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Clouded Judgment: The Implications of Smith v. Merritt in the Realm of Social Host Liability and Underage Drinking in Texas Perspective.

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PERSPECTIVE

CLOUDED JUDGMENT: THE IMPLICATIONS OF *SMITH V. MERRITT* IN THE REALM OF SOCIAL HOST LIABILITY AND UNDERAGE DRINKING IN TEXAS

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"What we ask is that if the government wants to hold us to the same responsibilities and standards as other adults, then we be afforded the same privileges."[1]

I. INTRODUCTION

For decades, a vigorous debate has raged in the United States over minors and alcohol consumption.[2] Beginning with the Vietnam War, critics have denounced the contradiction and discord created by a government that drafted eighteen-year-olds to die in battle while prohibiting them from consuming alcohol.[3] Such protest succeeded in reducing the legal drinking age, but only for a short time.[4] Eventually, concern over young drivers consuming al-

1. Doug Myers, *Bill Would Let Voters Decide Minimum Drinking Age*, BATON ROUGE ADVOC., May 17, 1997, at 14A (quoting twenty-year-old Robert Owen, a representative of Equal Rights for All Adult Citizens), *available in* 1997 WL 7245024.

2. *See* Traci L. Toomey et al., *The Minimum Legal Drinking Age: History, Effectiveness, and Ongoing Debate*, 20 ALCOHOL HEALTH & RES. WORLD 213, 213 (1996) (describing the minimum drinking age as an ongoing debate reflective of the fluctuation in the minimum legal drinking age since 1970 throughout the United States).

3. *See* Matthew C. Houchens, Comment, *Killer Party: Proposing Civil Liability for Social Hosts Who Serve Alcohol to Minors*, 30 J. MARSHALL L. REV. 245, 253-54 (1996) (discussing the hypocrisy of eighteen-, nineteen-, and twenty-year-olds going to war in Vietnam without the right to drink alcohol); Kevin Snyder, Comment, *The Administrative Driver's License Suspension for Those Under Twenty-One: An Analysis of Section 322.2616,* Florida Statutes, 24 FLA. ST. U. L. REV. 1011, 1027 (1997) (recognizing the unfairness during the Vietnam War era caused by the fact that the minimum legal drinking age was twenty-one, yet those who were eighteen, nineteen, and twenty were expected to die in war); Alexander Reid, *Universities Turn Off Tap on Drinking*, BOSTON GLOBE, Oct. 3, 1988, at 1 (stating that in the midst of the Vietnam War, students demanded a lower drinking age to correspond with the ages of U.S. soldiers in Vietnam), *available in* 1988 WL 4635042; *see also* Michael P. Rosenthal, *The Minimum Drinking Age for Young People: An Observation*, 92 DICK. L. REV. 649, 662 (1988) (discussing the unrest over the eighteen-year-old draft requirement and the twenty-one-year-old drinking age during the time of the Vietnam War).

4. *Compare* Michael P. Rosenthal, *The Minimum Drinking Age for Young People: An Observation*, 92 DICK. L. REV. 649, 662 (1988) (indicating that after 1970, a majority of states lowered the drinking age to eighteen due to the perceived injustice of young soldiers not being allowed to consume alcohol), *with* Kelly Mahon Tullier, Note, *Governmental*

cohol persuaded many state legislatures to return the minimum drinking age to twenty-one.[5] In doing so, lawmakers necessarily determined that individuals between the ages of eighteen and twenty-one were too immature or irresponsible to consume alcoholic beverages.[6] Today, individuals who are at least eighteen

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Liability for Negligent Failure to Detain Drunk Drivers, 77 CORNELL L. REV. 873, 873 n.9 (1992) (stating that, as of 1988, "all states had increased the drinking age to 21").

The states that lowered their drinking ages did so because they determined that young Americans should not be drafted to serve in the military and yet be prevented from voting and drinking. *See* Michael P. Rosenthal, *The Minimum Drinking Age for Young People: An Observation*, 92 DICK. L. REV. 649, 653 (1988) (stating that the age of adulthood and the legal drinking age were decreased due to society's perception that young men who were fighting and dying in battle for the United States were not afforded "the rights and privileges of adults"); Kevin Snyder, Comment, *The Administrative Driver's License Suspension for Those Under Twenty-One: An Analysis of Section 322.2616,* Florida Statutes, 24 FLA. ST. U. L. REV. 1011, 1027 (1997) (indicating that concerns of fairness resulted from the realization that men who were too young to consume alcohol or vote were nonetheless perishing in battle in Vietnam and explaining that these concerns prompted a reduction of the drinking ages in several states, as well as the voting age across the nation); *see also* Russell G. Lande, *Opinion: Too Young to Drink*, RECORD (N.J.), Aug. 23, 1984, at A14 (condemning the fact that fifteen percent of American soldiers who died in 1983 in Beirut could not legally drink alcohol), *available in* 1984 WL 2436352; *Nothing Magic About Age of 21*, BATON ROUGE ADVOC., Apr. 1, 1996, at 8B (arguing that a minimum drinking age of twenty-one is unreasonable when individuals who are over the age of eighteen may, among other things, run a bar, serve in the state legislature, own property, and enlist in the military), *available in* 1996 WL 5928647.

Recently, a spokesman for the Marines said that persons old enough to fight in war for the United States should be regarded as mature enough to drink alcohol. *See* Carol J. Castaneda, *La. Drinking-Age Ruling Rekindles Debate*, USA TODAY, Mar. 22, 1996, at 3A (quoting Scott Gordon, spokesman for the Marines as stating that "[i]f you're going to ask a young man or young [woman] to go to war and potentially spill blood or die for their country, I think it's safe to say they're old enough to handle alcohol"), *available in* 1996 WL 2053291. *But see* Robert M. Jarvis et al., *Contextual Thinking: Why Law Students (and Lawyers) Need to Know History*, 42 WAYNE L. REV. 1603, 1608 (1996) (admitting that the "Vietnam War did play a role in the passage of the Twenty-Sixth Amendment," but stating that the Twenty-Sixth Amendment reduced the nationwide voting age primarily in order to "get around Congress' limited power to regulate state and local elections").

5. *See* 1 JAMES F. MOSHER, LIQUOR LIABILITY LAW § 1.03[2][b] (1998) (explaining that although many states lowered their legal minimum drinking ages during the 1970s, a number of states raised the legal minimum drinking age again to prevent young drivers from causing automobile accidents due to alcohol consumption).

6. *See* Matthew C. Houchens, Comment, *Killer Party: Proposing Civil Liability for Social Hosts Who Serve Alcohol to Minors*, 30 J. MARSHALL L. REV. 245, 286 n.102 (1996) (explaining that the minimum legal drinking age serves to counter irresponsible drinking by minors); *cf.* State v. Preston, 832 P.2d 513, 517 (Wash. Ct. App. 1992) (acknowledging that "juveniles between the ages of 13 and 17 who imbibe can be considered less responsible than those between the ages of 18 and 21 as evidenced by the fact that in several states the legal age limit for the consumption of alcohol is 18 years or older"), *aff'd sub. nom.* State v. Shawn P., 859 P.2d 1220 (Wash. 1993).

years of age, but under the age of twenty-one, can marry, vote, enlist in the armed services, and be executed for their crimes; however, they cannot legally consume or purchase alcohol.[7]

However, support exists for the higher minimum drinking age. *See, e.g.*, David Armstrong, *Deadly Quebec Crash Raises Alarm at N.E. Colleges*, BOSTON GLOBE, Feb. 6, 1995, at 14 (citing worries of college administrators over students in the United States who drive to Canada in order to benefit from the minimum drinking age of eighteen), *available in* 1995 WL 5920186; Editorial, *'Blood Borders' Could Come Back*, SAN ANTONIO EXPRESS-NEWS, Mar. 31, 1996 (citing a survey by the American Medical Association indicating that persons between the ages of nineteen and twenty are the group most prone to binge drinking and calling for a stricter observance of the minimum drinking age), *available in* 1996 WL 2826612; *Louisiana Ruling on Drinking Age Rightfully Sets Off Many Alarms*, SUN-SENTINEL (Ft. Lauderdale), Apr. 12, 1996, at 22A (proclaiming that a minimum drinking age of twenty-one "[does] young adults an enormous favor" by saving them from alcoholism and drunk-driving damage), *available in* 1996 WL 2497853; *Reaction Mixed on Drinking-Age Ruling*, DALLAS MORNING NEWS, July 3, 1996, at 32A (giving various opinions of restaurant employees regarding the upholding of Louisiana's minimum drinking age law that mandates age 21 as the legal drinking age, including the sentiment that adult crowds are more pleasant in bars and that those over twenty-one are better able to handle alcohol than those between the ages of eighteen and twenty-one), *available in* 1996 WL 2133797.

7. *See* U.S. CONST. amend. XXVI (guaranteeing suffrage to citizens "who are eighteen years of age or older"); TEX. PEN. CODE ANN. § 8.07(c) (Vernon Supp. 1998) (stating that an individual who is at least seventeen years old may be subject to execution); Fuller v. Maxus Energy Corp., 841 S.W.2d 881, 885 (Tex. App.—Waco 1992, no writ) (stating that persons over eighteen are free to make contracts, fight in wars, get married, and vote in elections); *Nothing Magic About Age of 21*, BATON ROUGE ADVOC., Apr. 1, 1996, at 8B (criticizing the fact that those over eighteen may marry, vote, serve in the Louisiana Legislature, and perform military duty, yet may not legally drink alcohol), *available in* 1996 WL 5928647. *Compare* Michael P. Rosenthal, *The Minimum Drinking Age for Young People: An Observation*, 92 DICK. L. REV. 649, 660 (1988) (asserting that persons between eighteen and twenty years of age should not be given autonomy regarding alcohol when alcohol-related accidents are a grave problem), *with* Kevin Snyder, *The Administrative Driver's License Suspension for Those Under Twenty-One: An Analysis of Section 322.2616,* Florida Statutes, 24 FLA. ST. U. L. REV 1011, 1028 (1997) (opining that "[t]he nation should return to a practice of fairness and concern for individual rights and lower the drinking age to reflect the level of responsibility expected of young adults"), *and* Alex Chan, *Drinking Age Discriminates Against Teenagers* (visited Aug. 25, 1998) <http://www.thelowell.org/lowell/may3-96/page3/drinking-age.html> (stating that "if our government feels that eighteen year olds are responsible enough to make important life decisions, it should show confidence in these young adults to act mature when it comes to drinking").

Today, eighteen-year-olds enjoy most of the privileges afforded to those twenty-one years of age or older. *See, e.g.*, FLA. STAT. ANN. § 743.07 (West 1997) (stating that "disability of nonage is . . . removed for all persons . . . who are 18 years of age or older, and they shall enjoy and suffer the rights, privileges, and obligations of all person 21 years of age or older except as otherwise excluded by the State Constitution . . . and . . . the Beverage Law"); MICH. COMP. LAWS § 722.52 (1993) (expressing that "a person who is at least 18 years of age . . . is an adult of legal age for all purposes whatsoever, and shall have the same duties, liabilities, responsibilities, rights, and legal capacity as persons heretofore acquired at 21 years of age"); TENN. CODE ANN. § 1-3-113(a) (1971) (declaring that

A similar dichotomy revolving around minors and alcohol consumption has developed in the State of Texas. In an unprecedented case, *Smith v. Merritt*,[8] the Texas Supreme Court held that a social host is not liable for providing alcohol to a guest who is over the age of eighteen, regardless of whether the guest is under the minimum legal drinking age.[9] The court reasoned that a nineteen-year-old guest is "an adult subject to being sued in his own capacity" for actions arising out of his consumption of alcohol, despite the fact that he is legally unable to purchase alcohol on his own.[10] The court made this determination in spite of the plain language of

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"[n]otwithstanding any laws to the contrary, any person who is eighteen (18) years of age or older shall have the same rights, duties, and responsibilities as a person who is twenty-one (21) years of age, except as provided [in this section] relative to [purchasing, possessing, transporting, and consuming alcoholic beverages]"); TEX. ALCO. BEV. CODE ANN. § 11.46 revisor's note (Vernon 1995) (indicating that "[n]otwithstanding any statutory or decisional law, or any rule, regulation, or ordinance . . . a person who is at least 18 years of age has all the rights, privileges, and obligations of a person who is 21 years of age"). For example, individuals between the ages of eighteen and twenty-one obtained the right to vote during the 1970s. *See* U.S. CONST. amend. XXVI, § 1 (stating that "[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age"); *cf.* Michael P. Rosenthal, *The Minimum Drinking Age for Young People: An Observation*, 92 DICK. L. REV. 649, 652-53 (1988) (showing that many states lowered the age of majority, and hence the voting age, during the early 1970s). During the same period, the minimum drinking age was lowered throughout the states to eighteen or nineteen, depending on the particular state. *See* 1 JAMES F. MOSHER, LIQUOR LIABILITY LAW § 1.03[2][b] (1998) (indicating that thirty-one states reduced drinking ages to either eighteen or nineteen during the early 1970s); Michael P. Rosenthal, *The Minimum Drinking Age for Young People: An Observation*, 92 DICK. L. REV. 649, 652 (1988) (revealing that many states lowered the minimum drinking age). Before this reduction, the minimum drinking and voting ages across the United States were twenty-one. *See id.* at 652-53 (indicating that before the 1970s, persons of age twenty and below could not drink or vote); Kevin Snyder, Comment, *The Administrative Driver's License Suspension for Those Under Twenty-One: An Analysis of Section 322.2616,* Florida Statutes, 24 FLA. ST. U. L. REV. 1011, 1027 (1997) (proclaiming that "[a]t the height of the Vietnam War, the drinking age was twenty-one").

8. 940 S.W.2d 602 (Tex. 1997).

9. *See* Smith v. Merritt, 940 S.W.2d 602, 607 (Tex. 1997) (declining to impose a duty on a social host for serving a guest as long as the guest is eighteen years of age or over).

10. *See id.* at 606. Chapter 106 of the Texas Alcoholic Beverage Code (TABC) prohibits a person under the age of twenty-one from purchasing alcohol. *See* TEX. ALCO. BEV. CODE ANN. §§ 106.01-.02 (Vernon 1995 & Supp. 1998) (providing that a minor, defined as a person under 21 years of age, "commits an offense if [the minor] purchases an alcoholic beverage").

the Texas Alcoholic Beverage Code (TABC), which provides that a minor is "a person under 21 years of age."[11]

Consider the example of an eighteen-year-old who attends a party at a friend's house. She drinks too much at the party, drives home intoxicated, and injures her friend riding in the passenger's seat. The effect of the court's holding in *Smith* is that this individual may be liable in tort for the injuries she caused to her passenger.[12] Conversely, the social host who provided the eighteen-year-old with alcohol avoids liability.[13]

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11. TEX. ALCO. BEV. CODE ANN. § 106.01 (Vernon 1995). In the State of Texas, classifications based on age do not involve a strict scrutiny constitutional analysis. *See* Weaver v. State, 823 S.W.2d 371, 374 (Tex. App.—Dallas 1992, pet. ref'd) (stating that age classifications do not require strict scrutiny because such classifications are not suspect); *see also* Walker v. Employees Retirement Sys., 753 S.W.2d 796, 797 (Tex. App.—Austin 1988, writ denied) (asserting that age classifications do not warrant strict scrutiny). To satisfy Article I, Section 3 of the Texas Constitution, an age classification must be reasonable, rather than arbitrary, and must be fairly and substantially related to the purpose behind the legislation. *See* Texas Woman's Univ. v. Chayklintaste, 530 S.W.2d 927, 928 (Tex. 1975) (stating that an "age classification is constitutionally permissible if it is reasonable, not arbitrary, and rests 'upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced are treated alike'" (quoting Reed v. Reed, 404 U.S. 71, 76 (1971))). Article I, Section 3 of the Texas Constitution states that "[a]ll free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services." TEX. CONST. art. I, § 3.

Only one Texas court has addressed age discrimination in relation to alcohol liability. *Fuller*, 841 S.W.2d at 883. In *Fuller*, the Waco court of appeals declared that treating individuals between the ages of eighteen and twenty as adults when determining liability resulting from the consumption of alcohol is not arbitrary or unreasonable. *See id.* at 885. The court came to this conclusion in one paragraph with no support for the proposition other than the assertion that eighteen-year-olds are adults for many purposes other than for drinking alcohol. *Cf. id.* (reasoning that because eighteen is the age of majority, eighteen-year-olds are presumably competent to behave as adults except where alcohol consumption is concerned). However, whether such a classification is fairly and substantially related to the purpose underlying the legislation is questionable. An important consideration is whether the purpose behind the legislation is legitimate. *See Texas Woman's Univ.*, 530 S.W.2d at 928 (stating that many decisions regarding constitutional challenges to the University rules "seem to turn on" whether purposes underlying such rules are legitimate).

12. *See Smith*, 940 S.W.2d. at 605 (noting that "[n]othing in the TABC or the common law prevents the Smiths from asserting a claim against Hale, the individual who made the choice to drink and drive").

13. *See id.* at 607 (holding that a social host is not liable for serving alcohol to a guest over the age of eighteen).

Although holding an individual responsible for her actions may seem just, the end result may often be an uncompensated victim.[14] In a serious accident, the passenger's medical bills may easily surpass the insurance limit.[15] In most instances, the only means that a person under twenty-one years of age has to pay for an injured person's medical bills is through a small insurance policy.[16] Apart from this insurance policy, an eighteen-year-old is virtually judgment-proof.[17] The supreme court in *Smith* ignores this reality by allowing a social host to escape liability, opining that the holding "does not leave the [passenger] without a remedy . . . [n]othing . . . prevents the [passenger] from asserting a claim against . . . the individual who made the choice to drink and drive."[18] Such a holding results in an injustice to the injured passenger because young drivers cannot always be relied upon to provide proper compensation to victims.[19]

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14. *See id.* at 604 (rendering a judgment wherein the Smiths received no award of damages even though their child was injured by an intoxicated underage guest to whom the defendant social hosts provided alcohol).

15. *See, e.g.*, Industrial Fire & Cas. Ins. Co. v. Cowan, 364 So. 2d 810, 811 (Fla. Dist. Ct. App. 1978) (indicating that medical expenses exceeded insurance coverage); Miller v. Windsor Ins. Co., 923 S.W.2d 91, 93 (Tex. App.—Fort Worth 1996, writ denied) (relating the plaintiff's contention that the defendant's policy limit did not cover his medical expenses resulting from an automobile accident).

16. *Cf.* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 123, at 913 (5th ed. 1984) (indicating that children, in contrast to their parents, are "usually not financially responsible"); VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 49 (1994) (discussing that children, as opposed to parents, are not financially responsible, and noting that parents are usually held liable); Denis Horgan, *Study Tells Us What We Already Know About Teens, Money*, HARTFORD COURANT, May 25, 1997, at A2 (asserting that any money teens have comes from their parents), *available in* 1997 WL 10965408; Laurie Tidyman-Jones, *Vision for Teens*, FRESNO BEE, Apr. 27, 1997, at B6 (contrasting teenagers with those who possess money), *available in* 1997 WL 3899845.

17. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 123, at 914 (5th ed. 1984) (indicating that children are generally financially unable to respond to damages); Kelly B. Dick, Comment, *Minor Drinking and Driving: California's Inconsistent and Inequitable Statutory Scheme of Social Host Immunity*, 25 U.C. DAVIS L. REV. 463, 485 n.142 (1992) (indicating that minors are often judgment-proof and unable to pay damages in lawsuits); Toni Weinstein, Note, *Visiting the Sins of the Child on the Parent: The Legality of Criminal Parental Liability Statutes*, 64 S. CAL. L. REV. 859, 863 (1991) (referring to children as judgment-proof due to their lack of financial resources).

18. *Smith*, 940 S.W.2d at 605.

19. *See* VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 5, 32 (1994) (stating that young drivers lack the financial solvency to pay large damages to injured third parties); Matthew C. Houchens, Comment, *Killer Party: Proposing Civil Liability for Social Hosts Who Serve Alcohol to Minors*, 30 J. MARSHALL L. REV. 245, 281 (1996)

The Texas Supreme Court's decision in *Smith* also creates an irreconcilable contradiction. On the one hand, an eighteen- to twenty-one-year-old is considered a minor unable to purchase or consume alcohol.[20] On the other hand, such an individual can be held solely liable as an adult for an injury occurring after a social host has provided her with alcoholic beverages.[21] Although many individuals under the age of twenty-one are unable to bear the responsibility connected with consuming alcohol, these individuals should not be subject to a disparity that holds them solely responsible for the adverse consequences that occur when a social host provides them with alcohol. Furthermore, in the wake of *Smith*, no deterrent exists to discourage social hosts from providing alcohol to individuals under twenty-one.

This Perspective evaluates this contradiction created by the Texas Supreme Court in *Smith* as well as its implications on social host liability in Texas. Specifically, this Perspective critically analyzes the court's holding, focusing on the inequities produced by permitting a social host to provide alcohol to individuals between the ages of eighteen and twenty-one without being subject to liability. Part II reviews the history of liability resulting from alcohol-related injuries in Texas. Part III discusses the facts in *Smith* and analyzes the court's decision in light of the TABC. Part IV examines the *Smith* holding and asserts that social host liability for serving alcohol to minors should encompass all guests under the age of twenty-one. Part V argues that the Texas Supreme Court erred in *Smith* by failing to impose liability on an adult social host for pro-

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(advocating that hosts who serve alcohol to teens be held liable for injuries that underage teens inflict upon third parties); *see also* Congini v. Portersville Valve Co., 458 A.2d 1384, 1386-87 (Pa. Super. Ct. 1983) (holding that social hosts owe no duty to victims injured by minor guests to whom the host served alcohol and conceding that although the "resulting tragedies" from drunk driving are serious, the court is "bound to follow existing law"); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 123, at 913 (5th ed. 1984) (explaining that teenagers lack the financial resources to respond to damages); 1 JAMES F. MOSHER, LIQUOR LIABILITY LAW § 2.01[2] (1998) (stating that legislatures are not as worried about the implications of drinking as they are about compensating injured victims of alcohol-related accidents).

20. *See* TEX. ALCO. BEV. CODE ANN. § 106.01 (Vernon 1995) (defining the term "minor" as "a person under twenty-one years of age").

21. *See Smith*, 940 S.W.2d at 606 (classifying Hale as an adult for purposes of civil liability resulting from his alcohol consumption).

viding alcohol to a minor guest.[22] This Perspective concludes that *Smith* should be overruled in order to ensure adequate compensation for victims of alcohol-related injuries and to reconcile inconsistent standards and responsibilities placed on individuals between the ages of eighteen and twenty-one.

II. History of Liability Stemming from Alcohol-Related Injuries to Third Parties in Texas

In Texas, social hosts are held to a much lower standard of care than vendors of alcohol.[23] Although this standard has been statutorily codified, it has been further developed in Texas case law. In fact, common-law liability of alcohol suppliers to injured third parties has continued to evolve over the last eleven years.[24] For example, in 1987, the Texas Supreme Court addressed the liability of commercial suppliers for injuries to third parties in *El Chico Corp. v. Poole*.[25] In 1993, the court resolved the question of social host liability for an adult guest's injuries to a third party in *Graff v. Beard*.[26] Two years later, a court of appeals evaluated the possibil-

22. *Cf.* Estate of Hernandez v. Arizona Bd. of Regents, 866 P.2d 1330, 1342 (Ariz. 1994) (en banc) (holding that social hosts are liable for the harm that results from serving alcohol to underage guests); Matthew C. Houchens, Comment, *Killer Party: Proposing Civil Liability for Social Hosts Who Serve Alcohol to Minors*, 30 J. Marshall L. Rev. 245, 281 (1996) (recommending liability for social hosts who serve minors in situations where such minors become intoxicated and subsequently cause harm).

23. *See Smith*, 940 S.W.2d at 607 (indicating that commercial providers of alcohol may be liable for serving individuals between eighteen and twenty, but social hosts will not be held liable for serving the same age group).

24. *See, e.g., id.* at 603 (addressing a social host's liability to injured third parties); Graff v. Beard, 858 S.W.2d 918, 918 (Tex. 1993) (refusing to impose social host liability for an adult guest's actions); El Chico Corp. v. Poole, 732 S.W.2d 306, 314 (Tex. 1987) (imposing liability for third party injuries on commercial providers of alcohol); Ryan v. Friesenhahn, 911 S.W.2d 113, 118 (Tex. App.—San Antonio 1995) (holding that "a duty exists between the adult social host and the minor guest"), *aff'd*, 960 S.W.2d 656 (Tex. 1998).

25. *See El Chico*, 732 S.W.2d at 308 (deciding "whether a person injured by an intoxicated driver may recover from the alcoholic beverage licensee who allegedly sold intoxicants to that intoxicated driver in violation of the Texas Alcoholic Beverage Code").

26. *See Graff*, 858 S.W.2d at 918 (declining to create a common law cause of action for social host liability).

ity of social host liability for a minor guest's actions in *Ryan v. Friesenhahn*.[27]

A. El Chico Corp. v. Poole

El Chico Corp. v. Poole[28] is a landmark case that addresses the relationship between suppliers of alcohol and third parties.[29] According to the Texas Supreme Court in *El Chico*, commercial providers of alcohol *do* owe a duty of care to injured third parties.[30] Prior to *El Chico*, a provider of alcohol could not be sued by persons who later became intoxicated and harmed either themselves or a third party.[31] According to the supreme court, courts traditionally refused to impose liability on providers, reasoning that the proximate cause of this harm was the perpetrator's drinking rather than the provider's furnishing of the alcohol.[32] The *El Chico* decision invalidated this reasoning.

In *El Chico*, the supreme court reviewed two lawsuits.[33] In each case, the commercial establishments served alcohol to intoxicated patrons.[34] The patrons subsequently caused car accidents, resulting

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27. *See Ryan*, 911 S.W.2d at 118 (creating a common-law cause of action against a social host that served alcohol to a minor guest who subsequently harmed a third party).

28. 732 S.W.2d 306 (Tex. 1987).

29. *See El Chico*, 732 S.W.2d at 308.

30. *See id.* at 314 (imposing liability on alcoholic beverage licensees who serve obviously intoxicated patrons and noting that such liability is based upon duties created by both common law and statute).

31. *See* Smith v. Sewell, 858 S.W.2d 350, 352 (Tex. 1993) (noting that at common law, alcohol servers could not be sued for any injuries occurring because of such service); 1 JAMES F. MOSHER, LIQUOR LIABILITY LAW § 2.02[6] (1998) (stating that traditionally, persons who became intoxicated and subsequently injured themselves could not sue bar owners for such injuries); Catherine Fancher, Note, *One Too Many? An Intoxicated Person May Now Sue a Commercial Provider of Alcohol Under Dram Shop Act for Injuries Sustained Due to His Own Intoxication*: Smith v. Sewell, *858 S.W.2d 350 (Tex. 1993)*, 25 TEX. TECH L. REV. 239, 240 (1993) (indicating the absence of liability for alcohol providers under the common law in Texas); *see also* TEX. ALCO. BEV. CODE ANN. § 2.01 (Vernon 1995) (defining "provider" and "provision").

32. *See El Chico*, 732 S.W.2d at 309 (stating that at common law "the consumption, not the sale or service of alcohol, was viewed as the sole proximate cause of the patron's intoxication and later injury to a third party"); *see also* VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 545 (1994) (discussing the traditional proximate cause analysis used by courts in order to reach the conclusion that alcohol providers were not civilly liable to third parties affected by intoxication of drinkers supplied with alcoholic beverages).

33. *See El Chico*, 732 S.W.2d at 308 (describing the two wrongful death suits).

34. *See id.* at 308-09.

in deaths to other drivers.[35] The families of the other drivers sued the establishments for negligently serving the already intoxicated patrons.[36] The supreme court held that commercial providers of alcohol could be liable to injured third parties for harm caused by those to whom the providers served alcohol.[37] According to the court, if the seller knew or should have known that the customer was drunk, the seller could be held liable.[38]

While *El Chico* was pending on appeal, the Texas Legislature passed the Dram Shop Act of 1987,[39] thus limiting the provider's duty created by the court in *El Chico*.[40] Under the Dram Shop Act, a seller of alcohol is less likely to be liable to a third party than under the common-law duty established by *El Chico*.[41] The Act permits liability only in instances in which the patron "was obviously intoxicated to the extent that he presented a clear danger to himself and others."[42] Hence, to show liability under the Dram Shop Act, the seller must not only know that the patron was drunk,

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35. *See id.* (discussing the resulting fatalities of the traffic accidents).

36. *See id.*

37. *See id.* at 314 (acknowledging that imputed liability of commercial providers of alcohol is derived from common-law negligence principles).

38. *See id.* (noting that a licensee is negligent as a matter of law if he sells alcohol to a visibly intoxicated customer).

39. Act of June 11, 1987, 70th Leg., R.S., ch. 303, § 3, 1987 Tex. Gen. Laws 1673, 1674 (current version at TEX. ALCO. BEV. CODE ANN. §§ 2.01-.03 (Vernon 1995)). The addition of Chapter 2 was virtually simultaneous with the *El Chico* decision. *See* Graff v. Beard, 858 S.W.2d 918, 919 (Tex. 1993) (discussing the enactment of § 2.03 in light of *El Chico*).

40. *See* Smith v. Merritt, 940 S.W.2d 602, 605 (Tex. 1997) (recognizing that the duty created by *El Chico* was wiped out by the Dram Shop Act); *Graff*, 858 S.W.2d at 919 (explaining that the Dram Shop Act superseded the *El Chico* decision).

41. *See Graff*, 858 S.W.2d at 919 (finding that the duty under the Dram Shop Act is "less onerous" for sellers of alcohol than the duty under *El Chico*); Fuller v. Maxus Energy Corp., 841 S.W.2d 881, 884 (Tex. App.—Waco 1992, no writ) (comparing the *El Chico* decision with the Dram Shop Act and concluding that the plaintiff has a much heavier burden of proving the case against a social host under the Act).

42. TEX. ALCO. BEV. CODE ANN. § 2.02(b)(1) (Vernon 1995). Section 2.02(b) states:

> (b) Providing, selling, or serving an alcoholic beverage may be made the basis of a statutory cause of action under this chapter . . . upon proof that:
>
> (1) at the time the provision occurred it was apparent to the provider that the individual being sold, served, or provided with an alcoholic beverage was obviously intoxicated to the extent that he presented a clear danger to himself and others; and
>
> (2) the intoxication of the recipient of the alcoholic beverage was a proximate cause of the damages suffered.

Id. § 2.02(b).

but also that the patron was dangerous to himself and to the public.[43]

B. Graff v. Beard

Since the enactment of the Dram Shop Act, injured consumers and third parties have filed numerous suits against commercial providers of alcohol.[44] Similarly, some plaintiffs have sought compensation for injuries from social hosts, hoping that the judiciary would create a common-law duty based on the Dram Act Shop Act.[45] However, the Act does not address whether social hosts are

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43. *See id.* (requiring the provider to realize that the recipient was intoxicated and that the recipient was dangerous to the public in general).

44. *See, e.g.*, Smith v. Sewell, 858 S.W.2d 350, 356 (Tex. 1993) (holding, in a suit brought under the Dram Shop Act, that when a person harmed by an intoxicated patron is that the patron himself, his recovery against the defendant seller will be limited or barred based on how much fault of his own contributed to the injuries); Born v. Virginia City Dance Hall & Saloon, 857 S.W.2d 951, 958 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (affirming the trial court's judgment for the defendant saloon in a wrongful death action under the TABC); Boyd v. Fuel Distrib., Inc., 795 S.W.2d 266, 268-69 (Tex. App.—Austin 1990, writ denied) (affirming summary judgment for the defendant store in a case brought under the Dram Shop Act for selling beer to a minor).

45. *See, e.g.*, *Graff*, 858 S.W.2d at 918-19 (considering the common-law duty creating liability for a social host, but declining to create such liability under the Act); Whitney Crowne Corp. v. George Distrib. Inc, 950 S.W.2d 82, 92 (Tex. App.—Amarillo 1997, writ denied) (refusing to find that the social host owed a duty as an employer to an employee who became intoxicated and later died in an automobile accident); Ryan v. Friesenhahn, 911 S.W.2d 113, 114, 118 (Tex. App.—San Antonio 1995) (discussing the facts of a case in which the parents sued the host of the party where their daughter consumed alcohol and killed herself driving home, and later holding that the adult hosts had a common-law duty to control the conduct of the minor guests), *aff'd*, 960 S.W.2d 656 (Tex. 1998); Walker v. Children's Serv., Inc., 751 S.W.2d 717, 718-20 (Tex. App.—Amarillo 1988, writ denied) (reviewing the facts in a suit against a social host for serving an employee who later injured himself in a car wreck due to intoxication, and finding no duty on the part of the host).

Some authorities indicate that the trend in other jurisdictions is not to hold social hosts liable for third party injuries inflicted by intoxicated guests. *See Walker*, 751 S.W.2d at 720 (stating "the great weight of authority supports the position that a social host should not be held liable to his guests nor to third parties whom his guests may injure"); Robert F. Cochran, Jr., *"Good Whiskey," Drunk Driving, and Innocent Bystanders: The Responsibility of Manufacturers of Alcohol and Other Dangerous Hedonic Products for Bystander Injury*, 45 S.C. L. REV. 269, 271 n.3 (1994) (stating that although social host liability is not completely unheard of in all jurisdictions, most states refuse to impose such liability); Michael K. Steenson, *With the Legislature's Permission and the Supreme Court's Consent, Common Law Social Host Liability Returns to Minnesota*, 21 WM. MITCHELL L. REV. 45, 56 (1995) (stating that "[t]he majority of jurisdictions deciding the issue have refused to hold social hosts liable for harm caused by intoxicated guests" (quoting Cole v. City of Spring Lake Park, 314 N.W.2d 836, 839-40 (1982))); *see also* Matthew C. Houchens, Comment, *Killer Party: Proposing Civil Liability for Social Hosts Who Serve Alcohol to Minors*,

included within its scope.[46] The Texas Supreme Court addressed this omission in *Graff v. Beard*[47] and held that the Act did not apply to social hosts,[48] effectively leaving the issue of social host liability to be decided through common law.[49]

Graff held, in part, that a social host is not liable for serving alcohol to an intoxicated *adult* guest.[50] The court explained that a social host should not be held responsible for knowing when an adult guest is intoxicated.[51] According to the court, a social host tends to be heavily outnumbered by his guests; moreover, the guests may consume alcohol before arriving at a party, in addition to exhibiting signs of intoxication at different times.[52] In light of these considerations, the *Graff* court held that a social host is not liable for

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30 J. MARSHALL L. REV. 245, 247-48 (1996) (stating that under Illinois law, social hosts cannot be held liable to third parties for serving either adults or minors). However, the current trend in most jurisdictions appears to be toward imposing liability on social hosts. *See* Bohan v. Last, 674 A.2d 839, 843 (Conn. 1996) (concluding that under Connecticut law, social hosts who serve minors are liable for injuries to third parties caused by drunk minors if service of alcohol by the social host is found to be the proximate cause of harm to the third parties); Jerome O'Callaghan, *"Under the Influence:" Pornography and Alcohol—Some Common Themes*, 29 AKRON L. REV. 35, 38 n.17 (1995) (indicating that several jurisdictions now impose liability on social hosts for harm to third parties).

46. *See* TEX. ALCO. BEV. CODE ANN. §§ 2.01-2.03 (Vernon 1995) (omitting social hosts from the liability framework).

47. 858 S.W.2d 918 (Tex. 1993).

48. *See Graff*, 858 S.W.2d at 919 (stating that only commercial providers are subject to the Dram Shop Act); *see also* Smith v. Merritt, 940 S.W.2d 602, 605 (Tex. 1997) (recognizing that the Texas Legislature purposefully excluded social hosts from civil liability for claims under Chapter 2 of TABC, which contains the Dram Shop Act); *cf.* Tennille v. Action Distrib. Co., 570 N.W.2d 130, 132-33 (Mich. Ct. App. 1997) (concluding that the state's dram shop act pertains solely to commercial sellers of alcohol).

49. *Cf., e.g., Smith*, 940 S.W.2d at 603-04 (confronting the issue of social host liability for guests over eighteen yet under twenty-one who are served alcoholic beverages); *Ryan*, 911 S.W.2d at 118 (addressing the issue of social host liability for guests under eighteen who are served alcoholic beverages); *Walker*, 751 S.W.2d at 719 (recognizing in 1988, approximately five years before *Graff*, that *Walker* was the first Texas case to address the issue of whether a social host owes a duty "to not serve alcohol to a visibly intoxicated adult [guest], whom the host knows, or should know, intends to drive a motor vehicle").

50. *See Graff*, 858 S.W.2d at 921 (recognizing that because a social host does not have the right to control an adult guest's access and consumption of alcoholic beverages, liability will not arise from that guest's consumption of alcohol).

51. *See id.* at 921 (refusing to make a social host responsible for keeping track of a guest's drinking and labeling the arguments that advocated affixing liability to the social host as "unconvincing").

52. *See id.* (noting the various obstacles to a host's knowledge of a guest's intoxication, including the number of guests, guests' consumption prior to arrival, and differing times of intoxication in guests).

the actions of intoxicated adult guests should they decide to drive while intoxicated.[53] Under the court's reasoning, adult guests should be solely responsible for their actions when they drink[54] because adult guests are not legally subject to control by the host.[55] Notably, *Graff* did not address a social host's liability to guests who are under the age of twenty-one.[56] However, a court of appeals faced this very issue two years later.

C. Ryan v. Friesenhahn

In 1995, the San Antonio court of appeals decided *Ryan v. Friesenhahn*.[57] In *Ryan*, the court addressed the issue of whether a defendant social host could be liable for serving alcohol to a seventeen-year-old who later died in an automobile accident.[58] The court determined that adult social hosts owe a common-law duty to minor guests[59] because adults have a better understanding of the risks associated with drinking alcohol.[60] The court explained, "That adults have superior knowledge of the risk of drinking should be apparent from the legislature's decision to allow persons to become adults on their eighteenth birthday *for all purposes but the consumption of alcohol*."[61] The *Ryan* court, therefore, drew a distinction between the duties owed to adult guests and the duties

53. *See id.* at 921-22 (concluding that individuals who consume alcohol have a responsibility to avoid the foreseeable risks of their behavior).

54. *See id.* at 922 (stating that an intoxicated guest is completely accountable for his injurious behavior).

55. *See id.* at 921-22 (observing that a social host has no legal right to control his guests).

56. *See id.* at 918-22 (failing to specifically define "adult" or "minor" in rejecting social host liability for serving adult guests).

57. 911 S.W.2d 113 (Tex. App.—San Antonio 1995), *aff'd*, 960 S.W.2d 656 (Tex. 1998).

58. *See* Ryan v. Friesenhahn, 911 S.W.2d 113, 114 (Tex. App.—San Antonio 1995) (finding that the plaintiffs stated a cause of action for negligence and negligence per se); *aff'd*, 960 S.W.2d 656 (Tex. 1998).

59. *See id.* at 118 (reasoning that the duty of social hosts toward minor guests can be inferred from legislative intent).

60. *See id.* (noting that minors are not competent to fully understand the effects of alcohol consumption, but adults seem to have a more superior knowledge of the risks inherent to the consumption of alcohol).

61. *Id.* (emphasis added) (citing Fuller v. Maxus Energy Corp., 841 S.W.2d 881, 885 (Tex. App.—Waco 1992, no writ)).

owed to minor guests.[62] The decision in *Ryan* was subsequently affirmed, albeit on other grounds, by the Texas Supreme Court.[63]

Nevertheless, neither the court of appeals nor the Texas Supreme Court addressed the scope of the term "minor." Notably, the supreme court emphasized the importance of Chapter 106 of the TABC,[64] which defines a minor as an individual under twenty-one years of age.[65] Thus, one can infer that the court intended to establish liability for social hosts serving alcohol to eighteen-, nineteen-, and twenty-year-olds who later cause automobile accidents.[66] This exact question, however, was answered in 1997 by the supreme court in *Smith v. Merritt*.[67]

III. Overview of Issues and Findings in *Smith v. Merritt*

In *Smith*, a Texas youth discovered the blurred line between childhood and adulthood in Texas.[68] Nineteen-year-old Robert Barbee hosted a party at his family's lake house.[69] Robert Hale, also nineteen years old, was one of the guests.[70] Barbee's family was neither present nor aware of the party; however, evidence indicated that the family was aware that Barbee had hosted parties at the lake house in the past.[71] After consuming "two or three cups of

62. *See id.* (explaining that "[w]hile one adult has no general duty to control the behavior of another adult, one would hope that adults would exercise special diligence in supervising minors").

63. *See* Friesenhahn v. Ryan, 960 S.W.2d 656, 659 (Tex. 1998) (affirming the court of appeals decision to remand the case because summary judgment was improper). In its opinion, the supreme court stated that "we express no opinion on the court of appeals' conclusion that the Ryans stated negligence and negligence per se causes of action." *Id.*

64. *See Ryan,* 911 S.W.2d at 117 (discussing Section 106.06, which makes providing alcohol to a minor a criminal offense, as a basis for a negligence per se action against a social host).

65. *See* Tex. Alco. Bev. Code Ann. § 106.01 (Vernon 1995) (defining a minor as a person under the age of twenty-one).

66. *See Ryan*, 911 S.W.2d at 118 (recognizing social host liability for serving alcohol to minors and relating that a minor, for TABC purposes, is "a person under twenty-one years of age").

67. *See* Smith v. Merritt, 940 S.W.2d 602, 603 (Tex. 1997) (deciding whether a social host was liable to a third party for injuries caused by the host's intoxicated nineteen-year-old guest).

68. *See id.* at 606 (finding that a nineteen-year-old was both a minor and an adult for two purposes, each related to alcohol consumption).

69. *See id.*

70. *See id.* at 604.

71. *See id.*

beer," Hale chose to drive another friend, Colin Smith, home.[72] On the way home, Hale collided with a truck.[73] Smith sustained serious injuries in the collision and sued Robert Barbee, along with Barbee's parents and grandparents who, together, owned the lake house.[74]

In the lawsuit, the Smiths alleged negligence and negligence per se "for providing Hale with alcohol in violation of liquor control laws and with knowledge that Hale would be driving."[75] The trial court rendered summary judgment for the social hosts.[76] The court of appeals held that Barbee and his family owed no common-law duty to Smith to prevent Hale from driving while intoxicated.[77] However, the appeals court partially reversed the trial court's decision, stating that a fact question existed regarding whether Barbee was negligent per se when he provided alcohol to the underage Hale.[78]

On further appeal, the Texas Supreme Court addressed both the negligence and negligence per se arguments.[79] First, the court addressed whether a cause of action for negligence could exist against a social host for serving alcohol to eighteen-, nineteen-, and twenty-year-old individuals.[80] Accordingly, the court sought to determine whether a social host owes a duty to withhold alcohol from a nineteen-year-old guest.[81] As the *Smith* court observed, deciding whether to impose a duty "involves complex social and economic policy considerations."[82]

After considering the legislative intent and public policy underlying Chapter 2 of the TABC, the court determined that the statute

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72. *Id.*
73. *See id.*
74. *See id.*
75. *Id.*
76. *See id.*
77. *See* Smith v. Merritt, 929 S.W.2d 456, 459 (Tex. App.—Tyler 1995) (stating that a social host is not liable for providing alcohol to the minor guest), *aff'd in part, rev'd in part*, 940 S.W.2d 602 (Tex. 1997).
78. *See Smith*, 929 S.W.2d at 459-60 (holding that a fact issue remained regarding negligence per se because the TABC guards against underage drinking).
79. *See* Smith v. Merritt, 940 S.W.2d 602, 604 (Tex. 1997) (addressing whether the social hosts were liable under negligence or negligence per se theories).
80. *See id.*
81. *See id.* (observing that the existence of a legal duty is the threshold issue in negligence cases).
82. *Id.*

precluded Smith's common-law negligence claim.[83] Specifically, the court found that Chapter 2 of the TABC, entitled "Civil Liabilities for Serving Beverages,"[84] provides "the exclusive cause of action for providing an alcoholic beverage to a person 18 years of age or older."[85] The court further noted that Chapter 2 expressly limits itself to a person who sells or serves alcohol *under a TABC permit.*[86] Thus, according to the *Smith* court, the Texas Legislature intended only to provide for a "statutory cause of action against commercial providers" and not a common-law duty against social hosts for serving alcohol to individuals under twenty-one.[87]

The *Smith* court also relied upon *Graff v. Beard* to justify its holding.[88] As indicated earlier, the *Graff* court refused to establish a common-law duty for social hosts who provide alcohol to adult guests.[89] Borrowing from *Graff*, the *Smith* Court reasoned that "[a]bsent a special relationship between the social host and the adult guest, the host has neither superior knowledge with which to foresee harm nor a legal right to control the guest."[90] The *Smith* court then refuted the notion that minors and social hosts have a special relationship such that the host should foresee harm and exercise control over the minor guest.[91] According to the court, even though nineteen-year-old Robert Hale was classified as a minor under the TABC, he was an adult for social host liability pur-

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83. *See id.* at 605 (explaining that "[t]he Legislature demonstrated its intent against the creation of common-law social host liability for serving persons eighteen years of age or older by including languages in Section 2.03 that liability under Chapter 2 'is in lieu of common law or other statutory law warranties and duties'" (citing TEX. ALCO. BEV. CODE ANN. § 2.03 (Vernon 1995))).

84. TEX. ALCO. BEV. CODE ANN. §§ 2.01-.03 (Vernon 1995).

85. *Smith*, 940 S.W.2d at 605 (quoting TEX. ALCO. BEV. CODE ANN. § 2.03 (Vernon 1995)) (emphasis omitted).

86. *See id.* (explaining that liability under Chapter 2 of the TABC extends only to those who serve or sell alcohol by permit or license). The Act defines a provider as "a person who sells or serves an alcoholic beverage under authority of a license or permit issued under the terms of this code or who otherwise sells an alcoholic beverage to an individual." TEX. ALCO. BEV. CODE ANN. § 2.01 (Vernon 1995).

87. *See Smith,* 940 S.W.2d at 605 (discussing the legislative intent behind the TABC).

88. *See id.* (stating that *Graff* leads to the conclusion that "the defendants . . . did not owe a common-law tort duty to the Smiths to refrain from providing alcohol to Hale").

89. *See* Graff v. Beard, 858 S.W.2d 918, 918 (Tex. 1993) (refusing to impose social host liability).

90. *Smith*, 940 S.W.2d at 605.

91. *See id.* at 606 (opining that because Hale was an adult, *Graff* is applicable).

poses.[92] According to Justice Abbott, the author of the opinion, the Legislature did not intend that persons between the ages of eighteen and twenty be classified as minors for civil liability purposes because the only reason for increasing the drinking age to twenty-one was to prevent the federal government from withholding highway funds from the state.[93]

In addition, the *Smith* court explained that the Legislature did not intend to permit social host liability for serving alcohol to persons eighteen years of age or over; doing so would impose harsher civil liability upon social hosts than commercial providers.[94] The court explained:

> Because commercial providers are much better equipped to determine how much alcohol guests have consumed and when they have approached their limit, it would be odd, indeed, to hold that a statute limiting commercial vendor liability simultaneously allows this Court to create social host liability at a lower standard of culpability.[95]

Finally, in rejecting the plaintiffs' negligence per se action, the court noted that because Chapter 2 provides the exclusive remedy for "civil liability for serving alcohol to persons aged eighteen to twenty," Chapter 106, which governs criminal liability, could not serve as the basis for civil liability.[96] In other words, although Chapter 106 provides criminal liability for adults who provide alcohol to persons under twenty-one years of age, this criminal statute

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92. *See id.* (explaining that "Hale was an adult for virtually all purposes at the time of [the] accident" as well as for the purpose of civil liability).

93. *See id.* (explaining that "[t]he Legislature raised the drinking age to twenty-one only for the express purpose of avoiding 'the imposition of sanctions against the state and loss of federal highway funds' for failure to comply with a federal highway funding statute" (citing TEX. ALCO. BEV. CODE. ANN. § 106.01 historical note (Vernon 1995) [Act of June 6, 1985, 69th Leg. R.S., ch. 285, §§ 1, 14, 15, Tex. Gen. Laws 1323, 1328-29; Act of June 11, 1985, 69th Leg., R.S., ch. 462, §§ 2, 15, 16, Tex. Gen. Laws 1625, 1629-30]).

94. *See id.* at 607 (noting that under Chapter 2, a commercial provider may be held liable "only if at the time the provision occurred it was apparent to the provider that the individual being sold, served, or provided with an alcoholic beverage was obviously intoxicated to the extent that he presented a clear danger to himself and others" (citing TEX. ALCO. BEV. CODE ANN. § 2.02(b)(1) (Vernon 1995))). Without the requirements that the recipient be "obviously intoxicated," common-law social host liability would allow plaintiffs to recover more easily from social hosts than commercial providers. *See id.*

95. *Id.*

96. *See id.* at 607-08 (contending that "[b]y enacting Chapter 2 separately from Chapter 106, and thereby establishing a bifurcated civil and criminal liability scheme, the Legislature manifested its intent that Chapter 2 should serve as the sole basis of civil liability for serving alcohol to persons aged eighteen to twenty").

could not form the basis of a negligence per se claim because of the Chapter 2 exclusivity clause.[97]

Thus, as a result of *Smith*, a social host is excluded from civil liability to third persons under Chapter 2 of TABC when the social host provides alcohol to someone who is at least eighteen years old because the social host has no common-law duty to prevent that individual from drinking.[98] This holding effectively leaves guests solely liable for any injuries they inflict that are the result of their alcohol consumption.[99] Moreover, *Smith* creates a contradiction unique to Texas case law. Essentially, the decision draws a distinction between adults *under* twenty-one and adults *over* twenty-one in the realm of social host liability. In addition to this contradiction, the court's decision in *Smith* cannot be reconciled with the TABC, legislative intent, the importance of compensating victims, or the majority approach of other states to social host liability.

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97. *See id.* at 608 (explaining that Chapter 2 "provides the exclusive cause of action for providing an alcoholic beverage to a person 18 years of age or older" (citing TEX. ALCO. BEV. CODE ANN. § 2.03 (Vernon 1995))).

98. *See id.* (discussing the implications of Chapter 2 of TABC for social hosts). Section 2.03 of the TABC provides:

> The liability of providers under this chapter for the actions of their customers, members, or guests who are or become intoxicated is in lieu of common law or other statutory law warranties and duties of providers of alcoholic beverages. This chapter does not impose obligations on a provider of alcoholic beverages other than those expressly stated in this chapter. This chapter provides the exclusive cause of action for providing an alcoholic beverage to a person 18 years of age or older.

TEX. ALCO. BEV. CODE ANN. § 2.03 (Vernon 1995).

99. In defense of its holding, the court stated that "[o]ur holding does not leave the Smiths without a remedy, however. Nothing in the TABC or the common law prevents the Smiths from asserting a claim against Hale, the individual who made the choice to drink and drive." *Smith,* 940 S.W.2d at 605.

IV. The Irreconcilability of the Texas Supreme Court's Reasoning in *Smith v. Merritt*—An Argument for Imposing Liability on Social Hosts for Accidents Caused by Intoxicated Individuals Who Are Under Twenty-One

A. *Using Minority Status to Establish Social Host Liability Based upon Negligence Per Se*

1. Texas Alcoholic Beverage Code Section 106.06 and Negligence Per Se

"In this code, 'minor' means a person under twenty-one years of age."[100]

Although the *Smith* court recognized that a social host may be liable for serving minor guests under eighteen years of age who cause accidents, it refused to impose civil liability on an individual who served alcohol to a nineteen-year-old.[101] According to the court, Robert Hale, a nineteen-year-old male, was an adult for all purposes except for the minimum drinking age provision.[102] The court relied upon the general standards for privileges such as voting, serving in the military, and the right to marry.[103] Because social host liability stems from the consumption of alcohol, and in this case, the consumption of alcohol by a minor under the TABC, the court should have deferred to the TABC definition of a minor.[104] In future decisions, the court should fashion a negligence

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100. Tex. Alco. Bev. Code Ann. § 106.01 (Vernon 1995).

101. *See Smith*, 940 S.W.2d at 603-04 n.1. In *Ryan v. Friesenhahn*, the Fourth Court of Appeals "concluded that social hosts can be liable in negligence and negligence per se for injuries sustained by an intoxicated guest under eighteen years of age." *Id.* The Texas Supreme Court granted "Friesenhahn's application for writ of error to determine whether the appellate court correctly imposed a social host duty under the circumstances of that case." *Id.* The Supreme Court's holding in *Smith v. Merrit*, however, "is limited to social hosts providing alcohol to guests eighteen years of age or older." *Id.* As such, *Smith* "is not dispositive of the *Friesenhahn* case." *Id.*

102. *See id.* at 606 (stating that "[t]he fact that he was defined as a minor solely for purposes of TABC Section 106.01 is not significant in our negligence analysis").

103. *See id.* (describing the various rights, duties, and privileges with which eighteen-year-olds are afforded).

104. *See* Tex. Alco. Bev. Code Ann. §§ 106.01, 106.04, 106.06 (Vernon 1995 & Supp. 1998) (mandating that in addition to the person who purchases or furnishes alcohol to a minor, a minor, defined as a person under the age of twenty-one, can be criminally charged for consuming alcohol).

duty consistent with the TABC and impose liability on hosts who serve alcohol to individuals under twenty-one years of age.

To this end, Section 106.06 of the TABC provides a sound basis upon which a negligence per se action can be framed. Section 106.06 imposes criminal liability on any person who "gives or with criminal negligence makes available an alcoholic beverage to a minor."[105] The *Smith* court held that "providing alcohol to a person aged eighteen to twenty, in violation of section 106.06 of the TABC, is not sufficient to establish a negligence per se cause of action against a social host."[106] The court relied on the provision found in Chapter 2 of the TABC that provides that "the exclusive cause of action for providing an alcoholic beverage to a person 18 years of age or older."[107] This section of the Dram Shop Act, according to the court, *precluded* social host liability under the theory of negligence per se.[108] However, Chapter 2 only applies to *commercial* providers of alcohol and does not address social host liability.[109] As the *Smith* court noted, "Only 'a person who *sells or serves* an alcoholic beverage *under authority of a license or permit* issued under the terms of [the TABC] or who otherwise sells an alcoholic beverage to an individual' can be liable under Chapter 2."[110]

Thus, Chapter 2 should not impede a civil cause of action brought against a social host for serving alcohol to an eighteen-, nineteen-, or twenty-year-old involved in an automobile collision. Nothing in the TABC precludes a negligence per se cause of action against social hosts who serve alcohol to eighteen-, nineteen-, or twenty-year-olds.[111] Rather, utilizing the TABC's definition of

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105. *Id.* § 106.06.

106. *Smith*, 940 S.W.2d at 608.

107. TEX. ALCO. BEV. CODE ANN. § 2.03 (Vernon 1995).

108. *See Smith*, 940 S.W.2d at 608 (stating that "[b]y enacting Chapter 2 separately from Chapter 106, and thereby establishing a bifurcated civil and criminal liability scheme, the Legislature manifested its intent that Chapter 2 should serve as the sole basis of civil liability for serving alcohol to persons aged 18 to 20").

109. *See* TEX. ALCO. BEV. CODE ANN. §§ 2.01, 2.03 (Vernon 1995) (imposing civil liability only on a provider of alcohol, which is defined as "a person who sells or serves an alcoholic beverage under authority of a license or permit").

110. *Smith*, 940 S.W.2d at 605 (emphasis added) (citing TEX. ALCO. BEV. CODE ANN. § 2.01 (Vernon 1995)).

111. *Cf.* TEX. ALCO. BEV. CODE ANN. § 106.06(a) (Vernon 1995) (stating that "a person commits an offense if he . . . gives or makes available an alcoholic beverage to a minor

"minor" as a basis for social host liability, and, in particular, a negligence per se action, is consistent with the goal of promoting safety that underlies the minimum legal drinking age.

2. Legislative Intent Regarding the Minimum Drinking Age and Civil Liability

The *Smith* court stated that the only reason Texas raised the drinking age from eighteen to twenty-one was to maintain the state's receipt of federal highway funding.[112] In other words, in order to conclude that the Legislature did not intend for the legal drinking age to be set at twenty-one, the *Smith* court relied on a legislative policy preference wherein the minimum drinking age in Texas was raised in exchange for federal highway money.[113] Relying on this underlying purpose for establishing the drinking age at twenty-one, the *Smith* court reasoned that persons over eighteen should retain their majority status for other purposes, including civil liability.[114] Thus, the court avoided the TABC's characteriza-

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with criminal negligence"); *Smith*, 940 S.W.2d at 608 n.7 (indicating that social hosts who provide individuals aged eighteen to twenty with alcohol are subject to prosecution).

By providing alcohol to an individual under the legal drinking age, the social host in *Smith* violated the law; if the Legislature sought fit to criminally punish social hosts for providing alcohol to individuals under twenty-one, it surely did not intend to limit a social host's civil liability for the same actions. *Cf.* TEX. ALCO. BEV. CODE ANN. § 1.03 (Vernon 1995) (proclaiming the purpose of the TABC to be "protection of the welfare, health, peace, temperance, and safety of the people of the state"). Although *Smith* states that the Legislature considered, but did not create, social host liability for serving guests over eighteen, no express legislative history forbidding such liability exists. *See Smith*, 940 S.W.2d at 608. If the Legislature sought to preclude such liability, it could have enacted legislation doing so. *See, e.g.*, CAL. BUS. & PROF. CODE § 123.92 (West Supp. 1991); Jacob R. Pritcher, Jr., Note, *Is It Time to Turn out the Lights? Social Host Liability Extended to Third Persons Injured by Intoxicated Adult Guests:* Beard v. Graff, *801 S.W.2d 158 (Tex. App.—San Antonio 1990, writ granted) (en banc)*, 22 TEX. TECH L. REV. 903, 903-10 (1991).

112. *See Smith*, 940 S.W.2d at 606 (recognizing that the minimum drinking age in Texas was raised to twenty-one so the State could continue to receive federal highway funding).

113. *See id.* at 606 (noting the Legislature's policy preference for lowering the drinking age to nineteen if the federal highway funding law is ever repealed or becomes unenforceable).

114. *See id.* at 606-07 (stating that "[t]he Legislature raised the drinking age to twenty-one *only* for the express purpose of avoiding 'the imposition of sanctions against the state and loss of federal highway funds' for failure to comply with a federal highway funding statute") (emphasis added). Thus, persons over eighteen are adults for all purposes, including civil liability, with the exception of the minimum legal drinking age. *Cf. id.*

tion of persons between the ages of eighteen and twenty as minors by emphasizing the Legislature's intent.[115]

Notably, the federal government's primary purpose for enacting legislation that restricted highway funding provided to states with minimum drinking ages under twenty-one was *safety*.[116] Viewing the drinking problem among youths to be so horrendous,[117] Congress determined that individuals between eighteen and twenty should not be treated as mature adults who may purchase alcohol.[118] In fact, statistics from the period surrounding the enactment of the minimum drinking age legislation showed that teenagers and individuals in their early twenties caused forty-two percent of all fatal drunk driving accidents in the United States.[119] Statistics such as these, along with a rising societal fear of drinking and driving,[120] prompted the United States Congress to enact legislation that promoted highway safety and raised the legal drinking age.[121] Many

115. *See id.* (stating that "[a]bsent the federal statute related to highway funds, persons aged nineteen and twenty . . . would not be minors under Section 106.01 [of the TABC]," and contending that the characterization of Hale as a minor under this TABC section "is not significant in our negligence analysis"). Section 106.01 of the TABC characterizes persons between the ages of eighteen and twenty as minors. *See* TEX. ALCO. BEV. CODE ANN. § 106.01 (Vernon 1995) (defining persons younger than "21 years of age" as minors).

116. *See* 23 U.S.C. § 158(a)(1) (1994) (withholding a percentage of federal highway funding from states which do not raise the minimum drinking age to twenty-one); S. REP. NO. 103-199, at 1 (1993) (indicating that the federal government's purpose for raising the drinking age to twenty-one was to promote highway safety in general).

117. *See* S. REP. NO. 103-199, at 1-2 (1993) (discussing the safety problems that are pervasive among young drivers).

118. *Cf.* 23 U.S.C. § 158 (1995) (explaining that if the states raise their minimum drinking ages to twenty-one, they may lose federal highway money).

119. *See* Michael P. Rosenthal, *The Minimum Drinking Age for Young People: An Observation*, 92 DICK L. REV. 649, 657 (1988) (relying on a 1982 U.S. Department of Transportation study on deadly accidents and stating that "sixteen- to twenty-four-year-old drivers represent twenty percent of licensed drivers in the United States and less than twenty percent of total miles driven, yet they account for forty-two percent of all fatal alcohol-related accidents").

120. *See id.* at 655-56 (detailing the history behind the federal highway funding act, including mounting public concern over drinking and driving).

121. *See* S. REP. NO. 103-199, at 1 (1993) (stating that the 1984 congressional enactment of the National Minimum Drinking Age Law, mandating withholding of federal highway funding from states with minimum drinking ages of less than twenty-one, was passed to lower the amount of deaths occurring on highways because of alcohol).

states followed Congress' lead, establishing the legal drinking age as twenty-one.[122]

The *Smith* decision, however, does not solve the continuing problem of teen-age drinking and driving.[123] Statistics from the Texas Department of Public Safety indicate that an eighteen-, nineteen-, or twenty-year-old driver is much more likely to be killed while driving an automobile in an intoxicated state than a sixteen- or seventeen-year-old.[124] Individuals between the ages of eighteen and twenty are also continually labeled as either immature or irresponsible,[125] and thus, in need of protection and gui-

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122. *See* David G. Dargatis, Note, *Put Down That Drink!: The Double Jeopardy Drunk Driving Defense Is Not Going to Save You*, 81 IOWA L. REV. 775, 779 n.21 (1996) (stating that, in 1988, Wyoming was the last state to increase the minimum legal drinking age to twenty-one); Kelly Mahon Tullier, Note, *Governmental Liability for Negligent Failure to Detain Drunk Drivers*, 77 CORNELL L. REV. 873, 873 n.9 (1992) (noting that all states had to raise the drinking age to twenty-one or lose federal highway funding); Carol J. Castaneda, *La. Drinking-Age Ruling Rekindles Debate*, USA TODAY, Mar. 22, 1996, at 3A (reporting that by 1988, every state returned the minimum drinking age to twenty-one), *available in* 1996 WL 2053291.

123. *See, e.g.*, Charles v. Seigfried, 651 N.E.2d 154, 172 (Ill. 1995) (McMorrow, J., dissenting) (citing MADD arguments that teenage drinking is a tremendous source of alcohol-related harm in society, including the problem of driving while intoxicated); William J. Bratton, *The New York City Police Department's Civil Enforcement of Quality-of-Life Crimes*, 3 J.L. & POL'Y 447, 462-63 (1995) (implicating teens in New York City's drunk driving problem); *Drunk Driving—No. 1 Killer of American Teens*, WASH. POST, Oct. 22, 1991, at Z5 (stating that "[t]raffic crashes were the leading cause of death of Americans ages 16 to 20, with more than half of the fatalities-3,361 in 1990-of *minors involving alcohol*, the DOT reported") (emphasis added), *available in* 1991 WL 2111985; *cf.* Carrie Teegardin, *Special Report: Teen Drinking No Questions Asked Views—Adults Want to Restrict Kids' Driving*, ATLANTA J.—CONST., Jan. 5, 1997, at E3 (illustrating parental concerns over teens' drinking and driving), *available in* 1997 WL 3947524.

124. *See* TEXAS DEP'T OF PUBLIC SAFETY, MOTOR VEHICLE TRAFFIC ACCIDENTS 54 (1996) (providing statistics that show that an eighteen-, nineteen-, or twenty-year-old driver was at least twice as likely to be killed while driving under the influence of alcohol than a seventeen-year-old driver during the period from 1993 to 1997).

125. *See* Matthew C. Houchens, Comment, *Killer Party: Proposing Civil Liability for Social Hosts Who Serve Alcohol to Minors*, 30 J. MARSHALL L. REV. 245, 286 n.102 (1996) (explaining that the minimum legal drinking age serves to counter irresponsible drinking by minors); *see also* Montgomery v. Orr, 498 N.Y.S.2d 968, 973 (N.Y. App. Div. 1986) (opining that "[a] minor by reason of his or her immaturity is not 'able bodied' to be able to drink or to make informed judgments in this regard. Therefore, the fault is not so much that of the minor, but that of the supplier"); *cf.* State v. Preston, 832 P.2d 513, 517 (Wash. Ct. App. 1992) (acknowledging that "juveniles between the ages of 13 and 17 who imbibe can be considered less responsible than those between the ages of 18 and 21 as evidenced by the fact that in several states the legal age limit for the consumption of alcohol is 18 years or older"), *aff'd sub nom.* State v. Shawn P., 859 P.2d 1220 (Wash. 1993).

dance.[126] As one commentator stated, they "have not shown that they can be treated like adults in alcohol-related decisions and they have not shown themselves to be responsible."[127] By not imposing liability on social hosts who provide alcohol to individuals between the ages of eighteen and twenty, the Texas Supreme Court is essentially refusing to help resolve this important public dilemma. The decision does nothing to deter socials hosts from serving alcohol to underage guests who may subsequently drink and drive. In addition, the court places great responsibility upon the underage individual who is often viewed as irresponsible.

The *Smith* decision's effect of not promoting safety not only contradicts Congress' intent behind raising the legal drinking age; it also contradicts the stated purpose behind the TABC. As the Tyler court of appeals appropriately noted in its *Smith v. Merritt* opinion, "[t]he stated purpose of the Alcoholic Beverage Code is 'the protection of the welfare, health, peace, temperance and safety of the people of the state,' and it is to be 'liberally construed to accomplish this purpose.'"[128] By refusing to recognize social host liability, the *Smith* court fails to construe the TABC liberally as a means of achieving safety. A liberal construction of the TABC, mindful of Congress' and the Texas Legislature's intent, would assign liability to a social host for the consequences arising from providing alcohol to underage adults.

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126. *See* Kelly v. Gwinnell, 476 A.2d 1219, 1230-31 n.1 (N.J. 1984) (Garibaldi, J., dissenting) (acknowledging that minors in general are protected by laws that recognize and take into account minors' immaturity); Michael P. Rosenthal, *The Minimum Drinking Age for Young People: An Observation*, 92 DICK. L. REV. 649, 660 & n.102 (1988) (stating that individuals between eighteen and twenty do not have the experience to handle a mixture of alcohol and driving, therefore society should be paternalistic toward these youths); *see also* Kevin Snyder, Comment, *The Administrative Driver's License Suspension for Those Under Twenty-One: An Analysis of Section 322.2616,* Florida Statutes, 24 FLA. ST. U. L. REV. 1011, 1013 (1997) (explaining that the Presidential Commission on Drunken Driving pressured states to implement minimum drinking ages of twenty-one in an effort to protect young drivers).

127. Michael P. Rosenthal, *The Minimum Drinking Age for Young People: An Observation*, 92 DICK. L. REV. 649, 660 (1988). Immaturity may not be the main concern behind the minimum drinking age. *See* Kenneth E. Gewerth & Clifford K. Dorne, *Imposing the Death Penalty on Juvenile Murderers: A Constitutional Assessment*, 75 JUDICATURE 6, 12 (1991) (asserting that administrative convenience, not minors' immaturity, is the probable reason behind state minimum drinking age laws).

128. Smith v. Merritt, 929 S.W.2d 456, 459 (Tex App.—Tyler 1995) (citing TEX.ALCO. BEV. CODE ANN. § 1.03 (Vernon 1995)), *aff'd in part, rev'd in part*, 940 S.W.2d 602 (Tex. 1997).

B. Smith v. Merritt's *Improper Reliance on* Graff v. Beard

Statutory interpretation was not the sole basis for the Texas Supreme Court's decision in *Smith*. The court also relied upon *Graff v. Beard*, in which the court refused to recognize social host liability for serving alcohol to adult guests.[129] In its reliance upon *Graff*, the *Smith* court reiterated the policy behind not imposing liability upon a social host.[130] According to the court in *Smith*, "Absent a special relationship between the social host and the adult guest, the host has neither superior knowledge with which to foresee harm nor a legal right to control the guest."[131] Consequently, the *Smith* court concluded that a social host occupies no special relationship to a nineteen-year-old guest because that nineteen-year-old guest is not a minor.[132] In addition to ignoring reality, this holding conflicts with the clear language and purposes of the TABC.[133]

The TABC repeatedly refers to individuals *under twenty-one* as a statutorily protected class.[134] Because a guest under the legal drinking age is prohibited from purchasing alcohol, a social host often provides any alcohol this individual consumes.[135] Therefore,

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129. *See* Smith v. Merritt, 940 S.W.2d 602, 605 (Tex. 1997) (noting that the court in *Graff* declined "to create a common-law tort duty for a social host who makes alcohol available to an intoxicated adult guest who will be driving"); Graff v. Beard, 858 S.W.2d 918, 918 (Tex. 1993) (refusing to create a common-law cause of action for social host liability).

130. *See Smith*, 940 S.W.2d at 605 (discussing why liability should remain on the drinker and not the host).

131. *Id.*

132. *See id.* at 606 (explaining that because Hale was an adult, the social host was not obligated to regulate Hale's drinking).

133. *See* TEX. ALCO. BEV. CODE ANN. § 106.01 (Vernon 1995) (defining minor as a person under twenty-one).

134. *See id.* (stating that persons younger than twenty-one are minors); Kovar v. Krampitz, 941 S.W.2d 249, 252 (Tex. App.—Houston [14th Dist.] 1996, no writ) (recognizing specifically that an eighteen-year-old, and generally all other persons under twenty-one, are part of protected class under the TABC); Ryan v. Friesenhahn, 911 S.W.2d 113, 117 (Tex. App.—San Antonio 1995) (stating that minors are protected under the TABC), *aff'd*, 960 S.W.2d 656 (Tex. 1998); Chapa v. Club Corp. of Am., 737 S.W.2d 427, 429 (Tex. App.—Austin 1987, no writ) (restating that minors are a class sought to be protected by the statute); *cf.* Walker v. Key, 686 P.2d 973, 977 (N.M. Ct. App. 1984) (stating that the New Mexico Legislature deemed minors to be a "special class").

135. *See* Graff v. Beard, 858 S.W.2d 918, 927 (Tex. 1993) (Gammage, J., dissenting) (stating that "the host still retains absolute control over whether alcoholic beverages should be served at all"); *see, e.g.*, Kobach v. Crook, 366 N.W.2d 857, 865 (Wis. 1985) (indicating that the social host allegedly gave a minor guest alcohol); Edward L. Raymond,

a social host often has the ability to control a minor guest's consumption of alcohol.[136] In this regard, the social host also maintains a special relationship with the minor guest. Thus, *Graff* is inapplicable to *Smith*, which indicates that a social host *should* be liable for injuries caused by an underage adult who consumes alcoholic beverages.

C. *Compensating Victims*

In addition to the deficiencies behind the *Smith* holding, the court's refusal to impose liability on a social host also forces the victim to seek compensation from the minor driver.[137] Typically, young drivers who support themselves are either uninsured or underinsured.[138] This lack of insurance ultimately creates a problem for a victim who is seeking redress for injuries.[139] The victim's only recourse is to sue the minor driver.[140] However, due to the driver's young age, the driver is not likely to have sufficient funds to compensate the victim.[141] Moreover, any assets the driver owns are

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Jr., Annotation, *Social Host's Liability for Injuries Incurred by Third Parties As a Result of Intoxicated Guest's Negligence*, 62 A.L.R.4TH 16 (1989) (referring to tort cases where social hosts provided underage guests with alcoholic beverages).

136. *Cf.* Montgomery v. Orr, 498 N.Y.S.2d 968, 973 (N.Y. App. Div. 1986) (stating that, for social hosts, denying alcohol to minors is easier than denying alcohol to adults); 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, 406 n.24 (1988) (asserting that adult social hosts will be able to control minor social guests with great ease compared to adult social guests).

137. *See Smith*, 940 S.W.2d at 605 (stating that plaintiffs are free to pursue a claim against the intoxicated driver).

138. *Cf.* VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 32 (1994) (stating that "[m]any drivers, *particularly young drivers, have assets insufficient to pay large judgments*, and so the prospect of a large judgment does not create much of a deterrent effect") (emphasis added).

139. *Cf. id.* (indicating that victims of young drivers are unlikely to receive sufficient reimbursement for injuries sustained).

140. *See Smith*, 940 S.W.2d at 605 (refusing to hold a social host liable for a third party's injuries, but noting the sole remaining option of suing the nineteen-year-old driver).

141. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 83, at 597 (5th ed. 1984) (stating that "the uninsured are, as a group, those who are least responsible financially, and so unlikely to be able to pay a judgment"); *The Other College Debt*, CHRISTIAN SCI. MONITOR, Sept. 5, 1997, at 20 (stating that "[t]he reality is that most college students have no income, little experience with credit, and often large student loan debts on top of what they're charging on their cards"), *available in* 1997 WL 2803762; *cf.* Eric Olson, *Student Season-Ticket Sales Below School's Expectations*, OMAHA WORLD-HERALD, Oct. 16, 1997, at 33 (suggesting that typical college students are unemployed and have little disposable income), *available in* 1997 WL 6316892.

likely exempt, making the driver essentially judgment-proof.[142] A victim, therefore, does not have an adequate remedy for any injuries sustained.[143]

Because of the poor financial position of the teenage driver, the adult social host is a better candidate to compensate the victim.[144] Often, a social host is an employed adult with a home and insurance.[145] If liability is imposed on the social host, the victim's chances of recovery dramatically increase.[146] First, the victim is able to sue two separate parties to recover damages for his injuries.[147] Second, the social host is likely to be in a better financial position than the driver to provide compensation.[148] Moreover, a social host will likely be better insured than a minor driver, also

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142. *See* Kelly B. Dick, Comment, *Minor Drinking and Driving: California's Inconsistent and Inequitable Statutory Scheme of Social Host Immunity*, 25 U.C. DAVIS L. REV. 463, 485 n.142 (1992) (stating that "[o]ften the drinking minor may be judgment-proof, lack insurance, or lack sufficient means with which to satisfy a monetary damage award").

143. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 82, at 587 (5th ed. 1984) (stating that "the fact that [an] insured was judgment-proof, would defeat all recovery in favor of anyone").

144. *Cf.* Walter E. Williams, *False Civil Rights Vision and Contempt for Rule of Law*, 79 GEO. L.J. 1777, 1779 (1991) (indicating that families where the heads of household are in their forties and fifties are nearly double that of family incomes where the heads of household are under the age of twenty-four).

145. *Cf.* Diane Long, *Here Comes the Truth: Class Gives Students Dose of Reality*, TENNESSEAN (Nashville), Dec. 12, 1996, at 4B (inferring that adulthood naturally brings with it "job skills, house buying and insurance"), *available in* 1996 WL 14211695; Ryan Verzaal, *Driving II: Road Hazards-Insurance Guarantees Enormous Expenses; Licenses Mean Tickets to Trouble for New Drivers*, SUN-SENTINEL (Ft. Lauderdale), Mar. 5, 1997, at 20 (indicating that teens transform into adults "with well-paying jobs and a need for home loans and life insurance"), *available in* 1997 WL 3093977.

146. *Cf.* VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 49 (1994) (noting that a parent may be vicariously liable for the tortious acts of a child); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 123, at 914 (5th ed. 1984) (explaining that a parent may be liable for the tortious acts of a child if the parent encourages the act).

147. *Cf.* Smith v. Merritt, 940 S.W.2d 602, 605 (Tex. 1997) (noting that the victim could sue the underage driver).

148. *Cf.* Kelly v. Gwinnell, 476 A.2d 1219, 1225 (N.J. 1984) (relating that social hosts may increase their premises liability limits to cover adverse incidents arising from serving alcohol); Kelly B. Dick, Comment, *Minor Drinking and Driving: California's Inconsistent and Inequitable Statutory Scheme of Social Host Immunity*, 25 U.C. DAVIS L. REV. 463, 485 n.142 (1992) (characterizing minors as generally unable to compensate victims). *But see* Greg K. Vitali, Note, *An In-Depth Analysis of the Development and Ramifications of New Jersey's Social Host Liability Statute*, 20 SETON HALL LEGIS. J. 532, 562 n.54 (1996) (asserting that numerous social hosts cannot afford sufficient homeowners' insurance to compensate victims).

increasing the possibility of recovery.[149] Additionally, imposing liability upon a social host for the victim's injuries furthers the public policy of making the victim whole.[150] Ultimately, if social hosts are called upon to make the victim whole, a greater likelihood exists that prospective social hosts will exercise greater care in serving alcoholic beverages; hosts who face liability for the actions of their underage guests will avoid providing alcohol to those guests.[151]

D. *Consensus*

Significantly, the *Smith* decision is contrary to many other jurisdictions that do not distinguish between minors under eighteen and minors under the minimum legal drinking age in the context of social host liability.[152] For example, New Jersey recognizes social host liability toward any minor under twenty-one who was served alcohol and was injured as a result.[153] In Arizona, social hosts who serve *anyone under the minimum drinking age* may also be held liable towards third parties injured as a result of such service.[154] In

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149. *See* Kelly B. Dick, Comment, *Minor Drinking and Driving: California's Inconsistent and Inequitable Statutory Scheme of Social Host Immunity*, 25 U.C. DAVIS L. REV. 463, 485 n.142 (1992) (stating that minors frequently are uninsured).

150. *Cf.* VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 5 (1994) (referring to the argument that those with the best ability to pay should reimburse victims as a basic element of public policy).

151. *Cf.* Saul Levmore, *Rethinking Comparative Law: Variety and Uniformity in Ancient and Modern Tort Law*, 61 TUL. L. REV. 235, 243-44 (1986) (explaining the need for a means to "prevent the inefficient exploitation of neighbors' resources" and asserting that negligent individuals must be assessed as liable, or held liable, in conjunction with their fellow negligent tortfeasors). Professor Levmore argues that a successful society implements a means, such as tort law, to discourage negligent behavior. *See id.* at 243.

152. *See* Charles v. Seigfried, 651 N.E.2d 154, 173-74 (Ill. 1995) (McMorrow, J., dissenting) (listing twenty-six states that permit liability for social hosts who serve individuals under the legal drinking age who later injure third parties); Cary Latimer, Note, Charles v. Siegfried: *Social Host Liability Takes a Backseat to Judicial Restraint*, 27 LOY. U. CHI. L.J. 1067, 1093 n.236 (1996) (indicating that over half of the states permit a victim to sue a social host for a minor guest's actions). *But see* Matthew C. Houchens, Comment, *Killer Party: Proposing Civil Liability for Social Hosts Who Serve Alcohol to Minors*, 30 J. MARSHALL L. REV. 245, 270 n.151 (1996) (explaining that, as of 1995, *twenty-seven* states recognized social host liability for serving minors).

153. *See* Componile v. Maybee, 641 A.2d 1143, 1147 (N.J. Super. 1994) (holding that social hosts may be liable to minors under the legal drinking age for damages linked to hosts serving minors).

154. *See* Estate of Hernandez v. Arizona Bd. of Regents, 866 P.2d 1330, 1342 (Ariz. 1994) (holding that "Arizona courts . . . will entertain an action for damages against a nonlicensee who negligently furnishes alcohol to those under the legal drinking age when that act is a cause of injury to a third person").

addition, Michigan allows claims against social hosts who provide alcohol to those under the minimum drinking age.[155]

Unlike Texas, a majority of states recognize that social hosts have a responsibility not to provide alcohol to individuals below the legal drinking age, and these states enforce this duty with civil liability.[156] A glaring inconsistency exists in Texas because the underage driver is incompetent to purchase or consume alcohol, yet the social host who provided the alcohol to the driver escapes liability on the grounds that eighteen- to twenty-year-olds are "mature enough" to accept sole responsibility for their actions. To resolve this inconsistency, social hosts, as well as the underage intoxicated guests, should be held liable for the actions of those guests when the actions result from consuming alcohol provided by the social host. Accordingly, Texas should follow the logic of other jurisdictions and treat all individuals under the minimum drinking age equally.

V. CONCLUSION

Smith v. Merritt creates serious ramifications regarding alcohol consumption and liability. Through statutes and case law, Texas has recognized that an individual's maturity level changes with age. As such, individuals under a certain age are required to be treated differently than individuals older than the designated age. In light of the fact that young people under the age of twenty-one encompassed a large percentage of the alcohol-related car accidents, the federal government designated the age of maturity in the context

155. *See* Longstreth v. Gensel, 377 N.W.2d 804, 812-13 (Mich. 1985) (allowing a negligence claim against social hosts who served a person *under the minimum drinking age*); Matthew C. Houchens, Comment, *Killer Party: Proposing Civil Liability for Social Hosts Who Serve Alcohol to Minors*, 30 J. MARSHALL L. REV. 245, 277 (1996) (stating that "[i]n *Longstreth v. Gensel*, the court construed the section which prohibited any person from furnishing liquor to underage persons to apply not only to license sellers but to all persons").

156. *See Charles*, 651 N.E.2d at 173-74 (noting that twenty-six states recognize social host liability in cases of adults serving minors); Matthew C. Houchens, Comment, *Killer Party: Proposing Civil Liability for Social Hosts Who Serve Alcohol to Minors*, 30 J. MARSHALL L. REV. 245, 270 n.151 (1996) (noting that over half of the states allow social host liability for subsequent actions of a minor guest); Cary Latimer, Note, Charles v. Seigfried: *Social Host Liability Takes a Backseat to Judicial Restraint*, 27 LOY. U. CHI. L.J. 1067, 1093 n.236 (1996) (recognizing that over half of the fifty states "have adopted social host liability for minors").

of alcohol consumption as twenty-one. Texas followed the federal government, perhaps reluctantly, and increased its legal drinking age to twenty-one.

However, in deciding *Smith*, the Texas Supreme Court ignored the underlying purpose for increasing the drinking age—immaturity of minors. The court should not have avoided that purpose when it decided to relieve social hosts of liability. Specifically, if a social host provides alcohol to an individual deemed too immature to drink, the social host should be liable for any damage that results from the individual's consumption of alcohol. Imposing such liability deters social hosts from providing liquor to minors and restores the legislative intent underlying the minimum legal drinking age. More importantly, by unifying its approach to social host liability with that of a majority of other jurisdictions, Texas will ensure that victims are able to receive compensation for their injuries. Therefore, the *Smith* decision should be overruled.