that the employer's violation of a California statute forbidding the service of alcohol to minors constituted actionable negligence.\textsuperscript{55} The California Supreme Court later extended the doctrine to situations involving service to adult guests.\textsuperscript{56}

The extension of liability to California social hosts, however, was short-lived. When the California legislature amended its Civil Code in 1978, it severely limited the scope of \textit{Brockett} and subsequent

\textsuperscript{49} E.g., Waynick v. Chicago's Last Dep't Store, 269 F.2d 322 (7th Cir. 1950), cert. denied, 362 U.S. 903 (1960); Thaut v. Finley, 50 Mich. App. 611, 213 N.W.2d 820 (1973).
\textsuperscript{50} 264 Cal. App. 2d 69, 70 Cal. Rptr. 135 (1968), rev'd on reh'g, 24 Cal. App. 3d 87, 100 Cal. Rptr. 752 (1972).
\textsuperscript{51} Cases involving employers as defendants raise different issues than cases involving other types of social hosts. The differences are so great that some courts view employer liability as a totally distinct area of law. In \textit{Otis Eng'g Corp. v. Clark}, 668 S.W.2d 307 (Tex. 1983), for example, the Texas Supreme Court stated: [The employer] says that by imposing liability for the acts of its intoxicated employee, [who got drunk at a company Christmas party], this Court would be judicially creating "dram shop" liability. We disagree. This is not a "dram shop" case. If a duty is to be imposed . . . it . . . would be based on additional factors.
\textit{Id.} at 309.
\textsuperscript{52} 264 Cal. App. 2d at 70, 70 Cal. Rptr. at 137.
\textsuperscript{53} \textit{Id.} at 71, 70 Cal. Rptr. at 137.
\textsuperscript{55} 24 Cal. App. 3d at 93, 100 Cal. Rptr. at 756.
\textsuperscript{56} See, e.g., Coulter v. Superior Court, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978); \textit{infra} notes 131-36 and accompanying text.
social host liability decisions. The amended statute specifically dis-
approved of the holdings in several social host cases, and ex-
pressly stated the legislature's intent "to reinstate the prior judi-
cial interpretation of this section."

Until 1985, California remained the only jurisdiction in which
the highest state court had attempted to impose social host liaibil-
ity based on statutory violations. The vast majority of courts had
rejected statutorily-based liability, reasoning that the legislatures
had intended to limit application of these statutes to commercial
sellers. Any extension of liability beyond commercial sellers, ac-
cording to these courts, should come from the legislatures, not
from the judiciary.

In 1985, however, a number of statutorily-based decisions
emerged. In Clark v. Mincks, for example, the Iowa Supreme

57. CAL. CIV. CODE § 1714(b) (1985) (mentioning Coulter v. Superior Court, 21 Cal. 3d
144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978); Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546
Rptr. 623 (1975)).

58. CAL. CIV. CODE § 1714(b) (1985); see CAL. CIV. CODE § 1714(c) (1985); CAL. BUS. &
PROF. CODE § 25602(b)-(c) (West Supp. 1985). The California courts generally have ruled
that these new statutes preclude most actions against social hosts. See Cory v. Shierloh, 29
App. 3d 124, 178 Cal. Rptr. 540 (1981) (holding that an action against a social host was not
foreclosed by the new statutes in a special situation in which a host served an individual
who he knew was developmentally disabled).

59. A few lower state courts had imposed liability on social hosts who furnished alcoholic
beverages to minor guests, based on statutory violations. See, e.g., Brattain v. Herron, 159
supreme courts that had imposed social host liability before 1985, however, had rested their
decisions on general negligence principles, although some of these courts had mentioned
statutory violations in passing. See, e.g., Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219
(1984) (mentioning applicable criminal sanctions, but imposing liability based on general
negligence principles and policy considerations).

60. See, e.g., Edgar v. Kajet, 84 Misc. 2d 100, 375 N.Y.S.2d 548 (1975), aff'd, 55 A.D.2d
597, 389 N.Y.S.2d 631 (1976); Manning v. Andy, 454 Pa. 237, 310 A.2d 75 (1973) (per
curiam).

61. See, e.g., Manning v. Andy, 454 Pa. 237, 240-42, 310 A.2d 75, 76-77 (1973) (Pomeroy,
J., concurring).

62. See, e.g., id. at 239, 310 A.2d at 76 (per curiam).

1167 (Ind. Ct. App. 1985); Clark v. Mincks, 364 N.W.2d 226 (Iowa 1985) (en banc); Long-
streth v. Gensel, 423 Mich. 675, 377 N.W.2d 804 (1985); Kobsack v. Crook, 123 Wis. 2d 259,

64. 364 N.W.2d 226 (Iowa 1985) (en banc).
Court relied principally on the violation of a criminal statute to impose social host liability. In Clark, William and Larry Mincks had hosted a cookout that was attended by several guests, including Robert Mincks, his wife Nancy, Michael Clark, his wife Shirley, and the Clark’s daughter Michelle. Nancy Mincks had begun drinking before the cookout, and had continued drinking large quantities of beer at the cookout. Although she was obviously drunk, and she had spilled beer on one of the hosts, Nancy had driven away from the cookout in a van with several passengers, including Michelle Clark. The van had flipped over and rolled several times, killing both Nancy and Michelle.65

The trial court had dismissed the wrongful death action filed by Michelle’s parents, ruling that no cause of action lies against a social host for injuries arising when the host gives intoxicants to a guest.66 The Iowa Supreme Court reversed,67 basing its decision on the hosts’ violation of an Iowa statute that provides: “[N]o person shall sell, dispense, or give to any intoxicated person, or one simulating intoxication, any alcoholic liquor or beer.”68 The court noted that it had relied in two previous cases on similar statutory violations to hold liquor store owners liable for damages stemming from their acts.69 Because the broad statutory language applied just as clearly to social hosts, the court also allowed recovery against the hosts in Clark.70

Almost simultaneously, the Georgia Supreme Court decided to rely partially on the violation of a criminal statute to justify its extension of civil liability to social hosts in Sutter v. Hutchings.71 In that case, a mother and her teenage daughter had held a party for the daughter’s high school classmates. The refreshments had included a keg of beer. At the party, the mother had observed an

65. Id. at 227-28.
66. See id.
67. Id. at 232.
68. IOWA CODE ANN. § 123.49(1) (West 1983) (cited in Clark, 364 N.W.2d at 228).
70. 364 N.W.2d at 231. The court also noted the general policy considerations that the New Jersey Supreme Court had advanced to justify its extension of social host liability, based on general negligence principles, in Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984). 364 N.W.2d at 230.
underage guest drinking heavily and later had watched him get into his car. She had allowed him to drive despite her expressed concerns about his intoxicated condition. A few minutes later, the drunk driver had sped through a red light and had killed the plaintiff's husband, David Sutter.\(^2\)

The Georgia Supreme Court reversed a decision in which the Georgia Court of Appeals had dismissed the widow's wrongful death action against the mother and her daughter.\(^3\) The supreme court supported its conclusion that social hosts have a duty not to serve liquor to visibly intoxicated or underage guests by noting the hostesses' violation of Georgia statutes that forbid the furnishing of alcohol to visibly intoxicated persons and to persons under the age of nineteen.\(^4\) The court found that the Georgia legislature had passed these statutes to protect not only intoxicated and underage individuals, but also motorists on the highways. Based on this interpretation, the court reasoned that a host's duty under the statutes extends to third parties.\(^5\) The defendants argued that the duty should not extend beyond commercial establishments because social hosts do not have bouncers to prevent drunken guests from driving. The court rejected that argument, reasoning that the host's duty arises before a guest becomes so visibly intoxicated that a bouncer is necessary. According to the court, the host's duty is to stop serving alcohol to a noticeably intoxicated guest.\(^6\)

Once the court had established this duty, its next task was to determine whether the defendants' breach of the duty proximately caused the plaintiff's injury. The court concluded that it had, because the risk in this case had been foreseeable to the defendants.\(^7\)

---

\(^2\) Id. at 194, 327 S.E.2d at 716-17.

\(^3\) Id. at 199, 327 S.E.2d at 720.

\(^4\) Id. at 197, 327 S.E.2d at 718-19. The two statutes that the court cited in Sutter were GA. CODE ANN. § 3-3-22 (1982) (“No alcoholic beverage shall be sold . . . given, provided, or furnished to any person who is in a state of noticeable intoxication.”), and GA. CODE ANN. § 3-3-23(a)(1) (Supp. 1985) (“No person knowingly, by himself or through another, shall furnish [or] cause to be furnished . . . any alcoholic beverage to any person under 19 years of age” except for medical or religious purposes, or in the home with parental consent.).

\(^5\) 254 Ga. at 197, 327 S.E.2d at 719.

\(^6\) Id.

\(^7\) Id. at 198, 327 S.E.2d at 719.
The court, therefore, approved the cause of action against the social host.\textsuperscript{78}

In \textit{Ashlock v. Norris},\textsuperscript{79} the Indiana Court of Appeals became the third court in fifteen days to announce a decision imposing social host liability using a statutory theory. In \textit{Ashlock}, the defendant had purchased several drinks for an acquaintance, Cindy Morrow. After several hours of drinking, the defendant and Morrow had left the bar. Although Morrow had stumbled and fallen as she had left, the defendant had helped her into her car after failing in an attempt to persuade her not to drive. About a mile from the bar, the Morrow's car had strayed ten feet off the road and had struck and killed Anthony Ashlock, who had been jogging. Morrow had continued driving for two miles before ending up in a ditch.\textsuperscript{80}

The administratrix of Ashlock's estate, suing for wrongful death, argued that the defendant's actions had violated an Indiana criminal statute that forbids anyone from furnishing alcoholic beverages to another person with knowledge "that the other person is intoxicated."\textsuperscript{81} This criminal violation, the plaintiff argued, also constituted the breach of a civil duty owed to Cindy Morrow.\textsuperscript{82} The court agreed, citing several cases in which similar violations had justified liability.\textsuperscript{83} Although most of these cases had involved tavern owners and bartenders,\textsuperscript{84} the court reasoned that "the legislature has chosen to draw no distinction between one who sells in violation of the statute and one who gives or furnishes in violation."\textsuperscript{85} Accordingly, the court extended liability to the host in \textit{Ashlock}.\textsuperscript{86}

\begin{footnotesize}
78. \textit{Id.} at 199, 327 S.E.2d at 720.
80. \textit{Id.} at 1168.
82. 475 N.E.2d at 1168.
84. \textit{See id.} The only exception was Brattain v. Herron, 159 Ind. App. 663, 309 N.E.2d 150 (1974), but that case was distinguishable because it involved the furnishing of alcohol to a minor rather than to an adult. \textit{See supra} note 59.
85. 475 N.E.2d at 1169.
86. \textit{Id.} A judge from another district of the Indiana Court of Appeals, in rejecting an attempt to impose liability on a college and a fraternity for injuries from an alcohol-related accident following a fraternity party, criticized the result in \textit{Ashlock} as "troublesome" and as raising "serious legal and practical problems." Campbell v. Board of Trustees, No. 06A01-8601-CV-1, slip op. at ____ (Ind. Ct. App. July 16, 1986).
\end{footnotesize}
Only a month after Clark, Sutter, and Ashlock were decided, the Supreme Court of Wisconsin extended liability to social hosts, based on the same theory, in Koback v. Crook.87 In Koback, two seventeen-year-old students, Leslie Koback and Michael Crook, had attended a graduation party hosted by the parents of a fellow student. The hosts had served beer to Crook, who had become intoxicated, and had left the party on his motorcycle with Koback as a passenger. Shortly thereafter, Crook's motorcycle had struck a parked car. Leslie Koback had been thrown to the pavement, and she had suffered severe injuries.88

The Wisconsin court noted that less than one year earlier, in Sorensen v. Jarvis,89 it had overruled several earlier decisions in which it had followed the common law rule of nonliability.90 In Sorensen, the court had imposed liability on a commercial vendor for selling liquor to a minor. The sale had been a statutory violation which, according to the court, had constituted negligence per se.91

In Koback, the Wisconsin court found the facts indistinguishable from Sorensen, despite the involvement of a social host rather than a commercial establishment.92 The court held that the same negligence per se principles applied because the same statutes had been violated. The fact that a social host rather than a commercial vendor had violated the statutes made no difference, the court reasoned, because the statutes applied equally to both.93 The court rejected arguments that social hosts and commercial vendors could be distinguished based on the blameworthiness of their conduct, the nature of their relationship with the person drinking the alcohol, their ability to spread the costs of liability, and the remoteness of their conduct from the injury.94 The court concluded that

87. 123 Wis. 2d 259, 366 N.W.2d 857 (1985).
88. Id. at 262, 366 N.W.2d at 858.
89. 119 Wis. 2d 627, 350 N.W.2d 108 (1984).
90. Olsen v. Copeland, 90 Wis. 2d 483, 280 N.W.2d 178 (1979); Garcia v. Hargrove, 52 Wis. 2d 289, 190 N.W.2d 181 (1971); Garcia v. Hargrove, 46 Wis. 2d 724, 176 N.W.2d 566 (1970).
91. 119 Wis. 2d at 645, 350 N.W.2d at 117.
92. 123 Wis. 2d at 269, 274, 366 N.W.2d at 862, 864.
93. Id. at 266, 366 N.W.2d at 860.
94. Id. at 267-70, 366 N.W.2d at 861-62. The court also dismissed several policy-oriented arguments, including contentions that social host liability would dilute the responsibility of
liability should attach, based on the hosts’ violation of the statutes forbidding service of alcohol to minors.  

Seven months after the decision in Koback, the Michigan Supreme Court decided Longstreth v. Gensel, becoming the fifth state court to adopt a social host liability rule during 1985. Longstreth involved a wedding reception during which a nineteen-year-old guest had consumed “an unspecified amount” of liquor. The youth subsequently had died in an automobile accident. The parents sued the hosts of the reception for their son’s death, claiming that the hosts’ violation of a Michigan statute forbidding the service of alcohol to minors was negligence that had proximately caused the death.

The trial court had granted the hosts’ motion for summary judgment, but the Michigan Court of Appeals had reversed. The Michigan Supreme Court upheld the court of appeals, agreeing with that court’s conclusion that the Michigan legislature had passed the statute not only to regulate licensees, but also “to exercise complete control of the alcoholic beverage traffic within the state.” Because the plaintiffs fell within the class that the statute was intended to protect, according to the court, they could maintain an action based on the hosts’ violation of the statute. Noting that Michigan law views violations of criminal statutes as prima facie evidence of negligence, and not as dispositive evidence, the court affirmed the court of appeals’ decision to remand the case to the trial court for further proceedings.

The decisions in Clark, Sutter, Ashlock, Koback, and Longstreth, coming so close together, seemed to indicate a rapidly esca-
lating trend toward imposition of social host liability based on statutory violations. Just nine days after Koback was decided, however, the Mississippi Supreme Court became the first of three courts in 1985 to reject the same theory expressly.\textsuperscript{104} In Boutwell v. Sullivan,\textsuperscript{106} several hosts allegedly had given large quantities of beer to a guest after the guest had become visibly intoxicated. About an hour and a quarter after the guest had left the host's home, his car had struck and killed a motorcycle rider. The rider's widow had sued for herself and for her children.\textsuperscript{106}

The plaintiffs argued that the hosts had been negligent per se because they allegedly had violated a Mississippi criminal statute that forbids the furnishing of alcoholic beverages to "any person who is visibly intoxicated."\textsuperscript{107} The court rejected the plaintiffs' argument, ruling that the host had not violated the statute because the statute did not apply to the hosts' conduct.\textsuperscript{108} Even if the plaintiffs had succeeded in showing a statutory violation, however, the multiple policy arguments the court advanced in rejecting the plaintiffs' general negligence theory\textsuperscript{109} indicate that the statutory argument still would have failed.

The Missouri Court of Appeals more squarely rejected a statutorily-based argument in Harriman v. Smith.\textsuperscript{110} In that case, the plaintiff alleged that three hosts had served alcoholic beverages to an underage guest, and had continued to serve the guest after he had become obviously intoxicated. The plaintiff's son, while riding


\textsuperscript{105} 469 So. 2d 526 (Miss. 1985).

Two other courts that rejected social host liability at approximately the same time addressed only general negligence principles, and not arguments based on statutory violations. See Keckonen v. Robles, 146 Ariz. 268, 705 P.2d 945 (Ariz. Ct. App. 1985) (review denied); Holmquist v. Miller, 367 N.W.2d 468 (Minn. 1985).

\textsuperscript{106} Id. at 527.

\textsuperscript{107} Id. (citing Miss. Code Ann. § 67-1-83(1) (1972)).

\textsuperscript{108} The statutory definition of "alcoholic beverage" did not include the beer served to the guest. See id. at 528 (citing Miss. Code Ann. § 67-1-5 (Supp. 1984)).

\textsuperscript{109} For example, the court noted the difficulties a social host would encounter in attempting to control his guest and the desire for legislative, rather than judicial, resolution of the question. See id. at 529; infra notes 265-70 and accompanying text.

\textsuperscript{110} 697 S.W.2d 219 (Mo. Ct. App. 1985).
in the guest's car after they had left the hosts' house, had died in an automobile accident.\footnote{111}

The plaintiff in \textit{Harriman} based his negligence per se argument on the hosts' violation of a Missouri statute that forbids the supplying of intoxicating liquor to minors or intoxicated persons.\footnote{112} Although the court acknowledged that individuals had been held liable under the statute,\footnote{113} it asserted that "the obvious intent of the legislature is the control of liquor licensees."\footnote{114} Based on this perceived lack of intent to control the conduct of social hosts, the court rejected the plaintiff's statutory argument.\footnote{115}

\textit{Clark, Sutter, Ashlock, Koback,} and \textit{Longstreth} demonstrate the popularity of the statutory theory among courts inclined to accept social host liability. \textit{Boutwell} and \textit{Harriman}, however, illustrate that some courts still have trouble accepting these arguments. The following section illustrates that alternative theories of social host liability, based on general negligence principles, have encountered even more resistance in recent decisions.

\textit{Negligence Based on Common Law Principles}

\textit{Development of Tavern Owner Liability}

The New Jersey Supreme Court was the first court to extend civil liability to tavern owners based on traditional negligence principles. Its extension of liability came in \textit{Rappaport v. Nichols},\footnote{116} which still is considered the leading case, just as it is in the area of statutorily-based liability.\footnote{117} Before \textit{Rappaport}, courts had held

\footnotesize
\begin{itemize}
  \item \textit{Id.} at 220.
  \item \textit{Id.} at 222-23 (quoting Mo. Rev. Stat. § 311.310 (1978)).
  \item \textit{Id.} at 223 (citing State v. Patton, 336 S.W.2d 726 (Mo. Ct. App. 1960)).
  \item \textit{Id.}
  \item \textit{Id.} The plaintiff's first contention, which stated that the hosts should be liable under common law negligence principles, also failed. \textit{See id.} at 220-22.
  \item The Florida District Court of Appeal also rejected a statutorily-based social host liability argument in 1985, based on its interpretation of precedent from the Florida Supreme Court. Bankston v. Brennan, 480 So. 2d 246 (Fla. Dist. Ct. App. 1985). The court of appeal, however, certified the question to the supreme court for a definitive resolution. \textit{See id.} at 248.
  \item Most recently, the South Carolina Court of Appeals rejected an attempt to impose liability based both on statutory violations and on common law principles. Garren v. Cummings & McCurdy, Inc., No. 0727, slip op. (S.C. Ct. App. June 9, 1986).
  \item 31 N.J. 188, 156 A.2d 1 (1959).
  \item \textit{See supra} notes 40-47 and accompanying text.
\end{itemize}
uniformly that sales of liquor to minors or intoxicated adults could not form the basis of a tort action. Courts had justified these holdings by stating that individuals are responsible for their own torts and that, because the sale of the liquor was so remote from the injury, only the consumption of the liquor could be considered the proximate cause.\textsuperscript{118} In \textit{Rappaport}, however, the New Jersey Supreme Court flatly rejected this argument and imposed a duty of care on tavern operators.

The court in \textit{Rappaport} focused its attention on the frequency of alcohol-related accidents on the nation's highways. The court reasoned that, given public awareness of the problem, reasonable tavern owners and bartenders could foresee the danger that resulted from their liquor sales.\textsuperscript{119} Because the danger was great, not only for the minor or the drunk but also for the traveling public, the court suggested that a reasonably prudent tavern operator would act to avoid the danger.\textsuperscript{120} As a result, the court reasoned that the jury should be permitted to consider the tavern owner's failure to act in \textit{Rappaport} as evidence of possible negligence. If the jury concluded that the owner had been negligent, according to the court, the jury also would have to determine whether the injury had resulted from the ordinary, foreseeable course of events stemming from the owner's negligence before it could impose liability.\textsuperscript{121}

\textit{Rappaport} ignited a trend toward tavern owner liability based on negligence principles. Although the trend was slow at first, it has accelerated in the past ten years. Today, tavern owner liability is imposed in the vast majority of states.\textsuperscript{122}

\textit{Application to Social Hosts}

All of the observations used in \textit{Rappaport} and subsequent cases to justify tavern owner liability arguably apply with equal force to social hosts. Even in jurisdictions where tavern owners have been subject to liability for many years, however, courts have been

\begin{flushleft}
\textsuperscript{118} See \textit{supra} notes 15-18 and accompanying text.
\textsuperscript{119} 31 N.J. at 201, 156 A.2d at 8.
\textsuperscript{120} Id. at 203-04, 156 A.2d at 8-9.
\textsuperscript{121} Id. at 203-04, 156 A.2d at 9.
\textsuperscript{122} See \textit{supra} note 6.
\end{flushleft}
reluctant to extend the analysis to social hosts. Prior to 1984, only two courts had applied the traditional negligence analysis to social hosts. Neither court was able to create a long-standing social host liability rule, because both state legislatures subsequently passed laws overruling these decisions.

In 1971, in *Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity*, the Oregon Supreme Court reversed a summary judgment in favor of a social host in an action grounded on a negligence theory. In *Wiener*, a college fraternity had served liquor to a minor. On the way back to campus, the minor had become involved in an automobile accident in which his passengers were injured. In considering the passengers' suit against the fraternity, the supreme court reasoned that a social host may have a duty in certain circumstances to restrict a guest's further access to alcoholic beverages. This duty is particularly likely to arise, the court explained, when the host "has reason to know that he is dealing with persons whose characteristics make it especially likely that they will do unreasonable things." According to the court, the circumstances giving rise to the duty almost certainly will occur when a host's guests are already severely intoxicated or are known to the host as unusually susceptible to the effect of alcohol. The court added that, in some circumstances, the duty also may arise with respect to guests who are minors. Because the guest in *Wiener* was a minor, the court held that summary judgment for the fraternity was inappropriate, and that the jury had to determine, under the particular circumstances of the social function, whether the host had a duty to restrict guests' access to alcohol.

---

125. See *CAL. CIV. CODE* § 1714(b)-(c) (1985); *CAL. BUS. & PROF. CODE* § 25602(b)-(c) (West Supp. 1985); *OR. REV. STAT.* §§ 30.955, .960 (1985).
127. *Id.* at 636-37, 485 P.2d at 20-21.
128. *Id.* at 639, 485 P.2d at 21 (citing W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 33 (3d ed. 1964)).
129. *Id.*
130. See *id.* at 643, 485 P.2d at 23.
In 1978, the California Supreme Court also recognized a cause of action against social hosts in *Coulter v. Superior Court*.\(^\text{131}\) In that case, the owner of an apartment complex had served drinks to a drunken party guest when he knew that the guest had a history of excessive drinking. This guest had driven after the party, and had caused an accident that had injured the plaintiff.\(^\text{132}\) Although the trial court had sustained the apartment owner’s demurrer to the plaintiff’s suit, the California Supreme Court reversed. The supreme court reasoned that, when a host knows that an obviously intoxicated guest intends to drive, the host’s service of alcoholic beverages to that guest creates a reasonably foreseeable risk of injury to motorists.\(^\text{133}\) In the court’s view, “[t]he danger of ultimate harm is as equally foreseeable to the reasonably perceptive social host as to the bartender,” and “is equally as great, regardless of the source of the liquor.”\(^\text{134}\) The court concluded that social hosts had a duty to prevent this harm,\(^\text{135}\) and it consequently reversed the lower court’s decision to sustain the defendant’s demurrer.\(^\text{136}\)

The legislatures of California and Oregon responded to these cases by passing statutes that eliminated, or at least severely limited, the potential scope of civil liability. The California legislature reacted swiftly, amending its prior law within months. The amended law expressly disapproved the result in *Coulter* and similar cases, and expressed the intent to “reinstate the prior judicial interpretation” of the rules governing social host liability.\(^\text{137}\) The Oregon legislature followed suit in 1979, restricting liability to social hosts who serve visibly intoxicated guests\(^\text{138}\) or who serve minors when “a reasonable person would have determined that

\(^{131}\) 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978).

\(^{132}\) Id. at 148, 577 P.2d at 671, 145 Cal. Rptr. at 536.

\(^{133}\) Id. at 152, 577 P.2d at 673, 145 Cal. Rptr. at 538.

\(^{134}\) Id. at 153, 577 P.2d at 674, 145 Cal. Rptr. at 539.

\(^{135}\) Id. The California Supreme Court’s decision to extend the duty to all social hosts contrasts with the Oregon Supreme Court’s decision in *Wiener* that a jury must examine the circumstances of the particular case to determine whether the duty arose. See supra note 130 and accompanying text; see also infra notes 249-54 and accompanying text (comparing the two approaches). For a thorough comparative analysis of *Coulter* and *Wiener*, see Graham, *Liability of the Social Host for Injuries by the Negligent Acts of Intoxicated Guests*, 16 Willamette L.J. 561 (1980).

\(^{136}\) 21 Cal. 3d at 155, 577 P.2d at 675, 145 Cal. Rptr. at 540.

\(^{137}\) See supra notes 57-58 and accompanying text.

identification should have been requested or that the identification exhibited was altered or did not accurately describe the person to whom the alcoholic liquor was sold or served.\textsuperscript{139}

These negative legislative responses in other states, however, did not deter the New Jersey Supreme Court from extending liability to social hosts in 1984. The New Jersey court announced a social host liability doctrine, based on a broad interpretation of traditional negligence principles, in its landmark decision in \textit{Kelly v. Gwinnell}.\textsuperscript{140} In that case, a couple had invited an individual to their apartment and had served him the equivalent of thirteen drinks, knowing that he would be driving home. After the guest had left, his automobile had collided head-on with a car driven by the plaintiff, causing severe injuries.\textsuperscript{141} The plaintiff had sued the couple for her injuries, but the trial court had granted the couple's motion for summary judgment,\textsuperscript{142} and the New Jersey Superior Court had affirmed the decision.\textsuperscript{143} The New Jersey Supreme Court reversed, however, holding that "the host may be liable under the circumstances in this case."\textsuperscript{144}

The supreme court reasoned that the negligence principles that it had applied to tavern owners in \textit{Rappaport v. Nichols}\textsuperscript{145} and subsequent cases\textsuperscript{146} were equally pertinent to social hosts.\textsuperscript{147} The court utilized the traditional negligence tests, inquiring whether the situation involved an unreasonable risk of harm to others and whether a reasonably prudent person would have foreseen the risk and acted to prevent it.\textsuperscript{148} In applying these tests, the court

\begin{footnotes}
\footnotetext{139. OR. REV. STAT. § 30.960 (1985). These new statutes apparently have had their intended effect. See Johnson v. Paige, 47 Or. App. 1177, 615 P.2d 1185 (1980) (although new statutes were not in effect when the accident occurred, passage of the statutes confirmed the court’s conclusion that a common law duty did not apply to the facts of the case).}
\footnotetext{140. 96 N.J. 538, 476 A.2d 1219 (1984).}
\footnotetext{141. \textit{Id.} at 541, 476 A.2d at 1220.}
\footnotetext{142. \textit{See id.} at 541-42, 476 A.2d at 1220-21.}
\footnotetext{144. 96 N.J. at 541, 476 A.2d at 1220.}
\footnotetext{145. 31 N.J. 188, 156 A.2d 1 (1959); \textit{see supra} notes 40-47 \& 116-21 and accompanying text.}
\footnotetext{147. 96 N.J. at 545-47, 476 A.2d at 1222-24.}
\footnotetext{148. \textit{Id.} at 543, 476 A.2d at 1221.}
\end{footnotes}
focused on the great risk associated with drunk driving, and reasoned that this known risk gave social hosts the same basis to foresee the danger as it had given to tavern owners.\textsuperscript{149} The court concluded that liability should attach, at least when a social host directly serves a guest whom the host knew would be driving.\textsuperscript{150} Because the hosts in \textit{Kelly} had been in a one-to-one situation with their guest, giving them a clear opportunity to foresee the danger involved, the court concluded that they potentially were liable for the plaintiff's injuries.\textsuperscript{151}

None of the courts that have extended liability to social hosts since \textit{Kelly} have relied exclusively on the New Jersey court's traditional negligence rationale. In \textit{Clark v. Mincks},\textsuperscript{152} for example, the Iowa Supreme Court did not rely on the general negligence principles articulated in \textit{Kelly}, even though the court quoted \textit{Kelly} extensively.\textsuperscript{153} The Iowa court based its finding of liability on the hosts' violation of an Iowa criminal statute.\textsuperscript{154} In \textit{Koback v. Crook},\textsuperscript{155} the Wisconsin Supreme Court also quoted \textit{Kelly} extensively,\textsuperscript{156} and considered many of the same policy issues\textsuperscript{157} and general negligence issues,\textsuperscript{158} but ultimately rested its holding on the existence of statutory violations.\textsuperscript{159} The Georgia Supreme Court did rely partially on general negligence principles to justify its extension of liability to social hosts in \textit{Sutter v. Hutchings},\textsuperscript{160} but that was not the thrust of its opinion. Although much of the opinion in \textit{Sutter} focused on the principles of common law duty, foreseeable danger, and proximate cause, which the court viewed quite

\begin{itemize}
\item[149.] See id. at 544-45, 476 A.2d at 1222.
\item[150.] Id. at 548, 476 A.2d at 1224.
\item[151.] Id. at 559-60, 476 A.2d at 1230. The court reserved judgment concerning liability in situations involving less direct contact between host and guest. Id. at 559, 476 A.2d at 1230.
\item[152.] 364 N.W.2d 226 (Iowa 1985) (en banc).
\item[153.] Id. at 230 (quoting \textit{Kelly}, 96 N.J. at 548-49, 476 A.2d at 1224-25).
\item[154.] See id. at 231; supra notes 64-70 and accompanying text.
\item[155.] 123 Wis. 2d 259, 366 N.W.2d 857 (1985).
\item[156.] See 123 Wis. 2d at 269, 274-75, 275-76, 277, 366 N.W.2d at 861, 864, 865, 865.
\item[157.] See, e.g., id. at 268-69, 366 N.W.2d at 861 (considering the ability of social hosts to spread the costs of liability); id. at 275-76, 366 N.W.2d at 865 (considering the effect of potential liability on the atmosphere at social events).
\item[158.] See id. at 272-75, 366 N.W.2d at 863-64 (considering the remoteness of the injury from the conduct).
\item[159.] See id. at 267, 366 N.W.2d at 861; supra notes 87-95 and accompanying text.
\item[160.] 254 Ga. 194, 327 S.E.2d 716 (1985); see supra notes 71-78 and accompanying text.
\end{itemize}
similarly to the New Jersey court in *Kelly*, the Georgia court's holding that a duty existed was based primarily on a violation of a Georgia criminal statute.

In contrast to *Clark*, *Koback*, and *Sutter*, four courts decided in 1985 to reject arguments urging social host liability based on negligence principles. In the first of these four decisions, *Keckonen v. Robles*, the Arizona Court of Appeals relied mainly on policy considerations to reject social host liability. These policy

---

161. See, e.g., 254 Ga. at 196-97, 197, 327 S.E.2d at 718, 719 (considering whether the case involved "unreasonable risk of harm"); id. at 197-98, 327 S.E.2d at 719 (considering foreseeability and proximate cause issues).

162. See id. at 197, 327 S.E.2d at 718-19; supra notes 74-75 and accompanying text.

One major flaw in the general negligence analysis that the court did undertake in *Sutter* is the scant attention the court paid to the inherent differences between bar owners and social hosts. For example, the court cited tavern owner cases for the same propositions and with the same force as social host cases. See, e.g., Taylor v. Ruiz, 394 A.2d 765 (Del. 1978) (cited in *Sutter*, 254 Ga. at 196, 327 S.E.2d at 718, in the same string citation as *Kelly* and other social host liability cases, to support the proposition that acceptance of liability was widespread). The court's only acknowledgment of the argument that social hosts and tavern owners were different was its rejection of the hosts' argument that, unlike commercial proprietors, they did not have bouncers available to control their guests' conduct. See supra note 76 and accompanying text.

In one other social host liability case decided after *Kelly*, an Indiana court discussed general policy issues briefly, but focused primarily on statutorily-based theories. See Ashlock v. Norris, 475 N.E.2d 1167, 1169 (Ind. Ct. App. 1985); supra notes 79-86. The Michigan Supreme Court, on the other hand, discussed only statutory violations when it extended liability to social hosts in 1985. See Longstreth v. Gensel, 423 Mich. 675, 377 N.W.2d 804 (1985); supra notes 96-103 and accompanying text.


The fifth 1985 case in which social host liability was rejected, Bankston v. Brennan, 480 So. 2d 546 (Fla. Dist. Ct. App. 1985), involved only an argument that liability should be imposed based on statutory violations. See supra note 115.

In cases decided before 1985, several other courts had rejected social host liability based on negligence principles. See *Keckonen*, 146 Ariz. at 270 n.2, 705 P.2d at 947 n.2 (noting the rejection of social host liability in eleven jurisdictions).


165. According to the court: "The decision by a court to impose liability is a policy decision. . . . No better general statement can be made than that the courts will find a duty where, in general, reasonable persons would recognize it and agree that it exists." *Id.* at 271-72, 705 P.2d at 948-49 (quoting W. KEETON, D. DOBB, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 359 (5th ed. 1984)). The court concluded that "reasonable persons would [not] extend to the social host the liability imposed on the tavern keeper"
considerations included the host’s lesser ability to control guests, compared to tavern owners;\textsuperscript{166} the host’s inability to spread the costs of liability to patrons;\textsuperscript{167} the potential flood of litigation;\textsuperscript{168} and the desire to leave the issue to the legislature.\textsuperscript{169} The court characterized \textit{Kelly}, which to its knowledge made New Jersey the only state in which social host liability prevailed,\textsuperscript{170} as a decision in which “t[a]ny thoughts of judicial restraint were not visible.”\textsuperscript{171} In the remaining three cases in which liability based on negligence principles was rejected, courts in Minnesota, Mississippi, and Missouri relied on similar policy rationales.\textsuperscript{172}

Even in the six jurisdictions in which social host liability now prevails, the extent of liability is debatable, particularly when large social gatherings are involved. The New Jersey court in \textit{Kelly}, for example, specifically limited its decision to cases involving direct, one-to-one contact between a host and a guest, and expressly reserved judgment concerning whether the same principles would apply to large gatherings.\textsuperscript{173} The Iowa court’s opinion in \textit{Clark} contained similar limitations.\textsuperscript{174} The Georgia court’s opinion in \textit{Sutter}, because “[t]he consequences of imposing such a duty are economically and socially staggering.” Id. at 271, 705 P.2d at 949.

\textsuperscript{166} Id. at 270, 705 P.2d at 947 (citing Settlemyer v. Wilmington Veteran's Post No. 49, 11 Ohio St. 3d 123, 464 N.E.2d 521 (1984)).
\textsuperscript{167} Id. (quoting DeMoulin & Whitcomb, Social Host’s Liability in Furnishing Alcoholic Beverages, 27 Fed’N Ins. Couns. Q. 349, 357 (1977)).
\textsuperscript{168} Id. (citing Miller v. Owens-Illinois Glass Co., 48 Ill. App. 2d 412, 199 N.E.2d 300 (1964)).
\textsuperscript{169} Id. (citing Lowe v. Rubin, 98 Ill. App. 3d 496, 424 N.E.2d 710 (1981), and Miller v. Moran, 96 Ill. App. 3d 596, 421 N.E.2d 1046 (1981)).
\textsuperscript{170} See id. The first four 1985 decisions in which courts imposed liability on social hosts were decided between March 14 and April 30. \textit{Keckonen} was decided on April 24.
\textsuperscript{171} Id. at 271, 705 P.2d at 948.
\textsuperscript{172} See Holmquist v. Miller, 367 N.W.2d 468, 472 (Minn. 1985) (focusing on the need to defer to legislative judgment); Boutwell v. Sullivan, 469 So. 2d 526, 529 (Miss. 1985) (noting both the host's inability to control guests and the need to defer to the legislature); Harriman v. Smith, 697 S.W.2d 219, 221-22 (Mo. Ct. App. 1985) (noting the distinctions between social hosts and tavern owners, as well as the importance of deference to the legislature).


\textsuperscript{173} \textit{Kelly}, 96 N.J. at 559, 476 A.2d at 1230.
\textsuperscript{174} The Iowa court in \textit{Clark} limited its opinion to situations in which

(1) the guest was intoxicated, (2) the host personally was actually aware the guest was intoxicated, (3) the host then made beer (or other intoxicating bever-
however, contained broad language arguably applicable to both small and large gatherings.\textsuperscript{175}

Even if one narrowly interprets \textit{Sutter} and other social host liability decisions, blanket social host liability is the next logical step in the current trend. The principles underlying liability arguably apply with equal force to larger gatherings, because any reasonably prudent social host realizes that many guests travel by automobile, and that many guests may drink excessively if given access to an open bar. This knowledge in no way depends on the size of the gathering.\textsuperscript{176} Mere similarity between the principles underlying

\begin{itemize}
  \item ages) available to the guest,
  \item the guest drank the beer (or beverages),
  \item the guest, while intoxicated, then operated a motor vehicle,
  \item by reason of the intoxication, the guest operated the vehicle in a manner which caused injury to (or the death of) the plaintiff (or the plaintiff's decedent).
\end{itemize}

\textit{Clark}, 364 N.W.2d at 231. Condition (2), requiring the host's personal awareness of the guest's intoxication, would prevent liability in most situations involving large gatherings.

The courts in \textit{Longstreth} and \textit{Koback} imposed even more limited liability than the courts in \textit{Kelly} and \textit{Clark}. These courts limited their holdings to situations in which a host served a minor, and did not discuss whether liability could stem from service to an adult. See \textit{Longstreth} v. Gensel, 423 Mich. 675, 685-86, 377 N.W.2d 804, 809 (1985); \textit{Koback} v. Crook, 123 Wis. 2d 259, 277-78, 366 N.W.2d 857, 866 (1985) (Bablitch, J., concurring).

175. The Georgia court in \textit{Sutter} stated that a jury could find any social host liable "who encouraged another, who was noticeably intoxicated and under the legal drinking age, to become further intoxicated and who furnished to such other person more alcohol, knowing that such person would soon be driving a vehicle." 254 Ga. at 199, 327 S.E.2d at 720. The court distinguished earlier cases applying the common law rule of nonliability, see, e.g., Keaton v. Kroger, 143 Ga. App. 23, 237 S.E.2d 443 (1977), by stating that these cases did not involve situations in which the "defendants furnished alcohol to a person who the defendants knew would soon be driving his car and who was noticeably intoxicated when the alcohol was furnished." \textit{Sutter}, 254 Ga. at 195, 327 S.E.2d at 717.

Both of these statements arguably require only general knowledge that a guest would be driving a car to and from the gathering, and not specific knowledge that a particular guest was intoxicated. The first statement requires only that the host "encouraged" further intoxication, not that he actually supplied liquor to a specific guest. \textit{See id.} at 199, 327 N.E.2d at 720. The reference to furnishing alcohol in the second statement also does not contain any requirement of one-to-one contact. \textit{See id.} at 195, 327 N.E.2d at 717.

176. Cf. \textit{Langle} v. Kurkul, No. 82-254, slip op. at ____ (Vt. Mar. 21, 1986) (Gibson, J., dissenting) ("Once a cause of action in negligence is recognized for the overserving of alcohol to obviously intoxicated potential drivers and minors, it is difficult, if not impossible, to deny the existence of a cause of action in other egregious situations.").

So far, courts have not applied liability to hosts of large gatherings. \textit{See infra} note 188 and accompanying text. In \textit{Coulter} v. Superior Court, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978), the California Supreme Court did find liability in a case involving a relatively large gathering at an apartment complex. That court, however, indicated that it would not find liability without evidence that the host affirmatively furnished alcoholic beverages to a particular individual. \textit{See infra} note 188. Even this rule apparently was too broad for
liability for hosts of small and large gatherings, however, does not justify extension of the liability doctrine. The broader issue of social host liability requires a more thorough analysis.

SHOULD THE COURTS EMBRACE SOCIAL HOST LIABILITY?

The New Jersey Supreme Court’s 1959 decision in Rappaport v. Nichols\(^\text{177}\) started a nationwide trend toward holding tavern owners liable for damages caused by their patrons’ alcohol-related accidents. Today, a majority of jurisdictions find actionable negligence in at least some circumstances involving tavern owners.\(^\text{178}\) Twenty-five years later, the same court’s decision in Kelly v. Gwinnell\(^\text{179}\) seems to have started a similar trend toward holding social hosts liable for such damages. In the first year after Kelly, courts in five other jurisdictions imposed liability.\(^\text{180}\) Courts in other jurisdictions soon may be asked to decide the same issue. These courts not only should consider the legal merits of social host liability, but also should analyze the policy considerations carefully. These policy considerations differ significantly from the considerations that accompany tavern owner liability.

Legal Analysis

Most states do not have dram shop statutes\(^\text{181}\) or other laws that directly address the civil liability of tavern owners or social hosts. Many states that had dram shop statutes either have repealed them\(^\text{182}\) or purposely have interpreted them narrowly.\(^\text{183}\) Any trend toward social host liability, therefore, more likely will come from court decisions similar to Kelly, which rely on negligence principles, rather than from new statutes or from new interpretations of old statutes.

---

the California legislature, which acted a year later effectively to reverse Coulter. See supra notes 57-58 and accompanying text.

177. 31 N.J. 188, 156 A.2d 1 (1959); see supra notes 40-47 & 116-21 and accompanying text.

178. See supra note 6.

179. 96 N.J. 538, 476 A.2d 1219 (1984); see supra notes 140-51 and accompanying text.

180. See supra note 12 and accompanying text.

181. See supra note 19.

182. See supra note 31.

183. See supra note 22 and accompanying text.
In traditional negligence analysis of social host liability cases, three considerations are pivotal: first, whether the injurious consequences of the conduct are reasonably foreseeable at the time and place of the act; second, whether the injurious consequences are related sufficiently to the conduct to meet the test of proximate cause; and third, whether imposing a legal duty is fundamentally fair given the possible benefits and the resulting burdens on the social host.

Foreseeability

In the social host liability cases decided to date, most courts have had little difficulty with the question of foreseeability. Courts generally have asserted, without explanation, that particular hosts easily could have predicted that furnishing more drinks to a


185. The proximate cause question was the primary justification for the common law rule of nonliability for anyone who sold or supplied liquor to a person who later became involved in an accident. See Megge v. United States, 344 F.2d 31, 32 (6th Cir.), cert. denied, 382 U.S. 831 (1965); State v. Hatfield, 197 Md. 249, 254-55, 78 A.2d 754, 756-57 (1951).


To some extent, questions of foreseeability, see supra note 184, are implicit in any consideration of proximate cause. Other factors, however, are also relevant. The New York Court of Appeals articulated the classic formulation of the tests for proximate cause in Pal-sgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1929):

The court must ask itself whether there was a natural and continuous sequence between cause and effect. Was the one a substantial factor in producing the other? Was there a direct connection between them, without too many intervening causes? Is the effect of cause on result not too attenuated? Is the cause likely, in the usual judgment of mankind, to produce the result? Or, by the exercise of prudent foresight, could the result be foreseen? Is the result too remote from the cause, and here we consider the remoteness in time and space. Id. at 354, 162 N.E. at 104 (Andrews, J., dissenting).

driving guest would create a significant risk of harm to other motorists.\textsuperscript{187} While these findings may have been accurate in the particular cases involved, they should not operate as general maxims applicable to all fact situations involving social hosts. In many cases, the existence of reasonable foreseeability is a much closer question.

When a bartender or a social host has one-to-one contact with his guest, a finding of reasonable foreseeability is sound because the bartender or host has control over the drinks served. He can see the guest and judge the danger involved if the guest has another drink. At a party or large social gathering, on the other hand, the host often lacks the ability to assess and foresee the danger. Individual guests frequently serve themselves without any contact with the host that would give the host an opportunity to assess the possible danger. Absent this opportunity, courts generally have refused to find negligence on the part of social hosts.\textsuperscript{188}

For a court to find foreseeability in a large social gathering involving little or no one-to-one contact between host and guests, the court would have to base its finding on the host’s general knowledge that one of his guests might overindulge and create a hazard on the highway.\textsuperscript{189} Liability based on such general knowledge places a duty on social hosts to monitor all of their guests’ alcohol

\textsuperscript{187} See, e.g., Coulter v. Superior Court, 21 Cal. 3d 144, 152-53, 577 P.2d 669, 674, 145 Cal. Rptr. 534, 539 (1978) (“We think it evident that the service of alcoholic beverages to an obviously intoxicated person by one who knows that such intoxicated person intends to drive a motor vehicle creates a reasonably foreseeable risk of injury to those on the highway.” (emphasis by the court)); Sutter v. Hutchings, 264 Ga. 195, 198, 327 S.E.2d 716, 719 (1985) (“[W]here one provides alcohol to a noticeably intoxicated 17-year-old knowing that he will soon be driving his car, it is foreseeable to the provider that the consumer will drive while intoxicated and a jury would be authorized to find that it is foreseeable to the provider that the intoxicated driver may injure someone.”).

\textsuperscript{188} See Coulter v. Superior Court, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978) (no liability because plaintiff did not allege that defendant affirmatively furnished the intoxicated individual with liquor); Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984) (foreseeability established only in a situation in which single guest was invited to defendant’s home and served the equivalent of thirteen drinks); Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity, 258 Or. 632, 465 P.2d 18 (1971) (no liability merely for providing a room where alcoholic beverages were served). \textit{But see supra} note 175 and accompanying text.

\textsuperscript{189} See \textit{supra} note 176 and accompanying text.
intakes closely. Even if social hosts can handle this burden, most reasonable persons would not expect hosts to undertake it.

Although these considerations illustrate the problems with finding foreseeability in large social gatherings, pressure associated with increasing public awareness of the dangers of drunk driving may prompt courts to find foreseeability even in these contexts. A judicial finding of foreseeability alone, however, cannot result in a judgment for the plaintiff. Courts must analyze other elements of negligence before determining a social host’s liability.

**Proximate Cause**

Under common law, courts relied on proximate cause as the primary rationale for refusing to extend civil liability to tavern owners and social hosts. These courts generally reasoned that the act of serving the liquor was too remote from the subsequent automobile accident to qualify as the proximate cause of the accident. Remoteness of the act from the injury, both temporal and spatial, is one factor relevant to a court’s determination of proximate cause, but it is not the only factor. Courts also must consider factors such as the directness of the connection between the injury and the conduct and the existence of intervening causes.

Cases in which courts have overturned the common law rule of nonliability reflect scant consideration of the proximate cause issue or of the relevant factors. In some tavern owner cases, courts have addressed this issue briefly by asserting that the injury resulted in the ordinary course of events flowing from the tavern owner’s negligence. These courts, however, have failed to give in-depth treatment to all of the considerations involved. The recent cases in which courts have imposed liability on social hosts reflect even less

---

190. The burden of controlling guests is difficult for social hosts, particularly in large gatherings. See infra notes 216-18 and accompanying text.
192. See supra note 1.
careful consideration of the issue. Some of these courts have neglected to consider proximate cause at all, \textsuperscript{196} while others that have mentioned the issue have downplayed its importance. \textsuperscript{197}

Proximate cause is an essential element of negligence analysis that courts must review when extending tort liability to either tavern operators or social hosts. The analysis, however, is the same whether it involves a tavern owner or a social host. If a court views a commercial sale of drinks to a customer as the proximate cause of an alcohol-related accident, then it also should view a gratuitous service of drinks to a guest as the proximate cause of a similar accident. The relationship between cause and effect is identical in both cases. \textsuperscript{198} If a court is to justify imposition of tavern owner liability but not social host liability, it must distinguish these situations either on general policy grounds or on legal grounds other than proximate cause.

\textit{Fairness of Imposing a Duty}

Although courts may discuss issues such as foreseeability and proximate cause in tavern owner or social host cases, the general fairness of imposing a legal duty seems to carry more weight in these courts' analyses. \textsuperscript{199} In fact, the fundamental fairness of any new legal duty is a crucial determinant of whether a court should impose tort liability under any new theory. \textsuperscript{200} Courts considering


\textsuperscript{198} See Koback v. Crook, 123 Wis. 2d 259, 274, 366 N.W.2d 857, 864 (1985).

\textsuperscript{199} See Keckonen v. Robles, 146 Ariz. 268, 271, 705 P.2d 945, 948 (Ariz. Ct. App. 1985) ("The decision by a court to impose liability is a policy decision.") (review denied); Coulter v. Superior Court, 21 Cal. 3d 144, 153, 577 P.2d 669, 674, 145 Cal. Rptr. 534, 539 (1978) (citing seven general fairness factors relevant to the determination of whether to impose a legal duty); Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984) (relying mainly upon general policy considerations to justify imposing a legal duty upon social hosts); Koback v. Crook, 123 Wis. 2d 259, 366 N.W.2d 857 (1985) (considering a number of general policy considerations); see also Olsen v. Copeland, 90 Wis. 2d 483, 488, 280 N.W.2d 178, 180 (1979) (citing six public policy considerations that were relevant to its decision not to impose a legal duty) (overruled in Sorensen v. Jarvis, 119 Wis. 2d 627, 350 N.W.2d 108 (1984)).

\textsuperscript{200} "Whether a duty exists is ultimately a question of fairness. The inquiry involves a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution." Goldberg v. Housing Auth., 38 N.J. 578, 583, 186 A.2d 291, 293
fundamental fairness take two basic approaches. Some take an ad hoc approach, discussing only factors that come to mind as relevant to a particular situation. Other courts, however, have developed comprehensive formulas designed to weigh all of the important factors.

One of the most widely accepted and frequently cited of these fairness formulas is the test that Judge Learned Hand developed in United States v. Carroll Towing Co. According to Judge Hand, a court deciding whether to impose a new legal duty must consider three factors: first, the probability that the injury will occur; second, the gravity of the injury if it does occur; and third, the burden of taking precautions adequate to prevent the injury. If the probability and the gravity of the injury do not outweigh the burden of its prevention, the formula directs courts not to impose a legal duty to prevent the injury. Although some courts considering social host liability have applied a form of the Carroll Towing test, their benefit/burden analyses have been flawed and incomplete.

---

(1962) (emphasis by the court); see also Keckonen v. Robles, 146 Ariz. 268, 271, 705 P.2d 945, 948 (Ariz. Ct. App. 1985) ("The decision by a court to impose liability is a policy decision.") (review denied).


203. Id. at 173.

204. Id. at 173.

205. Id.

206. Although these courts did not apply the Carroll Towing formula directly, they did analyze the benefits and burdens of social host liability under a similar approach. See, e.g., Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984) (analyzing the gravity of the harm using drunk driving statistics, and analyzing the burdens of preventing the harm and of obtaining adequate insurance).

207. Sutter v. Hutchings, 254 Ga. 194, 327 S.E.2d 716 (1985), provides a prime example of inadequate benefit/burden analysis. In Sutter, the court's entire benefit/burden analysis consisted of the following statement:

Finally, we pose this question: Which is the more valuable right, the right to serve alcohol to one's underage high school friends, or the right not to be killed by an intoxicated underage driver? There is no right to serve alcohol to one's underage high school friends.
Benefits

Courts generally have evaluated the benefit side of Judge Hand's formula, which includes both the probability and gravity issues, either by using emotional language to describe the scope of the problem or by reciting statistics enumerating the deaths and injuries.

Id. at 198-99, 327 S.E.2d at 720. This statement overestimates the benefits of the court's decision because the court does not consider how many deaths at the hands of "intoxicated underage drivers" could be attributed to social hosts or how many deaths might be prevented by a social host liability rule. See infra notes 208-14 and accompanying text. Likewise, the statement underestimates the burdens that would flow from the court's decision because the court considered only the chilling effect a social host liability rule would have on underage drinkers. The court failed to consider other more important burdens, such as the costs of insurance and preventative measures. See infra notes 215-26 and accompanying text.

Commentary concerning the benefits and burdens of social host liability contains similar flaws. One author, for example, has suggested that Judge Hand's formula supported a Texas decision imposing liability on an employer in a context that at least resembled social host liability. See Note, Expanding Third Party Liability for Failure to Control the Intoxicated Employee Who Drives, Otis Engineering Corp. v. Clark, 18 CONN. L. REV. 155, 176-77 (1985). The author overstated the benefits of the Texas decision, however, and totally ignored its burdens. Rather than considering only the drunk driving problem associated with employers or even with social hosts in general, the writer portrayed the benefits of the rule as if it would eliminate drunk driving, including drunk driving unconnected with employers or other social hosts. See id. ("The risks posed by drunken drivers are all too obvious."). The writer then immediately concluded that these benefits supported imposition of a high degree of care, without considering any of the potential burdens associated with preventing the risk. See id. at 177.

208. For example, in Coulter v. Superior Court, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978), the California Supreme Court stated:

[W]e must surely balance . . . the serious hazard to the lives, limbs, and property of the public at large, and the great potential for human suffering which attends the presence on the highways of intoxicated drivers. In doing so we need not ignore the appalling, perhaps incalculable, cost of torn and broken lives incident to alcohol abuse, in the area of automobile accidents alone.

The dimensions of this cost and its catastrophic personal and economic impact in terms of vehicular accidents, are profoundly disturbing social phenomena of our time.

Id. at 154, 577 P.2d at 675, 145 Cal. Rptr. at 540. A statement made by the Wisconsin Supreme Court in Koback v. Crook, 123 Wis. 2d 259, 366 N.W.2d 857 (1985), provides a more recent example:

We need not dwell on the grim statistics of death or mayhem on the highways to justify our support of . . . the New Jersey court [in Kelly]. We need only look to the consequences of the alleged negligence by the host in the instant case—a young woman physically, emotionally, and mentally crippled, a consequence that all too often is the result of uncontrolled furnishing of alcoholic beverages, whether at private affairs or in commercial settings.
attributable to drunk driving. These emotional statements and gruesome statistics, however, do not accurately reflect the benefits that would flow from a social host liability rule because they focus not just on the portion of the drunk driving problem attributable to social hosts, but rather on the drunk driving problem in its entirety. These analyses implicitly assume that the benefit of social host liability would be the complete elimination of drunk driving, but they offer no evidence that social host liability would have any impact on drunk driving, much less such a significant impact.

A proper benefit analysis would focus only on the benefits that likely would flow from a social host liability rule. Because only a few states have accepted social host liability, and most of those states rejected liability until recently, the amount of data that would be useful for such an analysis is limited. The data that is available, however, indicates that social host liability would have a minimal impact, at most, on drunken driving. In California, for example, alcohol-related highway fatalities increased by almost twenty percent between 1976 and 1978, during the period that it recognized social host liability, but began to decrease immediately

---

Id. at 276, 366 N.W. 2d at 865; see also Ashlock v. Norris, 475 N.E.2d 1167, 1169 (Ind. Ct. App. 1985) (referring to the “carnage on our public highways”); Kelly v. Gwinnell, 96 N.J. 538, 545, 476 A.2d 1219, 1222 (1984) (stating that damage from drunk driving deaths “is regarded increasingly as intolerable”).


210. In Kelly, the New Jersey Supreme Court did recognize that social host liability had no proven impact, but it failed to take that fact into account in its benefit analysis:

While the rule in this case will tend also to deter drunken driving, there is no assurance that it will have any significant effect. . . . We need not, however, condition the imposition of a duty on scientific proof that it will result in the behavior that is one of its goals.

Id. at 551-52, 476 A.2d at 1226.

Another problem with many courts’ benefit analyses is their failure to take into account the impact that other recent measures already have had on drunken driving. See, e.g., id. at 545, 476 A.2d at 1222 (noting New Jersey’s recent enactment of stronger criminal sanctions, but failing to take this fact into account in deciding whether the further step of social host liability was necessary).

211. Courts in only nine states have accepted social host liability even to a limited extent, see supra notes 8-9 and accompanying text, and the legislatures in three of these states have passed laws effectively overruling these decisions, see supra note 10 and accompanying text. In the six remaining states, the oldest case in which liability was extended to social hosts was decided in 1984. Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984). As a result, no state has had more than a few years’ experience with social host liability.
after the legislature repealed social host liability.212 Other states have had similar experiences.213 The lack of impact of social host liability in these states contrasts sharply with the immediate and sizeable impact that recently enacted criminal sanctions have had on drunk driving.214

If social host liability really had a significant impact on drunk driving, the accident statistics should have shown a change that was at least somewhat analogous to the change accompanying tougher criminal sanctions. Instead, these accident statistics reflect no favorable change. On the benefit side of the analysis, therefore, courts should have weighed only a speculative and, at best, minimal positive effect, rather than elimination of the entire drunk


213. In Iowa, a social host liability rule was in effect from 1972, when the Iowa Supreme Court decided Williams v. Klemesrud, 197 N.W.2d 614 (Iowa 1972), until 1979, when the Iowa legislature effectively abrogated Williams, IOWA CODE ANN. § 123.92 (West Supp. 1985) (amending IOWA CODE ANN. § 129.2 (West 1949)). See supra note 10. After 579 motorists died from drunk driving accidents in Iowa during 1976, the death toll rose from 478 in 1977 to 485 in 1978 and 509 in 1979. The toll was lower, however, in the first two years after the Iowa legislature repealed social host liability. The toll fell to 477 in 1980, and it rose only to 483 in 1981. Telephone Interview, supra note 212.

214. See, e.g. War on Alcohol Abuse Spreads to New Fronts, supra note 1, at 63 (reporting that deaths caused by drunk driving declined from 28,000 in 1980 to 23,600 in 1984); Outrage over Drunk Driving, supra note 1, at 18 (reporting that overall traffic fatalities declined from 49,000 in 1981 to 44,000 in 1982).

Some states have achieved even more remarkable reductions. For example, the Washington legislature enacted a series of stricter laws beginning in 1980. Mainly because of these new measures, the number of drunk driving deaths in Washington dropped from 516 in 1981 to 442 in 1982 and 364 in 1983, and the tally of alcohol-related accidents declined from 17,000 in 1981 to 14,500 in 1982 and 12,900 in 1983. 130 Cong. Rec. S8227 (daily ed. June 26, 1984) (statement of Sen. Evans). The experience in New Jersey before social hosts became liable was similar. After new criminal sanctions were passed and enforcement efforts were intensified, drunk driving arrests increased forty percent between 1980 and 1984. A result, between 1981 and 1983, deaths attributable to drunk driving dropped from 376 to 270, a twenty-eight percent decline. NEW JERSEY DIVISION OF MOTOR VEHICLES, SAFETY, SERVICE, INTEGRITY, A REPORT ON THE ACCOMPLISHMENTS OF THE NEW JERSEY DIVISION OF MOTOR VEHICLES 44 (1983) (cited in Kelly v. Gwinnell, 96 N.J. 538, 552 n.11, 476 A.2d 1219, 1226 n.11 (1984)).
driving problem. Viewed in this manner, close scrutiny of the bur-
dens side of the equation becomes even more important.

Burdens

The burdens associated with social host liability are considera-
ble. If liability were imposed, private individuals who decided to
host modest social gatherings would have to assume responsibility
for any accidents related to their guests' alcohol consumption. The
burden of shouldering this responsibility, or insuring against it,
probably would discourage many hosts from entertaining at all.\textsuperscript{215}

Social hosts and tavern owners differ in many ways, and these
differences generally make the burdens of liability far greater for
social hosts than for tavern owners. Proprietors of commercial es-
tablishments usually have experienced employees to dispense
drinks, while social hosts generally have no employees and cannot
directly control their guests' alcohol consumption. Even if a social
host did have a few friends voluntarily act as bartenders, these
friends would lack the professional experience necessary to deter-
mine when an individual has consumed too much alcohol or has
falsified his age to get a drink.\textsuperscript{216} Commercial establishments also
have the advantage of bouncers who can help control situations in
which customers challenge decisions not to serve more drinks.\textsuperscript{217}
Without these advantages, social hosts may be held responsible for
unfortunate accidents which they had little or no opportunity to
prevent.\textsuperscript{218}

\textsuperscript{215} For a general discussion of the burdens of a rule imposing liability upon social hosts,
see Casenote, \textit{Liability of Social Host for Furnishing Liquor to Guest Who Later Injures a

\textsuperscript{216} See Boutwell v. Sullivan, 469 So. 2d 526, 529 (Miss. 1985); Kelly v. Gwinnell, 96 N.J.

\textsuperscript{217} See Kelly v. Gwinnell, 96 N.J. 538, 567, 476 A.2d 1219, 1234 (Garibaldi, J., dissent-
argument against social host liability based on the lack of bouncers, reasoning that a host's
duty is to refrain from serving in the first place, not to control drunken guests once they
have been served).

\textsuperscript{218} See Kelly v. Gwinnell, 96 N.J. 538, 566-68, 476 A.2d 1219, 1234 (Garibaldi, J., dis-
senting). Justice Garibaldi also noted in her dissent that social hosts, unlike commercial
bartenders, often drink with their guests, further contributing to their inability to control
their guests' behavior. \textit{Id.} at 566-67, 476 A.2d 1234.

The burdens and costs associated with attempting to control guests' behavior are consid-
erably greater at large social gatherings than they would be in one-to-one situations, which
Social hosts generally have far fewer financial resources than tavern owners, making them far less able to take costly measures to control guests' behavior, or to shoulder the costs of liability or adequate insurance when they are unable to control guests' behavior. To a great extent, tavern owners gain this financial advantage from their ability to distribute costs among their patrons. As Justice Garibaldi pointed out in her dissent in Kelly: "The most significant difference between a social host and a commercial licensee... is the social host's inability to spread the cost of liability. The commercial establishment spreads the cost of insurance against liability among its customers. The social host must bear the entire cost alone."

Even if liability insurance would be available to protect social hosts, it would not provide an escape from the tremendous

---

219. Some courts have focused on the financial position of social hosts to justify a rejection of liability. See, e.g., Cory v. Shierloh, 29 Cal. 3d 430, 441, 629 P.2d 8, 14, 174 Cal. Rptr. 500, 506 (1981) ("[L]icensees are in a better position to defray the costs of liability and insurance than the usual 'social host' or other unlicensed provider."); Lowe v. Rubin, 98 Ill. App. 496, 499, 424 N.E.2d 710, 713 (1981) (noting that 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") (quoting DeMoulin & Whitcomb, supra note 167, at 357); see also Keckonen v. Robles, 146 Ariz. 268, 270, 705 P.2d 945, 947 (Ariz. Ct. App. 1985) (quoting the above-mentioned passage from Lowe v. Rubin) (review denied); Special Project, supra note 10, at 1121-22 (1985) (noting some courts' use of social hosts' inability to pass on costs to customers as a justification for refusal to impose liability).

220. Kelly v. Gwinnell, 96 N.J. 538, 568, 476 A.2d 1219, 1234 (1984) (Garibaldi, J., dissenting). The experience of New Hampshire bar owners provides an example of the relative burdens. When New Hampshire bars were faced with a twelve-fold increase in liquor liability insurance premiums, they were able to pass on the cost to their customers by raising prices no more than eighteen cents per drink. See Sorry, Your Policy is Canceled, TIME, Mar. 24, 1986, at 25 (reporting statement of New Hampshire Insurance Commissioner Louis Bergeron). Social hosts, on the other hand, cannot pass on these costs. Instead, they would have to absorb such huge premium increases personally.

221. The availability of insurance at any cost to protect social hosts is not a foregone conclusion. Compare Coulter v. Superior Court, 21 Cal. 3d 144, 153, 577 P.2d 669, 674, 145 Cal. Rptr. 534, 539 (1978) ("[W]e may assume that insurance coverage (doubtless increasingly costly) will be made available to protect the social host from liability in this situation.") and Koback v. Crook, 123 Wis. 2d 259, 268, 366 N.W.2d 857, 861 (1985) ("[I]t was conceded at oral argument that the defendant's homeowners liability policy provided coverage for the kind of claim asserted in this case.") with Kelly v. Gwinnell, 96 N.J. 538, 568, 476 A.2d 1219, 1235 (1984) (Garibaldi, J., dissenting) ("The majority cites no authority for its belief that actions against social hosts will be covered under homeowner's insurance.").
financial burdens that civil liability would impose. In fact, it would add to these burdens. Even courts that use the availability of insurance to justify liability agree that any available insurance would be at higher premiums.\textsuperscript{222} The past experiences of tavern owners indicate that the rise in premiums would be extremely high. In the District of Columbia, for example, one bar owner found that his premiums for liquor liability insurance jumped from $185 in 1984 to $26,500 in 1985 for half the amount of coverage.\textsuperscript{222} Similar experiences have become commonplace nationwide.\textsuperscript{224} Many tavern owners faced with these enormous premiums have elected to "go bare," carrying no liability insurance and hoping that they will not be sued.\textsuperscript{226} Because social hosts generally have fewer financial resources than commercial dispensers, such high premiums might result in even more decisions not to carry insurance. Even hosts who do not elect to "go bare" ultimately might be without coverage against most civil liability claims because of policy provisions that

\textsuperscript{222} See, e.g., Coulter v. Superior Court, 21 Cal. 3d 144, 153, 577 P.2d 669, 674, 145 Cal. Rptr. 534, 539 (1978); Kelly v. Gwinnel, 96 N.J. 538, 550 n.9, 476 A.2d 1219, 1225 n.9 (1984). In her dissent in \textit{Kelly}, Justice Garibaldi pointed out the impact of the rise in premiums and the unavailability of affordable insurance:

- Even if it is assumed that homeowner's insurance will cover this cause of action, it is unrealistic to believe that insurance companies will not raise their premiums in response to it.
- Furthermore, many homeowners and apartment renters may not even have homeowner's insurance and probably cannot afford it. Other homeowners may not have sufficient insurance to cover the limitless liability that the Court seeks to impose.

\textsuperscript{223} Marcus, \textit{Liquor Liability Coverage Drying Up}, Wash. Post, Nov. 10, 1985, at B1, col. 4. The insurance company raised these premiums, even though no District of Columbia court actually had held a tavern owner civilly liable, on the grounds that the District courts probably would find liability when they considered the issue. Id. at B10, cols. 2-3.

\textsuperscript{224} See, e.g., Special Project, supra note 10, at 1120 (noting that one California tavern owner's insurance premium climbed from $10,000 to $190,000 after the courts began imposing civil liability); \textit{Sorry, Your Policy is Canceled}, supra note 220, at 25 (reporting one New Hampshire bar's sponsorship of "Unhappy Hour" after its annual liability premiums rose from $1000 to $12,000). But see id. at 26 (reporting that New Jersey insurance companies have threatened to increase homeowners' premiums in response to social host liability, but have not actually done so yet).

\textsuperscript{225} See \textit{id.} at 1120 (noting that approximately one-third of California's 25,000 tavern owners chose to risk liability rather than to pay the high premiums that followed the California courts' imposition of civil liability); Marcus, \textit{supra} note 223, at B1, col 6 (reporting that a "substantial proportion" of restaurants in the District of Columbia are "out on a limb" because they have no liquor liability coverage).
exclude coverage for such acts as violations of beverage control statutes or service to minors.226

In the final analysis, social host liability would impose heavy financial burdens that might devastate unprotected individuals.227 Considered together with other potential impacts of social host liability,228 these burdens significantly outweigh the speculative and probably minimal benefits of a liability rule.229 The burdens that liability would place on social hosts have convinced many courts not to impose liability,230 and they have failed to convince other courts only because those courts erroneously focused their benefit analyses on the entire drunk driving problem.231 When the benefits of social host liability are reexamined and properly viewed, the benefit/burden analysis leaves no doubt about the proper result. Imposition of a legal duty is not fundamentally fair to social hosts.

Summary of Legal Analysis

Viewed through purely doctrinal notions such as foreseeability and proximate cause, civil liability for social hosts arguably is justified for the same reasons as civil liability for tavern owners, although the justifications become weaker as circumstances move along the continuum from one-to-one contact between host and guest to huge gatherings involving multiple hosts and hundreds of guests. As the New Jersey Supreme Court has observed, however,

229. See supra notes 208-14 and accompanying text.
230. See, e.g., supra notes 163-72 and accompanying text.
231. See supra notes 208-14 and accompanying text.
"whether a duty exists is ultimately a question of fairness."

Courts should not impose a duty on purely doctrinal grounds when that duty cannot pass scrutiny for fundamental fairness.

Social host liability cannot pass any reasonable fairness test. When the benefits and burdens of liability are examined closely, the benefits all but disappear. The crushing burdens of liability, on the other hand, become all too obvious. On fairness grounds alone, therefore, social host liability should be rejected.

**Policy Considerations**

Other policy considerations also enter into a court's decision concerning whether to impose liability on social hosts. Although these considerations do not relate specifically to the legal question of whether the duty is fundamentally fair from a benefit/burden perspective, they do relate in a more general manner to the impact of liability. As a result, they may have a significant bearing on whether to adopt the rule. Because of the unusually controversial nature of the issue, several such general policy factors have arisen which courts should consider in any decision concerning social host liability.

**Availability of a Remedy to Plaintiffs**

Proponents of social host liability often justify their position by arguing that liability would provide injured plaintiffs with another source of recovery. These advocates argue that, in the absence of liability, many plaintiffs would lack an effective remedy because

---


233. See, e.g., Rappaport v. Nichols, 31 N.J. 188, 205, 156 A.2d 1, 10 (1959) ("[W]e are convinced that recognition of the plaintiff's claim will afford a fairer measure of justice to innocent third parties whose injuries are brought about by the unlawful and negligent sale of alcoholic beverages to minors and intoxicated persons. . ."); Koback v. Crook, 123 Wls. 2d 259, 272, 366 N.W.2d 857, 863 (1985) ("[T]he responsibility of the drunk driver himself will be shared with at least one additional culpable party, the negligent tortfeasor who supplied the liquor."); see also Recent Decisions, Social Host May Be Held Liable for the Acts of Intoxicated Guests: Coulter v. Superior Court of San Mateo County, 9 Cum. L. Rev. 613, 623 (1978) (suggesting that, besides deterrence of drunk driving, the California Supreme Court's other major rationale for liability in Coulter was "to provide a plaintiff with access to another pocket").
the drunken driver was either a minor or a habitual drunkard. This "deep pocket" rationale is appealing when applied in a commercial context because commercial entities readily can absorb costs involved by purchasing insurance and passing on the cost to customers.

The deep pocket argument, however, is not convincing in a non-commercial setting. Whether or not a social host has obtained insurance, that host cannot spread his costs to other individuals. The host must absorb the costs alone. Although, despite these problems, injured plaintiffs occasionally could collect large judgments against social hosts when drunken drivers were judgment-proof, the probable frequency of these situations does not provide a particularly compelling justification for an extension of civil liability.

**Government Interest**

Another distinction between the policies associated with social host liability and those associated with tavern owner liability is the extent of the government's interest in regulating dispensers of alcoholic beverages. Historically, commercial dispensers have been subject to stringent regulation and licensing requirements, while social hosts have not been licensed and have been subject to very

234. See DeMoulin & Whitcomb, supra note 167, at 357.
235. See supra note 220 and accompanying text.
236. See Kelly v. Gwinnell, 96 N.J. 538, 588, 476 A.2d 1219, 1235 (1984) (Garibaldi, J., dissenting); see also supra notes 221-26 and accompanying text (discussing whether affordable liability insurance would be available to social hosts).
237. See Kelly, 96 N.J. at 568, 476 A.2d at 1234 (Garibaldi, J., dissenting); supra note 220 and accompanying text.
238. See Olsen v. Copeland, 90 Wis. 2d 483, 491, 280 N.W.2d 178, 181 (1979) ("The problem presented here is not one of the adequate remedies for an injured plaintiff.") (overruled in Sorenson v. Jarvis, 119 Wis. 2d 627, 350 N.W.2d 108 (1984)); Casenote, supra note 215, at 984 (noting that most social hosts are not owners of apartment complexes such as the defendant in Coulter).
239. See Keckonen v. Robles, 146 Ariz. 268, 270, 705 P.2d 945, 947 (Ariz. Ct. App. 1985) (noting legislative regulation of "virtually every aspect of the manufacture, sale, and distribution of alcoholic beverages" since the repeal of Prohibition) (citing Settlemyer v. Wilmington Veteran's Post No. 49, 11 Ohio St. 3d 123, 464 N.E.2d 521 (1984)) (review denied); Harriman v. Smith, 697 S.W.2d 219, 221 (Mo. Ct. App. 1985) (noting the governmental interest in business vendors, but not social hosts, that supports licensing requirements for vendors); supra note 38 and accompanying text (citing list of applicable statutes in all fifty states).
little regulation.\textsuperscript{240} As a result, social host liability does not impli-
cate the same level of government interest as tavern owner liabil-
ity.\textsuperscript{241} Particularly when plaintiffs have claimed that liability
should lie because of a host's statutory violations, many courts
have decided either that the government's lesser interest in regu-
ivating social hosts weighs against liability\textsuperscript{242} or that liability should
await a legislative determination that government involvement is
appropriate.\textsuperscript{243}

\textit{Moral Blameworthiness}

Some courts also have refused to impose liability because they
have viewed the potential liability as significantly greater than the
fault involved.\textsuperscript{244} Courts that have overturned the common law rule
of nonliability, however, have had little difficulty rejecting this
contention. These courts have emphasized the devastating results
of drunk driving, and have dismissed as unacceptable any moral
values that could ignore such devastation.\textsuperscript{245}

Given the public's heightened concern about drunk driving in re-
cent years,\textsuperscript{246} moral blameworthiness considerations now probably
weigh in favor of social host liability rather than against it.\textsuperscript{247} The
public's awareness of the dangers associated with drunk driving,
and the mounting pressure against such behavior, have replaced
older notions that the burdens of liability are not commensurate
with the fault involved. Although the moral blameworthiness

\textsuperscript{240} See supra notes 60-61 and accompanying text (noting that, until very recently, the
vast majority of courts had held that state legislatures did not intend to regulate social hosts
when they passed their liquor laws).

\textsuperscript{241} See Harriman v. Smith, 697 S.W.2d 219, 221 (Mo. Ct. App. 1985).

\textsuperscript{242} See id.

(citing Settlemyer v. Wilmington Veteran's Post No. 49, 11 Ohio St. 3d 123, 464 N.E.2d 521
(1984)) (review denied).

\textsuperscript{244} See Kelly v. Gwinnell, 96 N.J. 538, 549, 476 A.2d 1219, 1225 (1984) (pointing out the
use of this argument in the past to reject expanded liability).

\textsuperscript{245} See Coulter v. Superior Court, 21 Cal. 3d 144, 153, 577 P.2d 669, 674, 145 Cal. Rptr.

\textsuperscript{246} See supra note 1.

\textsuperscript{247} Cf. Kobray v. Crook, 123 Wis. 2d 259, 267, 366 N.W.2d 857, 861 (1985) (“We con-
clude that [the] fault principle [that an injured party should recover against an individual
who negligently causes injury] is equally applicable to the social host who by negligent fur-
nishing of the alcoholic drink causes the injury.”).
factor alone cannot justify liability, courts should add this factor to other considerations when they determine whether to extend liability to social hosts.

**Certainty Versus Flexibility**

When courts attempt to fashion a new legal rule, they often must choose between certainty and flexibility. If a court creates a rigid rule, unjust results may occur when the new rule is applied to cases with distinguishable fact patterns. On the other hand, if a court creates a flexible rule to respond to varying factual situations, affected individuals may have no clear standards by which to guide their conduct.248

The first two decisions in which courts extended liability to the social host demonstrate the problems this difficult choice causes in social host liability. In *Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity*,249 the Oregon Supreme Court fashioned a flexible rule which required the jury to determine whether, under the particular circumstances of a given case, the social host should have assumed a duty to control his guests' consumption of alcoholic beverages.250 In *Coulter v. Superior Court*,251 on the other hand, the California Supreme Court fashioned a blanket rule which imposed a duty on all social hosts who directly serve liquor to their guests.252 Both rules created problems. The *Wiener* rule proved too nebulous to apply successfully, while the *Coulter* rule often required courts to impose liability when it probably was

248. This notion perhaps was expressed best by Roscoe Pound:

[Even the most flexible of mechanisms will operate more or less mechanically, and it is not easy to make legal machinery flexible and at the same time adequate to the general security. The requirements of particular cases must yield more or less to the requirements of generality and certainty of legal precepts and of uniformity and equality in their application. Hence, even though in general the law tends to bring about results accordant with the moral sense of the community, the necessarily mechanical operation of legal rules will in particular cases produce situations where the legal result and the result demanded by the moral sense of the community are at least to some extent out of accord.]


250. See id. at 639-40, 485 P.2d at 21-22; supra notes 126-30 and accompanying text.


252. See id. at 152-53, 577 P.2d at 673-74, 145 Cal. Rptr. at 538-39; supra notes 131-36 and accompanying text.
unjustified. Possibly because neither the flexible rule nor the blanket rule worked, the state legislatures in Oregon and California modified the applicable statutes to abrogate or severely limit the scope of the new rules.

The tension between certainty and flexibility has continued in recent social host liability decisions. The New Jersey court in *Kelly v. Gwinnell*,253 the Iowa court in *Clark v. Mincks*,256 and the Wisconsin court in *Koback v. Crook*257 all chose blanket rules analogous to, but not as broad as, the rule in *Coulter*.258 On the other hand, the Georgia court in *Sutter v. Hutchings*259 chose a flexible rule more closely related to *Wiener*.260 Because these decisions all are less than two years old, the new rules in these cases have not undergone meaningful testing. As a result, the tension between certainty and flexibility remains. When courts in other jurisdictions consider social host liability, they will face the same difficult choice in attempting to fashion a rule that is fair, yet workable.

**Availability of Alternative Approaches**

Courts debating the wisdom of any proposed legal rule also must consider the availability of alternative approaches to the problem. If other effective remedies are available, a court should view the proposed rule with skepticism. A proposal that presents considerable difficulties and disadvantages, and that is unnecessary because effective alternatives exist, should not be adopted.

---

253. See supra note 135. See generally Graham, supra note 135 (comparing the approaches in *Wiener* and *Coulter*).

254. See supra notes 137-39 and accompanying text.


256. 364 N.W.2d 226 (Iowa 1985) (en banc).

257. 123 Wis. 2d 259, 366 N.W.2d 857 (1985).

258. See supra notes 64-70, 87-95 & 140-51 and accompanying text.

259. 254 Ga. 194, 327 S.E.2d 716 (1985); see supra notes 71-78 and accompanying text.

260. The court in *Sutter* stated that it would submit the issues of foreseeability and proximate cause to a jury for a determination of whether these elements were present:

[A] jury would be authorized to find that it is foreseeable to the provider that the intoxicated driver may injure someone. That is to say, a jury would be authorized to find that providing alcohol to a noticeably intoxicated 17-year-old automobile driver was one of the proximate causes of the negligence of the driver and of the injuries to the deceased.

*Id.* at 198, 327 S.E.2d at 719 (footnotes omitted).
For social host liability, many effective alternative measures are available. These alternatives could achieve the same purpose as social host liability—deterrence of drunk driving—with far more satisfactory results and with fewer disadvantages. One alternative already in force, for example, is criminal sanctions against drunk driving. In recent years, virtually every state has passed laws increasing criminal penalties for drunk driving and has strengthened enforcement of those laws. Unlike social host liability, these new measures have resulted in an immediate and significant reduction in the number of accidents involving drunk drivers. One possible explanation for the greater success of criminal sanctions is that they focus directly on drunk drivers rather than on third parties such as social hosts. Instead of trying to regulate the behavior of drunken drivers indirectly, criminal sanctions regulate behavior directly by forcing individuals who drink and drive to accept responsibility for the consequences of their actions.

Other alternatives are available. For example, noncriminal measures aimed directly at drunk drivers could provide significant deterrents. Several such measures are available, including civil forfeiture proceedings to confiscate vehicles driven by drunken drivers in automobile accidents, treatment of such vehicles as "instruments of crime" in these forfeiture proceedings, and provisions requiring all drivers to post bonds that they would forfeit upon conviction for drunk driving. These measures essentially are untested but, like criminal sanctions, they may prove more effective than social host liability in deterring drunk driving because they affect drunk drivers directly rather than through third parties.

---


262. See supra note 2 and accompanying text.

263. See supra note 214 and accompanying text.

264. See Kraft, supra note 4, at 400-09 (outlining these proposed approaches).
In short, many alternatives to social host liability are available. These alternatives can deter drunk driving at least as effectively as social host liability, if not more effectively. They also may not create as many burdens and incur as many disadvantages. At the very least, therefore, courts should not act hastily to impose liability without first considering whether these other measures are already mitigating the problem or are likely to mitigate it in the near future.

**Social Pressures**

Alternative measures do not have to involve judicial or legislative constraints. For example, social pressures may act to abate a problem, making further measures unnecessary. Because these pressures arise from a societal consensus concerning appropriate conduct, they are likely to operate with far less resistance than courts would encounter when they seek to enforce a norm through judicial sanctions.

With respect to the problems associated with drinking at social gatherings, social pressures clearly have begun to operate. In the past, social hosts were motivated by friendship to serve as many drinks as a guest requested, despite any concern for the guest's well-being. Hosts were under social pressure to refrain from being "big brothers." Because of the mounting awareness of drunk driving tragedies, however, social hosts now are likely to ignore these fears. Increasingly, hosts are acting consistently with their personal concerns for guests, and are refusing to serve additional drinks.\(^{265}\)

The presence of these social pressures is an important distinction between social host liability and tavern owner liability. These pressures generally do not operate in the commercial context

---

265. The Wisconsin Supreme Court noted this phenomenon in Koback v. Crook, 123 Wis. 2d 259, 366 N.W.2d 857 (1985):

"We are still our brothers keepers, and it would be a rare host at a social gathering who would knowingly give more liquor to an intoxicated friend when he knows his invitee must take care of himself on the highway and will potentially endanger other persons. Social justice and common sense require the social host to see within reason that his guests do not partake too much of his generosity."

*Id.* at 271, 366 N.W.2d at 862 (quoting Garcia v. Hargrove, 46 Wis. 2d 724, 740, 176 N.W.2d 566, 573-74 (1970) (Hallows, C.J., dissenting)).
because tavern owners and operators usually lack social hosts’ friendship concerns. Although tavern owners may have a sense of social responsibility, they also have a strong financial incentive to serve their patrons because of the profits they make from serving drinks.\footnote{266}

Social pressures clearly are not, by themselves, an adequate response to drunk driving after social events. Coupled with alternative legal measures, however, they represent an effective response to this problem that does not present the same disadvantages as social host liability. Courts should consider this response, which was not available to address problems connected with commercial dispensers, as an important reason not to extend liability beyond tavern owners to social hosts.

\textit{Deference to the Legislature}

Social host liability cases present the difficult and sensitive task of sorting out many competing policy considerations. The heavy political pressures created by increasing public awareness and activism have exacerbated these difficulties. Although courts certainly have the authority to expand civil liability to social hosts,\footnote{267} many courts have decided not to exercise that authority.

In light of the complicated issues and the increasing social and political pressures, many courts have decided that any extension of liability should come from the legislative branch.\footnote{268} According to these courts, legislatures are better equipped to investigate, examine, and debate the relative merits of conflicting policy

\footnotesize{\textsuperscript{266} See Harriman v. Smith, 697 S.W.2d 219, 221 (Mo. Ct. App. 1985).
considerations.\footnote{269}{See Harriman v. Smith, 697 S.W.2d 219, 221-22 (Mo. Ct. App. 1985); Holmes v. Circo, 196 Neb. 496, 505, 244 N.W.2d 65, 70 (1976); Garren v. Cummings & McCurdy, Inc., No. 0727, slip op. at ___ (S.C. Ct. App. June 9, 1986); Wilson v. Steinbach, 98 Wash. 2d 434, 441, 656 P.2d 1030, 1034 (1982) (en banc).} The need for deference is particularly compelling in the context of social host liability, these courts also note, because of the lack of legislative guidelines for courts to use in fashioning standards for liability, a lack which is mainly due to the government's traditional nonregulation of social hosts' conduct.\footnote{270}{See Keckonen v. Robles, 146 Ariz. 268, 270, 705 P.2d 945, 947 (Ariz. Ct. App. 1985) (citing Settlemyer v. Wilmington Veteran's Post No. 49, 11 Ohio St. 3d 123, 464 N.E.2d 521 (1984)) (review denied); see also supra note 240 and accompanying text (noting traditional government stance of not regulating social hosts).}

**Summary of Policy Considerations**

General policy considerations relevant to social host liability, like the legal arguments, do not favor an expansion of civil liability. Although moral blameworthiness does weigh in favor of extending liability, the traditional "deep pocket" justification for liability is considerably less compelling when applied to social hosts than when applied to tavern owners. Other policy considerations, including the relevant government interest, the difficulty of fashioning a rule flexible enough to avoid unjust results but certain enough to provide a workable standard, the availability of alternative measures, the social pressures at work, and the need for legislative deference, all weigh against an extension of liability. Together with the legal arguments, these considerations present a compelling case against social host liability.

**CONCLUSION**

In their fervor to prevent drunk driving, courts should not rush to impose civil liability on social hosts without carefully considering the merits and the drawbacks of such a decision. Rhetoric about the evils of driving while intoxicated, without more, does not justify a departure from the common law rule that only the drunk driver, and not the host who served him, is liable for injuries stemming from alcohol-related accidents. Courts should weigh the legal arguments and the underlying policy considerations painstakingly before they rush to change this established doctrine.
Although foreseeability and proximate cause arguments might justify an extension of liability to social hosts in certain situations, just as they have for tavern owners, the decision to impose liability ultimately must rest on whether the duty to act is fundamentally fair. Social host liability cannot pass any reasonable fairness test. The possible benefits of liability in deterring drunken driving are highly speculative at best. In fact, past experience indicates that the impact on drunk driving would be minimal. In contrast, social host liability would create identifiable and significant burdens. Social hosts would face prohibitive costs in attempting to avoid liability or in attempting to insure against it. Together with the general policy considerations, these minimal benefits and heavy burdens present a compelling case against any extension of liability. Instead of responding emotionally to understandable concerns about drunk driving, courts should take a closer look at these benefits and burdens, and should conclude that social host liability is a bad idea.

Derry D. Sparlin, Jr.