

## NOTES

### Party On?: The Excellent Adventures of Social Host Liability in Massachusetts

*“Keg: \$43*

*Plastic Cups: \$12.87*

*Emergency Room: \$3,500*

*Lawyer: \$25,000*

*Hosting an underage drinking party can get expensive. Don't think kids are safe at your house just because they aren't driving.”<sup>1</sup>*

#### I. INTRODUCTION

When Ronald and Carolyn Moulton let their daughter and several of her friends drink at their Danvers, Massachusetts home after their high school prom, they did not think that they were doing anything wrong.<sup>2</sup> After all, they took away all of the teenagers' keys before allowing them to imbibe any of the numerous cases of beer and hard liquor.<sup>3</sup> Ronald even joined them.<sup>4</sup> Even after they were sentenced to forty hours of court-ordered community service, eighteen months of probation, and paid a five hundred dollar fine, the Moultons still contend that they did the right thing that night because no one got hurt.<sup>5</sup>

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1. Vanessa O'Connell, *Uneasy Compromise: To Keep Teens Safe, Some Parents Allow Drinking at Home*, WALL ST. J., Sept. 14, 2004, at A1 (quoting language from Rhode Island radio campaign targeted at parents).

2. See, e.g., John Ellement, *Parents Take Rap For Teen Drinking, Danvers Couple Put On Probation*, BOSTON GLOBE, Aug. 24, 2004, at B1 (discussing Moultons' "parental wisdom" in allowing underage drinking party); Tom Farmer, *Cops Don't Prom-ote Parent's Teen-Booze Attitude*, BOSTON HERALD, May 19, 2004, at 2 (outlining attitudes behind supervised drinking party); Joe Fitzgerald, *Parents' Good Intentions Pave Road With Many Forks*, BOSTON HERALD, Aug. 25, 2004, at 10 (explaining parents' motives for throwing underage drinking party).

3. See *Couple in Court After Allegedly Allowing Teen Drinking Party*, BOSTONCHANNEL.COM, June 28, 2004 (describing contents found at underage drinking party), available at <http://www.thebostonchannel.com/print/34701>. Police found numerous cases of beer as well as bottles of hard liquor, such as Jack Daniels, Captain Morgan's, Mike's Hard Lemonade, and vodka. *Id.*

4. See *id.* (emphasizing adult participation at teenage drinking party). Police reports indicate that Mr. Moulton had a very strong odor of liquor on his breath and slurred his speech when answering questions. *Id.*

5. See Fitzgerald, *supra* note 2, at 10 (outlining court sentence for supervising teenage drinking party);

Unfortunately, they are not alone in that opinion.<sup>6</sup>

With teenage fatalities skyrocketing in recent years due to alcohol related automobile accidents, the newest trend in teenage drinking is for parents to allow underage children to consume alcohol at home under their supervision.<sup>7</sup> While parents think that they are providing their kids with an exemplary and safe alternative to drunk driving, they are setting the dangerous example that it is all right to pick and choose which laws to follow.<sup>8</sup> Even more disturbing is that they do so with little more than a slap on the wrist, as current criminal and civil sanctions often do little to deter parents from hosting such parties.<sup>9</sup>

Some states have begun clamping down on these underage parties by punishing the individuals responsible for allowing them to occur.<sup>10</sup> Massachusetts, for example, has implemented harsher jail time and fines for parents who violate the criminal statute by allowing underage drinking in their homes.<sup>11</sup> Massachusetts will not, however, extend civil liability to reach

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*see also* Kathleen Burge, *Parents Face Charges in Drinking by Teens, Adults Who Allow Alcohol Are at Risk*, BOSTON GLOBE, May 30, 2004, at A1 (describing teenager's alcohol induced death at parent supervised party). Sixteen-year-old Michael Berry consumed alcohol at a supervised underage party, punched a window, and passed out. *Id.* The next morning he was found dead from blood loss and exposure. *Id.*

6. *See* O'Connell, *supra* note 1, at A1 (exhibiting poll results measuring parental tolerance of teenage drinking). In a Wall Street Journal poll that surveyed 257 parents of children between the ages of fifteen and twenty, twenty-four percent said they would allow teens to drink in their home if they were present, while eleven percent would allow their teens to drink at a party where another parent was present. *Id.*; *see also infra* notes 59-62 and accompanying text (describing numerous state statutes and opinions on penalties for providing alcohol to minors); *Fall River Football Coach Fired After Hosting Drinking Party*, BOSTON GLOBE, Nov. 5, 2004 at 1 [hereinafter *Football Coach*] (illustrating attitude of many adults concerning underage drinking).

7. *See* O'Connell, *supra* note 1, at A1 (quoting teen drinking and driving statistics). The National Highway Traffic Safety Administration reported that 2395 teens died in alcohol-related car accidents in 2003 alone, an epidemic undoubtedly worsened by parents supporting underage alcohol consumption. *Id.*

8. *See* Scott Stafford, *An Explosive Combination Supervised or Not, Teens and Alcohol Don't Mix, Experts Say*, DALLAS MORNING NEWS, Apr. 30, 2004, at 10 (explaining parents unaware drinking leads to other high-risk behavior); Annie Sweeney & Andrew Hermann, *Booze-Approving Parents Real Problem*, CHI. SUN-TIMES, May 5, 2002, at 14 (suggesting parents allow teen alcohol consumption because of experimental attitude of 1960s and 1970s).

9. *See* Farmer, *supra* note 2, at 2 (quoting parents' reluctance to view actions as wrong). Carolyn Moulton stated, "I'd rather pay a \$2,000 fine than see any of these kids hurt, dead or whatever . . . . If I had to do it all over again, I can't say I would do anything different." *Id.* Her husband added, "If our politicians can send our kids over to Iraq and get their limbs blown off and lose their life, I have no problem giving them a beer." *Id.*; *see also infra* notes 45-49 and accompanying text (investigating court decisions failing to impose duty on parents which only "allow" teen drinking).

10. *See infra* notes 60-63 and accompanying text (exploring reaction to teen drinking by various jurisdictions).

11. *See* MASS. GEN. LAWS ch. 138, § 34 (2004) (imposing harsher criminal penalties on adults who allow underage drinking). The Massachusetts statute punishes those who knowingly or intentionally supply alcohol to a person under twenty-one years of age with a fine of not more than \$2000 and jail time of not more than a year. *Id.* The 2000 statute was enacted in response to the death of Greg Smith, a Marshfield, Massachusetts teenager who died in a car crash after drinking at a graduation party supervised by his friend's parents. *See* Sree Bhaktavatsalam, *Senate Approval of Social Host Bill Gives Marshfield Couple Closure*, PATRIOT LEDGER, July 27, 2000, at 1 (elucidating legislative intent behind criminal statute). The statute increased the fine from \$1000 and the prison term from six months. *Id.* *But see infra* notes 45-49 and accompanying text (discussing civil liability of parents whose provision of alcohol subsequently injures third party).

parents who do not actually furnish the alcohol if someone is subsequently injured by one of their guests.<sup>12</sup> The result is a confusing and confounding social host area of law that punishes parents the same regardless of whether death or injury occurs.<sup>13</sup> Until Massachusetts strengthens its civil liability to meet the stricter criminal liability standard recently enacted by the legislature, parents and teenagers will continue to abuse underage drinking without paying a sufficient price.<sup>14</sup> Parents owe a duty not only to their children and their children's friends, but also to innocent third parties, not to allow teenagers to drink at all.<sup>15</sup> If the courts fail to recognize this, the party will continue well into the night.<sup>16</sup>

This Note will address the inconsistencies resulting from strengthening criminal sanctions against parents who allow underage drinking in their homes without similarly strengthening the civil liability standard if an innocent third party is injured by one of their guests.<sup>17</sup> First, the Note will briefly examine the history of social host liability in the United States, and more specifically focus on its development in the Commonwealth of Massachusetts.<sup>18</sup> Next, the Note will examine the positions that other states have taken on the matter, both criminally and civilly, before returning to the specific problems currently confronting Massachusetts.<sup>19</sup> Finally, the Note will propose a negligence theory, which presumes that a parent who violates the current criminal statute in Massachusetts, by providing alcohol to a minor, has also breached a duty to all innocent third parties, and should, accordingly, be held civilly liable.<sup>20</sup>

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12. See *infra* notes 39-49 and accompanying text (discussing civil liability of social hosts in Massachusetts).

13. See David Abel, *Hostess Jailed for Underage Party*, BOSTON GLOBE, Oct. 6, 2004, at 1 (relating punishment of Haverhill, Massachusetts woman who condoned underage drinking at home). Nancy St. Jean was sentenced to one year in prison and fined \$2000, the maximum under the current statute, for providing alcohol to minors. *Id.* A sixteen year-old boy died at her house and Ms. St. Jean served six months of her one-year prison term as well as three years probation. *Id.*

14. Compare *infra* notes 39, 43, and 48-49, with notes 50-54 and accompanying text (discussing disparity between criminal and civil sanctions).

15. See *infra* Part III.B and accompanying text (proposing negligence per se standard with violation of criminal statute or other negligence theories).

16. See Fitzgerald, *supra* note 2, at 10 (predicting continuance of problem in future). Bob Holloway, the Moulton's Defense Attorney, told the judge, "[T]he problem's not going away. There will be proms and graduations in the future and we're going to have these questions again. I wish I had a magic answer. While my clients are grateful it's the end of their case, it's certainly not the end of the problem." *Id.*

17. See *infra* Part III.A (discussing differences in criminal and civil liability for parents who allow underage parties at home).

18. See *infra* Part II.A.3 (reviewing development of social host liability in United States and Massachusetts).

19. See *infra* Part II.E (examining other states' problems and answers to social host questions).

20. See *infra* Part III.B.3 (discussing negligence theories and reform proposals).

## II. HISTORY

*A. Development of Social Host Liability in the United States*

The development of social host liability in the United States is consistently rooted in modern tort law and relies primarily on negligence principles.<sup>21</sup> At early common law, for example, an individual who furnished alcohol to an intoxicated guest at his home was not held liable for any subsequent injuries because it was thought that the drinking of the alcohol, and not its procurement, was the proximate cause of the injury.<sup>22</sup> With increasing drunk-driving related fatalities, however, this position gradually lost favor and many legislatures enacted dram-shop laws and other statutes that allowed a cause of action to be brought against liquor vendors or bar owners so that responsibility could be attributed somewhere.<sup>23</sup> Historically, though, these same legislatures were reluctant to impose similar duties on social hosts because they believed that individuals serving drinks to guests in their homes were not in the same position as bartenders; nor did they possess the same experience to determine when a guest had consumed too much alcohol and, consequently, became a threat to third parties.<sup>24</sup> Overwhelming policy considerations eventually forced a change in that school of thought as well.<sup>25</sup>

21. See, e.g., *Keckonen v. Robles*, 705 P.2d 945, 949 (Ariz. Ct. App. 1985) (refusing to create social host duty not to furnish liquor to intoxicated guests); *Sutter v. Hutchings*, 327 S.E.2d 716, 717-19 (Ga. 1985) (outlining common law origins of social host liability and applicable modern negligence analysis); *Andres v. Alpha Kappa Lambda Fraternity*, 730 S.W.2d 547, 553 (Mo. 1987) (declining to impose social host liability for lack of common law duty). In an action to hold a social host liable for an injury caused by an intoxicated guest, the plaintiff must first prove that the defendant owed a legally recognized duty or obligation to the plaintiff to act, or refrain from acting, in a particular manner. See *Keckonen*, 705 P.2d at 948 (recognizing duty as key element of negligence claim); *Sutter*, 327 S.E.2d at 718-20 (detailing importance of duty in negligence analysis). Once the duty has been found, the plaintiff must also show a breach of this duty, a causal relationship between the defendant's breach of duty and the injury, and some actual loss or damage suffered by the plaintiff. *Keckonen*, 705 P.2d at 948 (listing remaining elements required for negligence claim); *Sutter*, 327 S.E.2d at 718-20 (detailing negligence analysis to find social host liability). See generally James Lockhart, *Causes of Action Against Social Host for Injuries Caused by Provision of Alcohol to Guest*, 15 COA 1 (2004) (laying out elements and defenses for prima facie case of negligence against social host).

22. See *Klein v. Raysinger*, 470 A.2d 507, 510-11 (Pa. 1983) (supporting view that abled body man's alcohol consumption is proximate cause of subsequent occurrence); 45 AM. JUR. 2D *Intoxicating Liquors* § 553 (1969) (defining common law standard). But see *Nehring v. LaCounte*, 712 P.2d 1329, 1335 (Mont. 1986) (refusing to follow "Neanderthal" approach to causation).

23. See *Waynick v. Chicago's Last Dept. Store*, 269 F.2d 322, 326 (7th Cir. 1959) (holding sale of alcohol to intoxicated patron as proximate cause of victim's injury); *Rappaport v. Nichols*, 156 A.2d 1, 8 (N.J. 1959) (basing tavern owner's liability on common-law negligence principles).

24. See *Harriman v. Smith*, 697 S.W.2d 219, 221 (Mo. Ct. App. 1985) (explaining differences in liability towards licensees and social hosts); *Settlemyer v. Wilmington Veterans Post*, 464 N.E.2d 521, 524 (Ohio Ct. App. 1984) (recognizing person in business better able to control patrons and their habits than social host). Traditionally, liquor vendors were treated differently because they realized a profit from selling liquor to patrons and were, therefore, able to insure themselves against risk of loss from doing business, whereas the social host did not. *Harriman*, 697 S.W.2d at 221.

25. See *Coulter v. Super. Ct. of San Mateo County*, 577 P.2d 669, 673-74 (Cal. 1978) (stating differences between vendor and social host insignificant for establishing duty owed to third parties); see also *supra* notes

*B. The Seminal Case: Kelly v. Gwinnell*

In 1984, the New Jersey Supreme Court decided the seminal case of *Kelly v. Gwinnell*,<sup>26</sup> laying out a common-law standard of social host liability that is still precedent today.<sup>27</sup> At issue before the court was whether a social host who served a visibly intoxicated adult guest at his home owed a duty to the victim of an automobile accident later caused by that drunken guest.<sup>28</sup> The superior court had originally granted summary judgment in favor of the host, reasoning that New Jersey had never extended common law liability to a social host when the guest was not a minor.<sup>29</sup> On appeal, however, the state supreme court decided that prevalent social policy demanded a change and expanded common law liability to include such social hosts.<sup>30</sup>

The court's balancing of public policy and fairness was instrumental to this decision.<sup>31</sup> Though there was little question that all of the elements required for a negligence cause of action were satisfied in the case, the court needed to decide if it was fair to impose a duty on a social host to monitor the intake of alcohol among his guests in order to protect unknown third parties.<sup>32</sup> Abandoning the once prevalent belief that the possibility of litigation should not intrude upon friends gathering at homes for a social drink, the court answered its inquiry by looking heavily into public policy.<sup>33</sup> Citing the

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33-34 and accompanying text (noting policy concerns behind duty of social hosts not to serve intoxicated guests).

26. 476 A.2d 1219 (N.J. 1984).

27. *See id.* at 1224 (announcing court's holding). The court specifically held, "that a host who serves liquor to an adult social guest, knowing both that the guest is intoxicated and will thereafter be operating a motor vehicle, is liable for injuries inflicted on a third party as a result of the negligent operation of a motor vehicle by the guest." *Id.*

28. *See Kelly*, 476 A.2d at 1220 (relating facts of case). The Zaks, in the capacity of social hosts, contended that they served Gwinnell only two to three drinks at their home. *Id.* At the time of the accident, however, Gwinnell's blood alcohol level was 0.286, nearly three times the legal limit of New Jersey at the time. *Id.* In reality, Gwinnell would have had to consume the equivalent of thirteen scotch on the rocks and would have shown "unmistakable signs of intoxication." *Id.*

29. *See Kelly v. Gwinnell*, 463 A.2d 387, 387-91 (N.J. Super. Ct. App. Div. 1983) (declining to expand liability with adults as social guests). The court also reasoned that New Jersey did not have a dram shop act in place imposing liability on the provider of alcoholic beverages, but the state, nonetheless, recognized licensee liability through common law decisions. *Id.* at 387-88; *see also* Linn v. Rand, 356 A.2d 15, 19 (N.J. Super. Ct. App. Div. 1976) (mentioning social host liability exists when serving to visibly intoxicated minor).

30. *See Kelly*, 476 A.2d at 1224 (rejecting liability limited solely to licensees because of profits derived by serving liquor). The court emphasized that liability proceeds from the duty of care that accompanies "the control of the liquor supply." *Id.* Additionally, the court further reasoned that, regardless of the motive for serving liquor, the host maintains a duty not to create unreasonable, foreseeable risks to third persons. *Id.*

31. *See id.* at 1222 (extending liability based on unanimous social goal).

32. *See supra* note 21 and accompanying text (laying out required elements for negligence cause of action); *Kelly v. Gwinnell*, 476 A.2d 1219, 1222 (citing *Goldberg v. Housing Auth. of Newark*, 38 N.J. 578, 583 (1962)). To determine if a duty exists, a court should weigh the relationship of the parties, the nature of the risk, and the public interest in the proposed solution. *Kelly*, 476 A.2d at 1222.

33. *See Kelly*, 476 A.2d at 1224 (addressing concerns ruling might interfere with accepted social behavior). The court held that the importance of victims of drunk driving accidents being justly compensated and deterring future drunk drivers from causing more death or injury on the roads far outweighed any

growing number of intolerable deaths caused by drunk-driving accidents each year, the historical prohibition of liquor vendors from serving intoxicated patrons, and recently strengthened criminal sanctions against drunk drivers, the court concluded that it was both fair and desirable to impose such a duty on social hosts, thereby creating a cause of action for common law negligence.<sup>34</sup> Since that decision, however, there has been little consanguinity among jurisdictions with regard to social host liability in the United States.<sup>35</sup>

### C. Development of Social Host Liability in Massachusetts

Prior to 1984, Massachusetts had long since attached liability to liquor licensees and vendors that served alcohol to intoxicated patrons who later caused injury or death to third parties.<sup>36</sup> After the *Kelly* decision in New Jersey, though, the Commonwealth decided the case of *McGuiggan v. New England Telephone & Telegraph Co.*,<sup>37</sup> addressing for the first time whether a similar duty should be imposed on social hosts in Massachusetts.<sup>38</sup> Though liability did not attach under the specific facts of the case before it, the court recognized the existence of social host liability to third persons “where a social host . . . knew or should have known that his guest was drunk [but] nevertheless gave him or permitted him to take an alcoholic drink.”<sup>39</sup> The court based its decision on common law principles of negligence where a social host unreasonably created a risk to third parties who he should have reasonably

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camaraderie that might be disrupted at social gatherings. *Id.*

34. *See id.* at 1222 (citing statistics relied on by court in extending liability to social hosts). At the time of this decision, forty-eight percent of all highway fatalities in New Jersey were attributable to alcohol and twenty-one percent of all automobile accidents were similarly linked to alcohol. *Id.*

35. *See infra* notes 60-63 and accompanying text (describing other states’ various positions regarding social host liability); Debra Baker, *Impaired Vision*, 84 A.B.A. J. 72, 72 (1998) (outlining numerous social host liability standards).

36. *See generally* *Cimino v. Milford Keg, Inc.*, 431 N.E.2d 920 (Mass. 1982) (basing liability of vendors on common law negligence principles); *Adamian v. Three Sons, Inc.*, 233 N.E.2d 18 (Mass. 1968) (recognizing bartender’s sale of liquor as proximate cause of drunk driving accident). The *Adamian* court noted that the “violation of a criminal statute is some evidence of the defendant’s negligence as to all consequences the statute was intended to prevent.” *Adamian*, 233 N.E.2d at 19. The defendant violated Massachusetts General Laws, chapter 138, section 69, as appearing in the statutes of 1933, chapter 376, section 2, which prohibited the sale of alcohol to “a person who is known to be a drunkard, an intoxicated person, or to a person who is known to have been intoxicated within the last six months.” MASS. GEN. LAWS ch. 138, § 69 (2004) (reflecting current codification of the former chapter 376, section 2); *Adamian*, 233 N.E.2d at 19.

37. 496 N.E.2d 141 (Mass. 1986).

38. *See id.* at 142-43. The *McGuiggan*’s held a high school graduation party for their eighteen-year-old son, setting up a keg and bar in the basement where the underage guests served themselves. *Id.* at 141-42. One guest, James Magee, also eighteen, drank approximately five rum and cokes before leaving to drive another guest home. *Id.* On the drive home, Daniel McGuiggan, the son of the hosts and a passenger in the car, leaned his upper body out of the window of the moving vehicle because he felt sick and subsequently died when his head struck a cement post. *McGuiggan*, 496 N.E.2d at 141-42.

39. *See id.* at 146 (announcing court’s holding). There was insufficient evidence to show that the *McGuiggan*’s actually served Magee or that they knew or should have known that he was intoxicated at the time. *Id.* at 142, 146-47.

foreseen might be injured as a result of his guest's intoxication.<sup>40</sup>

Despite the pronouncement of this common law standard of social host liability, *McGuiggan* left various problems and gaps to be resolved by future decisions.<sup>41</sup> Most notable was the court's express refusal to address whether a social host may avoid liability by letting his guests serve drinks to themselves.<sup>42</sup> Subsequent decisions have pointed out that control of the liquor supply is the dominant consideration in determining liability.<sup>43</sup> Accordingly, no liability attaches to a host who provides a social atmosphere to imbibe alcohol if he does not personally furnish the liquor to his guests but merely allows its consumption.<sup>44</sup>

While statutes exist making it a crime to knowingly sell or provide liquor to underage drinkers, there is no such age distinction currently made with regard to social host liability in Massachusetts.<sup>45</sup> Therefore, a violation of the Commonwealth's liquor laws concerning minors does not create an

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40. See *id.* at 142-43 (explaining common law principles of negligence); see also *supra* note 21 and accompanying text (discussing necessary elements for negligence cause of action).

41. See Mary H. Seminara, Note, *When the Party's Over: McGuiggan v. New Eng. Telephone & Telegraph Co. and the Emergence of a Social Host Liability Standard in Massachusetts*, 68 B.U. L. REV. 193, 205-08 (1988) (analyzing issues *McGuiggan* court failed to address or inadequately resolved). The court, for example, did not define certain terminology it employed, including what "permitted him to drink" or "obviously intoxicated" meant. *Id.* at 205-06. Additionally, there is no mention of whether social hosts should purchase insurance to protect themselves from severe liability or whether comparative negligence and contribution laws will attach to lessen some of the financial burden. *Id.* at 206-07.

42. See *McGuiggan*, 496 N.E.2d at 146 (passing on question of liability when guests serve themselves). But see *infra* notes 43-48 and accompanying text (discussing cases addressing social host liability when guests serve themselves).

43. See, e.g., *O'Flynn v. Powers*, 646 N.E.2d 1091, 1092 (Mass. 1995) (reasoning parent who does not supply alcohol to children not liable as social host); *Cremins v. Clancy*, 612 N.E.2d 1183, 1186 (Mass. 1993) (reiterating control over liquor supply dominant consideration); *Ulwick v. DeChristopher*, 582 N.E.2d 954, 957 (Mass. 1991) (stipulating host of party not liable because lacked control of liquor supply); see also *Makynen v. Mustakangas*, 655 N.E.2d 1284, 1286 (Mass. App. Ct. 1995) (illustrating tough decisions associated with control of liquor supply). In *Makynen*, there was a refrigerator filled with beer and soda in the garage where the defendant left his nephew alone to fix his car; but the defendant could still hear the refrigerator door being opened and closed several times. *Makynen*, 655 N.E.2d at 1286. He later took his nephew out to a restaurant and bought him three additional beers. *Id.* The court said that it was unnecessary to rule on whether the defendant had sufficient control over the alcohol in the refrigerator to attach liability as a social host because the act of purchasing three additional beers was enough in itself to demonstrate control of a liquor supply. *Id.* at 1287.

44. See *supra* note 43 and accompanying text (discussing social host liability only when in control of liquor supply).

45. Compare MASS. GEN. LAWS ch. 138 § 34 (2004) (making it illegal to sell or furnish alcohol to underage child), MASS. GEN. LAWS ch. 138 § 34A (2004) (prohibiting attempted procurement of alcohol by individuals under twenty-one years of age), and *McGuiggan v. New Eng. Tel. & Tel. Co.*, 496 N.E.2d 141, 144 (Mass. 1986) (stating eighteen as legal drinking age at time of decision), with *Sutter v. Hutchings*, 327 S.E.2d 716, 719-20 (Ga. 1985) (suggesting common law claim against social host providing liquor to intoxicated minor), *Brattain v. Herron*, 309 N.E.2d 150, 157 (Ind. Ct. App. 1974) (recognizing providing alcohol to minor violates statute as negligence), *Walker v. Key*, 686 P.2d 973, 978 (N.M. Ct. App. 1984) (allowing claim against social host for providing alcohol to minor), and *Congini v. Portersville Valve Co.*, 470 A.2d 515, 518 (Pa. 1983) (expressing violation of statute prohibiting furnishing liquor to minors as negligence per se).

independent ground for civil liability.<sup>46</sup> Instead, parents who serve as social hosts for their teenager's illegal drinking parties are held to the same standard as social hosts who similarly provide alcohol legally to other adults.<sup>47</sup> By these standards, a parent who allows a party at her house knowing that alcohol will be present, whether she is home or not, is not civilly liable if a third party is injured unless the parent actually serves the alcohol to the children.<sup>48</sup> Additionally, the social host owes no duty to an intoxicated guest who subsequently injures himself, even if the guest is under the legal drinking age because courts routinely believe that the guest, regardless of his age, is in the best position to prevent harm to himself.<sup>49</sup>

#### *D. Criminal Sanctions in Massachusetts for Providing Alcohol to Minors*

Though the Massachusetts statutes relating to underage liquor consumption currently have no bearing on civil liability in the Commonwealth, they have recently been strengthened to impose harsher criminal sanctions on parents who allow teenagers to drink in their homes.<sup>50</sup> In 2000, for example, the Massachusetts legislature reacted to the drunk-driving death of a Marshfield teenager who had imbibed at an adult-sanctioned keg party by increasing jail

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46. See *Ulwick v. DeChristopher*, 582 N.E.2d 954, 958 (Mass. 1981) (affirming violations of underage drinking statutes not independent ground for civil liability). The court concluded that any liability for providing alcohol to minors must be established on common law grounds of negligence. *Id.*

47. See *supra* note 39 and accompanying text (detailing *McGuiggan* court's holding announcing social host liability standard).

48. Compare *Langemann v. Davis*, 495 N.E.2d 847, 848 (Mass. 1986) (denying affirmative duty on parent who does not provide or serve alcohol to minors), with *Wallace v. Wilson*, 575 N.E.2d 1134, 1135 (Mass. 1991) (concluding same even if parent supervises party). In *Langemann*, the mother left her daughter home alone and had reason to believe that her daughter would throw a party where alcohol would be present. *Langemann*, 495 N.E.2d at 848. In *Wallace*, however, the mother remained home to supervise a get together where underage boys brought cases of beer right through the front door. *Wallace*, 575 N.E.2d at 1135. The court reached similar decisions in both instances because it determined that "sound social policy would not be advanced" by a rule that placed a parent who absents himself during an illegal party in a better position than a parent who stays at home to supervise it. *Langemann*, 495 N.E.2d at 848; *Wallace*, 575 N.E.2d at 1135.

49. See, e.g., *Sampson v. MacDougall*, 802 N.E.2d 602, 606-07 (Mass. 2004) (establishing social host owes no duty to underage drinker who injures himself); *Panagakos v. Walsh*, 749 N.E.2d 670, 672 (Mass. 2001) (holding underage drinker as adult responsible for his own actions); *Hamilton v. Ganius*, 632 N.E.2d 407, 407-08 (Mass. 1994) (foreclosing lack of duty because of voluntary consumption by drinker). All of these cases describe drinkers that are over eighteen years-old but under the legal drinking age of twenty-one, allowing the court to argue that these individuals are adults in the eyes of the law and should be held responsible for their own voluntary consumption. *Sampson*, 802 N.E.2d at 606-07; *Panagakos*, 749 N.E.2d at 672; *Hamilton*, 632 N.E.2d at 407-08. The courts are silent on a social host's responsibility to a child under the age of eighteen who subsequently injures himself due to intoxication. *Sampson*, 802 N.E.2d at 606-07; *Panagakos*, 749 N.E.2d at 672; *Hamilton*, 632 N.E.2d at 407-08.

50. See MASS. GEN. LAWS ch. 138, § 34 (2004) (expressing language strengthening criminal penalties for allowing underage drinking). The statute provides, in pertinent part, "whoever furnishes . . . alcohol for a person under 21 years of age shall be punished by a fine of not more than \$2,000 or by imprisonment for not more than one year or both." *Id.* The 2000 amendment increased the penalty from six months to one year. *Id.*; see also *infra* notes 51-52 and accompanying text (discussing harsher changes to Massachusetts criminal sanctions).

time for parents who condone underage drinking in their homes to a maximum of one year and a fine of up to two thousand dollars.<sup>51</sup> Additionally, the legislature redefined and broadened the term “knowingly furnish” in the statute to include parents who simply allow drinking in their homes.<sup>52</sup> Previously, the statute had limited criminal liability only to those adults that actually served a minor by handing him a drink.<sup>53</sup> Hoping to save children’s lives by dissuading parents from allowing these parties to occur, lawmakers modeled the stricter statute on a twenty-year old Pennsylvania law that makes it a crime for an adult to knowingly or intentionally allow underage drinking on his property.<sup>54</sup>

Some lawmakers, however, still believe that the current law is not harsh enough in its attempt to discourage parents and adults from hosting underage drinking parties.<sup>55</sup> In 2003, for example, several state district attorneys, supported by Massachusetts Attorney General Tom Reilly, proposed an amendment that would include a two-year loss of driver’s licenses for people who supplied alcohol to minors.<sup>56</sup> The legislation was motivated by statistics showing that some Massachusetts counties have witnessed a rise in adult sanctioned parties involving underage drinking despite the revised criminal penalties.<sup>57</sup> Drunk-driving statistics have likewise not improved given the harsher penalties that now await parents.<sup>58</sup>

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51. See Bhaktavatsalam, *supra* note 11, at 1 (announcing approval of social host bill and relevant facts leading up to passage). Greg Smith crashed his truck into a telephone pole just miles from his home after drinking at an adult-sanctioned keg party to celebrate his high school graduation. *Id.* Greg’s father said “[t]he family was devastated and my son’s good judgment was stripped because of one misguided adult with bad judgment.” *Id.*

52. See MASS. GEN. LAWS ch. 138 § 34 (2004) (detailing change in statute’s specific language and standard). The statute defines “furnish” to mean “knowingly or intentionally supply, give, or provide to or allow a person under 21 years of age except for the children and grandchildren of the person being charged to possess alcoholic beverages on premises or property owned or controlled by the person charged.” *Id.* But see *supra* notes 43-48 and accompanying text (reasoning actual serving of minor needed for civil liability).

53. See Bill Archambeault, *Proposal: Hold Adult Hosts Responsible; Aim Is to Prevent Drinking by Teens*, PATRIOT LEDGER, May 20, 1999, at 1 (discussing previous components of law). John Lennon, the Cohasset, Massachusetts man who hosted the party where Greg Smith drank, was acquitted of criminal charges because no one had seen him hand Greg a beer. *Id.*

54. See *Ulwick v. DeChristopher*, 582 N.E.2d 954, 956-57 (Mass. 1991) (describing plaintiff’s liability claim for encouraging minors to drink based on Pennsylvania law); *Congini v. Portersville Valve Co.*, 470 A.2d 515, 518 (Pa. 1983) (reasoning negligence exists when furnishing intoxicants to persons legislature determines incompetent to handle effects); see also Archambeault, *supra* note 53, at 1 (explaining origins of revised Massachusetts criminal statute).

55. See Kathy McCabe, *DA Seeks to Curb Underage Drinking*, BOSTON GLOBE, Sept. 25, 2003, at 1 (asserting more accountability needed to discourage parents from hosting underage drinking parties). Attorney General Tom Reilly stated that a loss of license amendment to the current criminal law statutes could put more teeth on the law. *Id.*; see also *infra* note 56 and accompanying text (describing loss of license proposal).

56. See McCabe, *supra* note 55, at 1 (mentioning loss of license amendment). The Essex County District Attorney believes a loss of license would bring added consequences to parents who do not understand the severity of hosting underage parties. *Id.*

57. See *id.* (relating attorney’s opinion). While unable to cite specific statistics, Essex District Attorney Blodgett says local police tell him that the number of underage drinking parties has been increasing. *Id.*

58. See *Traffic Safety Facts 2002: State Alcohol Estimates*, National Highway Traffic Safety Administration (2002) [hereinafter *National Highway*] (publishing alcohol-involved accident and fatality

### E. Other States' Positions on Social Host Liability

Along with Massachusetts, every other state has grappled with the complexities of social host liability and its role in solving underage drinking.<sup>59</sup> Some jurisdictions, for example, view a criminal statutory violation of providing liquor to a minor as proof of negligence or negligence per se when attaching liability to social hosts.<sup>60</sup> Other states simply treat the service of alcohol to minors as a breach of a common-law duty by itself.<sup>61</sup> Others have enacted statutes that permit common-law claims to be brought against social hosts who knowingly furnish alcohol to minors.<sup>62</sup> Conversely, there are states that completely refuse to recognize a duty to prevent alcohol from reaching the hands, or mouths, of minors.<sup>63</sup> Regardless of the approach, underage drinking is a country-wide problem that needs to be addressed seriously by courts and legislatures.<sup>64</sup>

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numbers); MASSACHUSETTS DRUNK DRIVING STATISTICS [hereinafter MASS. STATS] (displaying Massachusetts alcohol related fatality numbers), available at <http://www.alcoholalert.com/drun-driving-statistics-massachusetts.html> (last visited Jan. 13, 2005). In 2002, nearly forty-eight percent of all automobile accident fatalities in Massachusetts were due to alcohol, as compared with forty-nine percent and fifty percent in 2001 and 2000, respectively. *Id.* The fatality rate, however, has been steadily increasing since 1998, which means that more people are being killed by alcohol each year. MASS. STATS, *supra*, at 1.

59. See *National Highway*, *supra* note 58, at 4 (exposing teen involvement in automobile accidents). In 2002, twenty-four percent of young drivers, ages fifteen to twenty-one, that were killed in crashes were intoxicated. *Id.*; see also *infra* notes 60-63 and accompanying text (discussing various states' stances on teen drinking).

60. See, e.g., *Brattain v. Herron*, 309 N.E.2d 150, 156 (Ind. Ct. App. 1974) (alleging statutory violation of providing liquor to minor negligence per se); *Longstreth v. Gensel*, 377 N.W.2d 804, 813 (Mich. 1985) (creating rebuttable presumption of negligence with violation of liquor statute); *Walker v. Key*, 686 P.2d 973, 978 (N.M. Ct. App. 1984) (holding breach of statute for providing alcohol to minors specifies claim for relief); *Koback v. Crook*, 366 N.W.2d 857, 860 (Wis. 1985) (recognizing negligence per se in furnishing liquor to minor).

61. See, e.g., *Keson v. Unkel*, No. 31 13 00, 1994 WL 146490, \*5-\*6 (Conn. Super. Ct. Apr. 13, 1994) (affirming host negligent in procuring alcohol for minor who later crashed vehicle and died); *Batten v. Bobo*, 528 A.2d 572, 574 (N.J. 1986) (recognizing cause of action against social host who served minor); *Wiener v. Gamma Phi Chap. of Alpha Tau Omega Fraternity*, 485 P.2d 18, 23 (Ore. 1971) (finding fraternity negligent when aware drinker was minor who had to drive home). In *Wiener*, as in each of these cases, the court found a common law duty for a host to refuse to serve drinks to a minor because it was unreasonable to do so given the circumstances. *Wiener*, 485 P.2d at 23.

62. See MINN. STAT. § 304A.801(6) (2004) (granting legislative authority to bring claim against social host who knowingly serves alcohol to minor); *VanWagner v. Mattison*, 533 N.W.2d 75, 81 (Minn. Ct. App. 1995) (allowing comparative negligence to offset absolute liability against adult providing alcohol to minor).

63. See *Spivey v. Sellers*, 363 S.E.2d 856, 857 (Ga. Ct. App. 1987) (reasoning as between provider and consumer, consumer has final opportunity to prevent effects of alcohol); *Charles v. Seigfried*, 651 N.E.2d 154, 165 (Ill. 1995) (refusing to hold social host liable for injury of intoxicated minor); see also *infra* note 65 and accompanying text (discussing reasoning behind *Charles* court decision).

64. See Kathleen Ryan, *After the Prom; Parents Can Protect Teens and Themselves from Post-Party Pitfalls*, DETROIT NEWS, May 21, 2004, at 1C (requiring parents to sign prom contract, imposing fines and jail time for underage drinking); *Fine For Students Caught Drinking at Teacher's Home*, CNN.COM, Sep. 11, 2004, (detailing party where teacher held drinking party for football players, cheerleaders, and band members) available at <http://www.cnn.com/2004/LAW/09/11/student.party.ap/index.html>; Scott Stafford, *An Explosive Combination Supervised or Not, Teens and Alcohol Don't Mix, Experts Say*, DALLAS MORNING NEWS, Apr. 30, 2004, at 10 (reporting furnishing alcohol to minors in Texas carries fine of \$4000 and year in jail).

States that have not recognized social host liability have hedged on the issue because of an understanding that it is the responsibility of the legislature, not the courts, to create a new cause of action.<sup>65</sup> Rhode Island courts, for example, currently do not recognize social host liability simply because the government has never expressly told them that they could do so.<sup>66</sup> Additionally, these states are reluctant to impose a common-law duty on hosts to monitor alcohol use among minors, where no such common-law duty exists for adult guests because they feel that there is no rational distinction between the two.<sup>67</sup>

The states that do attach social host liability to adults for providing alcohol to minors usually do so through common-law negligence principles or statutory violations.<sup>68</sup> An abundance of states, for example, view underage drinkers as a special class that legislatures have specifically sought to protect from the dangers of alcohol through the enactment of various liquor laws and criminal sanctions.<sup>69</sup> When a parent or adult violates one of those statutes, it is proof that they have acted unreasonably, resulting in negligence per se.<sup>70</sup> Other states, however, do not believe that such a statute is necessary to conclude that handing liquor to an underage drinker is unreasonable or that doing so causes

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65. See *Charles*, 651 N.E.2d at 159 (reasoning absence of social host liability from dram shop acts preempts court's imposition of it); *Gerstenblatt v. Nordic Lodge, Inc.*, No. K.C. 01-0225, 2002 WL 31749934, \*2-\*3 (R.I. Super. Nov. 26, 2002) (dismissing social host claim because legislature never created right). In *Charles*, the plaintiff relied on an Illinois statute that made it a petty offense for an individual to host a party when he is aware that children under the age of eighteen are in possession of alcohol and then allows those minors to leave intoxicated. *Charles*, 651 N.E.2d at 162; see also 235 ILL. COMP. STAT. 5/6-16(c) (2004) (relating statute's specific language); Diane Schmauder Kane, *Social Host's Liability for Death or Injuries Incurred by Person to Whom Alcohol was Served*, 54 A.L.R.5TH 313, \*29 (2004) (discussing states' reasoning for not creating social host liability). The court refused to allow civil liability because it was contrary to legislative intent. *Charles*, 651 N.E.2d at 162.

66. See *Gerstenblatt*, 2002 WL 31749934 at \*3 (declaring Rhode Island Supreme Court never adopted social host duty to injured third persons). The Rhode Island Supreme Court also ruled that the "creation of new causes of action should be left to the Legislature." *Id.*; see also O'Connell, *supra* note 1, at \*2 (illustrating recent proposals to strengthen Rhode Island's criminal law on underage drinking). In 2004, lawmakers asked the legislature to expand criminal sanctions to include adults who "knowingly allow" underage drinking. O'Connell, *supra* note 1, at \*2. The bill was rejected because it was overly broad. *Id.*

67. See *Dorris v. Price*, 22 S.W.3d 42, 45 (Tex. Crim. App. 2000) (refusing to recognize difference between minors and adults when no duty exists for adult guests).

68. See *supra* notes 60-61 and accompanying text (listing decisions where court finds negligence either by statute or breach of common law duty).

69. See *Brattain v. Herron*, 309 N.E.2d 150, 156 (Ind. Ct. App. 1974) (determining legislature intended to protect citizens of Indiana from dangers of minors consuming alcohol); *Walker v. Key*, 686 P.2d 973, 977 (N.M. Ct. App. 1984) (reflecting legislative finding people under twenty-one not ready to handle liquor causing foreseeable injuries); *Koback v. Crook*, 366 N.W.2d 857, 861 (Wis. 1985) (announcing negligence in minor liquor cases not question for jury but defined by statute).

70. See *Brattain*, 309 N.E.2d at 156 (describing unreasonableness of statutory violations and resulting negligence per se); *Walker*, 686 P.2d at 977 (illustrating legislative intent to create statutory cause of action); *Koback*, 366 N.W.2d at 861 (concluding negligence results with statutory violation). Jurisdictions that follow negligence per se theories based on statutory violations do not distinguish between a seller or social provider of alcoholic beverages to a minor because it is not logical or equitable to do so when a minor is involved. *Brattain*, 309 N.E.2d at 156.

foreseeable risks to both the minor and innocent third parties.<sup>71</sup> These states simply impose a common-law duty on adults to refrain from acting unreasonably in their distribution of alcohol to minors.<sup>72</sup>

Finally, there are states that enact statutes specifically prohibiting hosts from providing alcohol to underage drinkers.<sup>73</sup> Minnesota, for example, allows common-law tort claims to be brought by anyone injured by an intoxicated minor, though the host may use the defense of contributory negligence to limit his liability.<sup>74</sup> The legislature, through enactment of this statute, has sought to place social hosts on the same footing as commercial vendors, expanding liability to effectively deter underage drinking in the state.<sup>75</sup> Additionally, Minnesota has passed a keg registration law that acts as an investigative tool to determine who actually provided alcohol to minor drinkers in order to pursue civil damages claims against a host.<sup>76</sup> Parents, then, must think twice about providing alcohol to underage drinkers in their homes as they are vulnerable to both heavy civil and criminal penalties.<sup>77</sup>

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71. See *Batten v. Bobo*, 528 A.2d 572, 574 (N.J. 1981) (imposing duty on social hosts consistent with statutory prohibitions against serving minors); *Huston v. Konieczny*, 556 N.E.2d 505, 509 (Oh. 1990) (parents allowing unsupervised drinking party failed to meet standard of ordinary care expected of them); *Wiener v. Gamma Phi Chap. of Alpha Tau Omega Fraternity*, 485 P.2d 18, 23 (Ore. 1971) (finding fraternity's behavior in providing alcohol to known minor unreasonable under circumstances).

72. *Supra* notes 61, 71, and accompanying text (discussing why these jurisdictions have common law duty not to serve minors in place).

73. See MINN. STAT. § 340A.801(6) (2003) (providing specific language for statutory common law cause of action against social host); *VanWagner v. Mattison*, 533 N.W.2d 75, 79 (Minn. 1995) (holding person furnishing liquor to person under age twenty-one negligent as matter of law). The relevant Minnesota statute allows any person who suffered damages at the hands of an intoxicated person a right of action against the host who provided that person with alcohol. MINN. STAT. § 340A.801(6) (2003); *VanWagner*, 533 N.W.2d at 79. Subdivision 6 specifically states, "Nothing in this chapter precludes common law tort claims against any person 21 years old or older who knowingly provides or furnishes alcoholic beverages to a person under the age of 21 years." MINN. STAT. § 340A.801(6) (2003); see also MINN. STAT. § 340A.90 (2003) (creating right of civil actions against provider of alcohol to minor who causes injuries).

74. See *VanWagner*, 533 N.W.2d at 80 (recognizing legislature explicitly made dram shop liability open to comparative fault); see also *supra* note 73 and accompanying text (addressing relevant statutory provisions allowing cause of action for sponsoring underage drinking).

75. See *VanWagner*, 533 N.W.2d. at 80 (placing social hosts on same footing as commercial vendors regarding liability). The court allowed contributory negligence because it determined that social hosts should not be held to a higher standard of liability than commercial vendors selling liquor illegally for profit. *Id.*

76. See MINN. STAT. § 340A.513(4) (2004) (requiring registration of all kegs to track underage parties to purchaser). Governor Jesse Ventura signed the law to "get tough on adults who provide keg beer to underage drinkers." See *Minnesota Join Together*, MINN. INST. OF PUB. HEALTH, (Nov. 11, 2004) (relating purposes behind Minnesota keg registration law), available at <http://www.miph.org/mjt/newlaws.html>.

77. See MINN. STAT. § 340A.701 (2004) (providing criminal penalties for serving liquor to underage drinkers); *Sweeney & Herrmann*, *supra* note 8, at 14 (detailing origins of "Kevin's Law"). The Minnesota law was enacted in response to the death of sixteen-year-old Kevin Brockway, who was killed after drinking beer at a party where a father provided the alcohol. *Sweeney & Herrman*, *supra* note 8, at 14. The law increases the severity of furnishing liquor to a minor from a misdemeanor to a felony, punishable by a fine of up to \$4000 and ten years in prison. *Id.*; see also MINN. STAT. § 340A.701 (2004) (citing language of statute).

*F. A Return to Massachusetts' Current Problems Facing Underage Drinking*

While the positions that other states have taken on social host liability outlined above only represent a general summary, it is clear that Massachusetts falls somewhere in the middle when it comes to liability concerning minors and drinking.<sup>78</sup> The recent amendments to criminal underage drinking statutes, which make it a crime to knowingly allow minors to consume alcohol on the host's property, are a significant start, but the attitudes of parents like the Moulton's still remain prevalent throughout the Commonwealth.<sup>79</sup> Changes need to be made to educate parents that what they are doing is wrong and should carry serious consequences if someone happens to be injured because of their bad judgment.<sup>80</sup>

### III. ANALYSIS

*A. The Failure of Massachusetts Social Host Liability Law*

In order to properly dissuade parents from allowing underage drinkers to imbibe in their homes, Massachusetts must extend civil liability to reach adults that knowingly allow such drinking to take place under their roofs.<sup>81</sup> As the law currently stands, a third party that is subsequently injured by an intoxicated minor may not recover from the parents who allowed the party unless those parents actually furnished alcohol to their minor guests.<sup>82</sup> This is in direct contrast to the criminal statutes in the Commonwealth that make it a crime to simply allow a minor to consume a single alcoholic beverage.<sup>83</sup> Such a disparity in civil and criminal sanctions creates a confusing area of law that does not accurately portray or deter the seriousness of contributing to underage drinking.<sup>84</sup> Instead, a parent who uses his bad judgment to host an underage

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78. See *supra* notes 50-63 and accompanying text (outlining several jurisdictional views regarding social host liability).

79. See *supra* note 50 and accompanying text (exhibiting recent changes in Massachusetts criminal law for providing liquor to underage drinker); *Football Coach*, *supra* note 6, at 1 (illustrating attitude of many adults concerning underage drinking). On October 22, 2004, a Fall River, Massachusetts high school football coach was fired from his job after hosting an underage drinking party at his home to drown the pain of a big loss to an archrival school. *Football Coach*, *supra* note 6, at 1.

80. See *infra* Part III (proposing adoption of negligence per se when statutory violation present). See generally Matthew C. Houchens, Comment, *Killer Party: Proposing Civil Liability for Social Hosts Who Serve Alcohol to Minors*, 30 J. MARSHALL L. REV. 245 (1996) (suggesting reform in civil liability standards).

81. See *supra* notes 50-54 and accompanying text (outlining criminal statute's punishment of adults who knowingly allow underage drinking in their homes).

82. See *supra* notes 39, 43, 48-49 and accompanying text (detailing current state of social host liability law in Massachusetts with regard to minor guests).

83. See *supra* note 50 and accompanying text (quoting specific language of Massachusetts liquor liability statute prohibiting furnishing of alcohol to minor).

84. See Farmer, *supra* note 2, at 2 (revealing attitude of parents who see nothing wrong with allowing teen drinking). Compare *supra* notes 39, 43, 48-49 and accompanying text (exposing different criminal and civil standards applied to adults providing alcohol to minors), with *supra* notes 50-54 and accompanying text

drinking party, where a guest injures himself or an innocent third party, may walk away with only a slight fine and minimal jail time or probation, never actually recognizing that what he did was wrong.<sup>85</sup>

### 1. Problems with Treating Minors as Adults for Social Host Liability

Most troubling about the current state of social host liability law in Massachusetts is the court's identical treatment of adult and underage drinking guests.<sup>86</sup> The rule established in *McGuiggan v. New England Telephone and Telegraph Co.*, for example, makes a social host liable only when he knows or should have known that his guest was drunk but continued to serve him alcohol anyway.<sup>87</sup> The standard is based on common-law principles of negligence where the host breached a duty by creating a reasonably foreseeable risk to third parties who might later come into contact with the inebriated guest.<sup>88</sup> If the guests serve themselves, however, the duty disappears because it is not the conduct of the social host that created the risk of injury to third parties.<sup>89</sup> While the standard is sensible when applied to adults, it loses its practicality with regard to underage drinkers.<sup>90</sup>

Minors under the age of twenty-one are a special class of society, recognized by the legislature as needing extra protection from the many harms of alcohol.<sup>91</sup> Parents who allow minors to drink, then, are culpable enough to be committing

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(illustrating disparity between civil and criminal penalties for parental allowance of underage drinking).

85. See *supra* note 13 and accompanying text (relating host's punishment for death of guest due to excessive consumption of alcohol); see also McCabe, *supra* note 55, at 1 (reporting punishment of host who provided alcohol to guest who subsequently killed third party). Brendan Kneram, a twenty-year-old student at Syracuse University, was sentenced to six months in jail after he pleaded guilty to supplying alcohol to a Newburyport teenager who later crashed his automobile, killing an innocent third party. McCabe, *supra* note 55, at 1.

86. See *Ulwick v. DeChristopher*, 582 N.E.2d 954, 956 (recognizing *McGuiggan's* authority applies in situations where social host furnished liquor to adult or minor). Additionally, the court explicitly identifies the control of the liquor supply, rather than the age of the guest, as the controlling factor in determining liability. *Id.* at 957.

87. See *supra* note 39 and accompanying text (quoting precise language of case creating social host liability in Massachusetts).

88. See *supra* note 40 and accompanying text (explaining basis for common law negligence theory); see also *McGuiggan v. New Eng. Tel. & Tel. Co.*, 496 N.E.2d 141, 146 (Mass. 1986) (dismissing reasonableness standard with regard to minors). The *McGuiggan* court stated that it "is easier to find a violation of a standard of reasonableness when the intoxicated guest is underage, a person to whom, generally in this country, it is thought to be wrong to furnish an alcoholic drink." *McGuiggan*, 496 N.E.2d at 146. As the guest in the case was of the legal drinking age, the court did not explore this reasonableness standard any further. *Id.* at 144. Subsequent decisions have focused more on control of the liquor supply. *Supra* note 46 and accompanying text.

89. See *supra* note 48 and accompanying text (denying host, who does not serve alcohol to guests, created risk of injury to traveler).

90. See generally *McGuiggan*, 496 N.E.2d 141 (conceding ease in finding violation of reasonableness when wrongfully giving alcohol to underage drinkers).

91. See MASS. GEN. LAWS ch. 138 § 34 (2004) (making it illegal to sell or furnish alcohol to underage child); MASS. GEN. LAWS ch. 138 § 34A (2004) (prohibiting attempted procurement of alcohol by minors under twenty-one).

a crime but not negligent enough to create a duty to protect third parties from foreseeable harm.<sup>92</sup> Presumably, this is because parents that do not actually serve alcohol to the underage guests are in no position to tell whether or not they are drunk, in accordance with the *McGuiggan* standard.<sup>93</sup> This is where the law fails, however, because drunkenness is essentially the equivalent of consuming an excessive amount of alcohol.<sup>94</sup> While a more seasoned adult drinker may consume multiple beverages before he has drunk to excess, making it difficult for a host to determine intoxication, every drop of liquor illegally consumed by a minor is excessive.<sup>95</sup> A reasonable host should recognize that making any amount of alcohol available to minors, even indirectly, will result in drunk guests and, consequently, the foreseeable harm that the legislature had hoped to prevent by restricting the drinking age to twenty-one.<sup>96</sup>

The court's logic also fails in its view that the underage guest, as opposed to the adult host, is in the best position to prevent injury to himself.<sup>97</sup> In its continuing effort to achieve uniformity in its decisions regardless of the age of the social guest involved, the court disregards common sense much like the parents who host underage drinking parties.<sup>98</sup> It is easy to recognize, for example, that an underage drinker who has had almost no experience with the dangerous effects of alcohol is incapable of deciding for himself at what point he has had enough to drink.<sup>99</sup> Indeed, the minor has actually had too much when he consumes his first drop, making it even more unreasonable for the parent to allow consumption until the minor sees fit to stop.<sup>100</sup> It is troubling, then, that parents allow teenagers to make this determination with full support

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92. Compare *supra* notes 39, 43, 48-49 and accompanying text (highlighting similarities and differences in civil and criminal standards) with *supra* notes 50-54 and accompanying text (expounding differing opinions of culpability in criminal and civil contexts).

93. See *supra* note 39 and accompanying text (relating *McGuiggan*'s reliance on visible intoxication for liability).

94. See generally *McGuiggan v. New Eng. Tel. & Tel. Co.*, 496 N.E.2d 141 (Mass. 1986) (discussing blood alcohol content and various tolerances showing signs of intoxication at different points).

95. See *McGuiggan*, 496 N.E.2d at 142 (examining factors when person tolerant to alcohol would show unmistakable signs of intoxication); Baker, *supra* note 35, at 72 (recognizing recovery limited to narrow circumstances of obvious intoxication); Fitzgerald, *supra* note 2, at 1 (hypothesizing every illegal drop of alcohol consumed by minor as "drinking to excess").

96. See *supra* notes 39, 50 and accompanying text (applying *McGuiggan* drunkenness standard and criminal statutes to specific circumstances of inexperienced minor intoxication).

97. See *supra* note 49 and accompanying text (discussing host's lack of duty in preventing injury to social guest).

98. See *supra* notes 46, 86 and accompanying text (explaining court's uniform decisions regarding adult and minor guests despite obvious difference between them).

99. See Burge, *supra* note 5, at 1 (describing inebriated teenager's death after punching window, passing out, and losing fatal amounts of blood). Tales like this one are solemn reminders that underage drinkers are ill prepared to handle the effects and consequences of alcohol. *Id.* The death may have been prevented if the parents who hosted the party checked in on their guests one time. *Id.*

100. See *supra* note 95 and accompanying text (reasoning underage drinking excessive and, therefore, unreasonable).

of the courts, even though the legislature has long since removed that decision from the equation with the passage of various pieces of liquor legislation that disallow individuals under the age of twenty-one from consuming alcohol.<sup>101</sup> If a minor cannot make the decision because of his inexperience and immaturity, and the legislature and law enforcement officials have already instructed teens that they are not to drink, it leaves no one, but the parents who allow underage drinking in their homes, to prevent injuries to third parties or guests.<sup>102</sup> Accordingly, because it is ultimately the responsibility of the parents to prevent harm, the doors of civil liability should be swung wide open when parents fail to correctly monitor these parties and injury unfortunately occurs.<sup>103</sup>

*B. Proposing a New Standard for Social Host Liability Law in Massachusetts*

Like the many jurisdictions that have already done so, Massachusetts should adopt a negligence per se rule when dealing with parents who condone underage drinking.<sup>104</sup> Under such a rule, parents who knowingly allow minors to drink in their homes, even if they do not serve the liquor to their guests directly, will be in violation of a criminal statute, and by definition, unreasonable in their actions.<sup>105</sup> Adherence to such a standard would create fluidity among civil and criminal sanctions while dispensing with the need to find a parental duty to prevent foreseeable harm; a duty that the court has been reluctant to find when parents do not directly serve alcohol to underage guests.<sup>106</sup> Indeed, it can generally be conceded that any parent who knowingly allows alcohol to reach the hands of a minor is acting unreasonably.<sup>107</sup> A negligence per se standard would then only affirm what is already believed by the public at large.<sup>108</sup>

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101. See *supra* notes 49-54 and accompanying text (suggesting minor's duty to prevent own harm inconsistent with criminal statute prohibiting underage drinking); see also Houchens, *supra* note 80, at 281 (opining underage liquor statutes take away minor's decision to drink).

102. See *supra* notes 49-54 and accompanying text (suggesting duty to prevent harm to underage guests falls solely on adult host serving alcohol); see also *Tobin v. Norwood Country Club, Inc.*, 661 N.E.2d 627, 633 (Mass. 1996) (highlighting reduced decision making ability in minors who have engaged in drinking). The court stated, "the law forbids the serving of alcohol to minors because they are thought to be peculiarly susceptible to the effects of alcohol and less able to make decisions about what amount of alcohol they may safely consume in various situations." *Tobin*, 661 N.E.2d at 633.

103. See *infra* Part III.B and accompanying text (proposing negligence standard to include social hosts which knowingly allow underage drinking resulting in harm).

104. See *supra* notes 60, 69-70 and accompanying text (portraying multiple jurisdictions providing for negligence per se for liquor violations).

105. See *supra* notes 50, 69 and accompanying text (combining Massachusetts underage criminal statute language with negligence per se standard).

106. See *supra* note 48 and accompanying text (discussing court's reluctance to find duty when host does not directly serve alcohol to guests).

107. See *supra* notes 90-91 and accompanying text (conceding activity of providing liquor to underage drinker generally accepted as wrong); see also *Pollard v. Powers*, 738 N.E.2d 1144, 1147 (Mass. App. Ct. 2000) (admitting host did not call police when party got uncontrollable because knowledge of illegal action).

108. See *supra* notes 90-91 and accompanying text (noting known unreasonableness and illegality of

With this in mind, it is important to note that Massachusetts courts sometimes find that parents who allow underage drinking are negligent.<sup>109</sup> Instead, as exhibited in the seminal decision of *Kelly v. Gwinnell*, the elements of common-law negligence have always been present but courts have been reluctant to formally extend civil liability to social hosts because of their concern for policy and fairness.<sup>110</sup> The adoption of a negligence per se standard would then effectively eliminate the hesitation of extending liability to these individuals by allowing the legislature to determine the appropriate standard and punish those who fall below it.<sup>111</sup> Such a standard would not create any additional or undue burdens on the host either, as the prohibition of serving liquor to anyone under the age of twenty-one is a long standing and well-known historical restriction not only in the Commonwealth but throughout the United States.<sup>112</sup>

### C. *Kelly v. Gwinnell* Revisited

Twenty-one years ago, when the Supreme Court of New Jersey decided *Kelly*, the court faced a similar crisis to the one presently being waged in Massachusetts.<sup>113</sup> The *Kelly* court recognized that public policy and fairness, in light of the circumstances before it, compelled a change in New Jersey's social host liability law.<sup>114</sup> Those same factors would now justify Massachusetts's extension of civil liability to reach adult hosts who knowingly allow underage drinking in their homes.<sup>115</sup>

Primary to the *Kelly* court's decision to create social host liability was its balancing of overwhelming public concern for the minimization of drunk-driving fatalities with any possibility of unfairness on the host in monitoring the

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violating state liquor laws, despite lack of duty). *But see supra* notes 6, 8-9 (discussing contrary attitudes and statistics of parents who see nothing wrong allowing minors to drink).

109. *See Panagakos v. Walsh*, 749 N.E.2d 670, 673 (Mass. 2001) (holding conduct of host violated various liquor laws but refusing to impose duty); *Wallace v. Wilson*, 575 N.E.2d 1134, 1135 (Mass. 1991) (holding duty of care based on existing social values, customs, and policy).

110. *See Kelly v. Gwinnell*, 476 A.2d 1219, 1222-24 (N.J. 1984) (explaining elements for negligence action clearly present and imposition of duty to prevent risk fair); *see also Cimino v. Milford Keg, Inc.*, 431 N.E.2d 920, 920 (Mass. 1982) (expressing plaintiff has burden of proving every element for negligence: duty, breach, causation, and damages).

111. *See supra* notes 69-70 and accompanying text (defining legislative basis for negligence per se findings).

112. *See supra* note 91 and accompanying text (explaining Commonwealth's specific statutes currently prohibiting underage drinking); Houchens, *supra* note 80, at 253 (outlining various ages of consent other states have adopted for different activities, including drinking).

113. *See supra* notes 26-34 and accompanying text (discussing complete reasoning of present circumstances which induced *Kelly* court to create social host liability).

114. *See supra* notes 31-34 and accompanying text (citing factors considered by court, including drunk-driving statistics, criminal statutes, and historical prohibition).

115. *See supra* notes 50-53, 57-58 and accompanying text (paralleling similar Massachusetts drunk-driving statistics and criminal statute amendments to meet scenario in *Kelly*).

alcohol consumption of his guests.<sup>116</sup> When taken together, however, there was little doubt of the outcome, as minor inconveniences associated with monitoring alcohol were no match for reducing automobile fatalities.<sup>117</sup> The same is true here, but even more so, considering that the court would specifically prevent automobile fatalities involving children.<sup>118</sup> Parents must already refrain from providing liquor to underage guests or else be subject to criminal penalties; therefore any chance to further deter parents from hosting underage parties should be embraced.<sup>119</sup>

Additionally, the existence of a criminal statute that explicitly punishes parents who knowingly allow underage drinking to occur on their property is a convincing argument for reform in social host liability laws.<sup>120</sup> The legislature's abandonment of the very language still used by courts in civil actions illustrates that the old standard was not properly working as a deterrent.<sup>121</sup> Indeed, despite the passage of the stricter criminal penalties, underage drunk driving statistics have remained constant and the prevalence of adult sanctioned parties has even increased throughout portions of the Commonwealth.<sup>122</sup> The *Kelly* court utilized similar evidence in determining that a change was necessary in New Jersey.<sup>123</sup> Massachusetts, likewise, should do the same.<sup>124</sup>

Implementing a negligence per se standard that embraces the current language of the Massachusetts liquor statute would send a message to adults that willful blindness of teenagers openly consuming alcohol in their homes will no longer be tolerated.<sup>125</sup> Faced with the threat of soaring civil sanctions

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116. See *supra* note 33 and accompanying text (suggesting prevention of horrific drunk-driving fatalities outweighed minor inconveniences of monitoring alcohol among guests).

117. See *supra* note 33 and accompanying text (detailing longstanding relationships not enough to prevent duty attaching to social hosts).

118. Compare *supra* note 33 and accompanying text (specifying important factors considered in establishing social host liability to prevent adult drunk-driving abuse), with *supra* notes 57-58 (theorizing effect similar expansion of liability could have on underage drunk-driving abuse in Massachusetts).

119. See *supra* notes 50, 52 accompanying text (illustrating ease with which standard could take place, utilizing current criminal statutes for negligence).

120. See *supra* notes 50-54 and accompanying text (outlining circumstances surrounding change in Massachusetts criminal standard for underage drinking).

121. See *supra* notes 39, 43, 48 and accompanying text (announcing language and standard of civil liability relies on actual service of alcohol to minor); *supra* notes 52-53 and accompanying text (elucidating legislature's abandonment of exact standard in criminal statute to replace with "knowingly allow" standard).

122. See *supra* notes 57-58 and accompanying text (mentioning increased prevalence of parties and consistent fatality numbers despite heavier criminal sanctions).

123. See *supra* note 34 and accompanying text (discussing presence of new criminal statute in court's reasoning to create new social host liability). Specifically, the *Kelly* court held that where "long-standing criminal sanctions against drunk-driving have recently been significantly strengthened to the point where the Governor notes they are regarded as the toughest in the nation," it is both fair and reasonable to impose such a duty on social hosts to monitor the consumption of their guests. *Kelly v. Gwinnell*, 476 A.2d 1219, 1222 (N.J. 1984).

124. See *supra* notes 50-54 and accompanying text (realizing Massachusetts' similar strengthening of criminal sanctions would make new standard fair and reasonable).

125. See *Burge*, *supra* note 5, at 1 (painting willful blindness of adults as ostriches sticking heads in sand).

and already existing jail time and fines, parents would be forced to seriously think twice before absently allowing such underage parties to take place.<sup>126</sup> Until that happens, however, and civil and criminal penalties remain disjointed, parents and teenagers will continue to abuse underage drinking without paying a sufficient price.<sup>127</sup>

#### IV. CONCLUSION

The purpose of this Note is not to suggest that teenagers should completely refrain from alcoholic consumption until they reach the legal drinking age of twenty-one. Indeed, it may be convincingly argued that a minor's first drink and the uncertainties and pressures that come with it are an important part of adolescence and maturity that should be preserved by allowing kids to be kids. The decision to drink, however, should not be made by the parents who allow underage drinking parties to occur in their homes. By providing a "safer" venue that encourages and promotes underage drinking, parents are not only placing their children and others in danger of serious injury, but are also effectively removing any decision-making process that may allow a minor to weigh his options and think twice before drinking to excess.

It is irrational for Massachusetts to explicitly distinguish minors in certain avenues of liquor liability law while simultaneously allowing parents to treat underage guests as adults for purposes of social host liability. Underage drinkers are a special class of society singled out by the legislature as needing special protection from the numerous dangers of alcohol consumption. Parents that allow parties in their homes are blatantly ignoring criminal statutes and common sense that tell them that what they are doing is wrong. Amazingly, they still do not get the message.

Instead, the Massachusetts legislature and judiciary should recognize that parental support and allowance of underage drinking parties in their homes threatens the safety of the Commonwealth every night that they occur. The attitudes of the Moulton's and others like them will not be swayed unless they are held civilly responsible for any deaths or injuries that occur because of their bad judgment. A negligence per se standard is the most effective method to accomplish this; equating negligence with a blatant violation of current criminal sanctions. Having already established that the well being of their

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While the current criminal sanctions no longer allow for willful blindness, it is still in place for civil liability, as long as parents are not deterred by the often lax criminal penalties. *Id.*

126. See *supra* notes 73-77 and accompanying text (exhibiting effect strict civil and criminal sanctions, working together, can have on deterring underage drinking).

127. See *supra* notes 5-9, 13, 16, 79 and accompanying text (describing continued problem of parent-sanctioned parties and parents' attitude believing nothing wrong). While parents continue to think that they are doing nothing wrong, brushing off criminal penalties and probation, the minors who rely on their judgment are the ones who are suffering the heaviest consequences, often with injury or death. *Supra* notes 13, 16 and accompanying text.

children's future is not a sufficient enough deterrent for these parents to refrain from hosting underage drinking parties, perhaps the Moulton's and others like them will respond if their wallets, and not their kids, are the ones that are seriously damaged.

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