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Social Host Liability in Pennsylvania: Coherent Policy or "Judicial Gymnastics"?

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I. Introduction

The problem of drunk driving in America has reached tragic proportions. Over fifty percent of all highway deaths are alcohol-related.[1] Between 1973 and 1983 over 250,000 Americans were killed in alcohol-related traffic accidents and millions more were injured.[2] Dealing with this problem has become one of the foremost legal issues of our day. On the national level it has spawned Supreme Court cases,[3] a presidential commission,[4] legislative hearings,[5] and legislation aimed at creating a national minimum drinking age.[6] In Pennsylvania, the problem has resulted in the formation of an executive task force[7] and tough new laws aimed at drunk drivers.[8] The "war against drunk drivers" has also prompted numerous interest groups to debate all sides of the many issues involved.[9]

This heightened concern with drunk driving has reignited the

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1. PRESIDENTIAL COMMISSION ON DRUNK DRIVING, FINAL REPORT 1 (Nov. 1983) [hereinafter cited as FINAL REPORT].

2. *Id.*

3. *See, e.g.*, Delaware v. Prouse, 440 U.S. 648 (1979) (holding that random stops of motor vehicles upon no reasonable suspicion were unconstitutional "seizures," but court did not preclude states from developing "less intrusive" methods to spot-check traffic).

4. *See* Exec. Order No. 12358, 3 C.F.R. comp. 179 (1983) (creating the Presidential Commission on Drunk Driving). *See also* Remarks of President Ronald Reagan on Signing Executive order No. 12358, 1 PUB. PAPERS 162-63 (1982).

5. *See, e.g., Hearings before the Subcomm. on Surface Transportation of The Committee on Public Works and Transportation*, 97th Cong., 2nd. Sess. 619-708 (1982) (concerning federal incentive grants to states to encourage adoption of measures aimed at deterring drunk driving).

6. *See* Highway Safety Amendments, Pub. L. 98-363, 98 Stat. 435 (1984).

7. *See* Governor's Task Force on Drunk Driving, *It's Time to Treat Drunk Driving Like the Crime It Is!* (1982) (pamphlet explaining purposes of the task force).

8. *See* 75 PA. CONS. STAT. ANN. § 1547 (Purdon 1977 & Supp. 1984) (the "implied consent" law whereby any person under arrest for driving under the influence who refuses to submit to chemical testing will have his driver's license suspended for twelve months); 75 PA. CONS. STAT. ANN. § 3731 (Purdon 1977 & Supp. 1984) (mandatory 48 hour jail term for persons convicted of driving under the influence); 75 PA. CONS. STAT. ANN. § 3735 (Purdon 1977 & Supp. 1984) (minimum three-year prison term for person who unintentionally causes the death of another while driving under the influence).

9. *See War on Alcohol Abuse Spreads to New Fronts*, U.S. NEWS & WORLD REP., Dec. 24, 1984, at 63-64. *See also* Taylor, *Some MADD Ideas on Happy Hour*, Philadelphia Daily News, Jan. 25, 1985 at 10, col. 1.

controversy over what the proper scope of civil liability should be for purveyors of alcohol when their guests' or customers' overindulgence results in vehicular mayhem.[10] The Supreme Court of Pennsylvania[11] recently handed down two decisions that dealt with the civil liability of social hosts who serve alcohol to guests. In *Klein v. Raysinger*[12] the court held that there could be no social host liability for service of a visibly intoxicated adult whom the host knew was likely to operate an automobile.[13] The court based its decision on the common law rule that service of alcohol to an individual cannot be the proximate cause of any of the consumer's subsequent actions.[14] In *Congini v. Portersville Valve Co.*,[15] the court decided that a social host *could* be held liable for serving alcohol to a minor who subsequently injures himself.[16] The court justified this holding with what it found to be a legislative policy aimed at protecting society from the inherent danger created when minors consume alcohol.[17] Strong dissents accompanied both opinions, one criticizing *Klein* for its inappropriate result,[18] and the other condemning *Congini* for its inconsistent reasoning.[19]

The inconsistency of the decisions seems to result from the majorities' reliance on undisclosed views about what the ultimate result of each case should be. These undisclosed "policy reasons" are camoflauged in the *Klein* opinion by an outdated and indefensible doctrine[20] and in *Congini* by a contrived finding of legislative policy.[21] Such decisions provide little guidance for the future develop-

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10. *See, e.g.*, Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984) (common law action against social host); Hutchens v. Hankins, 61 N.C. App. 1, 303 S.E.2d 584, *review denied*, 309 N.C. 191, 305 S.E.2d 734 (1983) (negligence per se action against commercial vendor); Comment, *Employer Liability for a Drunken Employee's Actions Following an Office Party: A Cause of Action Under Respondeat Superior*, 19 CAL. W.L. REV. 107 (1982) [hereinafter cited as Comment, *Employer Liability*]; Note, *Social Host Liability for Injuries Caused by the Act of an Intoxicated Guest*, 59 N.D.L. REV. 445 (1983) [hereinafter cited as Note, *Social Host Liability*].

11. The court was composed of Chief Justice Roberts and Justices Nix, Larsen, Flaherty, McDermott, Hutchinson and Zappala.

12. 504 Pa. 141, 470 A.2d 507 (1983). *See also infra* notes 102-12 and accompanying text.

13. 504 Pa. at 148, 470 A.2d at 511.

14. *See infra* note 30.

15. 504 Pa. 157, 470 A.2d 515 (1983). *See also infra* notes 113-25 and accompanying text.

16. 504 Pa. at 164, 470 A.2d at 518.

17. 504 Pa. at 161-62, 470 A.2d at 517-18. *See infra* notes 116-19 and accompanying text.

18. *See* 504 Pa. at 149-56, 470 A.2d at 511-15 (Larsen, J., dissenting) (quoting in full the late Justice Manderino's dissent from *Manning v. Andy*, 454 Pa. 237, 242-50, 310 A.2d 75, 77-81 (1973)).

19. *See* 504 Pa. at 166-68, 470 A.2d at 520-21 (Zappala, J., dissenting).

20. *See infra* note 131 and accompanying text.

21. *See infra* notes 133-41 and accompanying text.

ment of the law.[22] This proposition is illustrated by the recent Superior Court decision in *Sites v. Cloonan*,[23] which suggests the availability of another theory of recovery even though that theory is inconsistent with the analysis of *Klein* and *Congini*.[24]

This comment will address the issue of social host liability in Pennsylvania. It will point out the lack of coherent doctrine, the omission of relevant policy considerations from judicial opinions, and the need to have the issue addressed in the public legislative forum. The legislature could clarify the law, enunciate a current and comprehensive policy, and formulate an effective mix of solutions to this pressing problem. The comment will further point out the improbability that any legislative action will be taken and the resultant need for a technique of cooperative lawmaking to be initiated through judicial action.

II. History of Liquor Purveyor Liability

Civil liability for purveyors of alcohol has historically been dealt with in one of the following four ways:[25] 1) common law nonliability;[26] 2) liability based on violation of a dram shop or civil damage act;[27] 3) liability based on violation of a liquor control statute;[28] and 4) liability based on common law negligence principles.[29]

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22. *See* Green, *Tort Law—Public Law In Disguise*, 38 TEX. L. REV. 257, 262 (1960) [hereinafter cited as Green, *Tort Law*]. After discussing a case in which the court failed to disclose its reliance on policy considerations, Professor Green concluded: "The possibilities of tort litigation based on this decision are incalculable." *Id.* Professor Robert Keeton articulated the same position in a recent lecture, where he stated the following:

> When courts are engaged in the inevitable enterprise of filling gaps in statutes, the value choices they make as legitimate representatives of society will be wiser as they are better informed by advocacy addressed explicitly to the competing principles, policies and values at stake and as they are openly explained in judicial opinions.

Lecture by Professor Robert E. Keeton, The Annual Roy R. Roy Lecture given at Southern Methodist University School of Law (February 24, 1978), *reprinted in* R. KEETON, STATUTES, GAPS, AND VALUES IN TORT LAW 20 (1978). These comments are part of an ongoing debate over the use and articulation of policy considerations in the developing areas of tort law and the relative merits of judicial versus legislative reform of that law. *See infra* notes 133-41 and 151-61 and accompanying text.

23. 328 Pa. Super. 481, 477 A.2d 547 (1984).

24. 328 Pa. Super. at 483, 477 A.2d at 548 n.2. The *Sites* court alluded to the idea that it may be possible for a defendant to be found to be "more than a social host" if he possesses enough of the characteristics of a licensee to justify his being held liable as one. This theory is unworkable in light of the reliance by the Pennsylvania Supreme Court upon statutes to fix standards for imposing liability. Furthermore, the Pennsylvania Supreme Court seems to place more analytical importance on the characteristics of the consumer of the alcohol than on its providers.

25. *See* 22 DUQ. L. REV. 1105, 1111 (1984).

26. *See infra* notes 30-31 and accompanying text.

27. *See infra* notes 32-52 and accompanying text.

28. *See infra* notes 53-66 and accompanying text.

29. *See infra* notes 67-74 and accompanying text.

A. *Common Law Nonliability*

The common law did not recognize a cause of action against one who furnished alcoholic beverages to an ordinary, able-bodied man.[30] Courts maintained that furnishing alcohol could not be the proximate cause of a drinker's subsequent acts. The causal chain would be traced back no further than his consumption. This is known as the "consumption rule." Many commentators attribute this rule to the Protestant ethic that a person should bear the consequences of his acts.[31]

B. *Dram Shop Acts*

By the mid-nineteenth century, a complete rejection of the rationale of the common law consumption rule occurred in states that enacted dram shop acts.[32] These acts were a product of the temperance movement,[33] and were drafted to discourage the sale of alcohol by imposing strict civil liability on tavern keepers if their sales caused injuries to person, property or means of support.[34] Although generally short-lived,[35] dram shop acts were important for two reasons. First, they provided a way to compensate innocent third parties for losses suffered as a result of the "spillover effects" of the liquor

30. 45 AM. JUR. 2D INTOXICATING LIQUORS § 553 (1969). *see, e.g.*, Cherbonnier v. Rafalovich, 88 F. Supp. 900 (D. Alaska 1950); Cole v. Rush, 45 Cal.2d 345, 289 P.2d 450 (1955); Lee v. Peerless Ins. Co. 248 La. 982, 183 So.2d 328 (1966). In some jurisdictions, this rule was moderated by allowing recoveries against those who supplied alcohol to persons "in such a state of helplessness or debauchery as to be deprived of [their] will power or responsibility for [their] behavior." 45 AM. JUR.2D *Intoxicating Liquors* § 554 (1969). *See, e.g.*, Bissell v. Starzinger, 112 Iowa 266, 83 N.W. 1065 (1900) (severe intoxication); Nally v. Blandford, 291 S.W.2d 832 (Ky. 1956) (knowledge that patron would attempt to consume entire quart of whiskey in a short amount of time). *See generally* Annot., 97 A.L.R.3D 528 (1980) (common law liability for purveyors of liquor).

31. *See* Keenan, *Liquor Law Liability in California*, 14 SANTA CLARA L. REV. 46, 48 (1973); Comment, *Employer Liability, supra* note 10, at 108.

32. These acts were also known as Civil Damage Acts. The first one was enacted in Wisconsin in 1850, and by the turn of the century most states had had one at one time or another. *See generally* McGough, *Dram Shop Acts*, 1967 A.B.A. SEC. OF INS. NEGLI & COMPENSATION L. 448.

33. *Id.*

34. Dean Prosser has defined strict liability as "liability that is imposed on an actor apart from either (1) an intent to interfere with a legally protected interest . . . or (2) a breach of a duty to exercise reasonable care, *i.e.* actionable negligence." W.P. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 75 at 534 (5th ed. 1984) [hereinafter cited as PROSSER]. Although many dram shop acts imposed this strict liability, *see, e.g., infra* note 44 (Illinois dram shop act imposed strict liability), others required plaintiff to prove that defendant had violated a liquor control statute by serving the individual in question. *See, e.g., infra* note 76 (Pennsylvania dram shop act required illegal service). *See also* Graham, *Liability of the Social Host for Injuries Caused by the Negligence Acts of Intoxicated Guests*, 16 WILLIAMETTE L.J. 561, 563-69 (1980) [hereinafter cited as Graham, *Liability of the Social Host*].

35. The early dram shop acts fell prey to a shift in attitudes towards prohibition during the Civil War, but in the 1870's many dram shop acts were passed which lasted until prohibition and beyond. *See* MCGOUGH *supra* note 32 at 449-50.

trade.[36] Second, by allowing recovery against purveyors of liquor, the acts recognized that service of alcohol *could* be a proximate cause of injuries.[37]

Liability through dram shop acts has been limited to commercial purveyors of alcohol.[38] Courts' refusals to hold social hosts liable under dram shop acts have generally been based on strict statutory construction,[39] deference to the legislature,[40] and fear of inviting an excessive amount of litigation.[41] In *Cruse v. Aden*,[42] a woman attempted to invoke the Illinois dram shop act[43] to recover from a man who had furnished her husband two drinks of intoxicating liquor. Despite the broad wording of the statute, the Supreme Court of Illinois reasoned that the statute must be strictly construed because it was "of a highly penal nature."[44] Noting that the dram shop act dealt largely with the regulation of commercial establishments, the court held that it did not apply to social hosts.[45]

When courts *have* interpreted dram shop acts to allow social host liability, state legislatures have responded by clarifying the wording of the statutes to prevent future judicial decisions holding

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36. The imposition of strict dram shop liability, *see supra* note 34 (definition), is generally justified by the theory of enterprise liability; that is, because a business makes a profit from a product or activity which causes harm to others, the injured persons should be compensated from the profits of the business. *See* Comment, *Liquor, the Law and California: One Step Forward — Two Steps Backward*, 16 SAN DIEGO L. REV. 355, 363-64 (1979). That way, costs are absorbed into the price of the product and are borne by the producers and consumers of the product which causes the injuries. *See* Comment, *Torts: Liability of the Social Purveyor*, 28 OKLA. L. REV. 204, 206 n.14 (1975). *See also infra* notes 205-07 and accompanying text (discussing products liability).

37. *See* Rappaprt v. Nichols, 31 N.J. 188, 156 A.2d 1, 5 (1959). Dram shop acts also, however, allowed the negligent consumer of alcohol to recover. This issue, in the form of contributory negligence, is still given consideration in some jurisdictions. *See, e.g.*, Congini v. Portersville Valve Co., 504 Pa. 157, 470 A.2d 515, 518-19 (1983). *See also infra* notes 76, 80, and 120.

38. Graham, *Liability of the Social Host*, *supra* note 34, at 563-54.

39. *See, e.g.*, Cruse v. Aden, 127 Ill. 231, 20b N.E. 73 (1889).

40. *See, e.g.*, Miller v. Moran, 96 Ill.App.3d 596, 421 N.E.2d 1046 (1981) ("whether to provide additional remedies is a legislative rather than a judicial decision."); State *ex rel* Joyce v. Hatfield, 197 Md. 249, 78 A.2d 754, 757 (1951) ("the fact that there is no no such law in Maryland expresses the legislative intent as clearly and compellingly as affirmative legislation would.").

41. *See, e.g*, Miller v. Owens-Illinois Glass Co., 48 Ill. App. 412, 199 N.E. 2d 300 (1964) ("It would open up the floodgates of litigation . . . .").

42. 127 Ill. 231, 20 N.E. 73 (1889).

43. Dram Shop Act of 1874 (R.S. 1874, 438) (current version at ILL. STAT. ANN. ch. 43, at 135 (West. Supp. 1983)). Section 9 of the Act reads, in pertinent part, as follows:

> Every husband, wife . . . or other person, who shall be injured in person or property, or means of support by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name . . . against any person or persons who shall, by selling or giving intoxicating liquors, have caused the intoxication, in whole or in part, of such person or persons . . . .

Id. at § 9.

44. 127 Ill. at 239, 20 N.E. at 77.

45. *Id.*

social hosts liable. This has happened on two occasions. In *Williams v. Klemsrud*,[46] the Supreme Court of Iowa held a private individual liable under the state's dram shop act.[47] The statute provided a cause of action against "any person" who furnished alcohol to the individual whose intoxication caused plaintiff's injury.[48] The legislature responded by repealing the old dram shop act and enacting a new statute that only permits recovery from "any licensee or permittee."[49] In *Ross v. Ross*,[50] the Supreme Court of Minnesota interpreted the word "giving" in their dram shop act[51] as evidence of its application to noncommercial suppliers. Soon after the decision was handed down, the Minnesota legislature amended the law by deleting the word "giving."[52]

C. *Liability Based on Violations of Liquor Control Statutes*

The most prevalent method of imposing civil liability is through a negligence action based on violation of a liquor control statute.[53] Such statutes have been enacted in all states and they typically forbid the sale or gift of intoxicating beverages to minors or obviously intoxicated persons.[54] The statutes create a duty to protect the general public from the dangers inherent in serving alcohol to high-risk persons.[55] Violating the statute breaches that duty, and the resulting

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46. 197 N.W.2d 614 (Iowa 1972). In *Williams*, a 21 year old college student purchased a pint of vodka for a minor friend. The minor drank the alcohol, became intoxicated, and drove into plaintiff's vehicle. *Id.* at 615.

47. IOWA CODE ANN. § 129.2 (West Supp. 1966) (current version at IOWA CODE ANN. § 123.92 (West Supp. 1983).

48. *Id.*

49. Graham, *Liability of the Social Host, supra* note 34, at 567-68. *See* IOWA CODE ANN. § 123.92 (West Supp. 1983).

50. 294 Minn. 300, 200 N.W.2d 149 (1972). Defendant purchased liquor for his minor brother. The minor was killed when, after drinking the liquor and becoming intoxicated, he drove off the road. The decedent's parents and infant son were awarded damages under the Minnesota dram shop act.

51. MINN. STAT. ANN. § 340.95 (West Supp. 1972) (current version at MINN. STAT. ANN. § 340.95 (West Supp. 1984)). The act provided a cause of action "against any person who, by illegally selling, bartering, or *giving* intoxicating liquors . . ." (emphasis supplied).

52. Note, *Social Host Liability, supra* note 10, at 457.

53. Comment, *Negligence Actions Against Liquor Purveyors: Filling the Gap in South Dakota*, 23 S.D.L. REV. 228, 240 (1978). *See* 22 DUQ. L. REV. 1105, 1114 (1984).

54. *See, e.g.*, N.Y. ALCOHOLIC BEVERAGE CONTROL LAW § 65 (McKinney 1984) which provides, in pertinent part, as follows:

> No person shall sell deliver or give away . . . any alcoholic beverages to: 1. Any person actually or apparently under the age of nineteen years; 2. Any intoxicated person or to any person, actually or apparently, under the influence of liquor; or 3. Any habitual drunkard . . . .

Id. For a list of the liquor control statutes existing in all fifty states, see Note, *Social Host Liability*, *supra* note 10, at 447 n.12.

55. Graham, *Liability of the Social Host*, *supra* note 34, at 569-70. *See* RESTATEMENT (SECOND) OF TORTS § 286, which provides as follows:

> The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part

intoxication and injury are generally regarded as reasonably foreseeable.[56]

The first use of this method was in *Rappaport v. Nichols*,[57] in which the Supreme Court of New Jersey held a tavern owner liable for injuries suffered by a third person in a traffic accident caused by an intoxicated minor. Defendant had served alcoholic beverages to the minor in violation of a New Jersey law prohibiting such service.[58] Since *Rappaport*, this type of action has been used to impose civil liability on both tavern owners and social hosts for serving both minors[59] and visibly intoxicated adults.[60]

Use of this method to impose civil liability on social hosts in California has provoked a negative legislative response. Until 1971, California adhered to the consumption rule. This was judicially abolished in *Vesely v. Sager*,[61] in which the liability of a tavern owner was based on his violation of a liquor control statute.[62] In 1972, this liability was extended to a situation in which an employer served a minor employee in violation of the same statute.[63] Finally, in the

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

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

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

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

See, e.g., Taylor v. Ruiz, 394 A.2d 765 (Del. 1978); Marusa v. District of Columbia, 484 F.2d 828 (D.C. Cir. 1973). The statutes may be held to place all responsibility on the provider of the liquor. Thus contributory negligence will be no defense, and even the negligent consumer may recover. *See generally* PROSSER, *supra* note 34, at 461, which reads as follows:

> [C]ontributory negligence of the plaintiff is a complete bar to his action for any common law negligence of the defendant. Whether it is a bar to the liability of a defendant who has violated a statutory duty is a matter of the legislative purpose which the court finds in the statute.

Id. (footnotes omitted).

56. *See* RESTATEMENT (SECOND) OF TORTS § 288 B (1965), which provides that "[t]he unexcused violation of a legislative enactment or an administrative regulation which is adopted by the court as defining the standard of conduct of a reasonable man is negligence in itself." *See generally* Brattain v. Herron, 159 Ind. App. 663, 670-72, 309 N.E.2d 150, 155-58 (1974).

57. 31 N.J. 188, 156 A.2d 1 (1959).

58. 31 N.J. at 201, 156 A.2d at 8.

59. *See, e.g.*, Nesbitt v. Westport Square Ltd., 624 S.2d 519 (Mo. Ct. App. 1981) (licensee held liable for serving minor); Thaut v. Finley, 50 Mich. App. 611, 213 N.W. 2d 820 (1974) (social host held liable for serving minor).

60. *See, e.g.*, Ono v. Applegate, 62 Hawaii 131, 612 P.2d 533 (1980) (licensee held liable for serving visible intoxicated adult); Clark v. Mincks, 364 N.2d 226 (Iowa, 1985) (social host liable for serving visibly intoxicated adult); Ashlock v. Norris, ____ Ind. ____, 475 N.E.2d 1167 (1985) (same); Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984) (same).

61. 5 Cal.3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971).

62. *Id.* The statute in question was CAL. BUS & PROF. CODE § 25602 (West Supp. 1970) (current version at CAL. BUS. & PROF. CODE § 25602(a) (West Supp. 1984)) which provided that "[e]very person who sells, furnishes, gives, or causes to be sold, furnished, or given away any alcoholic beverage to any habitual or common drunkard or to any obviously intoxicated person in guilty of a misdemeanor."

63. Brockett v. Kitchen Boyd Motor Co., 24 Cal.App.3d 87, 100 Cal. Rptr. 752 (1972).

1978 decision of *Coulter v. Superior Court*,[64] liability was imposed on the owner of an apartment complex for serving a visibly intoxicated adult at a tenants' party.[65] After *Coulter*, the legislature abrogated *all* civil liability with the exception of commercial sales to visibly intoxicated minors.[66]

D. Liability Based on Common Law Negligence Principles

The key to civil liability under standard negligence principles is the imposition of a duty of care. Where liability has been imposed, that duty has been found to be a general duty to protect all others from harm that is a reasonably foreseeable result of one's actions.[67] Although the existence of a pure common law cause of action has been mentioned in the context of findings of civil liability for commercial liquor purveyors, the concept has generally been superfluous in light of applicable liquor control statutes.[68] The concept becomes

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64. 21 Cal.3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978). *See generally* Comment, *Social Host Liability for Furnishing Alcohol: A Legal Hangover?*, 10 PAC. L.J. 95 (1979).

65. 21 Cal.3d at 148-49, 577 P.2d at 671, 145 Cal. Rptr. at 536. Although the court predicated liability on the violation of the statute, it stated in dicta that the case was also an appropriate one for a common law cause of action in negligence. *Id.* at 152, 577 P.2d at 673-75, 145 Cal. Rptr. at 538-40.

66. *See* CAL. BUS. & PROF. CODE § 25602 (West Supp. 1984) which provides as follows:

> (b) No person . . . [who furnishes alcohol to another illegally] shall be civilly liable to any injured person or the estate of such person for injuries inflicted on that person as a result of intoxication by the consumer of such alcoholic beverage.
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> (c) The Legislature hereby declares that this section shall be interpreted so that the holdings in cases such as Vesely v. Sager, Bernard v. Harrah's Club, and Coulter v. Superior Court be abrogated in favor or prior judicial interpretation finding the consumption of alcoholic beverages as the proximate cause of injuries inflicted upon another by an intoxicated person.

(citations omitted). The exception is provided in § 25602:1, which states that "a cause of action may be brought by or on behalf of any person who has suffered injury or death against any person licensed . . . who sells, furnishes, gives or causes to be sold, furnished, or given away any alcoholic beverage to any obviously intoxicated minor . . . ."

67. *See* Alegria v. Payonk, 101 Idaho 617, 619 P.2d 135 (1980) ("one owes the duty to every person in our society to use reasonable care to avoid injury to the other person *in any situation in which it* could be reasonably anticipated or foreseen that a failure to use such care might result in such injury.") (emphasis in original); Kelly v. Gwinnell, 96 N.J. 538, 544-45, 476 A.2d 1219, 1222 (1984). *See also* RESTATEMENT (SECOND) OF TORTS § 289 (1965) which provides, in pertinent part, as follows:

> The actor is required to recognize that his conduct involves a risk of causing an invasion of another's interest if a reasonable man would do so while exercising (a) such attention, perception of the circumstances, memory, knowledge of other pertinent matters, intelligence, and judgment as a reasonable man would have
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> . . . .

Section 290 requires an actor, in evaluating the risk he is creating, to know "the qualities and habits of human beings and animals and the qualities, characteristics, and capacities of things and forces." *Id.* at § 290.

68. *See supra* note 65. The common law method has been useful in cases where the service of alcohol and the resulting injuries took place in different states and state liquor laws could not be given extraterritorial effect. *See, e.g.*, Waynick v. Chicago's Last Dep't Store, 269 F.2d 322 (7th Cir. 1959) (service in Illinois and resulting accident in Michigan); Colligan v.

important in the area of social host liability, when the applicability of penal statutes to the host is usually questionable.[69]

Social host liability has been imposed using a pure common law approach in two jurisdictions. The Supreme Court of Oregon, in *Wiener v. Gama Phi Chapter of Alpha Tau Omega Fraternity*,[70] held a fraternity liable for knowingly serving a minor when they knew he had driven to the party and would have to drive home. The court stated a general rule that "[t]here might be circumstances in which the host would have a duty to deny his guest further access to alcohol."[71] The legislature responded to this case by establishing threshold standards for the imposition of social host liability for service to both minors and visibly intoxicated adults.[72] New Jersey has held social hosts liable in cases involving both minors and visibly intoxicated adults.[73] Although a bill was introduced in the legislature to abrogate all social host liability, no action has yet been taken.[74]

III. Civil Liability in Pennsylvania

A. History

1. Commercial Purveyors.—Pennsylvania has imposed civil liability on commercial purveyors of alcohol for over a hundred years. In 1854, the Commonwealth enacted a dram shop act that permitted third persons to recover for injuries to person or property resulting

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Cousar, 38 Ill.App.2d 392, 187 N.E.2d (1963) (Illinois and Indiana).

69. Graham, *Liability of the Social Host*, *supra* note 34, at 577. *See, e.g.*, *supra* notes 46-52 and accompanying text; *infra* notes 85-87 and accompanying text.

70. 258 Or. 632, 485 P.2d 18 (1971).

71. *Id.* at 630, 485 P.2d at 21-22.

72. The Oregon legislature enacted OR. REV. STAT. §§ 30.955 and 30.960 (1983). OR. REV. STAT. § 30.955 (1983) provides that "[N]o private host is liable for damages incurred or caused by an intoxicated social guest unless the private host has served or provided alcoholic beverages to a social guest when such quest was visibly intoxicated." OR. REV. STAT. § 30.960 (1983) provides as follows:

> [N]o licensee, permittee, or social host shall be liable to third persons injured by or through persons not having reached 21 years of age who obtained alcoholic beverages from the licensee, permittee or social host unless it is demonstrated that a reasonable person would have determined that identification exhibited was altered or did not accurately describe the person to whom the alcoholic liquor was sold or served.

73. Linn v. Rand, 140 N.J. Super. 212, 356 A.2d 15 (N.J. Super. Ct. App. Div. 1976) (social host serving minor); Figuly v. Knoll, 185 N.J. Super. 477, 449 A.2d 564 (N.J. Super. Ct. Law Div. 1982) (social host serving adult); Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984) (social host serving adult). *See* 8 RUT.-CAM. L.J. 719 (1977).

74. A.B. 43 201st. Leg., 1st Sess. (1984). The bill reads, in pertinent part, as follows:

> No person, other than a person licensed . . . to sell alcoholic beverages, who furnishes any alcoholic beverages, to a person at or over the age at which a person is authorized to purchase and consume alcoholic beverages shall be civilly liable to any person or the estate of any person for personal injuries or property damage inflicted as a result of intoxication by the consumer of the alcoholic beverages.

The bill did not pass during the 1984 Legislative session.

when one person illegally furnishes alcohol to another.[75] The act was put to its first test in 1861 in *Fink v. Garman.*[76] Until the time of its repeal, the act was applied to service of both minors[77] and intoxicated and intemperate adults.[78]

The dram shop act was repealed in 1951 when the Commonwealth enacted a comprehensive liquor code.[79] Beginning with the case of *Schelin v. Goldberg,*[80] Pennsylvania courts have imposed liability based on violations of section 493(1) of the Liquor Code.[81]

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75. Act of May 8, 1854, P.L. 663, No. 648. Sections one and three of the Act provided, in pertinent part, as follows:

> That wilfully furnishing intoxicating drinks by sale, gift or otherwise to any person of known intemperate habits, to a minor, or to an insane person for use as a beverage shall be held and deemed a misdemeanor . . . and the wilful furnishing of intoxicating drinks as a beverage to any person when drunk or intoxicated shall be deemed a misdemeanor . . .That any person furnishing intoxicating drinks to any other person in violation of any existing law, or of the provisions of this acts [sic], shall be held civilly responsible for any injury to person or property in consequence of such furnishing, and anyone aggrieved may recover full damages against such person so furnishing . . . .

The Act was different from usual dram shop acts in that 1) it required an illegal act rather than imposing strict liability; and 2) it only authorized compensation for injuries to persons and property. Losses to means of support were dealt with through the use of the wrongful death and survival acts. *See infra* note 77.

76. 40 Pa. 95 (1861). In *Fink*, a woman recovered from a tavern keeper who served her husband while he was intoxicated. As a result of the intoxication, the husband fell to his death under the wheels of his wagon. *Id.* at 98-99. The action was actually brought under the wrongful death and survival acts, *see* Act of April 15, 1851 P.L. 674, No. 358 § 19 (survival act); Act of April 26, 1855 P.L. 309, No. 323, § 1 (wrongful death), but the required finding of negligence was predicated upon the dram shop act. 40 Pa. at 104. In commenting on the defendant's action, Justice Woodward stated that "[n]o standard of social duty, or of obedience to law, can be applied to Fink's act which will not prove it to have been in a very eminent sense unlawful negligence." *Id.* He refused to recognize contributory negligence as a defense, stating that the decedent, at the time of the service, had been incapable of legal acts. *Id.* at 106. *See also supra* note 37. In concluding, he stated: "As the judicial tribunals did not make the law, they have no power to lessen its exactions, and, looking to the humane purposes of the legislation, they have no disposition to thwart it by glosses and refinements." *Id.*

77. *See, e.g.*, McKinney v. Foster, 391 Pa. 221, 137 A.2d 502 (1958); Manning v. Yokas, 389 Pa. 136, 132 A.2d 198 (1957) (minors).

78. *See, e.g.*, Davies v. McKnight, 146 Pa. 610, 23 A. 320 (1892) (intoxicated adult); Bier v. Myers, 61 Pa. Super. 158 (1915) (intoxicated and intemperate); Littell v. Young, 5 Pa. Super. 205 (1897) (intemperate); Carbaugh v. Grove, 84 Pa. D & C 489 (1950) (intoxicated); McKusker v. Quinn, 26 Pa. D. 499 (1917) (intoxicated).

79. Act of April 12, 1951, P.L. 90, No. 179 (codified as amended at PA. STAT. ANN. tit. 47 §§1-101 - 1-796 (Purdon 1969 & Supp. 1984)).

80. 188 Pa. Super. 341, 146 A.2d 648 (1958). In *Schelin*, plaintiff was served alcohol in defendant's bar while visibly intoxicated. As he was leaving, he was attacked and severely injured by another patron. The court found defendant negligent based on his violation of the liquor control statute, *see infra* note 32, and held that, as a matter of law, plaintiff could not be found contributorily negligent. *Id.* at 350, 146 A.2d at 653. *See* RESTATEMENT (SECOND) OF TORTS § 483 (1965), which provides as follows:

> The plaintiff's contributory negligence bars his recovery for the negligence of the defendant consisting of the violation of a statute, unless the effect of the statute is to place the entire responsibility for such harm as has occurred upon the defendant.

Id.

81. PA. STAT. ANN. tit. 47 § 4-493(1) (Purdon 1969). Section 493(1) provides, in pertinent part, as follows:

> It shall be unlawful . . . [f]or any licensee or the board, or any employe[e],

When the Pennsylvania Supreme Court implied that licensees could be held liable for serving a minor even without a showing of visible intoxication,[82] the General Assembly added Section 497[83] to the Code. Section 497 requires a showing of visible intoxication before a licensee may be held liable. Thus, civil liability is now imposed only on licensees who serve alcohol to visibly intoxicated adults or minors.[84]

2. *Social Hosts.*—In *Commonwealth v. Randall*,[85] the words "or any other person" were construed by the Superior Court to include noncommercial liquor providers within the confines of section 493(1). In *Manning v. Andy*,[86] a plaintiff attempted to apply that

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servant or agent of such licensee or of the board, or any other person, to sell, furnish or give any liquor or malt or brewed beverages . . . to any person visibly intoxicated, or to any insane person, or to any minor, or to habitual drunkards, or persons of known intemperate habits.

Plaintiff must then prove that intoxication was a proximate cause of the injury. *See* Majors v. Brodhead Hotel, 416 Pa. 265, 270-71, 205 A.2d 873, 877 (1965). In *Majors*, the court stated that "[c]ausation is as much a part of negligence actions based upon statutory violations as it is of purely common law actions." The court stated that "in order to find the defendant proximately caused an injury it must be found that his allegedly wrongful conduct was a substantial factor in bringing about plaintiff's injury even though it need not be the only factor," and held that defendant could escape liability if he could show that plaintiff's injury would have occurred even without the negligent conduct of the defendant. *Id.* at 271, 205 A.2d at 877.

82. *See* Smith v. Clark, 411 Pa. 142, 190 A.2d 441 (1963). Plaintiff, a minor, was served intoxicants at defendant's place of business while he was visibly intoxicated. He was subsequently injured when he drove his automobile off the road. Justice Eagen stated: "That the serving of intoxicants to minors *or* to visibly intoxicated persons are separate and distinct violations, there can be no doubt." *Id.* at 144, 190 A.2d at 442 (emphasis in original). He stressed, however, that while the illegal service would constitute negligence per se, plaintiff would have to show that his injuries were a result of intoxication in order to establish the requisite proximate cause. *Id.* at 146, 190 A.2d at 443.

83. PA. STAT. ANN. tit. 47 § 4-497 (Purdon 1969). Section 497 provides as follows:

No licensee shall be liable to third persons on account of damages inflicted upon them off of the licensed premises by customers of the licensee unless the customer who inflicts the damages was sold, furnished or given liquor or malt or brewed beverages by the said licensee or his agent, servant or employee when the said customer was visibly intoxicated.

Id. In Simon v. Shirley, 269 Pa. Super. 364, 409 A.2d 1365 (1979), § 497 was held to preclude civil liability for illegal service of a minor absent a showing of visible intoxication at the time of such service.

84. *See, e.g.*, Jardine v. Upper Darby Lodge No. 1973, 413 Pa. 626, 198 A.2d 550 (1964) (adult); Simon v. Shirley, 269 Pa. Super. 364, 409 A.2d 1365 (1979) (minor).

85. 183 Pa. Super. 603, 133 A.2d 276 (1957). *Randall* involved a criminal application of the law. Defendants, private individuals, were convicted of furnishing liquor to minors. In interpreting the meaning of the worlds "or any other person" in § 493(1), Judge Ervin stated:

The doctrine of *ejusdem generis* is but a rule of construction to aid in ascertaining and giving effect to the legislative intent, where there is uncertainty, and does not warrant the court in subverting or defeating the legislative will be confining the operation of a statute within narrower limits than intended . . . .

Id. at 614, 133 A.2d at 281 (quoting 50 AM. JUR. *Statutes* § 250).

86. 454 Pa. 237, 310 A.2d 75 (1973). Plaintiff was an employee of defendant. She had attended a party sponsored by defendant and was injured in an automobile accident while riding home with a co-employee. The complaint alleged that the employee had been served alcoholic beverages while in a visibly intoxicated state. The trial court dismissed for failure to state a cause of action in negligence. *Id.* at 238-39, 310 A.2d at 75-76.

construction in the context of a civil suit against a social host. The supreme court[87] refused to adopt the *Randall* construction. The court held that section 493(1) applied only to licensed persons engaged in selling intoxicants.[88] The per curiam opinion concluded with the following statement: "[W]hile appellant's proposal may have merit, we feel that a decision of this monumental nature is best left to the legislature."[89]

Justice Manderino, joined by Justice Roberts, dissented strongly, setting forth a detailed rationale for imposing liability under either a pure negligence or a statutory violation theory.[90] He began by noting the trend toward abolishing immunities that deprive citizens of their constitutionally guaranteed "day in court,"[91] and then charged the majority with countering this trend by establishing a new immunity.[92] Next, arguing that trial of the case was not limited to a statutory cause of action, he applied a pure negligence analysis.[93] Stating that serving alcohol to a visibly intoxicated person was certainly not "reasonable" behavior under a negligence definition, he stressed that the chain of events leading from intoxication to injury was readily foreseeable.[94] He felt that the plaintiff should be given an opportunity to prove her case in court.

Turning to the statutory violation theory, Justice Manderino adopted the superior court's construction of section 493(1) set forth in *Randall*.[95] He stressed that, out of twenty-five separate subparts

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87. The court consisted of Chief Justice Jones and and Justices Eagen, O'Brien, Roberts, Pomeroy, Nix, and Manderino. The decision was per curiam; Justice Pomeroy filed a concurring opinion; and Justice Manderino, joined by Justice Roberts, dissented.

88. 454 Pa. at 239, 310 A.2d at 76.

89. *Id.*

90. *Id.* at 242-50, 310 A.2d at 77-81.

91. *Id.* at 242, 310 A.2d at 77-78 (citing PA. CONST. art. 1, § 11) ("every man for any injury done him in his lands, goods, person or reputation shall have remedy by due course of law . . ."). *Accord* Littell v. Young, 5 Pa. Super. 205, 214 (1897) ("In enacting the statute of May 8, 1854, the legislature followed the clear analogies of the common law which for most injuries to persons or property provide a remedy for the private wrong to the person injured by a civil suit for damages and for the public wrong by indictment.") *See also* J. LOCKE, THE SECOND TREATIES OF GOVERNMENT 4-11 (T. Peardon ed. 1952) (discussion of the vindication of "natural law" through the legal system). *See generally infra* note 179 and accompanying text.

92. 454 Pa. at 242-43, 310 A.2d at 77-78.

93. *Id.* at 243-44, 310 A.2d at 78-79 (citing RESTATEMENT (SECOND) OF TORTS § 286). For the text of that section see *supra* note 55.

94. 454 Pa. at 245, 310 A.2d at 78-79. Justice Manderino stressed that since the defendant's act could easily be found to be the cause in fact of the injury, the only thing that could prevent it from being held as the legal cause would be the finding of an intervening superceding cause. *Id. See generally* PROSSER *supra* note 34 at §§ 41-45 (discussing proximate cause). He stated that the driver's intervening negligent act could not be a superceding cause if: a) defendant should have realized that he would so act; or b) the act was not highly extraordinary; or c) the driver's conduct was a normal consequence of defendant's conduct and the manner in which it is done is not extraordinarily negligent. 454 Pa. at 245, 310 A.2d at 78-79 (quoting RESTATEMENT (SECOND) OF TORTS § 447).

95. 454 Pa. at 245, 310 A.2d at 79.

under section 493, only 493(1) included the words "or any other person" in addition to words referring to the Liquor Control Board and commercial licensees.[96] He noted that if the statute were adopted as a negligence standard, the purpose of such adoption would be to further the general policy of the legislation.[97] He then quoted the statement of legislative policy from the statute, which stated that the statute should be liberally construed to protect the general welfare of the Commonwealth's citizens.[98] He concluded by stating that fear of inviting a deluge of litigation was no justification for denying citizens a legal remedy for their injuries.[99]

Justice Pomeroy, in his concurring opinion, stated that it was inappropriate to hold social hosts to the strict standard of civil liability governing statutory violations by commercial vendors.[100] He did, however, think that a pure negligence action should be available against a social host who serves liquor to someone whom he knows or should know is intoxicated and is likely to drive.[101]

B. Present State of Social Host Liability in Pennsylvania

The pure negligence action against a social host that Justice Pomeroy encouraged in *Manning* came before the Pennsylvania Supreme Court ten years later in *Klein v. Raysinger*.[102] Justice McDermott, writing for the majority, made short work of the case. He noted that only three jurisdictions recognized such a cause of action: California,[103] New Jersey,[104] and Oregon.[105] He then dismissed *Coulter* because of its subsequent legislative abrogation.[106] *Figuly*

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96. *Id.* at 247, 310 A.2d at 79-80. *See* PA. STAT. ANN. tit. 47 § 4-493 (Purdon 1969).

97. *Id.* at 247, 310 A.2d at 80. *See infra* text accompanying note 137.

98. *Id.* (quoting PA. STAT. ANN. tit. 47 § 1-104(a) (Purdon 1969). Section 1-104(a) of the liquor code reads as follows:

> This act shall be deemed an exercise of the police power of the Commonwealth for the protection of the public welfare, health, peace and morals of the people of the Commonwealth and to prohibit forever the open saloon, and all of the provisions of this act shall be liberally construed for the accomplishment of this purpose.

PA. STAT. ANN. tit. 47 § 1-104(d) (Purdon 1969) (footnote omitted).

99. *Id.* at 249, 310 A.2d at 81 (quoting Ayala v. Philadelphia Bd. of Educ., 435 Pa. 584, 595-96, 305 A.2d 877, 882 (1973), which abrogated sovereign immunity).

100. 454 Pa. at 240-42, 310 A.2d at 76-77.

101. *Id.* at 242, 310 A.2d 77.

102. 504 Pa. 141, 470 A.2d 507 (1983). The court stated the issue of the case as whether a cause of action in negligence would lie against a social host who served a visibly intoxicated adult guest when the host knows or should know that the guest intends to drive a motor vehicle. *Id.* at 144-45, 470 A.2d at 508.

103. Coulter v. Superior Court, 21 Cal.3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978). *See supra* notes 64-66 and accompanying text.

104. Figuly v. Knoll, 185 N.J. Super. 477, 449 A.2d 564 (N.J. Super. Law Div. 1982). *See supra* note 74. *Kelly v. Gwinnell* had not yet been decided.

105. Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity, 258 Or. 632, 485 P.2d 18 (1981). *See supra* notes 70-72 and accompanying text.

106. 504 Pa. at 145, 470 A.2d 509.

was dismissed as weak authority due to its status as an unappealed trial-level decision.[107] Finally, he distinguished *Weiner* by noting that it involved service of a minor and therefore resembled cases in other jurisdictions allowing liability for such an act.[108] Noting the lack of supporting authority, he refused to recognize the cause of action.[109] The holding was stated in terms of the common law consumption rule: that consumption of alcohol, rather than its furnishing, is the proximate cause of any subsequent occurrence.[110] Chief Justice Roberts, who had sided with Justice Manderino in *Manning*, dissented,[111] basing his opinion on the *Randall* interpretation of section 493(1). Justice Larsen quoted in full Justice Manderino's dissenting opinion from *Manning* in support of his view of the case.[112]

The same day *Klein* was decided, the court decided *Congini v. Portersville Valve Co.*,[113] which dealt with a social host who served alcohol to a minor. Justice McDermott, again writing for the majority, distinguished *Congini* from *Klein* in two respects. First, he noted that *Congini* dealt with service of a minor.[114] Second, he pointed out that recovery was being sought by the consumer of the intoxicants rather than an innocent third party.[115] In holding the host liable, the court took special note of the existence of a statute forbidding minors from purchasing or consuming any alcoholic beverage.[116] This statute, the justice stated, "represents an obvious legislative decision to protect both minors and the public at large from the perceived deleterious effects of serving alcohol to persons under twenty-one years of age."[117] The court noted that any adult who furnished alcohol to a minor could be found guilty as an accomplice to the minor's

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107. *Id.*

108. *Id.* at 146-47, 470 A.2d at 509-10.

109. *Id.* at 148, 470 A.2d at 510-11.

110. *Id.*

111. *Id.* at 149, 470 A.2d at 511 (Roberts, C.J., dissenting) ("The use of the language 'any other person' clearly manifests a legislative intent to impose an obligation upon all persons to refrain from furnishing alcoholic beverages to visibly intoxicated persons in circumstances which create a reasonably foreseeable risk of harm to third parties.").

112. *Id.* at 149-56, 470 A.2d at 511-15 (Larsen, J., dissenting).

113. 504 Pa. 157, 470 A.2d 515 (1983). Plaintiff was an 18-year-old employee of defendant. He was served alcoholic beverages at defendant's Christmas party and became intoxicated. Defendant, through one of its agents, had control of plaintiff's car keys but the agent, knowing plaintiff's condition, nonetheless turned the keys over to him. Plaintiff attempted to drive home and was involved in an accident that left him totally and permanently disabled.

114. *Id.* at 160, 470 A.2d at 517.

115. *Id.* Considering the basis for the consumption rule, that fact would not seem to support a finding of liability in *Congini* rather than *Klein*.

116. *Id. See* 18 PA. CONS. STAT. ANN. § 6308 (Purdon 1983). Section 6308 states that "[a] person commits a summary offense if he, being less than 21 years of age, attempts to purchase, purchases, consumes, possesses or transports any alcohol, liquor or malt or brewed beverages." *Id.*

117. 504 Pa. at 162, 470 A.2d at 518.

offense under the general accomplice liability statute.[118] It then stated that these two legislative enactments created a standard which, when violated, could be used to impose civil liability.[119] Summarizing his holding, Justice McDermott stated: "Under our analysis, the actor's negligence exists in furnishing intoxicants to a class of persons legislatively determined to be incompetent to handle its effects. It is the person's service which forms the basis of the cause of action . . ."[120]

Justice Zappala responded to this blatant dismissal of the consumption rule with a blistering dissent.[121] He felt that the majority was, in effect, overruling *Klein* with its holding.[122] He reasoned:

> If it is consumption by an adult guest, rather than the furnishing of alcohol by a host which is the proximate cause of subsequent occurrences, then it is not less compelling to conclude that it is a minor's voluntary consumption of alcohol which is the proximate cause of harm which results.[123]

In a final volley, he stated: "This matter is better left to legislative action than judicial gymnastics."[124]

Although his rationale and result are not desirable,[125] Justice Zappala's statement of the problem is quite accurate. While the

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118. *Id.* at 161, 470 A.2d at 517. *See* 18 PA. CONS. STAT. ANN. § 306 (Purdon 1983).

119. 504 Pa. at 162, 470 A.2d at 517-18 (quoting RESTATEMENT (SECOND) OF TORTS § 286 (1965). *See supra* note 55 (for text of § 286). The court also held that defendant could assert Congini's contributory negligence as a defense. They based this on two factors: that an 18-year-old person is presumptively capable of negligence, and that Congini had violated a statute by consuming alcohol. *See* RESTATEMENT (SECOND) OF TORTS § 469 (1965) (an unexcused violation of a statute enacted for the actor's protection is contributory negligence in itself). No mention was made of the historical absence of the contributory negligence defense in cases where alcohol is involved. *See, e.g.*, Davies v. McKnight, 146 Pa. 610, 23 A. 320 (1892) ("[A holding of contributory negligence] would practically destroy the [dram shop act]"); Littell v. Young, 5 Pa. Super. 205 (1897) ("[A] man cannot put liquor into another so as to destroy his capacity to take care of himself and then charge him with being guilty of contributory negligence because he does not take care of himself."); *but cf.* 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 25-26 (1769) ("[a]s to . . . drunkenness or intoxication . . .; our law looks upon this as an aggravation of the offense, rather than as an excuse . . . ."). The court noted that under the comparative negligence statute, the factfinder would determine whether Congini would be barred from recovery. *See* 42 PA. CONS. STAT. ANN. § 7102 (Purdon 1983) (plaintiff's negligence will not bar recovery unless it is "greater than" that of the defendant).

120. 504 Pa. at 163, 470 A.2d at 518.

121. *Id.* at 166-68, 470 A.2d at 520-21 (Zappala, J., dissenting).

122. *Id.*

123. *Id.* at 168, 470 A.2d at 521.

124. *Id.* ("The reasoning applied in *Klein* should be applied to this case as well, rather than upon 'public policy' which may be manipulated to support what the majority believes is a better result.") *See also* Farage & McBride, *Annual Survey of Significant Developments in the Law: Tort Law*, 1985 PA. B.A.Q. 24, 43 ("[T]he 'proximate cause' language represents invocatory words which describe the result which the Court desires to reach, and not the reason for the result.") [hereinafter cited as Farage & McBride].

125. Justice Zappala would have the court adhere strictly to the old common law consumption rule. It is the position of this comment that that rule is outmoded, indefensible, and should be abandoned. *See infra* note 131 and accompanying text.

courts' treatment of commercial purveyors is adequate in light of the available clear-cut legislative guidelines, its handling of the social host is characterized by issue avoidance resulting in incoherent policy.[126] In the court's one paragraph *Manning* opinion, it cited *Jardine v. Upper Darby Lodge*,[127] a case dealing with a liquor licensee, for the proposition that section 493(1) did not apply to noncommercial liquor purveyors.[128] Although *Jardine* is probably the most widely cited case in support of a nonstatutory cause of action,[129] the court ignored that analytical avenue. Instead, without even analyzing existing statutes, the court deferred to the legislature.[130] When a pure negligence action was finally brought before them in *Klein*, the court hid behind the old common law consumption rule. This archaic perversion of proximate cause doctrine has been virtually abandoned by modern courts' adoption of the "negligence in the air" concept and reliance on foreseeability to determine proximate cause issues.[131]

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126. *See infra* notes 127-141 and accompanying text. *See also* Farage and McBride, 24, 43 ("[w]hat would happen if the social host got an 18 year old drunk and the latter then crashed into another vehicle, injuring third persons who are innocent, but no more than the third persons denied recovery under [the *Klein*] opinion?").

127. 413 Pa. 626, 198 A.2d 550 (1964).

128. In *Jardine*, an adult drank all night in defendant's tavern and, shortly after leaving, drove his car into two pedestrians. Defendant argued that the repeal of the dram shop act demonstrated a legislative intent not to impose liability. The court replied that "[w]hen an act embodying in expressed terms a principle of law is repealed by the legislature, then the principle as its existed at common law is still in force." *Id.* at 631, 198 A.2d at 553 (quoting Schelin v. Goldberg, *supra* note 80 at 651). The court then pointed out the legislative determination through 493(1) that serving an intoxicated person was dangerous, and concluded by stating the following: "The first prime requisite to de-intoxicate one who has, because of alcohol, lost control over his reflexes, judgment and sense of responsibility to others is to stop pouring alcohol into him. This is a duty which everyone owes to society and to law entirely apart from any statute." *Id.* at 631, 198 A.2d at 553. The court made no effort to explain its reliance on *Jardine*, and the case is far from being a conclusive rejection of social host liability.

129. *See, e.g.*, Nazareno v. Urie, 638 P.2d 671, 674 (Alaska 1981); Ono v. Applegate, 62 Hawaii 131, 136, 612 P.2d 533, 539 n.5 (1980); Comment, *California Liquor Liability: Who's to Pay the Costs?* 15 CAL. W.L.REV. 490, 509-10 (1980) [hereinafter cited as Comment, *California Liquor Liability*]; Comment, *Negligence Actions Against Liquor Purveyors: Filling the Gap in South Dakota*, 23 S.D.L.REV. 228, 233 (1978) [hereinafter cited as Comment, *Filling the Gap*].

130. 454 Pa. at 239, 310 A.2d at 76.

131. The term "negligence in the air" comes from the now famous case of Palsgraff v. Long Island R.R. Co. 248 N.Y. 339, 162 N.E. 99 (1928), where Justice Cardozo, addressing the issue of the unforeseeable plaintiff, wrote "Proof of 'negligence in the air' . . . will not do." *Id.* (quoting POLLOCK, TORTS 455 (11th ed)). This was in response to Justice Andrews' dissent, where Andrews posited that "[e]very one owes to the world at large a duty of refraining from those acts that may unreasonably threaten the safety of others." *Id.* at 350, 162 N.E. at 103. *See also supra* note 67 and accompanying text.

The consumption rule has been described as "a back-eddy running counter to the mainstream of modern tort doctrine." Fuller v. Standard Stations Inc., 250 Cal.App.2d. 687, 691, 58 Cal. Rptr. 792, 794 (1967). The *Fuller* court went on to say the following: "Current judicial analysis considers the outer boundaries of negligence liability in terms of duty of care rather than proximate causation. [Duty] rests in part upon social policy factors, in part upon an inquiry whether the actor's conduct involves a foreseeable risk to persons in the plaintiff's position." *Id. Accord* Coulter v. Superior Court, 21 Cal.3d 144, 152-53 577 P.2d 669, 674-75, 145 Cal. Rptr. 534, 539 (1978); Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity, 258 Or. 632, 636, 458 P.2d 18, 21 (1971).

Courts in Pennsylvania have been consistently liberal in their proximate cause determinations in cases dealing with the civil liability of liquor purveyors.[132]

In *Congini*, the court partially extricated itself from its proximate cause dilemma but, in so doing, created a glaring inconsistency in its handling of social host liability. Serving alcohol to a minor, especially one who exhibits no outward manifestations of intoxication, creates no more foreseeable risk of harm than serving alcohol to a visibly intoxicated adult. While there may be valid policy arguments for making this distinction,[133] liquor laws have consistently treated these two classes the same.[134] In making the distinction, the court did not provide policy justifications, but instead based its holding on a questionable finding of legislative intent.[135] The court began with a statute aimed at deterring minors from obtaining alcohol for themselves. It then bootstrapped that statute to a general criminal accomplice statute and declared that its new creation was legislative policy justifying a negligence standard aimed at imposing liability on hosts who serve alcohol to minors. Although it is true that both of these statutes are directly applicable to the actors in such a situation,[136] when a court is seeking to discern legislative *policy*, direct applicability can and should bow to the search for a statute that enunciates a policy more generally applicable to the problem posed by the case.[137] Such a statute would be, for this case, section 493(1) of the Liquor Code,[138] which applies to the supplying of alcohol *by a*

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132. *See, e.g.*, Majors v. Brodhead Hotel, 416 Pa. 265, 205 A.2d 873 (1965) (plaintiff climbed out sixth-floor bathroom window and fell off fenced-in roof); Corcoran v. McNeal, 400 Pa. 121, 161 A.2d 367 (1960) ("The proprieter of an establishment whose employees pour inflammable liquid into a vessel already too full cannot plead ignorance of results when the vessel explodes from contact with the slightest spark."); McKinney v. Foster, 391 Pa. 221, 137 A.2d 502 (1958) (minor plaintiff was served two or three beers and had an accident one and one half hours later, six miles from defendant's establishment); Davies v. McKnight, 146 Pa. 610, 23 A. 320 (1892) (decedent died of pneumonia contracted when he got drunk and passed out in a gutter); Bier v. Myers, 61 Pa. Super. 158 (1915) (plaintiff left saloon "staggering drunk"; his mangled body was found several hours later on a railroad track far from the nearest crossing).

133. *See infra* note 141.

134. *See* Act of May 8, 1854 P.L. 663, No. 648 (includes minors, visibly intoxicated persons, insane persons, and habitual drunkards); PA. STAT. ANN. tit. 47 § 493(1) (Purdon 1969) (same). *See supra* notes 75 and 81 (for text).

135. *See supra* notes 116-119 and accompanying text. Current events provide an illustration of the questionable efficacy of trying to ascertain the intent of the Pennsylvania General Assembly. That body recently passed a law intending to liberalize Sunday sales of liquor, only to find out some time later that they had inadvertently legalized tavern gambling. *See* R. Kirkpatrick, *How a Sunday Liquor Bill Became a Law Allowing Cash Card Tournament* (AP News Analysis, Jan. 9, 1985). *See also infra* note 142.

136. *See* Congini v. Portersville Valve Co. 504 Pa. 157, 164, 470 A.2d 515, 518 n.3 (1983). Direct applicability was what the court used to distinguish *Congini* from *Manning v. Andy*.

137. *See* RESTATEMENT (SECOND) OF TORTS § 286 comment b (1965).

138. *See supra* note 81.

liquor purveyor to a high-risk class of persons. A further problem with the *Congini* approach is its flouting of the policy enunciated in section 497 of the Liquor Code.[139] Although that statute is not specifically applicable to noncommercial purveyors of alcohol, it does set a standard of care. By not limiting the *Congini* opinion to cases involving visibly intoxicated minors, the court has imposed a higher standard of care on social hosts than that applied to commercial purveyors.[140] This is inconsistent with any policy reasons that may exist for differentiating between the treatment of social and commercial liquor purveyors.[141]

IV. In Search of an End to Judicial Gymnastics

A. The Need for Legislative Action

An analysis of *Klein* and *Congini* illustrates the need for legislative reform of Pennsylvania's laws governing civil liability of purveyors of alcohol. Since there is no existing statute declaring where civil liability does and does not lie and since courts refuse to strike out on their own via the pure common law route, they are left chasing the elusive apparition of legislative intent.[142] They are forced to adopt or reject legislative language or policy as they seek a standard for imposing or denying civil liability. If a court decides to enter the fray, there seems no end to the differing statutes, judicial constructions of statutes, and combinations thereof which it may use to craft a rationale for its decision[143]—whether or not that rationale played any

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139. *See supra* note 83.

140. *See* Mancuso v. Bradshaw, 338 Pa. Super. 328, 487 A.2d 990 (1985) (licensee can't be held liable for serving minor absent showing of visible intoxication *regardless* of the standard set for social hosts by *Congini*).

141. *Id.*

142. Concerning the divination of legislative intent from statutes, Hobbes wrote the following:

> [I]nsomuch as no written law, delivered in few or many words, can be well understood without a perfect understanding of the final causes for which the law was made, the knowledge of which final causes is in the legislator. To him, therefore, there cannot be any knot in the law insoluble, either by finding out the ends to undo it by, or else by making what ends he will . . . by the legislative power, which no other interpreter can do.

T. HOBBES, LEVIATHAN 218-19 (H. Schneider ed. 1958) [hereinafter cited as HOBBES, LEVIATHAN]. *See generally* Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L.REV. 1 (1957) (critique of a Supreme Court case involving statutory construction).

143. The choices include the *Manning* statutory method of denying liability for service of a visibly intoxicated adult, *see supra* notes 86-88 and accompanying text; Justice Manderino's statutory or common law negligence theories for imposition of such liability, *see supra* notes 90-94 and accompanying text; and the *Congini* criminal accomplice approach, *see supra* notes 113-20 and accompanying text. The latter could either include or forego the § 497 requirement of visible intoxication. *See supra* notes 83 and accompanying text. In addition, it could be argued social host liability has existed since the enactment of the dram shop act.

The dram shop act imposed liability on anyone who served liquor *"in violation of any existing law,"* and, in addition, made service by *"any person"* of minors and visibly intoxicated

part in the actual making of the decision.

Maintaining the integrity of the legal system is not the only compelling reason for legislative action on this issue. Drunk driving is a pressing national problem and the focus of much public attention.[144] The decisions discussing when to impose liability determine who will bear the monumental costs generated each year as a result of alcohol abuse.[145] A problem that touches us all in some way deserves to be debated and decided in a public forum, not a judicial chamber.[146] Further, the history of this area of the law demonstrates that its evolution has been affected by changes in both public opinion and technological innovation.[147] Evidence of the current trend may be found by turning to the Presidential Commission on Drunk Driv-

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adults, among others, a misdemeanor. *See supra* note 75. A 1933 liquor control act made it illegal "for any licensee or the board, or any employee, servant or agent of such licensee or of the board, to see, furnish or give" intoxicating liquor to the same class of high-risk consumers. Act of November 29, 1933 P.L. 15 No. 4 § 602(e) (Special Session 1933-34), *as amended by* Act of June 10, 1937 P.L. 1762 No. § 602(5). This act did *not* repeal any part of the dram shop act. *Id.* The dram shop act was not repealed until the Act of April 12, 1951, *supra* note 79, which made it illegal "[f]or any licensee or the board, or any employee, servant or agent of such licensee or of the board *or any other person*, to sell, furnish or give" intoxicating liquor to high-risk individuals. *Id.* (emphasis supplied). The Historical Note to the codification of that act, *see* PA. STAT. ANN. tit. 47 at 358 (Purdon 1969), states that "[t]he words 'or any other person' inserted in clause (1) above, were included in said penal clause in order to entirely supply section 1 of the Act of 1854, May 8, P.L. 663." *Id.* In Commonwealth v. Wilhelm, 6 Pa.C. 30 (1887), a private individual was convicted under the existing penal law for providing liquor to a known drunkard. Judge Archibald opined as follows:

> It seems to me if I should declare that this was not a furnishing, it might lead to the evasion of the law, and it is a question whether a person who should lend himself to obtaining liquor for a person of known intemperate habits in this way would not be amenable to this statute.
>
> It is quote broad in its terms, and while we should not strain at the construction which will make an act criminal, we should not allow evasions to creep in which would avoid the intended effect of the statute.

Id. at 31.

Finally, it seems that a court could treat the issue of contributory negligence in many and varied ways. *Compare* notes 37, 76, 80, and 119.

144. In 1981, there were 1,093,884 drunk driving arrests nationwide. U.S. DEP'T OF JUSTICE, SOURCE BOOK OF CRIMINAL JUSTICE STATISTICS 461 (1983). In addition, a 1982 Gallup Poll showed that 89 percent of Americans favored stricter drunk driving laws. *Id.* at 300. *See also Alcohol on the Rocks*, NEWSWEEK, Dec. 31, 1984 at 52-54; *supra* notes 1-9 and accompanying text.

145. Estimates of these costs range from 21 to 24 billion dollars annually. FINAL REPORT, *supra* note 1 at 1.

146. *See* Bickel & Wellington, *Legislative Purpose and The Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 27 (1957) ("The popular voice which expresses without inhibition what is wanted in the way of immediate palpable results should be heard somewhere and Congress is that place."). *See also infra* notes 168-69 and accompanying text.

147. *See supra* notes 33 and 35 and accompanying text. *See also* Halvorson v. Birchfield Boiler, Inc., 76 Wash.2d 759, 765, 458 P.2d 897, 901-02 (1969) (Finley, J., dissenting). Judge Finley, speaking of the consumption rule stated the following:

> Such reasoning is far more persuasive when a drunkard is annoying or assaulting a passerby, riding a horse, or driving his carriage through the village street at the breathtaking speed of 10 to 15 miles per hour, than when an inebriate is in incompetent control of a two-ton metal juggernaut powered by three hundred horsepower.

Id.; 22 DUQ. L. REV. 1105, 1112-13 (1984).

ing, which recommended that each state enact a dram shop act.[148] The Pennsylvania General Assembly has not addressed this problem since 1965.[149] The present legislature should address the issue so that its specific pronouncements can enable courts to deal with the problem as it presently stands. The courts should not have to infer legislative intent from laws enacted two decades ago.[150]

B. Reality of Legislative Inaction

Legislatures are not always the best places to turn for reform of tort law. Two reasons prompt this conclusion. First, the majority of state legislators are not lawyers.[151] This absence of legal training makes it less likely that a state legislator will take an interest in tort law reform.[152] It also makes it less likely that a legislator will be able to master the necessary background to make a meaningful evaluation of the problem and its possible solutions.[153] Second, the most imposing obstacle to dram shop legislation is harsh political reality. Legislation is typically conceived or aborted in response to the actions of organized special interests[154]—which in this case are the liquor and insurance lobbies.[155] Any opposing forces in the battle to

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148. FINAL REPORT, *supra* note 1 at 11.

149. *See supra* note 83 and accompanying text (enactment of § 4-497 of the liquor code).

150. *Compare supra* note 147 *with* notes 135, 142, and 144. Even if the legislature had actually addressed the issue of social host liability in the past, social conditions and public opinion have changed.

151. *See* J. Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265, 271 (1963) [hereinafter cited as Peck, *Reform*]. For example, 34 out of 203 members of the Pennsylvania House of Representative during the 1983-84 session had law degrees. *See* COMMONWEALTH OF PENNSYLVANIA, HOUSE OF REPRESENTATIVES, LEGISLATIVE DIRECTORY (1983-84).

152. Peck, *Reform*, *supra* note 151 at 270-75. Besides lack of exposure to theoretical legal principles, Professor Peck lists time constraints, staffing limitations and emphasis on constituent service as factors tending to make systematic tort law reform a low priority item on a state legislator's agenda.

153. *Id.* ("[A]n abundance of evidence indicates that the legislative environment is not conducive to scholarly or detailed examination which is essential to effective reformulation of a complicated area of private law."). The frequent enactment of criminal statutes without concurrent civil remedies is pointed to as further evidence of the lack of consideration for tort problems. *Id.*

154. *Id.* at 281-85. This is known as client politics. It occurs when the benefits (or costs) of a given policy will accrue to a relatively small, easily organized group, and the costs (or benefits) will be diffused throughout the population. It is in the interest of the small group, the members of which will gain or lose a comparatively large pro rata amount, to make an effort to shape that policy to conform to their best interests. The larger group, receiving a relatively insignificant effect, will have no motivation to act. This can at times be changed when a highly emotional issue is well-publicized. *See* WILSON, AMERICAN GOVERNMENT 204-29, 594-96 (1980). As Professor Peck states: "[reform] will not come because legislators spend their spare time reading advance sheets." Peck, *Reform*, *supra* note 151, at 286.

155. *See* Comment, *One More For the Road: Civil Liability of Licensees and Social Hosts For Furnishing Alcoholic Beverages to Minors*, 59 B.U.L. REV. 725, 732 n.55 (1979) (providing an account of the pressure exerted by the California beverage industry in getting civil liability abrogated) [hereinafter cited as Comment, *One More For the Road*]; *see also* Comment, *Liquor, the Law and California: One Step Forward—Two Steps Backward*, 16

initiate dram shop legislation would be either small, poorly-funded organizations or individual citizens.[156] Furthermore, since most people have either a financial stake in or a personal opinion on this issue, any decision would create winners and losers — a no-win situation for a legislator.[157] Legislatures and legislators have therefore historically endeavored to avoid these "hot" issues. When forced to take action, they have normally been content to enact benign laws that leave the tough interpretive choices to courts and administrative agencies.[158]

C. *A Judicial Solution?*

It is this reliance on judicial resolution of tough policy questions that provides both the need and justification for a judicial solution to the problem. While the confusion in the area of social host liability admittedly results from the absence of specific dram shop legislation and would be best cured by legislative action, a concurrent cause is the refusal of courts to abandon their futile search for a coherent rationale derived from legislative enactments. Courts continue to either contrive findings of legislative intent from a hodge-podge of statutory enactments, or defer to the policy they find so loudly proclaimed by legislative silence.[159] Meanwhile, the legislature contin-

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SAN DIEGO L. REV. 355, 375 n.112 (1979); Comment, *Liability of Liquor Suppliers in California: A Return to the Common Law*, 12 U.C.D.L. REV. 191, 202-03 (1979). An interesting consideration in Pennsylvania is that the Commonwealth runs a major part of the "liquor industry." *See Killing Happy Hour*, Greensburg Tribune-Review, Dec. 28, 1984, at A6, col. 1 ("When the politicians began using the system to make money, they sacrificed the idea of enforcing moral moderation.").

156. *See* Peck, *Reform, supra* note 151, at 282 ("The fortuitous victims of negligence . . . form no natural or integrated economic, social, or political group.") The groups organized to combat alcohol abuse have so far concentrated on stiffening criminal sanctions against drunk drivers. In this area, they have enjoyed the support of the liquor and insurance industries. *See supra* notes 9 and 144. An attempt to initiate legislation aimed at civil liability would cause these well-organized, well-funded, politically experienced groups to bring to bear the powerful force of legislative inertia. It is far easier to kill legislation than to initiate it. *See* Peck, *Reform, supra* note 152.

157. *See supra* note 154. *Cf.* Comment, *Employer Liability, supra* note 10, at 119 ("Apparently legislators consider the potential detriment to the liquor industry and the insurers of drinking establishments and social hosts to outweigh the benefit society would derive from holding negligent servers civilly liable.").

158. *See* Wright, *Beyond Discretionary Justice* (book review), 81 YALE L.J. 575, 584-85 ("when Congress is too divided or uncertain to articulate policy, it is no doubt easier to pass an organic statute with some vague language . . ."); *see also* Peck, *Reform, supra* note 151, at 270.

159. Commentators generally agree that total deference to the legislature is advisable. Professor Green states this position as follows:

> Is it the part of wisdom to follow old patterns until the legislature has spoken? And how long must the wait be in areas where the legislature has little competence and the legislators are prisoners of the *political* process? It is much easier to make decisions which will support a new policy without attempting to formulate the doctrine too strictly or identify the policy, and this is what usually happens, leaving to further litigation the development both of doctrine and of its underlying policy.

ues to avoid a thorny problem and the issue remains unsettled.

A realistic assessment of the political constraints of the legislature would lead the courts to abandon their deference and proceed with a judicial analysis utilizing the pure common law approach. This mode of analysis, including disclosure of the weighing of competing policy considerations, would provide the means for developing a coherent doctrine of social host liability.

This course would be an effective compromise between improper "judicial legislation" and complete abrogation of judicial responsibility for tort law reform.[160] It would effectively bridge the gap between conceptualism and legal realism.[161] It would rise above the conceptualistic approaches of *Klein* and *Congini* while creating a new doctrine that would combine common law negligence principles with current policy considerations. Continuity would be provided by this explicit use of doctrine and policy in tandem, rather than the use of one to mask the other.[162] Predictable, methodical development of the law would be ensured by the use of the standard analytical formula but would be tempered be clearly enunciated policy considerations.[163] The law would remain stable, but would be able to adapt smoothly and rationally to changing times. The modern trend in tort scholarship has been toward acknowledging this use of policy considerations in developing new doctrines,[164] and in recognizing the im-

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Green, *Tort Law, supra* note 22, at 269. *Cf.* T. HOBBES, LEVIATHAN 178 (H. Schneider ed. 1958). Speaking of individual freedoms in the face of legislative silence, Hobbes stated: "In cases where the sovereign has prescribed no rule, there the subject has the liberty to do or forbear according to his own discretion."

160. *See generally*, Green, *Tort Law, supra* note 22; Peck, *Reform, supra* note 151; Keeton, *Creative continuity in the Law of Torts*, 75 HARV. L. REV. 463 (1962) [hereinafter referred to as Keeton, *Creative Continuity*].

161. The conceptualist would advocate strict adherence to established doctrine and would be most likely to state that "the law does not spread its protection so far" or that the problem lies solely within the province of legislative action. Pure conceptualists criticize judicial activism as founded purely on policy without the sound doctrinal support needed for continuity. Pure legal realists are inclined to ignore doctrine in favor of a decisional method addressed solely to policy considerations in each case. They criticize conceptualists for failing to articulate policy reasons, which they feel are the true source of any decision, and engaging in casuistic distinctions of facts in order to fit their holdings within the Procrustean bed of settled doctrine. Opinions rendered in this manner leave no real basis for understanding past decisions other than engaging in conjecture about possible historical conditions may have motivated the decision. *See generally* Green, *Tort Law, supra* note 22; Keeton, *Creative Continuity, supra* note 160.

162. Cardozo commented on this as early as 1923, stressing the need for compromise. *See generally* B. CARDOZO, *The Growth of the Law*, in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 185-250 (M. Hall ed. 1947) [hereinafter cited as CARDOZO, *Growth*]. *See also* Green, *Tort Law, supra* note 22, at 8.

163. *See, e.g.*, Halvorson v. Birchfield Boiler, 76 Wash.2d 759, 767, 458 P.2d 897, 902 (1969) (Finley, J., dissenting) ("Adaptation of the law of torts to the myriad risk-creating agencies and devices of modern society requires continuous application of easily understood basic principles to a plethora of divergent and continually emergency [*sic*] factual combinations.").

164. WHITE, TORT LAW IN AMERICA 230-43 (1980).

portance of including these considerations in judicial opinions.[165]

In addition, this method would beneficially integrate judicial and legislative decision-making methods by utilizing the strengths and overcoming the limitations of each.[166] The strengths of the legislature lie in its accessibility to popular opinion and control[167] and its flexibility and creativity in lawmaking. The legislature's ability to write comprehensive legislation and create administrative machinery for policy implementation gives it this creativity.[168] But as noted above, in the area of legal doctrine legislatures suffer from disinterest, inexperience, and political paralysis.[169] Courts, on the other hand, have the advantages of legal training and an environment created to be conducive to legal thought.[170] They are also less vulnerable to political pressures.[171] Nonetheless, courts may only decide cases that are brought before them and can merely pronounce judgments rather than enact detailed remedial systems.[172] Thus, situations arise in which courts must reform legal principles and depend on the legislature for "fine-tuning" their future application.[173] Examples of this technique can be seen when reviewing the history of products liability, contributory negligence and immunities. In these areas, reform consensus developed where legislative action was not forthcoming; the judiciary then conformed with the consensus and legislative "fine-tuning" followed.[174] Many courts that have refused

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165. *Id. But see* CARDOZO, *Growth, supra* note 163, at 226 ("The trained intuition of the judge continually leads him to right results for which he is puzzled to give unimpeachable legal reasons.").

166. *See* Comment, *Social Host Liability for Furnishing Alcohol: A Legal Hangover?* 10 PAC. L.J. 95, 117 (1979) ("By combining factors from judicial decisions, legislative action, and independent thought, a truly just method can be devised to deal with injuries caused by the overconsumption of alcohol.") [hereinafter cited as Comment, *Hangover*].

167. *See generally* Peck, *Reform, supra* note 151, at 296-302 (legislative and judicial strengths and weaknesses).

168. *Id. See also* Note, *Extension of the Dram Shop Act: New Found Liability of the Social Host*, 49 N.D.L. REV. 67, 70-71 (1972) (discussing benefits of legislature's being able to put a cap on dram shop liability and impose a different statute of limitations); Comment, *Hangover, supra* note 166, at 113 (discussing ability of legislature to craft legislation to compensate victim and impose costs on drunk drivers).

169. *See supra* notes 151-58 and accompanying text.

170. *See* Peck, *Reform, supra* note 151, at 297; CARDOZO, *Growth, supra* note 162, at 264 (distinguishing legislators and judges as between "amateur" and "professional" lawmakers).

171. *See* Peck, *Reform, supra* notes 151, at 285 ("[e]ven if elected, judges are not chosen for their abilities to represent or respond to public pressures.").

172. *See supra* note 169.

173. *See, e.g.*, Keeton, *Creative Continuity, supra* note 160, at 472-86. After discussing specific instances of this technique, Professor Keeton writes: "Thus these developments may be viewed as illustrating not merely the possibility of clash between decisional and statutory creativity but also the possibility of their serving in combination to bring about reform that neither alone would have been likely to achieve." *Id. See also* Comment, *One More For the Road, supra* note 155, at 746 n.146 ("The impetus for legislative reform often proceeds from judicial recognition that a change in the law is warranted.").

174. *See* Peck, *Reform, supra* note 151, at 287-93 and 303-12; Keeton, *Creative Continuity, supra* note 160, at 472-86. This technique has been exhibited in Pennsylvania in the

to impose social host liability have stated that the proposal has merit but is amenable only to legislative resolution.[175] Given the high degree of legislative inertia impeding such resolution, those courts are in effect making that legislative decision themselves.

V. Pure Common Law Approach

A. Elements

The elements of a cause of action in negligence in Pennsylvania are: 1) a duty or obligation, recognized by the law, which requires an actor to conform to a certain standard of conduct; 2) failure to conform to that standard; 3) a causal connection between the actor's breach and any resulting injuries; and 4) actual damages or injury.[176] As noted above, Pennsylvania courts have generally been very liberal in tracing causation between the service of alcohol to a high-risk individual and injuries caused by the individual's subsequent behavior.[177] Thus, the two key elements in a suit for negligent service of alcohol would be met by establishing that the defendant was under a duty, and by proving that he breached that duty. The court must therefore initially decide whether to impose a duty, and then must discern the proper standard of care the actor must meet to discharge that duty. Answering these questions requires an analysis of relevant policy arguments.

The validity and strength of a policy argument, of course, rests upon an assumption that the law in question has that policy as a goal.[178] Tort law traces its roots back to the very origins of Anglo-American jurisprudence,[179] and is based primarily on compensa-

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areas of sovereign and governmental immunity. *See* Ayala v. Philadelphia Bd. of Pub. Educ., 453 Pa. 584, 305 A.2d 877 (1973) (abolishing governmental immunity); Political Subdivision Tort Claims Act of 1978, P.L. 1399, No. 330 § 202 (codified as amended at 42 PA. CONS. STAT. ANN. § 8542 (Purdon 1982) (reinstating governmental immunity with limited exceptions)); Mayle v. Pennsylvania Dept. of Highways, 479 Pa. 384, 388 A.2d 709 (1978) (abolishing sovereign immunity); Act of Sept. 28, 1978, P.L. 788 No. 152 § 5110 (codified as amended at 42 PA. CONS. STAT. ANN. § 8522 (Purdon 1982) (reinstating sovereign immunity with limited exceptions). *See generally* R. EPSTEIN, MODERN PRODUCTS LIABILITY LAW (1980).

175. *See, e.g., supra* text accompanying note 90. Miller v. Moran, 96 Ill.App.3d 596, 421 N.E.2d 1046 (1981); *accord* Cole v. City of Spring Lake Park, 314 N.W.2d 836 (1982); Runge v. Watts, 180 Mont. 91, 589 P.2d 145 (1979).

176. *See* Morena v. South Hills Health System, 501 Pa. 634, 462 A.2d 680 (1983).

177. *See supra* note 132.

178. *See* CARDOZO, *Growth, supra* note 162, at 230 ("*Some* theory of liability, some philosophy of the end to be served by tightening or enlarging the circle of rights and remedies, is at the root of any decision in novel situations when analogies are equivocal and precedents are silent.").

179. According to Hobbes, "as men, for the attaining of peace and conservation of themselves thereby, have made an artificial man, which we call a commonwealth, so also have they made artificial chains, called *civil laws*" in order to assure peace in man's interrelationships. HOBBES, LEVIATHAN, *supra* note 142, at 172. Locke states that the purpose of these laws is "that all men may be restrained from invading others' rights and from doing hurt to one another, and the law of nature be observed, which wills the peace and preservation of all

tion.[180] Over the years, tort law in general and the negligence field in particular have utilized various policy rationales including compensation,[181] deterrence,[182] punishment[183] and risk spreading or shifting.[184] Scholars have at times debated the relative merits of these policies in relation to specific situations and in the context of advocating an ultimate goal for tort law.[185] The most practical approach, however, has been that of Prosser, who describes torts as concerned primarily with the adjustment of the conflicting interests of individuals to achieve a desirable social result.[186] He lists several "factors which affect liability," but expresses no preference for any one over another and quickly moves on to his discussion, analysis, and synthesis of cases.[187]

B. Duty

According to Dean Prosser, duty is an expression of the sum total of those policy considerations which lead the law to say that the plaintiff is entitled to protection.[188] The initial determination of this sum total is usually arrived at by considering the utility of an activity that is creating risks, the degree of the risk created (that is, the probability that harm will result), and the gravity of the resulting harm.[189] Using this premise, one can arrive at an approximation of how much cost, in terms of foregone utility, may be borne in reducing the degree of risk or gravity of harm. Statistics show that the more serious a traffic accident, the greater the probability that alcohol was involved.[190] In addition, common sense dictates that as more alcohol is consumed by a high-risk individual his driving ability becomes further impaired. The probability that he will have an accident if he drives is thereby increased.

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mankind." J. LOCKE, THE SECOND TREATISE OF GOVERNMENT 6 (T. Peardon ed. 1952). In early English law, this translated into the doctrine that a man acted "at his peril" and was vulnerable to an action in trespass for any harm directly done by him to another. This action was primarily penal in nature, but eventually included a damage award to the victim. PROSSER, *supra* note 34, at § 6.

180. The divorce of tort from criminal law came with the advent of the action on the case to recover damages resulting from some culpable act or omission. PROSSER, *supra* note 34, at § 6. *See also* 3 W. BLACKSTONE, COMMENTARIES 123.

181. *See supra* notes 179-80 and accompanying text.

182. *See* Williams, *The Aims of the Law of Tort*, 4 CURRENT LEGAL PROBLS. 137 (1951).

183. *See* WHITE, TORT LAW IN AMERICA 237 (1980).

184. *See* Posner, *A Theory of Negligence*, 1 J. OF LEGAL STUD. 29 (1972).

185. *See generally* WHITE, TORT LAW IN AMERICA (1980).

186. *See* Prosser, *supra* note 34, at § 3.

187. *Id.* at § 4.

188. *See* PROSSER, *supra* note 34, at § 42.

189. *See* United States v. Carrol Towing Co., 159 F.2d 169 (2nd Cir. 1947) (Learned Hand, J.); Clewell v. Pummer, 384 Pa. 515, 121 A.2d 459 (1956).

190. *See* Note, *Social Host Liability*, *supra* note 10, at 445.

In light of the probability and gravity of the harm resulting from service of alcohol to a high-risk individual, a fairly high degree of cost should be tolerated in an effort to lessen the danger. The utility of the social consumption of alcohol is more difficult to quantify. Alcohol complements foods and facilitates a great deal of social intercourse. Nonetheless, as the quantity of alcohol consumed increases, it provides less culinary enjoyment, dulls social skills, and rapidly begins to increase the risks of injury or anti-social behavior. In economic terms, the marginal utility of each additional drink diminishes rapidly and becomes negative after one reaches legal intoxication.[191] Thus, the cost of prohibiting the later drinks is quite tolerable in light of the higher cost of allowing continued service, especially when one considers that the only burden involved is a certain amount of social awkwardness.[192] The only duty involved rests upon the host, who must discontinue service of alcohol when failure to do so would present a foreseeable risk of injury to others. Imposing an affirmative duty to control the guest's conduct would involve much more complicated legal problems,[193] but such is not the case.

While it is therefore desirable to prohibit excessive drinking, the question remains whether imposing a duty on the *provider* of alcohol is a proper means of accomplishing that goal. Those who are against imposing a duty argue that by holding the drinker solely responsible for his subsequent acts, maximum deterrence of excessive drinking will be directed at the point where ultimate control rests.[194] This argument also rests on the moral premise that one should be held responsible for his own acts and that it would be unfair to punish the host for the intemperance of his guest.[195] Although this argument has moral appeal, in reality it is the provider of alcohol who has ultimate control over consumption and whose judgment is likely to be affected by the threat of liability. This proposition takes into account the cognitive mental state of the actors at the time of con-

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191. Marginal utility is defined as the increase in total utility that consumption of one additional unit of a product yields to the consumer. The fact that the increase will be smaller with each additional unit consumed is known as the "law of diminishing marginal utility." *See* C. MCCONNELL, ECONOMICS 501-02 (7th ed. 1978).

192. *See* Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984). In evaluating the social costs of imposing liability the court in *Kelly* reasoned that "those social dislocations, their importance, must be measured against the misery, death, and destruction caused by the drunken driver." *Id.* at 558, 476 A.2d at 1229. *See also* Comment, *Filling the Gap, supra* note 130, at 236.

193. For a detailed analysis of those legal problems, see Harper & Kime, *The Duty to Control the Conduct of Another*, 43 YALE L.J. 886 (1934).

194. *See, e.g.*, Cory v. Shierloh, 29 Cal.2d 430, 444, 629 P.2d 8, 13, 174 Cal. Rptr. 500, 505 (1981); Comment, *Hangover, supra* note 166, at 106. *But see* 9 PEP. L. REV. 784, 797 (1982) ("The notion that . . . imposing liability upon the individual drinker will drive more carefully for fear of incurring liability.") *See generally* Andenaes, *The General Preventative Effects of Punishment*, 114 U. PA. L. REV. 449 (1966).

195. *See* Kelly v. Gwinnell, 96 N.J. 538, 549, 476 A.2d 1219, 1225 (1984).

sumption, recognizing that the one whose consumption is sought to be moderated is in a state of diminished reason. He is therefore less likely to think about the consequences of his acts or to be dissuaded from acting on the basis of some amorphous threat of liability.[196] Opponents of imposing a duty further argue that by suspending service to the drinker, the host is rendering it more likely that the drinker will leave the party and attempt to drive.[197] While that may be true, the converse of the proposition is that it is safer to keep serving the individual, thus causing his faculties to deteriorate further, while hoping that he will not try to leave. Considering the likelihood that a guest will eventually try to drive home,[198] it seems most prudent to stop service at the earliest time that it becomes obvious the guest poses a lethal threat to himself and others should he drive after leaving the social gathering.

In addition, imposition of a duty on social hosts would further the policies of punishing socially detrimental conduct and compensating loss. If hosts could be held liable, an injured party would have a greater chance of obtaining a full recovery where the primary tortfeasor's resources are inadequate.[199] Although a potential victim may be able to procure adequate insurance coverage, in cases where the injured party has not done so it would be fairer to impose the financial burden on one who bears at least a part of the moral blame for the innocent party's injuries.[200]

While a balancing of utility, risk, and policy certainly yields a decision in favor of imposing a duty upon purveyors of alcohol to

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196. *See* Comment, *Dram Shop Liability — A Judicial Response*, 57 CAL. L. REV. 995, 1018 (1969); Comment, *Filling the Gap, supra* note 129, at 259. *But see* DeMouline & Whitcomb, *Social Host's Liability in Furnishing Alcoholic Beverages*, 27 FED'N. INS. COUNSEL Q. 349 (1977) ("It is unlikely that this strict liability standard will deter persons from serving liquor to minors or intoxicated persons, especially since it is doubtful that noncommercial suppliers will be made adequately aware of their possible liability.").

197. *See* Comment, *One More For the Road, supra* note 155, at 737-38. The commentator then proposes a standard of social host liability for service of *any* minor. His justification for this is the ease with which hosts could recognize minors, the high percentage of alcohol-related traffic accidents involving minors, and the value of prohibiting service *before* intoxication has occurred. This is the approach taken by Pennsylvania. It erases the distinction between social and commercial purveyors and imposes substantial potential costs upon hosts; but then ignores the additional injuries that could be prevented by application to visibly intoxicated adults. This unnecessary distinction results in a failure to prevent injuries that could be prevented without the imposition of substantial additional costs.

198. *See* Halvorson v. Birchfield Boiler Inc., 76 Wash.2d 759, 769, 458 P.2d 897, 902 (1969).

199. *See* Kelly v. Gwinnell, 96 N.J. 538, 551, 476 A.2d 1219, 1224 (1984). *See also* 9 PEP. L. REV. 784, 797 (1982) ("[B]y imposing liability upon the drinker and immunizing the provider, the legislature has only affected the innocent third person . . . .") Comment, *California Liquor Liability, supra* note 129, at 511 ("when an inebriated patron is uninsured, or for some reason is unable to compensate the victim, it is only equitable that a plaintiff should have an alternative means of recovery."); Comment, *Filling the Gap, supra* note 129, at 232 (referring to this as the "two pockets are deeper than one theory").

200. *See* Green, *Tort Law, supra* note 22, at 6.

deny high-risk persons further access, there remains an argument that imposing such a duty upon social hosts would be unfair. This argument stresses the differences between commercial and social purveyors and the circumstances under which they deal with drinkers.[201] The solution to this problem lies in the adoption of a proper standard of care for negligence actions involving the service of alcohol.

C. *Standard of Care*

Opponents of social host liability argue that commercial purveyors of alcohol have greater expertise at recognizing and dealing with high-risk consumers of alcohol.[202] It is felt that the face to face confrontation between bar employee and patron every time a drink is served and the existence in taverns of methods for ejecting unruly and intoxicated patrons makes it easier for commercial purveyors to avoid liability.[203] This ignores the difference in standards used for imposing liability. Commercial purveyors are held to a statutory standard created especially for the environment in which they operate. Social hosts would be held to the standard of care of a reasonable man under the circumstances. Thus, the unique circumstances of each case would be taken into consideration in the evaluation of the defendant's behavior.[204]

The difference in standards of care is also significant to the issue of the varying financial capacities between commercial and social purveyors. Critics of social host liability argue that its imposition is unfair because tavern owners can pass the resulting cost on to their customers and private individuals cannot.[205] It must be pointed out that this risk-shifting concept has been used primarily as a justification for the imposition of *strict enterprise liability*.[206] Liability based on *fault* need not be predicated upon a defendant's ability to shift his costs. In fact, the opposite is true. If costs are imposed because of one's moral fault, every effort should be made to prevent

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201. *See generally* Note, *Extension of the Dram Shop Act: New Found Liability of the Social Host*, 49 N.D.L. REV. 67 (1972) [hereinafter cited as Note, *Extension*]. Comment, *Employer Liability, supra* note 10, at 137-38; Comment, *California Liquor Liability, supra* note 130, at 519-20.

202. *See* Graham, *Liability of the Social Host, supra* note 34, at 568.

203. *See* Comment, *California Liquor Liability, supra* note 129, at 519. *See generally* Comment, *One MOre For the Road, supra* note 155, at 742-44.

204. *See* Graham, *Liability of the Social Host, supra* note 34, at 580; Note, *Extension, supra* note 202, at 82 (suggesting factors to be considered); Comment, *One More For the Road, supra* note 155, at 747-49 (proposing that cause of action be based on "affirmative offering" and "capacity for control.").

205. *See* Comment, *One More For the Road, supra* note 155, at 744-46.

206. *See supra* notes 34 and 37 and accompanying text. *See also* Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973).

evasion of those costs.[207]

VI. Legislative Response

If history is any guide, judicial adoption of a pure common law negligence action against social hosts would almost certainly bring about a legislative response.[208] Yet while the arrival of that legislative response is easily predictable, its form is not. Although the legislatures of Iowa,[209] Minnesota[210], and California[211] were all quick to abrogate the judicially recognized action, Oregon codified it,[212] and New Jersey has yet to act.[213] It is also significant that the last example of a legislative response was in 1978. Since then, the problem of drunk driving has stimulated both national attention and national political action.[214] Assuming heavy media coverage and balanced lobbying efforts,[215] a wide variety of legislative responses including those listed below would be possible.

1) *Abrogation* — Given public opinion, total abrogation seems to grow more unlikely with each passing year.
2) *Dram Shop Act* — This would clarify once and for all who could or could not be held liable for serving whom, and under what conditions. Such an act could also clarify the availability of contributory negligence and other defenses.
3) *Secondary Liability* — This would require that third party plaintiffs collect as much as possible from the primary tortfeasor before taking action against the social host.
4) *Limitation on Liability* — Plaintiffs would only be allowed to recover from social hosts up to a stated amount.

VII. Conclusion

When *Klein* and *Congini* arrived for decision on the same day, the Supreme Court of Pennsylvania was presented with a golden opportunity to enunciate a coherent policy in the area of social host liability. It is the position of this commentator that the court failed to take full advantage of that opportunity. Lacking any clearly applicable legislative mandate, the court was free to engage in a reasoned judicial analysis of the problem as a whole. Instead, and seemingly

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207. *See* Comment, *One More For the Road, supra* note 155, at 745.
208. *See supra* notes 46-52, 61-66, 70-74 and accompanying text.
209. *See supra* note 49 and accompanying text.
210. *See supra* note 52 and accompanying text.
211. *See supra* note 66 and accompanying text.
212. *See supra* note 72 and accompanying text.
213. *See supra* notes 73-74 and accompanying text.
214. *See supra* notes 1-9, 144 and accompanying text.
215. *See* Peck *Reform, supra* note 151, at 286 ("when the judicial reform is challenged the lobbies and pressure groups will, fortunately, bear a burden absent in the usual legislative situation — that of persuading legislators to overturn or modify the determination of a respected boy of impartial men.").

for unarticulated reasons of its own, the court fashioned a fragmented rationale through selective use of disparate legislative enactments. While failing to distinguish between two different classes of suppliers, the court drew an arbitrary distinction between two members of the same class of high-risk consumers. In so doing, the court both neglected its duty of reasoned judicial law-making and intruded upon the legislature's province of representative government. What remains is a rule without a reason, and little hope for clarification. Pennsylvania will not have a rational method of dealing with this legal dilemma until the two branches of government begin to make creative and cooperative use of their unique tools.

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