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## ARE NEW YORK'S SOCIAL HOST LIABILITY LAWS TOO STRICT, TOO LENIENT, OR JUST RIGHT?

*Jared Wachtler\**

### I. INTRODUCTION

The alcoholic beverage industry is one of the largest revenue-generating industries in the United States with retail sales “total[ing] approximately \$115.9 billion in 2003.”<sup>1</sup> It is no secret that Americans love their alcohol, and that is evidenced both by the annual revenue generated from the sales of alcoholic beverages, and from alcohol related statistics.<sup>2</sup> According to a 2008 United States Center for Disease Control report, fifty percent of American adults aged eighteen years and older consider themselves “regular drinkers.”<sup>3</sup> While the growth and success of the industry is profitable and beneficial for the economy, the consumption of large amounts of alcohol comes at a heavy price. In 2006, there were 22,073 alcohol-induced deaths in the United States, excluding deaths attributed to accidents, injuries, and/or Fetal Alcohol Syndrome.<sup>4</sup> In addition to those alcohol-induced deaths, there were 13,491 alcohol-impaired driving fatalities, creating a total of over 35,000 alcohol related deaths, not including

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<sup>1</sup> *Economics of Alcohol and Tobacco: U.S. Alcohol Sales and Consumption*, LIBRARYINDEX.COM, <http://www.libraryindex.com/pages/2127/Economics-Alcohol-Tobacco-U-S-ALCOHOL-SALES-CONSUMPTION.html> (last visited Apr. 13, 2010).

<sup>2</sup> *Id.* (noting that sales for beer, distilled sprites, and wine for the last several years have grown dramatically).

<sup>3</sup> J.R. PLEIS ET AL., NAT'L CTR. FOR HEALTH STATISTICS, SUMMARY HEALTH STATISTICS FOR U.S. ADULTS: NATIONAL HEALTH INTERVIEW SURVEY, 2008 11 (2009).

<sup>4</sup> MELONIE HERON ET AL., NAT'L CTR. FOR HEALTH STATISTICS, DEATHS: FINAL DATA FOR 2006 11 (2009).

injuries or non-driving related alcohol fatalities.<sup>5</sup> This is a substantial number, and it is scary to think that the number may increase over time due to the large amount of underage alcohol consumption in the United States.<sup>6</sup> According to a National Center for Health Statistics report, thirty-nine percent of minors between the ages of twelve and seventeen have consumed an alcoholic beverage.<sup>7</sup> Also shocking is that in 2007, nearly fifteen percent of the alcohol-related automobile fatalities involved minors under the age of twenty-one.<sup>8</sup>

It is for these reasons that both the state and federal governments have created laws to curb alcohol-related fatalities and the consumption of alcohol by minors.<sup>9</sup> One way that lawmakers have attempted to accomplish these goals is by imposing civil, and sometimes criminal, liability on the establishments and social hosts that provide alcohol to intoxicated adults and minors.<sup>10</sup>

In response to the wide ranging and devastating consequences of underage drinking such as traffic crashes and fatalities, sexual assault and other forms of violence, alcohol toxicity, and suicide, with an estimated annual social cost of at least \$53 billion, the National Academies Institute of Medicine urged state and local

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<sup>5</sup> NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., 2007 TRAFFIC SAFETY ANNUAL ASSESSMENT: ALCOHOL-IMPAIRED DRIVING FATALITIES 2 (2008).

<sup>6</sup> See CHERYL FRYAR ET AL., NAT'L CTR. FOR HEALTH STATISTICS, SMOKING, ALCOHOL USE, AND ILLICIT DRUG USE REPORTED BY ADOLESCENTS AGED 12-17 YEARS: UNITED STATES, 1991-2004 3-5 (2009) (noting that "[t]en percent of adolescents aged 12-17 years had five or more drinks of alcohol in a row within a couple of hours on at least one day during the past month").

<sup>7</sup> *Id.* at 3.

<sup>8</sup> NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., *supra* note 5, at 2.

<sup>9</sup> See Edward L. Raymond, Jr., Annotation, *Social Host's Liability for Injuries Incurred by Third Parties as a Result of Intoxicated Guest's Negligence*, 62 A.L.R. 16, § 6(a) (1986) (noting that in Georgia, "[a] social host who furnished alcohol to a noticeably intoxicated person under the legal drinking age, knowing that such person would soon be driving his or her car, could be held liable in tort to a third person injured by the negligence of the intoxicated driver," and in Indiana, "a social host who provided alcoholic beverages to a minor [is] liable for injuries incurred by a third party because of the minor's negligence"); see also N.Y. GEN. OBLIG. LAW § 11-100 (McKinney 2008) (providing a cause of action for persons injured by intoxicated or impaired minors against those who knowingly provide or assist in providing alcohol to minors); Alcoholic Beverage Control Act, S.C. CODE ANN. § 61-6-4070 (2008) (rendering it unlawful for a person to provide alcohol to a minor).

<sup>10</sup> See William J. Bernat, Note, *Party On?: The Excellent Adventures of Social Host Liability in Massachusetts*, 39 SUFFOLK U. L. REV. 981, 984 (2006) (discussing the history of social host statutes).

governments to enact a comprehensive set of strategies to reduce underage consumption. These strategies include strengthening social host liability laws to deter underage drinking parties and other gatherings.<sup>11</sup>

The general purpose of social host liability laws is to prevent injuries caused by intoxicated minors and adults.<sup>12</sup> Instituting penalties on those who provide alcohol to minors and intoxicated adults so that they are held liable for the actions of those that have consumed alcohol at their homes or establishments will likely cause hosts to be more considerate of who they serve alcohol to in the future, thereby preventing alcohol related accidents, injuries, and fatalities.<sup>13</sup>

Alcohol consumption by minors has been a problem since the imposition of a minimum drinking age.<sup>14</sup> Whether the minimum drinking age is eighteen, as it was in many states prior to 1984 when the federal government instituted the Uniform Drinking Age Act,<sup>15</sup> or twenty-one, those that are not of legal age to consume alcohol will still find a way. Any parent that has ever had a child in high school knows what typically happens at the average high school party: underage drinking. These parties take place in almost every school district throughout the country, and many times they occur without the

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<sup>11</sup> *Social Host Liability and Underage Drinking Parties*, SOCIALHOST.ORG, <http://www.socialhost.org/> (last visited April 10, 2010) (citing INSTITUTE OF MEDICINE OF THE NATIONAL ACADEMIES, REDUCING UNDERAGE DRINKING: A COLLECTIVE RESPONSIBILITY (Richard J. Bonnie & Mary Ellen O'Connell eds., 2004)).

<sup>12</sup> Samuel Randall, Note, *Loco Parents: A Case for the Overhaul of Social-Host Liability in Florida*, 62 U. MIAMI L. REV. 939, 942-43 (2008).

<sup>13</sup> *Social Host Liability and Underage Drinking Parties*, *supra* note 11.

<sup>14</sup> See *Facts About Youth and Alcohol: Minimum Legal Drinking Age*, AM. MED. ASS'N, <http://www.ama-assn.org/ama/pub/physician-resources/public-health/promoting-healthy-lifestyles/alcohol-other-drug-abuse/facts-about-youth-alcohol/minimum-legal-drinking-age.shtml> (last visited Nov. 24, 2009).

<sup>15</sup> *Id.* See also Richard P. Campbell, *Legal Issues Pertaining to Social Host Liability*, SOCIALHOSTLIABILITY.ORG, [www.socialhostliability.org/legalissues/](http://www.socialhostliability.org/legalissues/) (last visited Nov. 20, 2009).

Laws vary widely from state to state. Some states do not impose any liability on social hosts. Others limit liability to injuries that occur on the host's premises. Some extend the host's liability to injuries that occur anywhere a guest who has consumed alcohol goes. Many states have laws that pertain specifically to furnishing alcohol to minors.

Richard P. Campbell, *Social Host Liability: State Law*, SOCIALHOSTLIABILITY.ORG, <http://www.socialhostliability.org/law/> (last visited July 31, 2010).

knowledge of the homeowner.<sup>16</sup> Many underage teenagers regularly procure fake identification and illegally drink at bars throughout the country.<sup>17</sup> But what if a teenager drinks too much and gets alcohol poisoning? What if a minor drinks at a party, gets into a car, and causes a fatal accident? Who is liable in the event of an injury or incident occurring as a result of that teenager's drinking? Parents and the owners of establishments that serve alcohol may be shocked to learn that they can be held liable in New York for the injuries of third parties, if those responsible for causing the injury were drinking alcohol or procured alcohol at a home or establishment prior to the injury.<sup>18</sup>

For many years, the owner of the premises where the drinking took place was not held liable for alcohol-related injuries.<sup>19</sup> However, over the last few decades, social host liability laws have emerged throughout the nation.<sup>20</sup> These laws are aimed at imposing liability upon those who serve as social hosts and provide alcohol to minors and intoxicated adults for injuries or incidents that arise as a direct result of serving alcohol to their guests.<sup>21</sup> Many jurisdictions now have "rules, regulations, constitutional provisions, . . . legislative enactments[,] statutes, and case law bearing on the subject of social host liability."<sup>22</sup> While social host liability laws vary by jurisdiction, they mostly focus on the liability of social hosts for injuries sustained by a third party as a result of the negligence of an intoxicated minor or adult guest.<sup>23</sup>

Generally, there are three ways in which a social host can be held liable for injuries to a third party as a result of serving or not-supervising an intoxicated guest and/or minor—through a common law negligence claim against the social host,<sup>24</sup> a dram-shop act,<sup>25</sup> or

<sup>16</sup> *Social Host Liability and Underage Drinking Parties*, *supra* note 11.

<sup>17</sup> Christopher J. Murray, Comment, *Fake IDs: Can Bar Owners Sue if They Get Fooled?*, 89 MARQ. L. REV. 437, 438 (2005).

<sup>18</sup> See N.Y. GEN. OBLIG. LAW §§ 11-100(1), 11-101(1) (McKinney 2008).

<sup>19</sup> See Bernat, *supra* note 10, at 984 (noting that early common law did not hold those who provided alcohol to an intoxicated person in their own home liable for the injuries caused by the intoxicated person).

<sup>20</sup> *Social Host Liability and Underage Drinking Parties*, *supra* note 11.

<sup>21</sup> *Id.*

<sup>22</sup> Raymond, Jr., *supra* note 9, at § 1(a).

<sup>23</sup> *Id.*

<sup>24</sup> Bernat, *supra* note 10, at 991-92.

<sup>25</sup> Raymond, Jr., *supra* note 9, at § 2(a).

the violation of a legislative statute, rule, or regulation.<sup>26</sup> Additionally, some states have enacted criminal liability laws that render social hosts not only civilly, but also criminally liable for injuries sustained by third parties as a result of a minor's intoxication that occurred on their premises.<sup>27</sup> At common law, tort liability was not imposed on the party that provided the alcohol to able-bodied individuals.<sup>28</sup> The reason for this was the belief that the actual drinking of alcohol, and not the furnishing of alcohol, was the proximate cause of the injury.<sup>29</sup> Courts in various jurisdictions have held that a social host may be liable under common law negligence for an injury to a third party when that injury was the result of an intoxicated minor guest's negligence and it was the host that furnished the alcohol to the minor guest.<sup>30</sup> Conversely, other courts have held that negligence will not be imposed on the social host in the event of an injury to a third party, regardless of whether the minor who caused the accident procured alcohol at the host's residence or establishment.<sup>31</sup>

Social host liability laws are not targeted simply at homeowners. Any place where people congregate, that either sells or distributes alcoholic beverages, has the potential for liability under social host liability law.<sup>32</sup> For establishments that actually sell alcohol, the governing laws for liability are referred to as "Dram Shop Acts."<sup>33</sup> Forty-two states throughout the country have, on record, some form of a Dram Shop Act.<sup>34</sup> A Dram Shop Act is an act that is created by the legislature as an exception to the common law rule prohibiting liability of social hosts to an injured third party.<sup>35</sup> These acts typical-

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<sup>26</sup> *Id.* § 1(a).

<sup>27</sup> Bernat, *supra* note 10, at 990-92.

<sup>28</sup> D'Amico v. Christie, 518 N.E.2d 896, 898 (N.Y. 1987).

<sup>29</sup> *Id.*

<sup>30</sup> Koback v. Crook, 366 N.W.2d 857, 860 (Wis. 1985) (holding the defendant negligent per se when the defendant gave alcohol to a minor who then was involved in a motorcycle accident after leaving the defendant host's residence); Linn v. Rand, 356 A.2d 15, 19 (N.J. Super. Ct. App. Div. 1976) (finding the defendant negligent for serving a minor alcohol before the minor struck and killed an infant pedestrian while driving).

<sup>31</sup> See Shea v. Matassa, 918 A.2d 1090, 1097 (Del. Supr. 2007).

<sup>32</sup> See *Civil Causes of Action: Dram Shop Act and Legal Definition*, USLEGAL.COM, <http://definitions.uslegal.com/c/civil-causes-of-action-dram-shop-act/> (last visited Apr. 8, 2010).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> D'Amico, 518 N.E.2d at 898.

ly impose liability on those who are involved in the sale of alcohol and can potentially impose liability based on injuries to a third party as a result of that sale.<sup>36</sup> There are also differing legislative enactments in jurisdictions throughout the country that impose varying degrees of liability for injuries to third parties against those that either provide or assist in the procurement of alcohol to minors and/or intoxicated adults.<sup>37</sup> Violation of these laws, enactments, or statutes can result in imposing significant liability on the social host and could potentially lead to large damage awards.<sup>38</sup>

The purpose of this Comment is to examine New York State's position on social host liability and to compare New York's laws and regulations to the laws and regulations regarding social host liability in other states. While it is illegal to sell alcohol to minors in every state, some states have laws that impose significant liability on social hosts, while others impose limited or no liability on social hosts for the injuries to third parties as a result of serving alcohol to minors or intoxicated adults. This Comment will examine the law in New York and determine, based on an examination of New York State's regulations and case law, in addition to laws from other states, if the liability imposed on social hosts is too lenient or too strict, and address what can be done to improve the laws in the future. Part II will discuss the social host liability laws in New York State and specifically examine the two ways in which a host can be civilly liable for violating these laws. Part III will examine the social host laws in other states, both criminal and civil, and compare the severity and effectiveness of those state laws with New York's social host laws. Finally, Part IV will analyze criminal social host liability laws and examine whether New York State should impose criminal sanctions similar to those that exist in numerous states, in addition to the already existing civil social host liability laws.

## II. CIVIL LIABILITY IN NEW YORK STATE

New York State not only takes a tough stance on the sale of alcohol to minors, alcohol involved crimes, driving while intoxicated, and driving while under the influence of alcohol, but also allows for

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<sup>36</sup> *Civil Causes of Action: Dram Shop Act and Legal Definition*, *supra* note 32.

<sup>37</sup> Raymond, Jr., *supra* note 9, § 2(a).

<sup>38</sup> *Id.*

the imposition of civil liability on both social hosts and establishments serving alcohol to minors.<sup>39</sup> According to New York Alcoholic Beverage Control Law ("NYABC") section 65,<sup>40</sup> "[n]o person shall sell, deliver or give away or cause or permit or procure to be sold, delivered or given away any alcoholic beverages to (1) Any person . . . under the age of twenty-one years [and] (2) Any visibly intoxicated person . . . ."<sup>41</sup> Much of the social host liability law in New York is derived from NYABC section 65.<sup>42</sup> In addition to NYABC section 65, New York State has a Dram Shop Act.<sup>43</sup> New York courts have also found social hosts liable under common law negligence,<sup>44</sup> and the state legislature has enacted statutes imposing civil liability on those that either provide alcohol to minors or assist minors in procuring alcohol.<sup>45</sup>

**A. Section 11-101:  
New York's Dram Shop Act—Liability of Sellers**

Many states have enacted Dram Shop Acts that hold sellers of alcohol liable to third parties for injuries sustained as a result of the intoxication of the purchaser of the alcohol.<sup>46</sup> New York State enacted a Dram Shop Act when the state legislature passed section 11-101 of the General Obligations Law,<sup>47</sup> which provides that:

Any person who shall be injured in person, property, means of support, or otherwise by any intoxicated person, or by reason of the intoxication of any person,

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<sup>39</sup> See N.Y. ALCO. BEV. CONT. LAW § 65 (McKinney 2010).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> See Howard S. Shafer & Mika Mooney, *A Refresher on New York Dram Shop Liability*, 37 N.Y. ST. B.A. TORTS, INS., & COMPENSATION L. SEC. J. 17, 17 (2008).

<sup>43</sup> See N.Y. GEN. OBLIG. LAW § 11-101 (McKinney 2008).

<sup>44</sup> See, e.g., *Comeau v. Lucas*, 455 N.Y.S.2d 871, 873 (App. Div. 1982) (holding that parents "breached their duty as owners of the premises, who had an opportunity to control the party held by their minor daughter with their consent, and that they reasonably should have been aware of the necessity for such control"); see also *D'Amico*, 518 N.E.2d at 899-900 (holding that common law negligence claims against social hosts are only valid if the injury to the third party occurred on the defendant's property and the "defendant had the opportunity to supervise the intoxicated guest").

<sup>45</sup> See N.Y. GEN. OBLIG. LAW §§ 11-100(1), 11-101(1).

<sup>46</sup> Raymond, Jr., *supra* note 9, § 2(a).

<sup>47</sup> Shafer & Mooney, *supra* note 42.



whether resulting in his death or not, shall have a right of action against any person who shall, by unlawfully selling to or unlawfully assisting in procuring liquor for such intoxicated person, have caused or contributed to such intoxication; and in any such action such person shall have a right to recover actual and exemplary damages.<sup>48</sup>

However, this Dram Shop Act only imposes liability on social hosts and establishments that actually sell alcohol, and not necessarily on those who simply provide alcohol to minors and/or already-intoxicated adults.<sup>49</sup> In *D'Amico v. Christie*, the New York Court of Appeals refused to hold a company liable under the Dram Shop Act for providing its employees beer during a company picnic liable.<sup>50</sup> After the picnic, one of the company employees was involved in a drunk driving accident and sustained various injuries.<sup>51</sup> However, the company was not held liable under the Dram Shop Act because the company did not sell the beer to the employee for a profit.<sup>52</sup> The court held:

We find no basis for departing from the consistent interpretation of lower courts that the Dram Shop Act requires a commercial sale of alcohol. That the statute is properly limited to sellers of intoxicating liquors is made plain even by its title: "Compensation for injury cause by the illegal sale of intoxicating liquor."<sup>53</sup>

In *Custen v. Salty Dog, Inc.*, the Appellate Division, Second Department also declined to impose dram shop liability on individuals who simply furnish, but do not sell, alcohol to intoxicated adults.<sup>54</sup> The court held that an employer was not liable for an injury to a third party which resulted from an employee's intoxication that had occurred while the employee was working, "[b]ecause of the non-existence of a commercial sale of liquor where the employers

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<sup>48</sup> N.Y. GEN. OBLIG. LAW § 11-101(1).

<sup>49</sup> *D'Amico*, 518 N.E.2d at 899.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> See *Custen v. Salty Dog, Inc.*, 566 N.Y.S.2d 348, 348 (App. Div. 1991).

provided free alcoholic beverages to their employees during their work shifts.”<sup>55</sup> Accordingly, in order for a social host or establishment to be liable to a third party under the Dram Shop Act in New York, the host or establishment must commercially sell intoxicating liquor rather than aid in the procurement of alcohol.<sup>56</sup>

Once it has been established that a commercial sale has taken place, it is imperative that a determination is made indicating that the sale of liquor was made directly to the individual who allegedly caused the injuries at issue.<sup>57</sup> In *Sherman v. Robinson*, the plaintiff contended that a convenience store that sold alcohol to a friend of the tortfeasor should be held liable under section 11-101 because the store clerk should have known that the quantity of alcohol being purchased was too much for one person to consume.<sup>58</sup> The New York Court of Appeals held that no liability should be imposed on the store for an indirect sale of alcohol and that the store was under no duty to investigate where or how the alcohol was going to be consumed.<sup>59</sup> As such, for the seller of the alcohol to be held liable under the Dram Shop Act, the court held that the plaintiff would have to show either that the tortfeasor was present during the sale, that they provided the money for the alcohol, or that they took possession of the alcohol after the sale was concluded.<sup>60</sup>

The most common dram shop litigation arises out of the provision that prohibits the sale of alcohol to a person who is visibly intoxicated.<sup>61</sup> Circumstantial evidence can establish that a person was visibly intoxicated at the time of the sale of alcohol; direct evidence of a person's visible intoxication is not required in order for a claim under the Dram Shop Act to be successful.<sup>62</sup> However, this does not mean that a single piece of circumstantial evidence, such as blood and urine tests, expert opinion, or eyewitness testimony, is enough on

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<sup>55</sup> Shafer & Mooney, *supra* note 42 (citing *Carr v. Kaifler*, 601 N.Y.S.2d 8 (App. Div. 2d Dep't 1993); *Custen*, 566 N.Y.S.2d 348).

<sup>56</sup> *Custen*, 566 N.Y.S.2d at 348 (“In order for a commercial vendor of alcohol to be held liable under General Obligations Law § 11-101 there must be a ‘sale’ of alcohol under General Obligations Law § 11-101.”).

<sup>57</sup> Shafer & Mooney, *supra* note 42 (citing *Sherman v. Robinson*, 606 N.E.2d 1365 (N.Y. 1992)).

<sup>58</sup> *Sherman*, 606 N.E.2d at 1366-67.

<sup>59</sup> *Id.* at 1368-69.

<sup>60</sup> Shafer & Mooney, *supra* note 42.

<sup>61</sup> *Id.* (citing *Kelly v. Fleet Bank*, 706 N.Y.S.2d 190 (App. Div. 2000)).

<sup>62</sup> *Romano v. Stanley*, 684 N.E.2d 19, 21-22 (N.Y. 1997).

its own to conclusively determine if the tortfeasor was visibly intoxicated.<sup>63</sup> “[W]hile individual pieces of circumstantial evidence may be inadequate to fulfill the requirement of visible intoxication, when considered in total the requirement may be satisfied.”<sup>64</sup>

In *Romano v. Stanley*, the New York Court of Appeals held that an expert’s testimony that the tortfeasor must have been exhibiting visible signs of intoxication based upon her blood alcohol level at the time of her death was insufficient to determine whether or not the tortfeasor was visibly intoxicated.<sup>65</sup> “[W]hen examining any circumstantial evidence supporting an assertion of visible intoxication, it must be ‘supported by the surrounding facts and circumstances in order to be probative.’”<sup>66</sup> Since *Romano*, the courts in New York have continued to hold that “visible intoxication may be established by circumstantial evidence.”<sup>67</sup>

In *Kish v. Farley*, a girl named Christina Kish was killed in a drunk driving accident when the car in which she was a passenger was hit by a car driven by an intoxicated driver named Christina Mills.<sup>68</sup> Testimony from a State University School of Medicine professor in pharmacology and toxicology found that high blood alcohol content alone was not enough to establish visible intoxication.<sup>69</sup> The expert testified that besides her high blood alcohol content, depositions from witnesses indicated that prior to leaving the establishment at which she had been drinking, Mills showed signs of intoxication such as “droopy eyes, fragmented, incoherent and irrational speech, plus a tearful and irritable demeanor.”<sup>70</sup> Although the expert had not seen Mills on the night of the accident, the evidence of her visible intoxication obtained through the depositions, coupled with her high blood alcohol content, was enough for him to determine that she was visibly intoxicated at the time she left the bar.<sup>71</sup> Accordingly, when examining the evidence in its entirety to determine if the social host or establishment is liable for an injury to a third party under the Dram

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<sup>63</sup> Shafer & Mooney, *supra* note 42, at 18.

<sup>64</sup> *Id.* (citing *LaCatena v. M.C. & E.D. Beck, Inc.*, 825 N.Y.S.2d 727 (App. Div. 2006)).

<sup>65</sup> *Romano*, 684 N.E.2d at 21-23.

<sup>66</sup> Shafer & Mooney, *supra* note 42, at 18.

<sup>67</sup> *Kish v. Farley*, 807 N.Y.S.2d 235, 236 (App. Div. 2005).

<sup>68</sup> *Id.* at 236.

<sup>69</sup> *Id.* at 236-37.

<sup>70</sup> *Id.* at 237 (internal quotation marks omitted).

<sup>71</sup> *Id.* at 236-37.

Shop Act, the evidence must adequately and conclusively support the assertion that the tortfeasor was visibly intoxicated at the time of the sale of alcohol.<sup>72</sup>

The Dram Shop Act is one way in which New York State has attempted to curb the injuries, accidents, and fatalities that are associated with alcohol consumption.<sup>73</sup> If an establishment violates the Dram Shop Act and an injury to a third party results from the sale of the alcohol to a minor or an intoxicated adult, the owner or social host of the establishment can be held civilly liable for the injuries that may occur as a result of the alcohol sale.<sup>74</sup> Although a social host is defined as “a person who furnishes another with alcohol in a social setting and not as a licensed vendor,”<sup>75</sup> the Dram Shop Act only applies to a party that provides alcohol to a minor or intoxicated adult for commercial purposes, which includes parties that have sold alcohol for profit but are not necessarily licensed vendors.<sup>76</sup> Accordingly, the Dram Shop Act is one of the ways that social hosts can be held liable for injuries sustained by third parties as a result of providing alcohol to either a minor or an intoxicated adult.

## **B. Section 11-100: New York's Social Host Liability Law**

With the prevention of accidents involving minors and the reckless consumption of alcohol by both minors and adults in mind, the New York State Legislature sought to expand on the Dram Shop Act so that liability would be imposed on those that assisted minors in procuring alcohol without the requirement that there be a sale for profit.<sup>77</sup> Because the sale of alcohol for profit is necessary for a social host to be held liable for injuries to third parties under the Dram Shop Act, in 1983 the New York State Legislature enacted section

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<sup>72</sup> Shafer & Mooney, *supra* note 42, at 17 (“There *must* be adequate evidence to support the conclusion that the tortfeasor was visibly intoxicated, and when examining any circumstantial evidence supporting an assertion of visible intoxication, it must be supported by the surrounding facts and circumstances in order to be probative.”) (internal quotation marks omitted).

<sup>73</sup> *Civil Causes of Action: Dram Shop Act and Legal Definition*, *supra* note 32.

<sup>74</sup> N.Y. GEN. OBLIG. LAW §§ 11-100(1), 11-101(1).

<sup>75</sup> *Social Host Definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/social%20host> (last visited Apr. 8, 2010).

<sup>76</sup> N.Y. GEN. OBLIG. LAW §§ 11-100 (1), 11-101(1).

<sup>77</sup> *D'Amico*, 518 N.E.2d at 899.

11-100 of the General Obligations Law.<sup>78</sup> This law imposes liability upon those that provide alcohol to minors, and/or assist in the procurement of alcohol to minors, and is not concerned with whether there was an actual commercial purchase.<sup>79</sup> Section 11-100(1) states that:

Any person who shall be injured in person, property, means of support or otherwise, by reason of the intoxication or impairment of ability of any person under the age of twenty-one years, whether resulting in his death or not, shall have a right of action to recover actual damages against any person who knowingly causes such intoxication or impairment of ability by unlawfully furnishing to or unlawfully assisting in procuring alcoholic beverages for such person with knowledge or reasonable cause to believe that such person was under the age of twenty-one years.<sup>80</sup>

This law imposes liability on those who either provide or assist in providing minors with alcohol when that minor subsequently causes injuries to third parties and those injuries are a direct result of the intoxication of the minor or intoxicated adult for whom the alcohol was procured.<sup>81</sup> By enacting this law, the New York State Legislature maintained the liability of commercial sellers of alcohol under section 11-101, while simultaneously imposing liability on anybody that provides alcohol to minors, thus curbing underage drinking and punishing those that help minors obtain alcohol.<sup>82</sup>

For a defendant to be liable for damages arising out of a violation of section 11-100, there are three requirements that must be met.<sup>83</sup> First, the defendant must be aware of any alcohol consumption by minors.<sup>84</sup> It is also a strict requirement that a social host must have actual knowledge, or a reasonable belief, that the individual is

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<sup>78</sup> *Id.*

<sup>79</sup> N.Y. GEN. OBLIG. LAW § 11-100(1); *D'Amico*, 518 N.E.2d at 899.

<sup>80</sup> N.Y. GEN. OBLIG. LAW § 11-100(1).

<sup>81</sup> *Id.*

<sup>82</sup> *See Rust v. Reyer*, 693 N.E.2d 1074, 1077 (N.Y. 1998) ("The purpose of General Obligations Law § 11-100 is to employ civil penalties as a deterrent against underage drinking.") (citation omitted).

<sup>83</sup> *Shafer & Mooney*, *supra* note 42, at 18.

<sup>84</sup> *Id.*

under twenty-one years of age in order for a social host to be liable under section 11-100(1).<sup>85</sup> Second, the defendant must have authorized the consumption of alcohol on the premises.<sup>86</sup> Third, the defendant must have actively assisted in procuring the alcohol for the minors.<sup>87</sup> The Appellate Division, Second Department held in *Bregartner v. Southland Corp.*,<sup>88</sup> that the phrase “assists in procuring . . . includes using one’s own money to purchase alcohol” and/or contributing one’s money to purchase alcohol.<sup>89</sup> If a defendant has passively, and not actively, provided alcohol to a minor, he or she is not held liable under section 11-100.<sup>90</sup> The statute specifically dictates that a defendant is only entitled to recover actual damages against any person who “knowingly causes [another person’s] intoxication or impairment of ability by unlawfully furnishing to or unlawfully assisting in procuring alcoholic beverages for such person with knowledge or reasonable cause to believe that such person was under the age of twenty-one years.”<sup>91</sup>

The first requirement needed for a defendant to be liable for an injury to a third party under section 11-100 is that he or she must be aware of the consumption of alcohol by the minor.<sup>92</sup> In *Lombart v. Chambery*,<sup>93</sup> the plaintiff claimed that Mary Chaffer, the homeowner of the property at which the party serving alcohol occurred and grandmother of the underage host, should be liable for the injuries sustained to the plaintiff.<sup>94</sup> These injuries were the result of a drunk driving accident that the plaintiff was involved in after leaving the party.<sup>95</sup> The plaintiff alleged that “[Mary] allowed her adult grandson to have a party at her home and she knew, or should have known, that alcohol was served to individuals under the legal drinking age and that Chambery thereby became intoxicated” as a result of her

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> 683 N.Y.S.2d 286 (App. Div. 1999).

<sup>89</sup> *Id.* at 288 (internal quotation marks omitted).

<sup>90</sup> *Rust v. Reyer*, 652 N.Y.S.2d 309, 310 (App. Div. 1997), *rev'd*, 693 N.E.2d 1074. (“General Obligations Law [section] 11-100 is not applicable to a homeowner who has neither supplied alcohol to nor procured alcohol for consumption by an underage person.”).

<sup>91</sup> N.Y. GEN. OBLIG. LAW § 11-100(1).

<sup>92</sup> *Shafer & Mooney*, *supra* note 42, at 18.

<sup>93</sup> 797 N.Y.S.2d 216 (App. Div. 2005).

<sup>94</sup> *Id.* at 217.

<sup>95</sup> *Id.*

negligence.<sup>96</sup> The complaint went on to indicate that Mrs. Chaffer had violated section 11-100 by allowing the party to occur.<sup>97</sup>

However, the court held that the defendant was not negligent in her supervision of the partygoers because Mrs. Chaffer was not aware that a large party had taken place or that there were individuals under the legal drinking age consuming alcohol at her residence.<sup>98</sup> The court also held that the defendant was not liable for violating section 11-100 because she did not know that alcohol was served to individuals under the legal drinking age.<sup>99</sup> The court found that the “defendant was, at most, ‘a passive participant who merely knew of the underage drinking [at her residence] and did nothing else to encourage it.’ ”<sup>100</sup> If the defendant had actual knowledge that there was alcohol being consumed by minors at a party in her home, she would have likely been held civilly liable for the injuries that resulted from the minor’s intoxication.<sup>101</sup> Thus, in order to be held liable under section 11-100, a defendant must have actual knowledge that alcohol was provided to persons under the legal drinking age.<sup>102</sup>

The second requirement that must be met for a defendant to be liable under section 11-100 is that either: (1) the defendant was physically present at the party at the time of the alcohol consumption by the tortfeasor or (2) the defendant had advanced knowledge that the party was going to occur and minors were likely going to be consuming alcohol.<sup>103</sup> In *Cole v. O’Tooles of Utica, Inc.*, the Appellate Division, Fourth Department properly granted the defendant’s cross-motion for summary judgment since the defendant was not home at the time the party was held at his residence, and he did not have any

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Lombart*, 797 N.Y.S.2d at 217-18.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 218 (quoting *Rust*, 693 N.E.2d at 1077).

<sup>101</sup> See N.Y. GEN. OBLIG. LAW § 11-100(1) (allowing victims to recover damages against any person who knowingly causes the intoxication or impairment); see also *Lombart*, 797 N.Y.S.2d at 217-18 (holding that defendant was not liable for injuries caused by intoxicated minor because she was unaware that underage drinking was taking place in her home).

<sup>102</sup> See *supra* note 98 and accompanying text.

<sup>103</sup> See *Cole v. O’Toole’s of Utica, Inc.*, 643 N.Y.S.2d 283, 287 (App. Div. 1996) (noting that lower court properly granted defendant’s cross-motion for summary judgment where defendant “provided evidence that he was not at home at the time of the party, that he did not have advance knowledge that the party was going to be held, and that the injuries occurred off the premises under his control”).

advanced knowledge that the party was going to occur.<sup>104</sup> A third party was killed in a fatal car accident involving an intoxicated minor who left a house party, and the court refused to hold the homeowner liable because he was not at the premises at the time of the party, and he either had no advanced knowledge that the party was taking place or had no knowledge that there would be underage alcohol consumption occurring at his house.<sup>105</sup> Accordingly, for a defendant to be liable under section 11-100, the defendant must have either been physically present at the event at the time of the alcohol being consumed or know in advance that the party was going to occur and that minors would likely be consuming alcohol.<sup>106</sup>

Finally, and most importantly, for a defendant to be liable for injuries to third parties in New York under section 11-100, they must have actively, and not passively, provided alcohol to minors.<sup>107</sup> A defendant actively provides alcohol to minors when he or she actually purchases alcohol for minors and/or contributes funds for minors to procure alcohol.<sup>108</sup> *Bregartner v. Southland Corp.* was a consolidated case involving four separate actions that arose as a result of a car crash that occurred after minors had consumed beer purchased at a 7-Eleven Store.<sup>109</sup> The Appellate Division, Second Department, held that “ ‘assisting in procuring’ alcohol [to minors] includes ‘using one’s own money to purchase alcohol for another,’ and ‘contributing money to the purchase of alcohol.’ ”<sup>110</sup>

The relevant action, *Groene v. Esposito*, was an appeal by plaintiff Esposito after the lower court granted a cross-motion for summary judgment in favor of the defendant Groene.<sup>111</sup> In this case,

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *See id.*

<sup>107</sup> *See* O’Neill v. Ithaca Coll., 866 N.Y.S.2d 809, 812 (App. Div. 2008) (agreeing with lower court’s decision to grant defendant’s motion for summary judgment because mere knowledge of the purchase of alcohol and presence of minors is insufficient to be considered “actively assist[ing] in procuring the alcohol”).

<sup>108</sup> *Id.* at 811-12 (holding that active procurement of alcohol involves purchasing the alcohol, directly providing the alcohol to the minor, or playing a role that was indispensable in obtaining the alcohol, such as driving the minor to the store or giving the minor money to make the purchase).

<sup>109</sup> *Bregartner*, 683 N.Y.S.2d at 288.

<sup>110</sup> *Id.* (quoting *Slocum v. D’s & Jayes Valley Rest. & Café, Inc.*, 582 N.Y.S.2d 544, 545 (App. Div. 1995)).

<sup>111</sup> *Id.* at 287-88.



the Appellate Division, Second Department found that the lower court erred in granting the motion for summary judgment because there was a question of fact as to whether Groene had actively assisted in providing alcohol to minors.<sup>112</sup> The plaintiffs in the case presented evidence that led the court to believe that Groene had provided “some, if not all, of the money which was used to purchase beer on the night in question.”<sup>113</sup> Accordingly, the court remanded the case for further review because if Groene had actually supplied the money to purchase the alcohol that led to the injury, he would be held liable under section 11-100 for the injuries sustained by the third party as a result of the minor’s intoxication.<sup>114</sup>

*Bregartner* is just one example of civil liability potentially being imposed on a person that actively procured alcohol for minors. An example of the courts refusing to impose liability on a homeowner that passively provided alcohol to minors can be seen in *Lane v. Barker*.<sup>115</sup> In *Lane*, the Appellate Division, Third Department found that although the parents had authorized their son to have a party and knew alcohol would be consumed at the affair, they were not liable under section 11-100.<sup>116</sup> The court held that the parents were not liable for the injuries sustained to a third party as a result of the minor’s intoxication, even though he became intoxicated from alcohol provided at the party because “[t]he record [wa]s . . . clear . . . that the parents did not procure or furnish the alcohol that was consumed at the party, nor did they provide funds for that purpose. . . . [section] 11-100 mandates that a person ‘furnish’ or ‘procure’ alcoholic beverages as a predicate for liability . . . .”<sup>117</sup> Thus, in order for a defendant to be held liable for damages under section 11-100, he or she must have actively participated in the procurement of alcohol for a minor.<sup>118</sup> If the defendant did actively participate in procuring alco-

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<sup>112</sup> *Id.* at 288.

<sup>113</sup> *Id.*

<sup>114</sup> See *Bregartner*, 683 N.Y.S.2d at 288 (stating that “using one’s own money to purchase alcohol for another” or “contributing money to the purchase of alcohol” is considered “assisting in procuring” the alcohol) (quoting *Slocum*, 582 N.Y.S.2d at 545) (internal quotation marks omitted).

<sup>115</sup> 660 N.Y.S.2d 194, 195 (App. Div. 1997).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> See *id.*; see also *O’Neill*, 866 N.Y.S.2d at 812 (mere knowledge of the purchase of alcohol and presence of minors is not enough to be considered “actively assist[ing] in procuring the alcohol”).

hol, knowing that minors would be drinking on his or her property, and authorized the drinking at that location, the defendant can be held civilly liable to third parties that have been injured as a result of an intoxicated minor's actions.<sup>119</sup>

### III. COMPARISON TO OTHER STATE LAWS REGARDING CIVIL LIABILITY OF SOCIAL HOSTS

#### A. Generally

While New York is one of the few states that impose only civil liability on social hosts, the New York standard that governs whether a social host will be liable to a third party is one of the more concrete and structured standards. Most states do not use the same three-factor approach as New York to determine whether a social host will be liable.<sup>120</sup> South Carolina, for example, has imposed a much broader and less concrete standard for holding social hosts liable and prior to the 2007 decision in *Marcum v. Bowden*, no liability was placed on social hosts at all for the injuries to a third party.<sup>121</sup>

In *Marcum*, the Supreme Court of South Carolina determined that not holding social hosts liable for injuries to third parties as a result of providing alcohol to minors would be contrary to the public good.<sup>122</sup> The court then established a standard for civil liability on the part of social hosts when it concluded that:

[H]enceforth adult social hosts who knowingly and intentionally serve, or cause to be served, an alcoholic beverage to a person they know or should know is between the ages of 18 and 20 are liable to the person served, and to any other person, for damages prox-

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<sup>119</sup> See, e.g., *Bregartner*, 683 N.Y.S.2d at 288.

<sup>120</sup> See, e.g., GA. CODE ANN. § 51-1-40(b) (2010) (considering factors such as the visibility of the guest's intoxication and the host's knowledge that the guest would soon be driving a motor vehicle); *Marcum v. Bowden*, 643 S.E.2d 85, 90 (S.C. 2007) (holding adult social hosts liable even without actual knowledge that a person is underage if they should have known that the person given the alcoholic beverage was underage); *Linn v. Rand*, 356 A.2d 15, 19 (N.J. Super. Ct. App. Div. 1976) (considering whether or not the host had knowledge that the guest would be driving that night as a factor).

<sup>121</sup> *Marcum*, 643 S.E.2d at 86.

<sup>122</sup> *Id.* at 89-90.

imately caused by the host's service of alcohol.<sup>123</sup>

This standard is more open to interpretation by the courts than New York General Obligations Law section 11-100 which requires actual knowledge of underage drinking, active procurement of alcohol, and consumption of alcohol on the premises.<sup>124</sup> The South Carolina standard is not as specifically worded as section 11-100, and thus it will be much easier for the courts to find a social host liable to an injured third party. Since the New York law clearly outlines what social hosts must do in order to protect themselves from civil liability to injured third parties, hosts can take more active steps to protect themselves from liability if they plan an event on their premises.

Georgia follows a similar standard to South Carolina in that it relies on a proximate cause standard; however, when analyzed closely, the Georgia standard is more akin to a negligence standard than simply proximate cause, as is the case in South Carolina.<sup>125</sup> The relevant social host statute in Georgia is section 51-1-40 of the Official Code of Georgia, entitled Liability for Act of Intoxicated Persons.<sup>126</sup> The statute provides that:

A person who sells, furnishes, or serves alcoholic beverages to a person of lawful drinking age shall not thereby become liable for injury, death, or damage caused by or resulting from the intoxication of such person, including injury or death to other persons; provided, however, *a person who willfully, knowingly, and unlawfully sells, furnishes, or serves alcoholic beverages to a person who is not of lawful drinking age, knowing that such person will soon be driving a motor vehicle, or who knowingly sells, furnishes, or serves alcoholic beverages to a person who is in a state of noticeable intoxication, knowing that such person will*

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<sup>123</sup> *Id.* at 90.

<sup>124</sup> See N.Y. GEN. OBLIG. LAW § 11-100(1); *O'Neill*, 866 N.Y.S.2d at 812; *Cole*, 643 N.Y.S.2d at 287.

<sup>125</sup> Sharon E. Conaway, Comment, *The Continuing Search for Solutions to the Drinking Driver Tragedy and the Problem of Social Host Liability*, 82 NW. U. L. REV. 403, 414-15 (1988) (stating that Georgia accepted social host liability on the basis that the host breached a duty of care and created an unforeseeable risk of harm to the plaintiff when violating a liquor control statute).

<sup>126</sup> GA. CODE ANN. § 51-1-40(b).

*soon be driving a motor vehicle, may become liable for injury or damage caused by or resulting from the intoxication of such minor or person when the sale, furnishing, or serving is the proximate cause of such injury or damage.*<sup>127</sup>

This standard was successfully applied in *Sutter v. Hutchings*,<sup>128</sup> where a social hostess was found liable for damages to an injured third party when she provided a visibly intoxicated minor alcohol knowing that he was going to be operating a motor vehicle.<sup>129</sup> In *Sutter*, the court determined that:

[A] person who encouraged another, who was noticeably intoxicated and under the legal drinking age, to become further intoxicated and who furnished to such other person more alcohol, knowing that such person would soon be driving a vehicle, is liable in tort to a [third party] injured by the negligence of such intoxicated driver.<sup>130</sup>

This is a problematic and vague standard because it is very difficult to prove (1) that a person had actual knowledge that the minor would be driving, (2) that one person encouraged another to drink, and (3) what constitutes a person being “noticeably intoxicated.”<sup>131</sup>

The Supreme Court of Georgia in *Riley v. H & H Operations, Inc.*,<sup>132</sup> clarified the vague nature of the statute by holding that, “[i]f one in the exercise of reasonable care should have known that the recipient of the alcohol was a minor and would be driving soon, he or

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<sup>127</sup> *Id.* (emphasis added).

<sup>128</sup> 327 S.E.2d 716 (Ga. 1985).

<sup>129</sup> *Id.* at 717, 719.

[W]here one provides alcohol to a noticeably intoxicated [minor] knowing that he will soon be driving his car, it is foreseeable to the provider that the consumer will drive while intoxicated and a jury would be authorized to find that it is foreseeable to the provider that the intoxicated driver may injure someone.

*Id.* at 719.

<sup>130</sup> *Id.* at 720.

<sup>131</sup> *See id.*

<sup>132</sup> 436 S.E.2d 659 (Ga. 1993).

she will be deemed to have knowledge of that fact.”<sup>133</sup> This decision changed the social host liability standard for civil liability in Georgia and essentially created a reasonable person standard.<sup>134</sup> While this is a clearer standard than that of South Carolina, it is still sub-par when compared to social host liability laws in New York. New York’s laws are strict, but reasonable and specifically outline what will be considered for a social host to be civilly liable for damages to third parties. Section (c) of the Georgia statute also provides that in determining whether “the sale, furnishing, or serving of [alcohol to a minor was] done willfully, knowingly, [or] unlawfully,” it is relevant if the party that furnished the alcohol checked identification.<sup>135</sup> If the party furnishing the alcohol checked identification before giving alcohol to the partygoer, then it exempts the party from social host liability under section 51-1-40.<sup>136</sup>

#### IV. CRIMINAL LIABILITY

##### A. Criminal Social Host Liability in New York

Social hosts who allow underage drinking parties on their property may face two distinct types of liability: state-level social host civil liability and state-level social host criminal liability.<sup>137</sup> State-level social host civil liability “imposes, by statute or court decision, a civil duty on social hosts across the relevant state that can be enforced through litigation brought by injured private parties seeking monetary damages against the host.”<sup>138</sup> New York’s Dram Shop Act, codified in sections 11-101 and 11-100 of the General Obligations Law, is an example of New York State instituting state-level social host civil liability on defendants that allow minors to become intoxicated on their premises.<sup>139</sup> Currently, New York State does not impose criminal social host liability on hosts who allow underage drink-

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<sup>133</sup> *Id.* at 661.

<sup>134</sup> *Id.*

<sup>135</sup> GA. CODE ANN. § 51-1-40(c).

<sup>136</sup> *Id.*

<sup>137</sup> *Social Host Liability*, MOTHERS AGAINST DRUNK DRIVING, <http://www.madd.org/Professionals/Social-Host/Social-Host-Liability.aspx> (last visited April 8, 2010).

<sup>138</sup> *Id.*

<sup>139</sup> See N.Y. GEN. OBLIG. LAW §§ 11-100, 11-101.

ing to occur on their property.<sup>140</sup> State-level social host criminal liability “involves a violation enforced through criminal prosecution and leading to criminal sanctions, such as fines or imprisonment. Social host criminal liability is closely linked to state laws prohibiting individuals from furnishing alcohol to youth under the age of [twenty-one].”<sup>141</sup>

While these criminal liability laws are closely related to the civil liability laws, they focus more on the setting where the drinking occurred, rather than on how the alcohol was procured.<sup>142</sup> As previously mentioned, New York is not among the twenty-four states that have instituted criminal liability laws for social hosts.<sup>143</sup> However, New York has imposed a state law, in addition to the Federal Uniform Drinking Age Act, which makes it illegal to procure alcohol for minors.<sup>144</sup> NYABC section 65(1) provides that “[n]o person shall sell, deliver or give away or cause or permit or procure to be sold, delivered or given away any alcoholic beverages to . . . [a]ny person, actually or apparently, under the age of twenty-one years.”<sup>145</sup> Although NYABC section 65(1) imposes criminal liability on those who procure alcohol for minors, there is no social host law in New York that imposes criminal liability on social hosts for simply owning the property or providing a venue in which the alcohol was consumed.<sup>146</sup>

There are important distinctions between NYABC section 65(1) and social host liability laws.<sup>147</sup> NYABC section 65(1) applies specifically to those purchasing or giving alcohol to minors, whereas

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<sup>140</sup> See *Underage Drinking: Prohibitions Against Hosting Underage Drinking Parties: Maps and Charts*, ALCOHOL POLICY INFO. SYS. (Jan. 1, 2009), [http://www.alcoholpolicy.niaaa.nih.gov/Prohibitions\\_Against\\_Hosting\\_Underage\\_Drinking\\_Parties.html](http://www.alcoholpolicy.niaaa.nih.gov/Prohibitions_Against_Hosting_Underage_Drinking_Parties.html) [hereinafter *Underage Drinking Maps and Charts*].

<sup>141</sup> See MOTHERS AGAINST DRUNK DRIVING, *supra* note 137.

<sup>142</sup> *Id.*

<sup>143</sup> *Underage Drinking Maps and Charts*, *supra* note 140.

<sup>144</sup> N.Y. ALCO. BEV. CONT. LAW § 65(1).

<sup>145</sup> See *id.*

<sup>146</sup> See *Pelinsky v. Rockensies*, 618 N.Y.S.2d 103, 104 (App. Div. 1994) (“This court has held that General Obligations Law [section] 11-100 is not applicable to the homeowner who has neither supplied alcohol to nor procured alcohol for consumption by an underage person.”); see also N.Y. GEN. OBLIG. LAW § 11-100(1).

<sup>147</sup> While NYABC section 65(1) imposes criminal liability, social host liability laws may impose either civil or criminal penalties and focus on where underage drinking has occurred, rather than on the supplying of alcohol to minors. See MOTHERS AGAINST DRUNK DRIVING, *supra* note 137.

social host liability laws refer to where the alcohol, that led to an injury, was consumed.<sup>148</sup> Purchasing or providing alcohol to a minor is a part of social host liability law, and if a host purchased alcohol for a minor he or she would be criminally liable under NYABC section 65(1); however, the states that impose criminal sanctions on social hosts focus not just on who purchased the alcohol, but also on where the alcohol was consumed and whether the purchaser knew who was going to consume the alcohol.<sup>149</sup>

### B. Criminal Social Host Liability Nationally

As of January 1, 2009, twenty-four states have enacted laws on record making it criminally unlawful to host an event at which there is a likelihood that consumption of alcohol by minors will occur.<sup>150</sup> Among the criminal liability laws in these twenty-four states, seven have laws that specifically pertain to underage parties, while seventeen have general laws that impose criminal liability on social hosts and do not explicitly target underage alcohol consumption.<sup>151</sup> The states that impose criminal liability on social hosts specifically for hosting underage parties are Alabama, Arizona, Florida, Kansas, Missouri, New Hampshire, and Wyoming.<sup>152</sup> The states that have general criminal liability social host laws are Alaska, Connecticut, Hawaii, Illinois, Maine, Maryland, Massachusetts, Missouri, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Washington, and Wisconsin.<sup>153</sup>

Typically, states imposing criminal liability consider four factors and two defenses in determining whether a host is responsible for the actions of a third party who has become intoxicated.<sup>154</sup> The four factors typically considered are: (1) what was the action of the

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<sup>148</sup> See N.Y. ALCO. BEV. CONT. LAW § 65(1); see also *MOTHERS AGAINST DRUNK DRIVING*, *supra* note 137.

<sup>149</sup> See *Underage Drinking: Prohibitions Against Hosting Underage Drinking Parties: Variables*, ALCOHOL POLICY INFO. SYS. (Jan. 1, 2009), [http://www.alcoholpolicy.niaaa.nih.gov/Prohibitions\\_Against\\_Hosting\\_Underage\\_Drinking\\_Parties.html](http://www.alcoholpolicy.niaaa.nih.gov/Prohibitions_Against_Hosting_Underage_Drinking_Parties.html) [hereinafter *Underage Drinking Variables*].

<sup>150</sup> See *Underage Drinking Maps and Charts*, *supra* note 140.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Underage Drinking Variables*, *supra* note 149.

guest—consumption or simple possession of alcohol; (2) what kind of property did the social event take place at—residence, outdoors, or other; (3) what was the degree of knowledge on the part of the social host regarding the age and level of intoxication of the guest that caused the injury to the third party; and (4) did the social host take preventative action that would potentially stop an injury from occurring as a result of intoxicated guests.<sup>155</sup> The two defenses, which only apply in certain states, that exempt the social hosts from liability from criminal prosecution are: (1) if the guest that became intoxicated and caused the injury was a family member or (2) if the guest that became intoxicated and caused the injury was a resident of the home in which the event took place.<sup>156</sup> These exceptions exist to prevent an immediate family member or a resident of the home from being considered a guest under the statute.<sup>157</sup>

These exceptions are not mutually exclusive as some states, like Arkansas, hold that being a family member is a valid exception, while being a resident of the home is not.<sup>158</sup> Conversely, in Oklahoma, being a resident is a valid defense to criminal liability, but being a family member is not.<sup>159</sup> In some states, like Arizona, either being a family member or being a resident of the place at which the event occurred is a valid defense against criminal liability for the social host.<sup>160</sup> In Pennsylvania, however, neither being a family member nor being a resident is a valid defense, and a social host can be held criminally liable for injuries to third parties as a result of a guest's intoxication, regardless of the relationship between the tortfeasor and the social host.<sup>161</sup>

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<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *State Profiles of Underage Drinking Laws: Arkansas*, ALCOHOL POLICY INFO. SYS., [http://alcoholpolicy.niaaa.nih.gov/APIS\\_State\\_Profile.html?state=AR](http://alcoholpolicy.niaaa.nih.gov/APIS_State_Profile.html?state=AR) (last visited July 29, 2010).

<sup>159</sup> *State Profiles of Underage Drinking Laws: Oklahoma*, ALCOHOL POLICY INFO. SYS., [http://alcoholpolicy.niaaa.nih.gov/APIS\\_State\\_Profile.html?state=OK](http://alcoholpolicy.niaaa.nih.gov/APIS_State_Profile.html?state=OK) (last visited July 29, 2010).

<sup>160</sup> *State Profiles of Underage Drinking Laws: Arizona*, ALCOHOL POLICY INFO. SYS., [http://alcoholpolicy.niaaa.nih.gov/APIS\\_State\\_Profile.html?state=AZ](http://alcoholpolicy.niaaa.nih.gov/APIS_State_Profile.html?state=AZ) (last visited July 29, 2010).

<sup>161</sup> *State Profiles of Underage Drinking Laws: Pennsylvania*, ALCOHOL POLICY INFO. SYS., [http://alcoholpolicy.niaaa.nih.gov/APIS\\_State\\_Profile.html?state=PA](http://alcoholpolicy.niaaa.nih.gov/APIS_State_Profile.html?state=PA) (last visited July 29, 2010).



In addition, there are often three crimes that social hosts are typically be charged with in those states that recognize criminal social host liability—“[c]ontributing to the delinquency of a minor[, m]anslaughter[, and r]eckless endangerment.”<sup>162</sup> These laws are aimed at imposing more than simply monetary sanctions against social hosts, and they succeed in instituting a governmental interest in curbing underage drinking and imposing serious consequences on social hosts for allowing underage drinking to occur on their premises.<sup>163</sup> The crucial difference between the civil and criminal social host laws is that the civil remedies can only be brought by private parties to provide monetary compensation for the injured party, whereas criminal charges are brought by a prosecutor and serve the public interest and not just private parties.<sup>164</sup>

Suppose, for example, that a social host has a party in New York at his or her home, and an underage guest becomes intoxicated, gets into a car accident, and kills two people and himself. Because there is only civil liability for social hosts in New York, the social host will suffer no repercussions unless the representative for the estate of the deceased decides to file a lawsuit. However, had the same accident taken place in New Jersey, the social host would have had a degree of liability including potentially facing imprisonment, regardless of whether the estates of the deceased filed suit.<sup>165</sup>

It is interesting that although New York is one of the thirty-eight states with laws that hold social hosts civilly liable, New York does not have a law that imposes criminal sanctions on social hosts.<sup>166</sup> This is because it is very difficult to prove criminal charges against social hosts.<sup>167</sup> There are multiple reasons why it is difficult to prove a criminal case against social hosts; however, the most prominent include (1) the difficulty in determining when the party that caused the injury became intoxicated, (2) social host liability cases typically involve mostly circumstantial evidence, and (3) the difficulty in finding reliable eyewitnesses that are willing to testify

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<sup>162</sup> Campbell, *supra* note 15.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> See *Underage Drinking Maps and Charts*, *supra* note 140.

<sup>166</sup> *Id.*

<sup>167</sup> Scott Helman & Maria Sacchetti, *Social Host Laws Hard To Enforce, DAs Say Snags Cited in Teen Drinking Cases*, BOS. GLOBE, Jan. 8, 2006, at A1.

against their peers.<sup>168</sup> It is more difficult to hold social hosts criminally liable than it is to hold hosts civilly liable, the reason being the necessary standard of proof.<sup>169</sup> While in a civil case the plaintiff must simply demonstrate that the defendant is liable by a preponderance of the evidence, in a criminal case the prosecutor must prove his case beyond a reasonable doubt.<sup>170</sup> It is very difficult to prove that the social host should be held liable for the injuries to a third party as a result of the actions of an intoxicated minor beyond a reasonable doubt.<sup>171</sup>

### C. Effects of Criminal and Civil Statutes

In Massachusetts, where social hosts can be found both criminally and civilly liable for injuries that occur as a result of the intoxication of a minor, there was not one successfully prosecuted case imposing criminal liability on social hosts in the six years following the enactment of the law.<sup>172</sup> According to Bristol, Massachusetts District Attorney Paul F. Walsh, Jr., "It's almost impossible to prove."<sup>173</sup> It is likely for this reason that New York does not have any laws that impose criminal liability on social hosts for the intoxication of minors.

There is no real indication, however, that imposing criminal sanctions on social hosts makes a significant impact on curbing underage drinking or preventing alcohol-related drunk driving fatalities from occurring. In 2008, there were 340 alcohol-impaired driving fatalities, forty-six of which were people under the age of twenty-one in New York State.<sup>174</sup> That means that in 2008, 1.7 out of every 100,000 people in New York,<sup>175</sup> and 0.9 out of every 100,000 people under the age of twenty-one in New York died due to alcohol-related driving fatalities.<sup>176</sup> Recall that New York State imposes no criminal

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<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> See *Burden of Proof*, CRIMINAL LAW LAWYER SOURCE, <http://www.criminal-law-lawyer-source.com/terms/burden-proof.html> (last visited July 27, 2010).

<sup>171</sup> See Helman & Sacchetti, *supra* note 167.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* (internal quotation marks omitted).

<sup>174</sup> See *Drunk Driving & Underage Drinking Statistics: New York*, THE CENTURY COUNCIL, <http://www.centurycouncil.org/learn-the-facts/statefacts/states/NY> (last visited July 30, 2010).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

sanctions on social hosts for hosting events at which underage guests become intoxicated.<sup>177</sup> Massachusetts, unlike New York, has enacted laws that impose both criminal sanctions and laws that place civil liability on social hosts where underage guests become intoxicated at their homes and/or establishments.<sup>178</sup> In 2008, eight years after the criminal social host laws were put into effect, there were 123 alcohol related driving fatalities, and twenty-two of those fatalities involved individuals under the age of twenty-one.<sup>179</sup> That means 1.9 out of every 100,000 people in Massachusetts,<sup>180</sup> and 1.4 out of every 100,000 people under the age of twenty-one in Massachusetts were involved in alcohol-related fatal crashes.<sup>181</sup>

While drunk driving fatalities are not determinative in whether the criminal sanctions are a successful means of curbing underage drinking, the prevention of alcohol-related driving fatalities is one of the primary goals of social host laws, and thus the statistic is both relevant and important.<sup>182</sup> It must be noted that, statistically, the imposition of criminal sanctions on social hosts, as opposed to simply civil liability, did not make a significant impact on curbing alcohol-related driving fatalities.<sup>183</sup> In theory, criminal sanctions against social hosts would instill enough fear into homeowners that it would prevent them from allowing their children or others to have events on their property where underage drinking may occur.<sup>184</sup> Practically, however, these criminal sanctions on social hosts seem to have a minor impact on curbing underage drinking.<sup>185</sup> Accordingly, the New York State Legislature is not too lenient in refraining from imposing criminal

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<sup>177</sup> See *Underage Drinking Maps and Charts*, *supra* note 137.

<sup>178</sup> *Id.*

<sup>179</sup> *Drunk Driving & Underage Drinking Statistics: Massachusetts*, THE CENTURY COUNCIL, <http://www.centurycouncil.org/learn-the-facts/statefacts/states/MA> (last visited July 30, 2010).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> See *Charles v. Seigfried*, 651 N.E.2d 154, 171-72 (Ill. 1995) (McMorrow, J., dissenting) (noting MADD's amicus curiae argument that the statistics of alcohol related motor vehicle accidents and underage drinking support finding a causal link between underage drinking and motor vehicle accidents).

<sup>183</sup> See Frank A. Sloan, Bridget A. Reilly & Christoph Schenzler, *Effects of Tort Liability and Insurance on Heavy Drinking and Driving*, 38 J.L. & ECON. 49, 70 (1995) (finding that civil liability has greater effects on binge drinking than criminal sanctions).

<sup>184</sup> See Helman & Sacchetti, *supra* at note 167.

<sup>185</sup> Gregory Zeller, *Suffolk County Legislature Passes Social Host Law*, LONG ISLAND BUS. NEWS, Dec. 4, 2007, at 1.

sanctions because the additional criminal sanctions do not seem to significantly, if at all, impact the public policy or adequately hinder the number of fatal alcohol-related accidents.

While New York is one of the thirty-eight states that has laws holding social hosts civilly liable, there are twelve states, plus the District of Columbia, that do not hold social hosts civilly liable at all for injuries to third parties that occur as a result of an intoxicated minor.<sup>186</sup> These states include Arkansas, California, Delaware, Hawaii, Kansas, Kentucky, Maryland, Oklahoma, South Dakota, Tennessee, West Virginia, and Virginia.<sup>187</sup> Interestingly, five of the states that do not impose civil liability on social hosts are states that have laws imposing criminal liability—Kansas, Arkansas, Hawaii, Maryland, and Oklahoma.<sup>188</sup>

This approach of holding social hosts criminally liable, but not civilly liable, for the injuries to third parties as a result of an intoxicated partygoer does not seem as effective as either the criminal and civil liability approach (i.e. Massachusetts) or simply the civil liability approach (i.e. New York). As mentioned earlier, in 2008 in New York State, 1.7 out of every 100,000 people were involved in an alcohol-related fatality.<sup>189</sup> Similarly, in 2008, 1.9 out of every 100,000 people in Massachusetts were involved in an alcohol-related fatality.<sup>190</sup> However, in Kansas—a state that imposes no civil social host liability, but imposes criminal sanctions on social hosts—5.2 out of every 100,000 people were involved in alcohol-related fatal car accidents.<sup>191</sup> Statistically, that is more than double the alcohol related fatal car accidents in New York, and almost double the number of alcohol related fatal accidents in Massachusetts. Some may argue that other factors contribute more heavily to the staggering differences between New York, Massachusetts, and Kansas besides social host

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<sup>186</sup> See Kat Zeiman, *The Trouble with Drunk Friends*, INSURE.COM, <http://www.insure.com/articles/homeinsurance/drunken-friends.html> (last visited Apr. 8, 2010).

<sup>187</sup> *Id.*

<sup>188</sup> Compare *id.* (listing states that do and do not recognize some form of social host liability laws), with *Underage Drinking Maps and Charts*, *supra* note 140 (showing a color coded map of states that have general social host laws, those with underage social host laws, and those states with no social host laws).

<sup>189</sup> *Drunk Driving & Underage Drinking Statistics: New York*, *supra* note 174.

<sup>190</sup> *Drunk Driving & Underage Drinking Statistics: Massachusetts*, *supra* note 179.

<sup>191</sup> *Drunk Driving & Underage Drinking Statistics: Kansas*, THE CENTURY COUNCIL, <http://www.centurycouncil.org/learn-the-facts/statefacts/states/KS> (last visited Aug. 2, 2010).

liability laws, specifically the location, population density, and landscape of the state.<sup>192</sup>

With that in mind, we next look at Maryland, a state very similar to both New York and Massachusetts. In 2008, in Maryland, another state that imposes only criminal sanctions and not civil liability on the part of social hosts, 2.7 out of every 100,000 people were involved in alcohol-related fatal car accidents.<sup>193</sup> Accordingly, it is fair to say that statistically, imposing only criminal sanctions, but placing no civil liability on the part of social hosts is the most ineffective way of curbing alcohol related driving fatalities.

While New York may not have the strictest laws governing social host liability, its method of implementing *only* civil liability is, statistically, the most effective and efficient way to accomplish the goals of social host liability laws. These goals include the curbing of underage drinking and the protection of the general public from potentially harmful situations involving alcohol related accidents.

## V. CONCLUSION

The number of alcohol related accidents, injuries, and fatalities will not diminish by itself over time. It is clear that states cannot outlaw alcohol consumption, as evidenced by the failure of prohibition in the early twentieth century. The only way for the state and federal governments to effectively address this very serious issue is to discover the root causes of these alcohol-related problems and address the problems before they start. Social host liability laws are one of the ways in which the states are addressing these problems.

New York may not be the strictest state when it comes to social host liability law, but, statistically, it appears as though the state's approach to stopping the consumption of alcohol by both minors and intoxicated adults is working. Although New York State only imposes civil liability on social hosts for the injuries caused to third parties as a result of intoxicated guests, the laws that are in place, Dram

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<sup>192</sup> See Samuel Warren, *Worst States for Drunken Driving*, FORBES, Nov. 20, 2008, available at [http://www.forbes.com/2008/11/20/driving-drunk-highway-forbeslife-cx\\_sw\\_1120\\_drunk.html](http://www.forbes.com/2008/11/20/driving-drunk-highway-forbeslife-cx_sw_1120_drunk.html) (noting that Montana has a high number of alcohol related driving fatalities because of its rural roadways).

<sup>193</sup> *Drunk Driving & Underage Drinking Statistics: Maryland*, THE CENTURY COUNCIL, <http://www.centurycouncil.org/learn-the-facts/statefacts/states/MD> (last visited Aug. 2, 2010).

Shop Act and General Obligations Law section 11-100, are both effective and efficient ways of accomplishing the goals of social host liability laws: stopping injuries, accidents, and fatalities that can be attributed to alcohol consumption. Although the laws are narrowly construed, they are effective because they put social hosts on notice as to what conduct will make them civilly liable and how they can prevent a potential disaster and avoid financial ruin before it occurs.

While it does not seem as though there is a sound reason for imposing criminal sanctions against social hosts, as they do not seem to make a significant difference in accomplishing the goals of social host liability laws, the New York State legislature should not rule out this option for the future. If the goal of social host liability laws is to encourage hosts to be more conscious of who is consuming alcohol at their events, any sort of law that imposes liability should be enacted. It is logical for states to impose laws that place varying degrees of liability on social hosts. These laws work to provide safety to the general public by preventing underage drinking and preventing the further intoxication of already intoxicated individuals. Preventing the injuries sustained as a result of underage drinking and/or the further intoxication of already intoxicated adults is exactly why laws like the Dram Shop Act and section 11-100 are both important and necessary.

As of the 2008 U.S. Census, New York is the third most densely populated state in the entire country,<sup>194</sup> and the only way to protect the people of the state from alcohol-related injury and death is to impose these social host laws. New York's stance on social host liability is appropriate for maximizing the goals that the New York State Legislature intended when it enacted the social host liability laws.

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<sup>194</sup> *State Rankings—Statistical Abstract of the United States: Resident Population—July 2008*, U.S. CENSUS BUREAU, <http://www.census.gov/statab/ranks/rank01.html> (last visited July 30, 2010).

