The Legal Implications of BYOB Parties on Social Host Tort Liability

"[I]n Juliano*, the SJC had the opportunity to correct a patently ridiculous anomaly in the law, viz.; a person in control of a premise has a duty of care under the criminal law to prevent underage drinking parties on her watch, but she has no corresponding duty of care under the common law to prevent injuries and deaths that so predictably flow from her conduct. In maintaining that irreconcilable disparity between a Massachusetts citizen's criminal law and common law responsibility for facilitating underage drinking, the SJC opted to take a myopic view of an endemic problem, rendered a great disservice to the people and made us less safe."*[1]

I. INTRODUCTION

Besides their strong economic enticement, the hosts of "Bring Your Own Booze" (BYOB) parties may have inadvertently discovered a strong legal incentive for hosting this form of party, namely to escape civil liability.[2] Individuals under the legal drinking age often exploit these parties, and the facts presented in *Juliano v. Simpson*[3] exemplify these parties' dangerous realties and the grave consequences of underage drinking.[4] Presented with an empty house void of any adult supervision, nineteen-year-old Jessica Simpson hosted a party at her father's home, where she permitted her underage friends to consume alcohol that they had procured before arriving.[5] A few short hours later, an intoxicated guest crashed into a utility pole while driving home, consequently causing his passenger, Rachel Juliano, to sustain serious injuries.[6] Despite Simpson's criminal behavior, the Massachusetts's Supreme Judicial Court (SJC) declined to broaden the scope of common-law, social-host liability

1. Richard P. Campbell, *Banning Underage Drinking Parties–a Matter of Public Health and Safety*, 19 MASS. LAWYERS J., no. 8, 2012, at 1, 17, *available at* http://www.massbar.org/media/1218943/april%202012.pdf, *archived at* http://perma.cc/HZ4G-PMVE.

2. *See* Suzanne Snell, *Supreme Judicial Court Rules Hosts Not Responsible for BYOB Underage Drinking*, WICKEDLOCAL.COM (Mar. 14, 2012), http://www.wickedlocal.com/danvers/news/x299880410/Supreme-judicial-court-rules-hosts-not-responsible-for-BYOB-underage-drinking, *archived at* http://perma.cc/6RTN-8CJ2 (noting no civil liability in Massachusetts for BYOB party).

3. 962 N.E.2d 175 (Mass. 2012).

4. *See id.* at 177 (stating Juliano suffered serious injuries as passenger in fellow guest's car after leaving party).

5. *See id.* (summarizing facts of case).

6. *See id.* at 179.

and affirmed that Simpson was not civilly liable for Rachel's injuries.[7] By refusing to recognize a duty for social hosts who provide a location for underage drinking but not the actual alcohol, the court's opinion ultimately exposed a troubling inconsistency in the legal system where the plaintiff is not awarded civil remedies despite the defendant's criminal liability.[8]

Although there are many facets of social host liability, the issue presented to the *Juliano* court arises in a limited number of social host scenarios.[9] In criminal liability cases for social hosts, the state enforces statutory violations through criminal punishment, but in civil settings, social host liability provides the plaintiff with a cause of action against a social host, in which monetary damages may be awarded.[10] Many jurisdictions that have implemented social host tort liability have determined that a plaintiff may sue both commercial vendors and noncommercial providers of alcohol; noncommercial providers of alcohol—social hosts—typically are sued in cases factually analogous to *Juliano*.[11] In cases involving social hosts, a court may consider whether liability should attach to each party who acted as a social host, often the child who hosted the party or the parents who knowingly permitted underage guests to drink on their premises.[12]

7. *See Juliano*, 962 N.E.2d at 184-85 (affirming trial court's dismissal of Juliano's social host liability allegations).

8. *See id*. at 183 ("[P]roposed expansion of social host liability . . . continues to be inadvisable."); Campbell, *supra* note 1, at 1, 17 (criticizing *Juliano* court's failure to rectify incongruity between criminal and civil liability); *see also* Snell, *supra* note 2 (noting police may still press criminal charges against Simpson).

9. *See, e.g.*, Ulwick v. DeChristopher, 582 N.E.2d 954, 954 (Mass. 1991) ("[W]hether a social host may be held liable in tort for injuries caused to a third person by an intoxicated guest . . . ."); McGuiggan v. New England Tel. & Tel. Co., 496 N.E.2d 141, 141 (Mass. 1986) (considering whether social host who provided alcohol liable for death caused by guest's drunk driving); Langemann v. Davis, 495 N.E.2d 847, 847-48 (Mass. 1986) (deciding whether social host liability extends to injuries from minor guest's drunk driving). "We conclude that, although in certain circumstances liability properly could be imposed on such a social host, on the facts presented on the social hosts' motion for summary judgment, they are not liable." *McGuiggan*, 496 N.E.2d at 141.

10. *See* BLACK'S LAW DICTIONARY 997 (9th ed. 2009) (defining liability as "enforceable by civil remedy or criminal punishment"); Robert H. Humphrey, *Social Host Liability*, RHODE ISLAND B.J., Dec. 2009, at 25, 25 (defining social host liability in terms of both criminal and civil liability); Peter A. Slepchuk, Note, *Social Host Liability and the Distribution of Alcohol and Narcotics: A Survey and Guide*, 44 SUFFOLK U. L. REV. 933, 935 (2011) ("'Social host liability' . . . describes the civil liability of a person who provides an intoxicant to another without remuneration.").

11. *See McGuiggan*, 496 N.E.2d at 147 (Lynch, J., concurring) (defining social host as individual not in commercial setting). Courts adhere to distinct policy concerns for assigning liability for commercial hosts versus social hosts. *See id.* at 143-44 (majority opinion). "Balancing these differences, courts have found it easier to impose a duty of care on the licensed operator than on the social host." *Id.* at 144; *see also* Lee A. Coppock, *Social Host Immunity: A New Paradigm To Foster Responsibility*, 38 CAP. U. L. REV. 19, 21-23 (2009) (distinguishing issues of civil liability between commercial hosts and social hosts).

12. *See* Juliano v. Simpson, 962 N.E.2d 175, 177 (Mass. 2012) (filing suit against underage host and her father who did not know of party); Martin v. Marciano, 871 A.2d 911, 915 (R.I. 2005) (recognizing duty for adult parent aware alcohol available for underage people at her home); Margaret F. Cooper, Comment, *A Duty of Care To Protect Persons from the Tortious Acts of Third Parties*—Biscan v. Brown*: Broadening the Special Relationship Doctrine To Include Adult Hosts of Parties Where Minors Are Consuming Alcohol*, 37 U. MEM. L.

It is imperative to note that at common law no duty for social hosts existed, but recently, several jurisdictions have been persuaded by public policy concerns to impose social host tort liability through judicial and legislative measures.[13] Originally, most of these jurisdictions held that liability was contingent on whether the social host directly provided or made the alcohol available to guests.[14] Currently, however, even presented with the popularity of BYOB parties and persisting public policy concerns, there is no unanimity among jurisdictions as to whether to broaden the scope of liability to accommodate these situations.[15] Only a minority of jurisdictions have chosen to so broaden the scope of liability, and these jurisdictions have done so through different approaches.[16]

Confronted with the many legal conundrums that have arisen from the popularity of BYOB and similarly fashioned parties, this Note's aim is to provide a close analysis of the many legal and policy concerns surrounding whether or not mere control of premises should give rise to duty as a matter of law for social hosts.[17] Section II.A will focus on the rise of social host tort liability in America.[18] Next, in order to properly understand the undertakings of the SJC in *Juliano*, Section II.B will describe the development of Massachusetts's common-law tort liability for a social host.[19] Section II.C will then explore the current dispute surrounding social host liability: whether to expand the duty of care when the social host merely provides the premises for underage drinking to take place.[20] This Section will thus compare the decision in *Juliano* with decisions from other jurisdictions that have adopted the minority approach, and it will also outline a variety of different methods

REV. 195, 207 (2006) (suggesting court may impose duty on either minor guests, parents of minors, or adult host).

13. *See Martin*, 871 A.2d at 916 (annunciating public policy against driving while intoxicated); Coppock, *supra* note 11, at 28 (noting no social host liability or duty of reasonable conduct at common law). "The movement away from the common law doctrine of immunity for those who serve alcohol now includes people who serve in a commercial context, but only in a very few jurisdictions are those who serve in a social setting exposed to sanctions of any kind." Coppock, *supra* note 11, at 20.

14. *See Juliano*, 962 N.E.2d at 181 (articulating liability currently attaches when host "actually served alcohol or made it available" in Massachusetts); *Martin*, 871 A.2d at 915-16 (recognizing limitations in liability despite public policy concerns); Coppock, *supra* note 11, at 22-23 (noting majority imposes liability depending on whether social host "'knowingly' furnished" alcohol).

15. *See Juliano*, 962 N.E.2d at 184 (asserting no national consensus on issue of whether merely providing location creates duty).

16. *See id.* (expounding only nine states adopted minority approach through statute, negligence per se, or court holding).

17. *See* Ferreira v. Strack, 652 A.2d 965, 970 (R.I. 1995) (stating clear public policy motivation to prevent driving while intoxicated); Campbell, *supra* note 1 (noting correlation between popularity of BYOB parties with prom season).

18. *See infra* Part II.A.

19. *See infra* Part II.B.

20. *See infra* Part II.C.

utilized in these other jurisdictions.[21] Finally, Parts III and IV will conclude by arguing that hosts who knowingly allow underage guests to drink alcohol on their property should be held civilly liable for their wrongdoing, regardless of whether these hosts supply the alcohol themselves.[22]

II. HISTORY

A. The Rise of Social Host Tort Liability

1. Early Establishment of the Dram Shop Acts

The consumption of alcohol has long been a contentious subject for federal and state governments.[23] While dram shop laws existed as early as the 1850s, the unmistakable inadequacy of the Prohibition Era resulted in these acts aimed at controlling the consumption by the individual drinker in the United States.[24]

21. *See infra* Part II.C.

22. *See infra* Parts III-IV.

23. *See* Cary R. Latimer, Note, Charles v. Seigfried*: Social Host Liability Takes a Back Seat to Judicial Restraint*, 27 LOY. U. CHI. L.J. 1067, 1067 (1996) (recognizing various attempts by courts to curb underage drinking problem). The government's struggle can be traced back to early colonial Massachusetts when the General Court of Massachusetts first made the sale of alcohol illegal in 1657. *See* DWIGHT VICK & ELIZABETH RHOADES, DRUGS AND ALCOHOL IN THE 21ST CENTURY: THEORY, BEHAVIOR, AND POLICY 121 (2011) (setting forth 1657 Massachusetts's law as first failed attempt to control alcohol). Despite the ban, alcohol remained readily available to the general public. *See id.* The colonists relied on alcohol because water was often unsanitary; thus, alcohol was simply the safer beverage to consume. *See id*. at 120 (explaining water sources subject to animal and human waste). "State and local governments could not adequately control alcohol consumption. . . . [E]veryone would be jailed for choosing mild intoxication over typhoid, typhus, cholera, and other waterborne diseases . . . ." *Id.* The simplicity of early American employment permitted people to remain mildly intoxicated at work, but the progression of the Industrial Revolution during the later part of the eighteenth century created an unprecedented need for a sober workforce. *See id.* (articulating complete sobriety not required for farm work). The transition from rural to urban centers resulted in the creation of new, more technologically savvy jobs. *See Industrial Revolution*, HISTORY, http://www.history.com/topics/industrial-revolution (last visited Dec. 18, 2014), *archived at* http://perma.cc/KX47-HXB8.

24. *See* Coppock, *supra* note 11, at 25-26 (noting Wisconsin enacted first Dram Shop Act in 1850). In conjunction with the new demands associated with the Industrial Revolution, the notion of prohibition was reintroduced beginning in the nineteenth century as political and religious groups united on social and ethical grounds to demand better regulation of alcohol. *See* VICKS & RHOADES, *supra* note 23, at 122 (describing political and religious belief "[d]runkenness led to poverty, a disorderly society . . . and lawlessness."). "It was a widely held belief that alcohol abuse led to the proliferation of prostitution, increased violence, and the dissolution of families." *See id.* at 124. As a result, on December 18, 1917, the United States Senate first proposed the Eighteenth Amendment to the U.S. Constitution. *See* David J. Hanson, *The Eighteenth Amendment*, ALCOHOL: PROBLEMS & SOLUTIONS, http://www2.potsdam.edu/alcohol/Controversies/The-Eighteenth-Amendment.html#.VNz4uylpLjR (last visited Feb. 12, 2015), *archived at* http://perma.cc/65VR-W7M9. By its terms, the Amendment was purposed to effectuate a nationwide ban on the production, transportation, and sale of alcohol, but instead, the Prohibition Era ironically gave rise to a culture founded on bootlegging and speakeasies. *See* BLACK'S LAW DICTIONARY 1331 (9th ed. 2009) (defining prohibition as era "when the manufacture, transport, and sale of alcoholic beverages . . . was forbidden"); VICK & RHOADES, *supra* note 23, at 131 ("Legitimate saloons and bars, long patronized by men, disappeared and were replaced with speakeasies."). Ultimately, the era lasted for thirteen years—from 1920 to 1933—until it was repealed with the ratification of the Twenty-First Amendment. *See* Hanson, *supra* (noting Eighteenth Amendment

These acts permitted "a plaintiff to recover damages from a commercial seller of alcoholic beverages for the plaintiff's injuries caused by a customer's intoxication."[25] Most of these statutes further specified that dram shop liability depended on additional factors, such as whether it was known that the person was a habitual alcoholic or the commercial host served someone who was already visibly intoxicated.[26] Despite these variations, traditional dram shop acts most notably did not provide an injured party with a cause of action against a social host.[27] Presently, most states still retain some form of a dram shop act, with the vast majority of these statutes exposing commercial hosts to civil liability in limited circumstances but not addressing the liability for social hosts.[28]

2. Legal Mechanics for Prima Facie Case Against Social Host

As with all cases of liability for negligence, the question of whether liability attaches to a social host is contingent on the five elements of a prima facie negligence case: the existence of a legal duty, breach of that duty, factual cause, proximate cause, and physical harm.[29] As a question of law, the first

remains only repealed amendment of U.S. Constitution). The prohibition of alcohol became increasingly unpopular during the Prohibition Era, leading to its subsequent repeal and resulting in many states enacting statutes that recognized the potential for civil liability against commercial hosts. *See* Coppock, *supra* note 11, at 21 ("[F]ailure to regulate consumption resulted in a shift in focus to the individual drinker."); Mary M. French et al., Special Project, *Social Host Liability for the Negligent Acts of Intoxicated Guests*, 70 CORNELL L. REV. 1058, 1066 (1985) (noting Prohibition and dram shop acts focused on restriction rather than reformation).

25. BLACK'S LAW DICTIONARY 567 (9th ed. 2009) (defining dram-shop act). Mary French and her coauthors explain:

> To establish a prima facie case under a dramshop act, a plaintiff must establish the following elements:
> 1. An intoxicating liquor must be involved;
> 2. The defendant must transfer the liquor;
> 3. The transferee must consume the liquor;
> 4. The transferee must become intoxicated, or the drink must contribute to an existing state of intoxication;
> 5. The intoxicated transferee must cause an actionable injury to the plaintiff;
> 6. The intoxication must have a causal connection to the plaintiff's injury;
> 7. The plaintiff must be entitled to bring suit under the dramshop act.

French et al., *supra* note 24, at 1070 (footnotes omitted).

26. *See* Coppock, *supra* note 11, at 26-27 (providing examples of limitations including whether patron habitual alcoholic or obviously intoxicated).

27. *See id.* at 21 (highlighting how statutes distinguish between liability of commercial vendors and immunity of social hosts).

28. *See id.* at 26-27 (exposing legislatures desire to "reign [sic] in court decisions that permit liability for sellers of alcohol"). "In a balancing act, statutes now allow liability to be imposed on commercial hosts beyond what was permitted under early common law, but at the same time also fashion statutory limits and protections for bars and bartenders." *Id.*

29. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 6 cmt. b (2010) (providing five elements needed to demonstrate liability for negligence causing physical harm).

element's determination that a legal duty exists is allocated entirely to the courts.[30] Most modern jurisdictions impose a general duty to act reasonably; thus, this first element is rarely litigated in the majority of cases where a party's negligence causes someone physical harm.[31] Nevertheless, courts still preserve the ability to determine whether, in light of policy concerns, the imposition of the general duty to act reasonably is inappropriate in specific circumstances.[32]

What distinguishes social host liability from other negligence cases is the discernible reluctance of courts to impose a legal duty of care on social hosts.[33] Courts imposed a no-duty standard for any and all cases involving social host liability at common law, but as states began to impose liability on commercial hosts, courts became increasingly inclined to reconsider the liability of social hosts.[34] Departing from common law's unambiguous standard, many modern courts have begun to recognize the legal duty of social hosts in a small number of well-defined circumstances.[35]

30. *See id.* ("The first element, duty, is a question of law for the court to determine."); *see also* Martin v. Marciano, 871 A.2d 911, 915 (R.I. 2005) (noting court makes decision on case-by-case basis).

31. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 7(a) (2010) (describing general duty of reasonable care); *see also* Coppock, *supra* note 11, at 29 (recognizing prior to distinct theory of liability for negligence, no duty to act reasonably existed).

32. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 7(b) (2010) (articulating exception to liability if duty of reasonable care unsuitable given circumstances). "In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification." *Id.* § 7(b) and cmts. a, c (providing "reasons of principle or policy" and "conflicts with social norms about responsibility" support determination duty "should not be imposed").

33. *See* Juliano v. Simpson, 962 N.E.2d 175, 183 (Mass. 2012) (explaining public policy concerns may support finding no duty); Coppock, *supra* note 11, at 31 (noting many courts impose no-duty rule). "In social host cases, many courts have followed the no-duty rule, even when the facts and traditional tort analysis would ordinarily allow a cause of action." Coppock, *supra* note 11, at 29-32. Regardless of whether a reasonable jury could find that the conduct was negligent, the no-duty standard effectively releases any potential social-host defendant from liability. *See Juliano*, 962 N.E.2d at 183-84 (observing no liability despite fulfilling every other legal element).

34. *See* McGuiggan v. New England Tel. & Tel. Co., 496 N.E.2d 141, 145-46 (Mass. 1986) (recognizing no liability at common law and current trend towards imposing liability); *see also* Coppock, *supra* note 11, at 26 (noting dram shop acts created potential for injured party to recover). *But see Martin*, 871 A.2d at 915 (stating courts generally find legal duty in cases involving commercial hosts).

35. *See McGuiggan*, 496 N.E.2d at 144 (providing cause of action based on creation of new legal duty for social hosts); Coppock, *supra* note 11, at 20 (noting minority has further departed from common law to include social hosts). One of the most common confines on social host liability is to provide a cause of action only where the guest involved was a minor under the legal drinking age. *See, e.g.*, Estate of Hernandez v. Ariz. Bd. of Regents, 866 P.2d 1330, 1338 (Ariz. 1994) (limiting liability of social hosts who furnish alcohol to underage guests); Pike v. Bugbee, 974 A.2d 743, 750-51 (Conn. App. Ct. 2009) (recognizing exception to common-law immunity where underage guest); Langemann v. Davis, 495 N.E.2d 847, 847-48 (Mass. 1986) (limiting liability to minor guests outwardly intoxicated at time). Oftentimes, state courts have chosen to impose liability only where the social host furnished alcohol to a visibly intoxicated guest and the host knows the guest will be driving while intoxicated, regardless of whether the guest is an adult or minor. *See, e.g.*, Clark v. Mincks, 364 N.W.2d 226, 231 (Iowa 1985) (limiting liability to guests visibly intoxicated when served before operating motor vehicle), *superseded by statute*, Act of May 22, 1986, ch. 1211, § 11, 1986 Iowa Acts 303, 305, *as recognized in* Fuhrman v. Total Petroleum, Inc., 398 N.W.2d 807, 809 (Iowa 1987); *McGuiggan*, 496 N.E.2d at 146 (limiting liability where host knowingly served intoxicated guest alcohol who then drove

3. Balancing Public Policy Concerns with Judicial Restraint

The developments in social host liability exemplify how the law of torts continuously responds to changing societal concerns.[36] The current trend towards imposing a legal duty on social hosts has resulted from increased concerns over two widespread societal problems—driving while intoxicated and underage drinking.[37] Our society has long recognized the gravity of driving under the influence, particularly when the driver is under the legal drinking age.[38] According to the National Highway Traffic Safety Administration (NHTSA), in 2012, 10,322 people died in motor vehicle crashes where a driver was intoxicated, which is equivalent to one death every fifty-one minutes.[39] "These alcohol-impaired-driving fatalities accounted for 31 percent of the total motor vehicle traffic fatalities in the United States."[40] Likewise, as

injuring third party); Kelly v. Gwinnell, 476 A.2d 1219, 1224 (N.J. 1984) (providing cause of action to third party injured in car accident based on host's knowledge).

36. *See McGuiggan*, 496 N.E.2d at 145-46 (recognizing tort law responds to changing societal concerns).

> This trend toward imposing liability is no doubt a response to the greater concern of society in recent years regarding the problems of drunken driving. It is understandable that the law of torts, which in many aspects measures one's duty by what is reasonable conduct in the circumstances, should begin to respond to society's increasing concern.

Id.; *see also* Cooper, *supra* note 12, at 210 (reaffirming tort liability purposed toward enhancing social wellbeing and encouraging risk-reducing behavior).

37. *See Juliano*, 962 N.E.2d at 185 (Botsford, J., concurring) (recognizing underage drinking, particularly when combined with driving, as significant social problem); *McGuiggan*, 496 N.E.2d at 145-46 (discussing social host liability as response to societal concerns over intoxicated driving and underage drinking).

38. Latimer, *supra* note 23, at 1067 (noting high correlation between drunk driving and underage drinking).

39. *See* NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., TRAFFIC SAFETY FACTS: 2012 DATA: ALCOHOL-IMPAIRED DRIVING (2013), *available at* http://www-nrd.nhtsa.dot.gov/Pubs/811870.pdf, *archived at* http://perma.cc/W9LN-LF4M [hereinafter 2012 ALCOHOL TRAFFIC FACT SHEET]; *see also Drunk Driving*, MADD, http://www.madd.org/drunk-driving/ (last visited Dec. 18, 2014), *archived at* http://perma.cc/XWE3-WFEY (stating 290,000 people injured from drunk-driving accidents in 2013); *Statistics*, MADD, http://www.madd.org/statistics/ (last visited Dec. 18, 2014), *archived at* http://perma.cc/DF5T-PH5X (providing twenty-eight people die every day in drunk driving accidents).

40. *See* 2012 ALCOHOL TRAFFIC FACT SHEET, *supra* note 39, at 1. "While motor vehicle crash fatalities increased by 3.3 percent overall, the number of people who died in alcohol-impaired-driving crashes increased by 4.6 percent." NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., TRAFFIC SAFETY FACTS: RESEARCH NOTE: 2012 MOTOR VEHICLE CRASHES: OVERVIEW (2013), *available at* http://www-nrd.nhtsa.dot.gov/Pubs/811856.pdf, *archived at* http://perma.cc/4U8X-P2FM [hereinafter 2012 MOTOR VEHICLE CRASHES]. Developments in automotive technology have influenced social host liability law because the increased popularity of automobiles has resulted in a higher number of drunk-driving accidents and thus a heightened public policy concern regarding drunk driving. *See* Slepchuk, *supra* note 10, at 936. As the common law was developing, people relied on horse-and-buggies for transportation, but the progression of automotive technology has facilitated an increase in the number of vehicles on the road today as well as the ability to travel at higher speeds. *See id.*; *see also* Coppock, *supra* note 11, at 24 (recognizing recent "rise of traffic and the sheer number of cars on the road"). Accordingly, "[t]he losses caused by drunk drivers, which were tolerated when cars drove fewer miles at slower speeds, were no longer socially acceptable." Coppock, *supra* note 11, at 24. Thus, these advancements in automobile design and the consequent growth in automobile popularity may be the motivation behind the modern rejection of the common–law, no-duty approach. *See id.*

of 2011, automobile accidents were the leading cause of death for teenagers in the United States, and approximately one quarter of these fatal crashes involved an intoxicated underage driver.[41] In 2012, the sixteen- to twenty-year-old age group accounted for eighteen percent of fatal crashes involving a blood alcohol concentration (BAC) of .08 or higher.[42]

Those in favor of extending a legal duty upon social hosts often contend that criminal sanctions alone do not adequately dissuade the behavior that contributes to underage drinking and driving.[43] Adopting the same argument, one study has found that in the states that do hold social hosts tortuously liable for intoxicated minor guests, the drunk-driving fatality rate has been reduced by nine percent.[44] Moreover, these studies highlight that without civil liability, both the victims of drunk driving accidents and their families may be uncompensated for their emotional, physical, and financial loss.[45]

On the other hand, those against imposing civil liability on social hosts rarely question the merit of these public policy concerns and instead assert that the matter is best suited for the legislative branch.[46] These advocates of judicial restraint often emphasize the fundamental differences between commercial and social hosts.[47] They recognize that commercial hosts may be more adept at monitoring and controlling those drinking in their establishment than social hosts would in their homes.[48] Similarly, imposing liability on social hosts

(describing modern technology's leading role influence in departure from common law).

41. *See* NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., TRAFFIC SAFETY FACTS: 2011 DATA: YOUNG DRIVERS 1, 3 (2013), *available at* http://www-nrd.nhtsa.dot.gov/Pubs/811744.pdf, *archived at* http://perma.cc/S4M2-NXR4 [hereinafter 2011 DATA: YOUNG DRIVERS].

42. *See* 2012 ALCOHOL TRAFFIC FACT SHEET, *supra* note 39, at 4 tbl. 3.

43. *See* Coppock, *supra* note 11, at 19-20 (asserting criminal sanctions have not successfully compensated victims or discouraged drunk driving). Many often assert that criminal statutes alone are statistically ineffective at reducing drunk driving. *See* Coppock, *supra* note 11, at 19-20. "[T]hese sanctions clearly have not had the desired effect of significantly reducing the incidents of impaired driving, and additionally, they often fail to adequately compensate victims—and society—for the losses that occur." *Id.* at 20 (footnote omitted).

44. *See* Angela K. Dills, *Social Host Liability for Minors and Underage Drunk-Driving Accidents*, 29 J. HEALTH ECON. 241, 244 (2010), *available at* http://www.angeladills.com/JHE_march2010.pdf, *archived at* http://perma.cc/P9XE-QPDX (finding imposing liability reduced drunk-driving fatality rate among eighteen- to twenty-year-olds by nine percent). "Using state-level traffic fatality data for 1975 through 2005, I estimate the effect of [social host laws for minors] on traffic fatalities involving and not involving alcohol." *Id.* at 241.

45. *See* Coppock, *supra* note 11, at 19-20 (asserting victims may not receive proper compensation without imposition of civil liability); *see also Impaired Driving*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., http://www.nhtsa.gov/Impaired (last visited Dec. 21, 2014), *archived at* http://perma.cc/T3SL-BCJ5 ("Alcohol-impaired motor vehicle crashes cost more than an estimated $37 billion annually.").

46. *See* McGuiggan v. New England Tel. & Tel. Co., 496 N.E.2d 141, 143 (Mass. 1986) (admitting other courts believe matter of tort liability for legislature); Ferreira v. Strack, 652 A.2d 965, 970 (R.I. 1995) (contending judiciary must enforce duties and responsibilities set forth by legislature).

47. *See* Coppock, *supra* note 11, at 31-32 (asserting civil liability creates greater burden for social hosts than for commercial hosts).

48. *See* Ulwick v. DeChristopher, 582 N.E.2d 954, 957 (Mass. 1991) (voicing concerns social hosts will resort to physical force to control unruly intoxicated guests); *McGuiggan*, 496 N.E.2d at 146 (expressing doubt in ability of social host to control guest consuming own alcohol).

could consequentially create the potential for massive financial exposure for individuals who do not have sufficient insurance.[49] Thus, courts are more likely to impose civil liability on commercial hosts rather than social hosts for reasons of uncertainty and problems with enforcement.[50]

B. Development of Tort Liability for Social Hosts in Massachusetts

Chapter 138, Section 34 of the Massachusetts General Laws makes it a crime to "knowingly or intentionally supply, give, or provide to or allow a person under 21 years of age . . . to possess alcoholic beverages on premises or property owned or controlled by the person charged."[51] In 1942, the SJC held in *Barboza v. Decas*,[52] that a violation alone was insufficient to establish a breach of legal duty.[53] As a result, there was no civil cause of action against a social host in Massachusetts for over forty years.[54]

The origination of social host tort liability in Massachusetts can be traced to August 6, 1986, forty-four years after *Barboza*.[55] On this day, the SJC simultaneously released the decisions of *McGuiggan v. New England Telephone & Telegraph Co.*[56] and *Langemann v. Davis*.[57] Together, these two

> [Social] [h]osts in these circumstances might be left with little alternative than to resort to physical force in order to discourage further drinking or to try to eject the guest, a solution that in many cases will aggravate the situation and put the drunk driver where he should not be—behind the wheel of a car.

Ulwick, 582 N.E.2d at 957.

49. *See McGuiggan*, 496 N.E.2d at 147 (Lynch, J., concurring) (recognizing homeowners lack adequate protection and may have to restrict activities on their property). "A social host is by definition not in a commercial setting where furnishers of goods or services can protect themselves from the catastrophic effects of liability by obtaining adequate insurance." *Id.* at 147; *see also* Coppock, *supra* note 11, at 32 (arguing illogical to impose liability on homeowners when not arising from ownership or possession).

50. *See McGuiggan*, 496 N.E.2d at 143-44 (recognizing differences between commercial vendor and social host make it easier to impose liability). *But see* Martin v. Marciano, 871 A.2d 911, 915 (R.I. 2005) (questioning distinction between commercial and social hosts). In deciding whether to extend the duty of reasonable care to BYOB social hosts, however, the court in *Martin* held that "[a]lthough this duty most often has been extended to tavern and barroom operators, there is no valid justification for absolving an adult parent of this higher standard of care when she knowingly provides alcohol, or is aware that it is available, to underage individuals, for consumption on her property." *Id.* (citation omitted).

51. MASS. GEN. LAWS ANN. ch. 138, § 34 (West 2014). As a criminal statute, the terms provided that a violation may be punishable by a maximum one year prison sentence and a $2,000 fine. *See id.*

52. 40 N.E.2d 10 (Mass. 1942).

53. *See id.* at 12 (holding violation of statute does not give plaintiff cause of action). The court asserted that the statute lacked the express or implied legislative intent necessary to create a cause of action. *Id.*

54. *See* McGuiggan v. New England Tel. & Tel. Co., 496 N.E.2d 141, 146 (Mass. 1986) (recognizing liability where host knew or should have known of guest's intoxication and provided alcohol).

55. *See McGuiggan*, 496 N.E.2d at 141-42 (considering liability of social host who provided alcohol to adult guest); Langemann v. Davis, 495 N.E.2d 847, 847-48 (Mass. 1986) (considering liability of host who did not provide alcohol to minor).

56. 496 N.E.2d 141 (Mass. 1986).

57. 495 N.E.2d 847 (Mass. 1986).

cases recognized the existence of a new legal duty on a social host, thereby establishing a common-law cause of action against a social host for the first time in Massachusetts.[58]

Although the court ultimately did not find the social host liable in *McGuiggan*, the case is nonetheless remembered for being the first time the SJC recognized the possibility of a cause of action for social host liability.[59] In the case, the McGuiggans held a party for their eighteen-year-old son and provided alcoholic beverages to their guests.[60] After leaving the party, their son became sick to his stomach, and as he went to lean his upper body out of his friend's car window he fatally struck a cement post.[61] Thus, the SJC considered "whether a social host violated a duty to an injured third person by serving an alcoholic beverage to a guest whose negligent operation of a motor vehicle, while adversely affected by the alcohol, caused injury to a third person."[62] The court held that liability depended upon whether the risk of injury stemming from their guest's intoxication was foreseeable and that the

58. *See* Juliano v. Simpson, 962 N.E.2d 175, 180-81 (Mass. 2012) (outlining development of social host liability in Massachusetts case law). In *Juliano* the court explained the significance of these two cases:

> Read together, *McGuiggan* and *Langemann* recognized a common-law cause of action based on a new duty of social hosts, while also putting limitations on the potential scope of liability: a social host could be held liable for injury to third parties caused by the drunk driving of a guest only in cases where the host had actually served alcohol or made it available.

Id. at 181.

59. *See McGuiggan*, 496 N.E.2d at 153 ("[A]lthough in certain circumstances liability properly could be imposed on such a social host . . . they are not liable."); *see also Juliano*, 962 N.E.2d at 180 (recalling cause of action against social host first established in *McGuiggan*).

60. *See McGuiggan*, 496 N.E.2d at 141 (noting some guests acted as bartenders and guests also allowed to serve themselves). The McGuiggans chose to provide alcoholic beverages to their son and underage guests, despite the fact that the legal drinking age in Massachusetts was twenty-one at the time. *See id.* at 141. The 1984 National Minimum Drinking Age Act was designed to create a national drinking age and provided that states must implement a minimum legal drinking age of twenty-one years to receive federal funding for their highways. *See* Act of July 17, 1984, Pub. L. No. 98-363, § 6, 98 Stat. 435, 437 (codified as amended at 23 U.S.C. § 158). The statute initially appeared to be effective; reports indicate that from 1985 to 1991, the percentages of people ages eighteen to twenty that consumed alcohol decreased from fifty-nine percent to forty percent. Centers for Disease Control & Prevention, *Fact Sheets–Age 21 Minimum Legal Drinking Age*, CDC, http://www.cdc.gov/alcohol/fact-sheets/minimum-legal-drinking-age.htm (last updated Nov. 19, 2014), *archived at* http://perma.cc/X9NT-HC87 (providing statistics regarding underage drinking). Nevertheless, the results proved to be merely temporary when the percentages later increased to forty-seven percent by 1999. *Id.*

61. *McGuiggan*, 496 N.E.2d at 141-42 (describing how son died in car accident after leaving party with friends). In addition to the many relatives in attendance, eighteen-year-old James Magee and three of the son's other friends also attended the party. *See id.* at 141. At some point during the party, Mrs. McGuiggan believed that Magee was capable of driving and thus allowed her son to go with him to drive a friend home, and Mr. McGuiggan noted in his deposition testimony that Magee appeared "perfectly normal" before leaving. *See id.* at 142.

62. McGuiggan v. New England Tel. & Tel. Co., 496 N.E.2d 141, 142 (Mass. 1986). On direct appellate review, the SJC adhered with traditional common-law tort analysis in determining whether the McGuiggans, as social hosts, were liable because no statutory tort liability existed. *See id.*

social host's actions were the proximate cause of the injury.[63] Persuaded by the seriousness of public policy concerns and the modern trend towards adopting liability, the SJC concluded that the risks outweighed the traditional assumption that a drinker's voluntary consumption of alcohol is the sole proximate cause.[64] Accordingly, the court entertained the possibility of a cause of action against a social host under certain circumstances so long as the "host knew or reasonably should have known that the intoxicated guest might presently operate a motor vehicle."[65]

While *McGuiggan* addressed social host liability in the context of providing alcohol to his or her guests, *Langemann* involved an adult social host who was neither present nor provided the alcohol to the underage guests.[66] Given that this case involved a minor guest, the issue presented to the court was whether a social host could be liable if he or she did not provide, nor make available, the alcohol.[67] Under those circumstances, the SJC declined to extend a duty of care, and the court noted that it had yet to decide a case where the social host had in fact provided the alcohol to the underage guest.[68]

C. BYOB: When Social Host Provides the Premises but Not the Alcohol.

Although the current minimum drinking age in the United States is twenty-one, most parents are aware that, statistically, their children will likely consume alcoholic beverages before their twenty-first birthday.[69] Likewise, many

63. *See id.* (considering potential breach of duty if social host should have reasonably foreseen injury).

64. *See id.* at 142-43, 145-46 (recognizing "traditional view supported by the weight of authority" indicates provider not liable for later injuries). "The risk created by serving liquor to an intoxicated person who is about to operate a motor vehicle is far too apparent to permit the conclusion that the social host's act could not have been the 'proximate' cause of a third person's injury." *Id.* at 145.

65. *See id.* at 146.

> We would recognize a social host's liability . . . where a social host who knew or should have known that his guest was drunk, nevertheless gave him or permitted him to take an alcoholic drink and thereafter, because of his intoxication, the guest negligently operated a motor vehicle causing the third person's injury.

Id.

66. *See* Langemann v. Davis, 495 N.E.2d 847, 847-48 (Mass. 1986) (noting *McGuiggan* involved intoxicated adult guest). While the adult social host was not home the night of the party, she did not give her daughter permission to consume alcohol and there were no alcoholic beverages in the home prior to her leaving. *See id.* at 847 (noting social host gave high-school-aged daughter permission to have party). After obtaining alcohol from a fellow guest, one of the minor guests became intoxicated and injured Langemann in a car accident after leaving the party. *See id.*

67. *See id.* at 848 (clarifying social host merely provided premises where minor guest consumed alcohol).

68. *See id.* (holding defendant's behavior did not create risk sufficient for common-law remedy). "We reject the argument that a parent, who neither provides alcoholic beverages nor makes them available, owes a duty to travelers on the highways to supervise a party given by her minor child." *Id.*

69. *See* 23 U.S.C. § 158 (2012) (requiring states to prohibit drinking under age twenty-one to receive federal highway funding); Centers for Disease Control & Prevention, *supra* note 60 (providing forty-seven percent of people aged eighteen to twenty years consumed alcohol in 1999).

parents believe that law enforcement has done little to deter underage drinking or safeguard the public from the numerous perils that ascend from it.[70] Consequently, an emerging belief among some parents is that underage drinking is simply inevitable.[71] In disregarding the law, many parents instead focus on providing a "safe place" for their underage children and friends to consume alcohol.[72] Whereas some parents go as far as to actually provide the alcohol, many only allow others to bring alcohol into their homes for the purposes of underage consumption.[73]

As a growing number of courts choose to deviate from traditional common-law principles, the novelty of social host tort liability has left these courts uncertain as to how to best define the scope of this new cause of action.[74] Thus, one recurring question that has since arisen is whether the mere control of the premises that provides a place for underage drinking may give rise to a legal duty as a matter of law.[75]

1. Juliano v. Simpson

The 2012 *Juliano* decision is currently the prevailing law in Massachusetts regarding whether mere control of the premises may give rise to a legal duty.[76]

70. *See* Samuel Randall, Note, *Loco Parents: A Case for the Overhaul of Social-Host Liability in Florida*, 62 U. MIAMI L. REV. 939, 939-40 (2008) (recognizing many parents believe they cannot rely on police to ensure children's safety). "When you add drinking to natural teenage curiosity and pleasure-seeking . . . the results can range from throwing up all over someone's carpet or saying something regrettable, to tragedies like unprotected (and unwanted) sexual contact, or fighting that leads to injury or even death." Barbara Cooke, *Parents, Teens, and Alcohol: A Dangerous Mix*, FAM. EDUC., http://life.familyeducation.com/teen/drugs-and-alcohol/29591.html#ixzz2vg4JG3Qu (last visited Mar. 12, 2014), *archived at* http://perma.cc/LRR2-G8NG; *see also* Josie Feliz, *Myths Debunked: Underage Drinking of Alcohol at Home Leads to Real Consequences for Both Parents and Teens*, THE PARTNERSHIP FOR DRUG-FREE KIDS (May 22, 2013), https://www.drugfree.org/newsroom/myths-debunked-underage-drinking-of-alcohol-at-home-leads-to-real-consequences-for-both-parents-and-teens, *archived at* http://perma.cc/32Y7-W2EH (recognizing underage consumption of alcohol as ongoing problem in American society).

71. *See* Randall, *supra* note 70, at 939 (providing "the idea that young people will do it anyway" is prevalent).

72. *See id*. (explaining some parents intend to protect children when they choose to consume alcohol by hosting); David J. Hanson, *Drinking with Parents Is "Protective" of Alcohol Abuse*, ALCOHOL: PROBLEMS AND SOLUTIONS, http://www2.potsdam.edu/alcohol/YouthIssues/1098982193.html#VJev1SAA (last visited Feb. 14, 2015), *archived at* http://perma.cc/D3YR-PR5V (noting benefits of teaching children moderate drinking).

73. *Compare* McGuiggan v. New England Tel. & Tel. Co., 496 N.E.2d 141, 141 (Mass. 1986) (describing how defendant parents provided alcohol to underage guests), *with* Juliano v. Simpson, 962 N.E.2d 175, 178 (Mass. 2012) (explaining adult social host did not make alcohol available to underage guests).

74. *See Juliano*, 962 N.E.2d at 181 (asserting necessary limitations with potential new cause of action against social host).

75. *See id.* at 177 (recognizing question of whether to expand current duty of care to include control of premises); *see also* Ulwick v. DeChristopher, 582 N.E.2d 954, 957 (Mass. 1991) (stipulating host who did not provide alcohol not liable because less ability to control guests). "Because the alcohol being consumed belongs to the host, the host is like a bartender at a commercial establishment who can 'shut off' a patron who is showing signs of excessive drinking." *Ulwick*, 582 N.E.2d at 957.

76. *See Juliano*, 962 N.E.2d at 177 (questioning whether liability attaches when adult does not furnish

In addition to a number of other claims of negligence, Juliano and her parents asserted that Simpson was liable as a social host.[77] On direct appellate review, the SJC was "asked to enlarge the scope of social host liability under . . . common law by extending a duty of care to an underage host who does not supply alcohol to underage guests, but provides a location where they are permitted to consume it."[78] Ultimately, the majority cited the public policy considerations discussed above as well as an "absence of 'clear existing social values and customs'" as reasons for declining to do so.[79]

In reaching this conclusion, the *Juliano* court began by noting that, as a question of law, it must rely on common-law principles in determining whether a social host who "knowingly allow[s] underage guests to possess alcohol in her home" gives rise to a legal duty because mere statutory violations themselves are insufficient to establish duty.[80] Addressing public policy considerations, the majority identified a number of challenges that may arise in expanding the scope of duty.[81] Furthermore, the majority reasoned that it was "reluctant to impose a duty of care in the absence of 'clear existing social values and customs.'"[82] By highlighting the need for separation of powers

alcohol to underage guests).

77. *See id.* (outlining procedural history of case). "In relevant part, the plaintiffs alleged that Jessica was negligent for knowingly allowing Dunbar and other underage persons to possess alcohol on property under her control—conduct that the plaintiffs claimed violated G.L. c. 138, § 34 . . . ." *Id.* The trial court found that the Julianos had failed to present sufficient evidence and thus dismissed all social host claims. *See id.* at 177-78.

78. *Id.* at 177. Nineteen-year old Jessica Simpson hosted a BYOB party at her parents' house on the night of July 2, 2007. *See id.* at 177-78 (noting father absent night of party). Although there was alcohol belonging to her father, Peter Simpson, in the house at the time of the party, those beverages were not offered to her guests. *See id.* at 178 (setting forth guests brought own alcohol and did not consume host's alcohol). One of the guests, nineteen-year-old Christian Dunbar obtained a "thirty-pack" of beer in addition to a bottle of rum from a liquor store on his way to the party. *See id.* (providing Dunbar consumed mixed drinks and beers from supply he obtained prior to party). At some point during the night, there was an altercation between Dunbar and his sixteen-year-old girlfriend Rachel Juliano to which friends intervened. *See id.* at 179. After voicing her apprehensions that Juliano had consumed too much alcohol to drive, Simpson agreed to allow Dunbar to drive Juliano home. *See id.* Shortly after leaving the house, the car struck a utility pole, which resulted in injuries to both Dunbar and Juliano. *See id.*

79. *See* Juliano v. Simpson, 962 N.E.2d 175, 183-84 (Mass. 2012) (quoting Remy v. MacDonald, 801 N.E.2d 260, 264 (Mass. 2004)) (asserting legislature's denial of civil social host liability statute weighs against expansion). This implies that legislature maintains that public policy concerns are not a sufficient reason to extend liability. *See id.* The court thus "reaffirm[ed] that liability attaches only where a social host either serves alcohol or exercises effective control over the supply of alcohol." *Id.* at 177.

80. *See id.* at 179-80 (declaring duty of care prerequisite for violation of criminal statute to support tort liability claim). The court reiterated that a mere statutory violation does not support a civil cause of action. *See id.* at 179 (affirming statute creates only criminal liability).

81. *See id.* at 183 (describing gravity of decision to extend duty of care to include mere control of premises). Before imposing liability, the court must first be able to construe "'the particular standard of conduct' to which defendants would be held." *Id.* (quoting *Remy*, 801 N.E.2d at 263). The majority voiced apprehensions that both judges and juries may face difficulties with finding culpability when courts are left with the task of defining the limits of duty. *See id.* Thus, the court recognized that the legislature may be better equipped to create and define duty of care. *See id.* at 183-84 (citing additional concerns of potential massive financial exposure).

82. *Id.* at 183.

between the legislative and judicial branches, the SJC determined that the legislature's apparent intent against expanding the current duty of care overshadowed the widespread problem of underage drinking and driving.[83] Ultimately, the court declined to extend the duty of care where the social host provides the premises for underage guests to consume alcohol but does not supply the alcohol itself.[84]

2. Minority Jurisdictions–Different Methods for Extending Liability

While *Juliano* is representative of the reasoning adopted in many courts that have embraced the majority approach, a small number of jurisdictions have in fact found that mere control of the premises does give rise to a legal duty.[85] There are three main methods utilized by these states for the purposes of imposing liability against a social host in such situations: through statute, negligence per se, or state common law.[86] In one method, the state legislature enacts a statute specifically creating civil liability for a social host who provides a location for minors to drink.[87] It is important to note that in some of these states—including Hawaii, Minnesota, and Nebraska—the statutes only

83. *See Juliano*, 962 N.E.2d at 183-84 (asserting legislature refused to add civil liability component to statute at issue). The court also set forth that policy concerns are not sufficient reason to extend liability. *See id.* ("[T]here is not a 'community consensus' regarding the proposed expansion of social host liability.").

> Knowing of the Legislature's involvement in and concern about the regulation of alcohol consumption by minors in particular, and in recognition of the fact that, as pointed out by the court, expanding social host liability raises complex issues of insurance coverage among others, it is prudent to give the Legislature time to address the issue raised in this case.

Id. at 186. (Botsford, J., concurring).

84. *See id.* at 177 (majority opinion).

85. *See* Juliano v. Simpson, 962 N.E.2d 175, 184 (Mass. 2012) (noting minority of states have found merely providing location creates duty).

86. *See infra* notes 87-90 and accompanying text (outlining three methods for minority approach).

87. *See, e.g.*, COLO. REV. STAT. ANN. § 12-47-801 (West 2015); HAW. REV. STAT. § 663-41 (West 2014) (limiting liability to hosts with knowledge who "reasonably could have prohibited or prevented . . . alcohol consumption"); MINN. STAT. ANN. § 340A.90 (West 2015) (limiting liability to social hosts in "reasonable position to prevent the consumption of alcoholic beverages"); NEB. REV. STAT. ANN. § 53-404 (West 2014); NEV. REV. STAT. ANN. § 41.1305 (West 2014); TEX. ALCO. BEV. CODE ANN. § 2.02 (West 2013) (providing cause of action only where social host furnished alcohol to underage guest). For example, the Colorado statute provides that a social host is civilly liable when "[i]t is proven that the social host knowingly served any alcohol beverage to such person who was under the age of twenty-one years or *knowingly provided the person under the age of twenty-one a place to consume an alcoholic beverage.*" *See* COLO. REV. STAT. ANN. § 12-47-801 (emphasis added). Where such a statute is provided, the state legislature has already defined the legal duties and responsibilities of the social host. *See* Ferreira v. Strack, 652 A.2d 965, 970 (R.I. 1995) (describing role of legislature). Nevertheless, while the statutes in these minority jurisdictions provide the injured party with a cause of action, liability only attaches to the social host where the plaintiff satisfactorily proves all five elements of a prima facie case of negligence. *See* Joseph Fabel, *Extending Social Host Liability: Chapter 154 Seeks To Hold Adults Accountable for Serving Alcohol to Minors*, 42 MCGEORGE L. REV. 499, 505 (2011) (noting social host not automatically liable in California).

provide a cause of action to the third party not the injured guest.[88] Applying the doctrine of negligence per se, the second approach creates a cause of action where the plaintiff is able to show that there was a violation of a criminal statute by the defendant.[89] Lastly, as only two states have done, a state's highest court may choose to impose such a duty based on traditional common-law principles.[90]

3. Biscan v. Brown[91] *and* Martin v. Marciano[92] *Extending Duty Based on Common-Law Principles*

While the SJC denied the opportunity to extend the duty of care in *Juliano*, both the Supreme Court of Tennessee and the Supreme Court of Rhode Island have held that there is a legal duty for social hosts who merely provide a location for underage drinking to occur.[93] Instead of relying on statutory violations, both courts extended the duty of care based on traditional common-law tort principles.[94] *Biscan* and *Martin* were decided within one month of each other in 2005, yet despite ample opportunities, none of the highest courts in other states have since seized the chance to follow suit.[95]

In *Biscan*, the Supreme Court of Tennessee "granted [the] appeal to determine whether an adult who hosts a party for minors and knows in advance

88. *See* HAW. REV. STAT. § 663-41; MINN. STAT. ANN. § 340A.90; NEB. REV. STAT. ANN. § 53-404 (containing provisions which expressly limit recovery to third-party plaintiffs). In Hawaii, for example, the social host liability statute includes that "[a]n intoxicated person under the age of twenty-one years who causes an injury or damage shall have no right of action under this part." HAW. REV. STAT. § 663-41.

89. *See* Largo Corp. v. Crespin, 727 P.2d 1098, 1107 (Colo. 1986), *superseded by statute*, Act of May 3, 1986, ch. 100, §§ 1-2, 1986 Colo. Sess. Laws 657, 657-58, *as recognized in* Build It & They Will Drink, Inc. v. Strauch, 253 P.3d 302, 306-07 (Colo. 2011) (detailing how to demonstrate liability under negligence per se doctrine). Where the doctrine of negligence per se applies, "the standard of lawful conduct in a criminal statute also sets a standard of care for tort actions and thus violation of a statute, without more, may establish a breach of duty." *Juliano*, 962 N.E.2d at 179. Under the doctrine of negligence per se, the existence—and breach of—a legal duty is dependent on a finding that the statute in question was meant to protect against that specific harm and that the victim was within the designated class of protected people. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 14 (2010) (summarizing requirements for existence of legal duty under doctrine). It is imperative to note that some states—including Massachusetts—opt not to follow the doctrine. *See Juliano*, 962 N.E.2d at 179 (reiterating Massachusetts has not adopted doctrine of negligence per se).

90. *See* Martin v. Marciano, 871 A.2d 911, 913 (R.I. 2005) (representing situation where state's highest court imposed extended duty); Biscan v. Brown, 160 S.W.3d 462, 466 (Tenn. 2005) (holding defendant had duty even though he did not provide alcohol to minor guests).

91. 160 S.W.3d 462 (Tenn. 2005).

92. 871 A.2d 911 (R.I. 2005).

93. *See Martin*, 871 A.2d at 913 (holding social host liable even where she did not provide alcohol to underage guests); *Biscan*, 160 S.W.3d at 466 (holding "adult host had . . . duty of care even though he did not furnish any alcohol").

94. *See infra* notes 96-99 and accompanying text (providing *Biscan* and *Martin* courts' analyses based on common-law principles).

95. *See supra* note 90 and accompanying text (setting forth only two states have presently extended duty based on common-law principles).

that alcohol will be consumed has or may voluntarily assume a duty of care towards the minor guests."[96] While the adult social host did not provide any of the alcohol consumed at the party, he was present throughout the party and made no attempts to prohibit or curb the underage drinking.[97] Similar to the facts in *Biscan*, Lee Martin, the defendant social host in *Martin*, also permitted her underage guests to drink in her presence at a party that she hosted for her daughter's high school graduation.[98] In both cases, the social hosts could be held liable despite the fact that they did not supply the alcohol.[99]

a. No Legal Duty for Third-Party Plaintiffs

Third-party liability has presented an additional obstacle for courts that wish to extend the duty of care under common-law principles.[100] The facts of both *Biscan* and *Martin*, cases that found social host liability for knowingly providing the premises for underage alcohol consumption, strongly resemble those of *Juliano*, where an underage guest injured the third-party plaintiff during or after attending a party with underage drinking—but *Juliano* did not follow the course taken in Rhode Island and Tennessee.[101] Generally, at common law, there is ordinarily no duty to control a third-party's conduct. [102]

96. *Biscan*, 160 S.W.3d at 466. On the night in question, the social host—Paul Worley—hosted a party for his daughter to celebrate her eighteenth birthday. *See id.* at 467 (providing father gave minor daughter permission to host party). Plaintiff, Jennifer Biscan, and her twin sister heard about the party through word of mouth at school and were allowed to stay upon arrival. *See id.* at 466-67 (noting social hosts did not personally invite plaintiff). Later that night, an intoxicated friend drove Biscan home and slammed into a guardrail. *See id.* (describing severity of Biscan's harm causing permanent brain injury).

97. *See* Biscan v. Brown, 160 S.W.3d 462, 467 (Tenn. 2005) (describing father present throughout party and knew minors drinking beer). In a deposition, Worley's father admitted that he anticipated minors would bring and consume alcohol at the party. *See id.* at 467-68 (mentioning daughter had prior alcohol experiences and juvenile court citations). "Worley instructed his daughter beforehand that his 'rule' would be that anyone who was drinking would be required to spend the night." *Id.* (noting rule not enforced).

98. *See* Martin v. Marciano, 871 A.2d 911, 913 (R.I. 2005) (setting forth party given with mother's explicit permission). Again, there was no formal guest list or invitations, and people instead heard about the party through word of mouth. *See id.* at 914 (noting party eventually grew to approximately seventy guests). Although there were two kegs available at the party, it remained disputed whether the mother had provided the alcohol herself. *See id.* When a fight erupted between some of the plaintiff Brian Martin's friends and one of the other guests, he attempted to defuse the situation by ordering the guest to leave. *See id.* (stating guest intended "to return with reinforcements"). Although he briefly complied with Martin's request, the guest returned shortly after with a friend and a baseball bat. *See id.* He then proceeded to strike Martin in the head. *See id.* (noting Martin did not know identity of person who struck his head).

99. *See id.* at 913 (noting heightened standard of care when adult knows about minor consumption); *Biscan*, 160 S.W.3d at 484 (stating father voluntarily assumed duty of care to minors drinking on property).

100. *See infra* note 102 and accompanying text (reiterating at common-law no duty to protect third parties).

101. *See* Juliano v. Simpson, 962 N.E.2d 175, 179 (Mass. 2012) (setting forth guest injured during ride home from party); *Martin*, 871 A.2d at 914 (explaining Martin struck with bat by intoxicated guest while at party); *Biscan*, 160 S.W.3d at 467 (describing Biscan injured when fellow guest crashed car while driving home).

102. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 37 (2010) (setting forth no general duty of care for third parties). "As a general rule, a person owes no duty to act

b. "Special Relationship" Exception for Third-Party Plaintiffs

Although at common law there is no duty to affirmatively act to protect third parties, one exception—the special relationship doctrine—establishes a legal duty where "the defendant 'stands in some special relationship to either the person who is the source of the danger, or to the person who is foreseeably at risk from the danger.'"[103] Where a special relationship exists, the defendant may be held liable for his or her failure to protect the injured third party from the actions of another.[104] Consequently, when deciding to extend the duty of care, both the Supreme Court of Tennessee and the Supreme Court of Rhode Island had to first find that a special relationship existed between the defendant social hosts and the third-party plaintiffs.[105]

In determining whether a legal duty exists for BYOB social hosts, the Supreme Court of Tennessee applied a balancing test in *Biscan*: "'A risk is unreasonable and gives rise to a duty to act with due care if the foreseeable probability and gravity of harm posed by defendant's conduct outweigh the burden upon defendant to engage in alternative conduct that would have prevented the harm.'"[106] To begin its analysis, the court considered whether there was a special relationship between Biscan and Worley, thus giving rise to a legal duty.[107] Relying heavily on public policy considerations, the court held that such a relationship did in fact exist.[108] After establishing that there was a

affirmatively to protect another from the dangerous acts of a third person." Cooper, *supra* note 12, at 197; *see also Martin*, 871 A.2d at 915 (recalling landowner generally has no duty to act to prevent harm towards third party).

103. Biscan v. Brown, 160 S.W.3d 462, 478-79 (Tenn. 2005) (quoting Turner v. Jordan, 957 S.W.2d 815, 818 (Tenn. 1997)). "An actor in a special relationship with another owes the other a duty of reasonable care with regard to risks that arise within the scope of the relationship." RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 40(a) (2010) (setting forth special relationship doctrine creates exception to no-duty-to-protect rule). Some of the most common special relationships include: "common carrier/passenger, innkeeper/guest, possessor of land used by the public/members of the public, employer/employee, parent/minor child, master/servant, possessor of land/licensee." Cooper, *supra* note 12, at 197 (footnotes omitted).

104. *See* Calista Menzhuber, Case Note, *Torts: In the Absence of Parents: Expanding Liability for Caretaker's Failure To Protect Minors from Third-Party Harm*—Bjerke v. Johnson, 35 WM. MITCHELL L. REV. 714, 720, 723 (2009) (providing exception where special relationship gives rise to duty to act with reasonable care). For all inquiries regarding the existence of a legal duty, courts determine whether a relationship should be deemed special based on public policy concerns. *See id.* at 720 (noting courts' consideration "reflects 'custom, public sentiment, and views of social policy'").

105. *See* Martin v. Marciano, 871 A.2d 911, 915 (R.I. 2005) (describing special relationship exception); *Biscan*, 160 S.W.3d at 480 (considering special relationship in determining existence of duty).

106. *See Biscan*, 160 S.W.3d at 478 (quoting McCall v. Wilder, 913 S.W.2d 150, 153 (Tenn. 1995)). On appeal, Worley argued that the trial court erred in denying his motion for summary judgment and asserted that there was no legal duty owed—or assumed—to Biscan. *See id.* at 468 (providing court rejected defendant's argument).

107. *See id.* at 480 (describing significance of special relationship).

108. *See id.* (recognizing social host owed duty to every minor guest based on public policy considerations). In doing so, the court highlighted how the judicial and legislative branches are frequently more likely to impose a duty towards minors as compared to adults. *See id.* at 480 (asserting public policy

special relationship, the court then balanced the remaining factors with the fact that Worley hosted the party intending to provide minors with a "safe" place to drink.[109] By extending the duty of care, the court held that "[b]ecause he knowingly permitted and facilitated the consumption of alcohol by minors, an illegal act, Worley had a duty to exercise reasonable care to prevent his guests from harming third persons or from befalling harm themselves."[110]

Similarly, in *Martin*, the Supreme Court of Rhode Island held that a social host may be liable when the adult social host has actual knowledge that there is alcohol available to be consumed by underage guests who are in attendance at a party on his or her property.[111] Turning to a previously recognized relationship, the court recognized that there is a generalized special relationship between someone who serves alcoholic beverages and the person that they are serving.[112] While this duty of care had previously only been applied to commercial vendors, the court here asserted that there was no legitimate reason why this higher standard of care should not also attach to adult parents who know that alcohol is present on their property for underage consumption.[113] Additionally, the court held that grave public policy concerns regarding drunk driving and underage drinking well outweighed the negligible consequences of imposing a duty on BYOB hosts.[114]

concerns greater when minors involved). "[T]he court observed that public policy supports imposing a duty on an adult to protect a minor—who is presumed to be immature and inexperienced—although a duty might not exist in comparable circumstances between adults." Cooper, *supra* note 12, at 204.

109. *See* Biscan v. Brown, 160 S.W.3d 462, 482 (Tenn. 2005) (balancing utility of "safe" place to drink with "feasibility, safety, usefulness, costs and burdens"). Although the court recognized the strong likelihood of underage drinking, it refused to disregard the social host's illegal behavior. *See id.* (criticizing those that condone behavior). Furthermore, the court held that the little social value in providing a safe place for teenagers to drink was insufficient to outweigh that foreseeable probability of harm or injury. *See id.*; Cooper, *supra* note 12, at 206-07 (asserting little social value because party undeniably illegal).

110. *Biscan*, 160 S.W.3d at 482.

111. *See* Martin v. Marciano, 871 A.2d 911, 913, 920 (R.I. 2005) (vacating grant of summary judgment and remanding to determine liability of social host).

> If defendant provided alcoholic beverages to underage partygoers as plaintiff alleges, or had actual knowledge of the presence and consumption of alcohol by underage drinkers on her property, then defendant was duty-bound to exercise reasonable care to protect plaintiff from physical assault by persons expected to be in attendance or those acting at their behest.

Id. at 913. In order to come to this conclusion, the court had to again find that there was a special relationship between the third-party plaintiff and the defendant social host. *See id.* at 915 (setting forth duty dependent on finding special relationship exists).

112. *See id*. at 915. (describing special relationship already exists "between those who provide intoxicants and those whom they serve").

113. *See id.* (suggesting no need to differentiate between commercial and social hosts in this situation). "[T]here is no valid justification for absolving an adult parent of this higher standard of care when she knowingly provides alcohol, or is aware that it is available, to underage individuals, for consumption on her property." *Id.*

114. *See id.* at 916 (highlighting negligible burden on social host). "To avoid assuming a duty of protection, the adult property owner must simply comply with existing law . . . . Therefore, the consequences

c. Voluntarily Undertaking Doctrine

In considering whether there was a duty to the third party, the court in *Biscan* notably also considered whether the adult social host had voluntarily assumed a duty of care.[115] The voluntary-undertaking doctrine provides that "[i]f a person voluntarily assumes a duty or undertakes to render services to another that should have been seen as necessary for her protection, that person may be liable for harm caused because of the negligent performance of his undertaking."[116] This duty arises even when the voluntary undertaking is gratuitous, as in *Biscan*.[117] In light of Worley's decision to implement a rule that his guests who consumed alcohol must stay the night, the court found that the adult social host voluntarily assumed a duty of care to thwart his inebriated guests from leaving the party and subsequently breached that duty.[118]

III. ANALYSIS

A. Potential Inadequacies of the "Safe Place" Argument

Pointing to the high likelihood of underage drinking, the premise behind the "safe place" argument is that providing underage guests with a safe place to

of imposing such a duty in cases such as this are not 'economically and socially staggering;' in fact, they are negligible." *Id.* (reasoning no serious implications for judicial restraint).

115. *See* Biscan v. Brown, 160 S.W.3d 462, 482 (Tenn. 2005) (applying voluntary undertaking doctrine even after court found special relationship existed); *see also* Cooper, *supra* note 12, at 206 (noting court turned to "general duty principles" in determining whether voluntary assumption of duty existed). In *Biscan*, the defendants provided three distinct theories to support the imposition of a legal duty: whether there was a common-law duty of care; if there was no common-law duty of care, whether the social host father had voluntarily assumed it; and whether there was a legal duty based on the doctrine of negligence per se. *See* 160 S.W.3d at 476 (setting forth three theories favoring imposition of legal duty).

116. Thorson v. Mandell, 525 N.E.2d 375, 378 (Mass. 1988). The Restatement of Torts provides that an actor's duty to third parties based on a voluntary undertaking arises in three scenarios: when "failure to exercise reasonable care increases the risk of harm beyond that which existed without the undertaking"; when an "actor has undertaken to perform a duty owed by the other to the third person"; and when "the third party, or another [party] relies on the actor's exercising reasonable care in the undertaking." RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 43 (2010). In addition to creating a duty to third parties, it is important to note that the voluntary undertaking doctrine also establishes that a person has a duty to those benefiting from a voluntary undertaking. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 42 (setting forth legal duty to others based on voluntary undertaking).

117. *See Biscan*, 160 S.W.3d at 482-83 (noting duty to act carefully may exist even though social host acted gratuitously). In the likely event that the voluntary undertaking is gratuitous, social hosts will only be held liable where they were grossly negligent. *See* Evans v. Lorillard Tobacco Co., No. 04-2840A, 2007 WL 796175, at *14 (Mass. Super. Ct. Feb. 7, 2007) (providing lessened duty of care where duty assumed gratuitously).

118. *See Biscan*, 160 S.W.3d at 483 (providing Worley's actions constituted breach of voluntarily assumed duty to act). As a question of law, the court in *Biscan* found that Worley had assumed a duty of care for all minor guests, and the court further rejected his argument that he had effectively abandoned any assumed duty when he failed to enforce his rule. *See id.* ("[H]is failure to enforce the rule is the very negligence of which the plaintiffs complain."). In doing so, the court explained that Worley was only capable of abandoning the duty prior to when the guests arrived and commenced drinking. *See id.* (recalling Worley "continued to execute his duty" by patrolling party).

consume alcohol will be more beneficial than merely ignoring the problem.[119] Nevertheless, the facts in *Biscan* highlight the dangerous consequences behind the "safe place" argument, specifically in the event that the adult social host fails to properly chaperone the event.[120] Ignoring any potential criminal implications, the issue at hand is to discuss the legal consequences behind both sides of the argument.[121] The fact remains that no matter the adult's initial intentions, numerous underage guests, as well as third party plaintiffs, continue to be injured and killed while under the watch of these often well-meaning parents.[122]

B. Missing Element in Juliano*–Presence at the Party*

Even though the SJC in *Juliano* ultimately adopted the majority approach, the decision was met with a great deal of criticism.[123] Many recognized that the evident discrepancy between criminal and civil law is likely to send a mixed message to our underage youth and adult social hosts.[124] While it is

119. *See supra* notes 70-72 and accompanying text (providing some parents argue better to break law and provide "safe place" for underage children to drink).

120. *See Biscan*, 160 S.W.3d at 467, 478 (recalling Biscan injured when Worley did not prevent her from leaving with intoxicated guest). Discussing the party with his underage daughter beforehand, Worley admitted that he anticipated that many of his underage guests would bring and consume alcohol at the party regardless of his efforts to prevent it. *See id.* at 477. According to the record, some of the underage guests were unaware of the existence of his rule that those who drank had to spend the night, and neither Worley nor his daughter made efforts to enforce the rule. *See id.* (noting Worley failed to notify guests of rule because he expected daughter to do so). Moreover, even though the father was at the house the night of the party, he exerted little effort in monitoring the behavior of his underage guests. *See id.* at 178 (describing how father initially walked around party but then left and fell asleep).

121. *See* Hanson, *supra* note 72 (providing potential benefits when adults responsibly and successfully teach children to monitor alcohol consumption). "Teenagers who report drinking alcohol with their parents are less likely than others to have either consumed alcohol or abused it in recent weeks according to a nation-wide study of over 6,200 teenagers in 242 communities across the U.S." *Id.* It is important to differentiate between allowing one's own child to drink alcohol in the home versus allowing underage children to invite numerous friends over to a party where there is little supervision while underage guests consume copious amounts of alcohol. *See* Cooke, *supra* note 70 (describing dangers of drunk driving and other criminal behavior when parents provide alcohol for parties).

122. *See* Martin v. Marciano, 871 A.2d 911, 914 (R.I. 2005) (providing adult social host did not attempt to interfere when fight took place during party); *see also* Biscan v. Brown, 160 S.W.3d 462, 478 (Tenn. 2005) (admitting social host neither enforced rule nor monitored guests' condition while drinking). "While many parents may think that allowing their teens and their teens' friends to drink at home under adult supervision keeps kids safe and leads to healthier attitudes about drinking, the truth is that there are serious negative consequences for both parents and teens." Feliz, *supra* note 70 (noting "even well-intentioned parents" hoping to keep kids safe provide "false sense of security").

123. *See infra* notes 124-25 and accompanying text (criticizing *Juliano* majority's holding). "In maintaining that irreconcilable disparity between a Massachusetts citizen's criminal law and common law responsibility for facilitating underage drinking, the SJC opted to take a myopic view of an endemic problem, rendered a great disservice to the people and made us less safe." Campbell, *supra* note 1, at 17.

124. *See* Snell, *supra* note 2 (recognizing no civil liability for criminal behavior). "If your teen hosts an illegal bring-your-own-booze (BYOB) party and one of their guests subsequently drives drunk and causes injury, death or damage, you might be off the hook—at least in a civil case." *Id.* (voicing concern about disparity in law).

already well established that there are serious safety concerns regarding the current epidemics of underage drinking and driving while intoxicated, the decision not to extend the duty of care may incidentally cause underage drinking parties to continue unceasingly because of a lack of legal repercussions.[125]

It is imperative to note, however, that the facts presented in *Juliano* may be distinguishable from the cases and statutes adopted in minority jurisdictions.[126] Although the father in *Juliano* may have been aware that there would be a party where underage guests in attendance would be consuming alcohol, he was not present at the party.[127] In comparison, in both *Biscan* and *Martin*, the adult social hosts went as far as to attend the party.[128] The adult social hosts involved in all three cases may have applied the "safe place" logic, but it may be extremely beneficial for courts to differentiate between the two "safe place" scenarios when faced with the arduous task of defining the scope of social host liability.[129]

C. Employing the Voluntary-Undertaking Principle To Establish Legal Duty of Social Host Liability

While courts appreciate the dangers associated with parents who have adopted the "safe place" mentality, courts are also confronted with the gravity of the decision to impose a duty of care.[130] Courts thus far have relied on the complex balancing of public policy issues with the consequences of creating a legal duty.[131] Most social host cases have required the courts to go as far as to

125. *See* Campbell, *supra* note 1, at 17 (proclaiming decision will do little to deter underage partying). "Because the Court dropped the ball, we can predict with near certainty that illegal underage drinking parties at private homes will begin anew as prom season gets underway and graduations follow." *Id.*

126. *See infra* Part III.C (distinguishing between cases and statutes imposing liability based on social host's presence at party).

127. *See* Juliano v. Simpson, 962 N.E.2d 175, 177 (Mass. 2012) (providing underage daughter "in sole control of the premises" on night of party); Campbell, *supra* note 1, at 1 (describing father's awareness of daughter's plans to host party).

128. *See* Martin v. Marciano, 871 A.2d 911, 914 (R.I. 2005) (stating defendant-parent present during party); Biscan v. Brown, 160 S.W.3d 462, 467 (Tenn. 2005) (noting father only parent present throughout party).

129. *See infra* Part III.C (suggesting different mode of analysis for existence of legal duty).

130. *See* Ferreira v. Strack, 652 A.2d 965, 968 (R.I. 1995) (highlighting momentous implications coincide with imposition of duty); Cooper, *supra* note 12, at 195-96 (cautioning imposition of liability may create long-term problems for courts to define limits of liability). "The reluctance of courts to impose liability in these circumstances has been founded, rightly or wrongly, on policy considerations, particularly consideration of the effect that a rule of social host liability would have on a multitude of personal relationships in a variety of social settings." McGuiggan v. New England Tel. & Tel. Co., 496 N.E.2d 141, 160 (Mass. 1986).

131. *See Juliano*, 962 N.E.2d at 183 (providing imposition of duty inappropriate where "'strong arguments of public policy'" suggest otherwise); *Ferreira*, 652 A.2d at 968 (balancing public policy with imposition of duty); Cooper, *supra* note 12, at 197 (noting policy-based exceptions to general reasonableness standard even when other elements satisfied). "The balancing test attempts to align the imposition of a duty with 'society's contemporary policies and social requirements concerning the right of individuals and the general public to be protected from another's act or conduct.'" Biscan v. Brown, 160 S.W.3d 462, 480 (Tenn. 2005) (quoting

create a new common-law duty, most likely because the courts declined to adopt a general duty to act reasonably at common law.[132] Notably, in the present debate regarding the civil liability of BYOB social hosts, the three methods that minority jurisdictions employ are all for the purposes of devising a legal duty under the circumstances.[133] The analysis of BYOB cases involving adult social hosts that intend to create a "safe place" for underage guests to drink, however, may lend itself to an additional inquiry, namely whether the social host voluntarily assumed a duty of care.[134]

As discussed above, when courts are confronted with the issue of whether to extend the duty of care to BYOB social hosts who intend to provide a "safe place" for underage guests to drink, the cases involve scenarios where the social host failed to adequately protect his or her guests.[135] No matter whether the general duty to act reasonably applies, the voluntary-undertaking doctrine provides that a person may voluntarily assume a duty of care for the negligent performance of an undertaking.[136] Accordingly, there is a strong argument to be made that in ignoring the law and providing a "safe place" to consume alcohol, these social hosts are voluntarily assuming a duty of care toward each of their underage guests.[137] Then, courts should focus on whether that assumed duty was subsequently breached.[138]

In redirecting the analysis to whether the adult social host voluntarily assumed a duty of care, it is essential to concentrate on whether the social host was physically present at the home when the party was taking place.[139] In

Bradshaw v. Daniel, 854 S.W.2d 865, 870 (Tenn. 1993)).

132. *See Juliano*, 962 N.E.2d at 177 (suggesting social host only liable if court chooses to extend duty of care).

133. *See supra* Part II.C.2 (outlining three methods for establishing existence of legal duty where host did not provide alcohol).

134. *See Biscan*, 160 S.W.3d at 476 (noting one theory supporting imposition of duty involved voluntary assumption of duty). "A 'special duty,' . . . reflects 'the ancient doctrine that once a duty to act for the protection of others is voluntarily assumed, due care must be exercised even though there was no duty to act in the first instance.'" Menzhuber, *supra* note 104, at 724.

135. *See supra* Part III.A (highlighting common failure of adult social host to monitor and protect underage guests).

136. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 42-43 (2010) (providing duty to third party and others when one voluntarily assumes duty).

137. *See* Biscan v. Brown, 160 S.W.3d 462, 483 (Tenn. 2005) (concluding intention to chaperone prior to party and actions throughout evidenced voluntary assumption of duty).

138. *See id.* (setting forth adult host liable if breach of voluntarily assumed duty).

> [A social host] is liable if either "(a) his failure to exercise reasonable care increases the risk of such harm, *or* (b) he has undertaken to perform a duty owed by the other to the third person, *or* (c) the harm is suffered because of reliance of the other or the third person upon the undertaking."

Id. It is essential to note that the court in *Biscan* only applied the voluntary-undertaking policy to establish liability between the injured third-party plaintiff and the defendant social host. *See id*. at 482-83; *supra* note 115 and accompanying text (providing alternative common-law principle may establish duty to third party).

139. *See Biscan*, 160 S.W.3d at 483 (describing affirmative action willingly creates assumption of legal

cases in which the adult social hosts were actually present at the party, there should be a legal responsibility to satisfactorily chaperone and protect their underage guests.[140] Imposing liability in these situations is appropriate because the social host has an unmatched ability to control the behavior of their underage guests.[141] Often, these adult social hosts not only know that their underage guests will consume alcohol but are active participants in facilitating the underage drinking; consequently, the fact that they did not provide the alcohol should be inconsequential.[142]

IV. CONCLUSION

Courts have historically declined the opportunity to extend the duty of care in the realm of social host liability, often based on concerns of judicial restraint. As demonstrated by the court in *Juliano*, there is trepidation felt by those faced with the difficult task of properly defining the scope of liability and removing any ambiguity surrounding preventative steps that could effectively limit liability. The voluntary-undertaking doctrine may simplify this difficult charge: It would create a legal duty to exercise ordinary care where the adult social host had actual knowledge that underage guests were consuming alcohol on his or her property. The social host could easily prevent liability under this principle and abandon any duty by cancelling the party before any guests arrive

duty). By limiting this liability to apply only where the adult host was physically present at the party, it takes into account that these hosts have the unique ability to proactively decide not to have the party and stop underage drinking from occurring in their homes. *See id.* (stressing host capable of abandoning duty if cancelled party before guests arrived and started drinking).

> To avoid assuming a duty of protection, the adult property owner must simply comply with existing law and refuse to provide alcohol or condone underage drinking on his or her property. Therefore, the consequences of imposing such a duty in cases such as this are not "economically and socially staggering;" in fact, they are negligible.

Martin v. Marciano, 871 A.2d 911, 916 (R.I. 2005) (quoting Keckonel v. Robles, 705 P.2d 945, 949 (Ariz. Ct. App. 1985)).

140. *See Biscan*, 160 S.W.3d at 466 (holding adult host assumes duty when he knows prior to party underage guests will drink). Although the adult social host in *Biscan* botched his attempt to protect his underage guests while they consumed alcohol, he admitted that he intended to take responsibility for their welfare. *See id.* at 478 (admitting reasonable for parents to presume he would supervise underage guests at party). "These parents know that kids are going to drink, but they've decided to be the responsible ones and supervise their drinking . . . ." Cooke, *supra* note 70.

141. *See* Cooper, *supra* note 12, at 205 (analyzing relationship between absolute duty to control guests and absolute duty to use ordinary care to control). "An adult host who is 'in charge' of a party held for minors . . . certainly has some ability to control the conduct of his guests." *Biscan*, 160 S.W.3d at 481. The ability of the adult social host to control the actions of his or her underage guests is crucial because otherwise it would be unfair to hold him or her liable for his or her guests' actions. *See* Menzhuber, *supra* note 104, at 727 (reiterating imposition of duty requires defendant able to protect against certain harm).

142. *See Biscan*, 160 S.W.3d at 482 (elucidating duty to care "lies separate and apart from" providing alcohol to underage guests).

and begin drinking or by taking reasonable measures to ensure the safety of their guests who are consuming alcohol. Consequently, it is fair that an adult's deliberate decision to host parties where underage drinking takes place should correspond with the hosts voluntarily assuming a legal duty of care for underage guests.

Understanding the realities of today's world, it is likely that parents will continue to adopt the "safe place" mentality and ignore the law as a last resort to protect children while they inevitably consume alcohol. In order to better prevent the dangerous problems that can arise with underage drinking, we must hold these adults responsible for their failure to adequately chaperone and supervise their underage guests. If we continue to adhere to the common-law, no-duty standard, the adults in question will have little legal incentive to follow through with their resolution to protect their intoxicated guests. While it would be wise for more courts to utilize the voluntary-undertaking doctrine in inquiries into an adult social host's potential legal duty, this is not the only common-law principle that can be applied to these cases. No matter what method is employed—the voluntary-undertaking doctrine, the special relationship doctrine, statutes, or the doctrine of negligence per se—the importance is the result: Establishing the existence of a legal duty will enable injured parties to recover.

Kathryn C. Lewis