Higher Education and Public Health:

Proper External Measures for Confronting Student Alcohol Abuse

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I. Introduction

Walk through a college residence hall, bar, or tailgate and you will likely come across a game of Circle of Death, a 2-for-1 special, or a half-melted ice luge. While the terms may be unfamiliar, the goal of each relates to a widely recognized public health issue facing college campuses across the country: the rapid consumption of alcohol by students. Student alcohol abuse has spurred not only the growth of university alcohol policies but the growth of lawsuits and state regulation as well.[1] University policies are appropriate internal measures for confronting student alcohol abuse. However, whether tort or state regulation is a more appropriate external measure to prevent and ameliorate the harms of student alcohol abuse remains an unanswered question. Consequently, this paper examines student drinking in the context of public health. It then summarizes applicable case law, criticisms of those cases, and considers the practical implications of tort liability for student drinking. Finding tort lacking as an external control measure for student alcohol abuse, it examines research findings on the effect of state regulation of alcohol and proposes new regulation aimed at reducing dangers associated with student alcohol abuse. It concludes with a recommendation that state regulation is a more appropriate vehicle for helping universities to confront student alcohol abuse.

II. Student Alcohol Abuse as a Public Health Issue

The average person probably thinks of health in terms of doctor or hospital visits. Public health, on the other hand, has a macro perspective. It examines the overall health of a community in order to provide an aggregate benefit.[2] Accordingly, the central purpose of public health is to

[1] *See* Ralph Hingson, et. al., *Magnitude of alcohol-related mortality and morbidity among U.S. college students ages 18-24: Changes from 1998 to 2001*, ANNUAL REVIEW PUB. HEALTH 263 (2005), which defines alcohol abuse as drinking 5 or more drinks in a single occurrence at least once a month.

[2] LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT, 16 (2008).

"monitor and evaluate health status, as well as to devise strategies and interventions designed to ease the burden of injury, disease, and disability and, more generally, to promote the public's health and safety."[3] Given this purpose, public health often emphasizes prevention over amelioration, though the two may be used conjointly to reduce potential dangers.[4] Effectuating prevention and amelioration requires an entity with the "power and responsibility to assure community well-being."[5]

Alcohol abuse by college students clearly qualifies as a public health issue at the participant, campus, and local community levels.[6] College students are an especially relevant population because students between the ages of 18-24 abuse alcohol at a greater rate than their non-college peers.[7] Approximately 44% of college students reported abusing alcohol at least once a year; 23% abused alcohol three or more times in a two-week span.[8] In the participant community, drinking has a profound effect on health and safety. From 1998 to 2001 the number of alcohol-related unintentional injury deaths increased from 1600 college students to 1700.[9] During the same period, alcohol-related unintentional injuries rose from 500,000 students to 600,000. Additionally, of the college students surveyed in both years approximately 500,000 reported engaging in unprotected sex after abusing alcohol.[10] College student alcohol abuse also affects the campus community. Negative secondary effects on students who are non- to moderate-drinkers include being hit or assaulted, having their property damaged, or experiencing

[3] *Id.* at 16.
[4] *Id.* at 19-20.
[5] *Id.* at 16.
[6] "Participant" is used to refer to students abusing alcohol. "Campus" encompasses those students as well as students who do not abuse alcohol. "Community" refers to non-students.
[7] *See* Hingson, *supra* note 1, at 263.
[8] *Id.* at 260.
[9] *Id.* at 259.
[10] *Id.* at 267.

unwanted sexual advances at the hands of students abusing alcohol.[11] In 2001, nearly 700,000 non- to moderate-drinkers reported being hit or assaulted; sexual assault and date rape accounted for nearly 100,000 of the total assaults.[12] The odds of a negative secondary effect affecting the campus community at a high drinking level schools was nearly 4-to-1 compared to low drinking level schools.[13] Finally, the health and safety concerns of alcohol abuse reaches beyond the college campus to the local community. From 1998 to 2001, the number of college students who reported they drank and drove rose from 2.3 million college students to 2.8 million.[14] Furthermore, research shows most episodes of college student alcohol consumption take place off-campus.[15]

Given that college student alcohol abuse is a public health issue, the question turns to what entity has the power and responsibility to assure community well-being. Internally, colleges and universities can introduce control measures to prevent and ameliorate the harms of student alcohol abuse. However, institutions do not bear the sole responsibility for creating an environment of alcohol abuse. Research shows "that persons who drink to excess even before they enter college are more likely to experience alcohol-related problems . . . in college."[16] Consequently, external control measures aimed at college student alcohol abuse can augment the internal efforts of institutions to assure the well-being of participant, campus, and local communities.

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[11] *See* Henry Wechsler, et. al. The Adverse Impact of Heavy Episodic Drinkers on Other Colleges Students, 56 J. OF STUDIES ON ALCOHOL (1995).
[12] Hingson, *supra* note 1, at 267.
[13] *See* Wechsler, *supra* note 11.
[14] Hingson, *supra* note 1, at 259.
[15] Toben F. Nelson, et. al., *The state sets the rate: The relationship among state-specific college binge drinking, state binge drinking rates, and selected state alcohol control policies,* 95 AM. J. OF PUB. HEALTH 444 (March 2005).
[16] Hingson, *supra* note 1, at 274.

Public health law creates, limits, and vests the power and responsibility necessary to ensure community well-being. To this end, several legal tools aimed at preventing and ameliorating harm have developed. First, a government's ability to tax and spend can provide "inducements to engage in beneficial behavior and disincentives to engage in risk activities."[17] Second, governments and private groups can alter the informational environment through the provision or requirement of information that encourages people to make healthier choices.[18] Third, governments can alter the built environment through local zoning and building codes to reduce injury, disease, and associated harms.[19] Fourth, governments can directly regulate persons, professionals, and businesses with clear, enforceable rules that alter behavior.[20] Fifth, governments and private citizens can indirectly regulate by bringing tort claims for public harms; tort liability, in theory, forces the abatement of public health risks too expensive to continue.[21] The propriety of these five tools in relation to the prevention and amelioration of college student alcohol abuse must be weighed.

III. The Failure of Tort as an Indirect External Control Measure

The two most cited cases for university tort liability related to student injury involve alcohol.[22] The first case, Bradshaw v. Rawlings,[23] was decided by the Third Circuit in 1979. The case followed closely on the heels of the G.I. Bill after World War II and the Student Rights movement of the 1960s. These two phenomena reshaped the student-university relationship. The relationship receded from viewing the role of universities as *in loco parentis* and toward

[17] Gostin, *supra* note 2, at 31.
[18] *Id.* at 32.
[19] *Id.* at 34.
[20] *Id.* at 36.
[21] *Id.* at 37.
[22] WILLIAM A. KAPLIN AND BARBARA A. LEE, THE LAW OF HIGHER EDUCATION, 92 (2007).
[23] Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir. 1979).

universities and courts treating students as adults.[24] Consequently, Rawlings found institutions had no duty to protect adult students from injury. The second case, Beach v. University of Utah,[25] reaffirmed the Third Circuit's reasoning in Rawlings. In Beach, the Supreme Court of Utah held an institution did not owe a duty of protection to its students because they were adults.

In Rawlings, college sophomores Donald Bradshaw and Bruce Rawlings attended a class picnic off campus. The picnic was organized by sophomore class officers with a professor serving as advisor; however, no professors attended the class picnic. The advisor signed a check for class funds that allowed an underage class officer to purchase six to seven kegs of beer for the seventy-five attendees. Bradshaw and Rawlings left the picnic with Rawlings driving despite witnesses testifying he was visibly intoxicated. Their vehicle struck a parked car; the accidently left Bradshaw paralyzed from the neck down.

The court found the "modern American college is not an insurer of the safety of its students."[26] It based its finding on the recognition that universities no longer assumed a role of *in loco parentis*. Students had fought for the ability to define and regulate their own lives through the Students Rights movement, and universities, as well as society, acquiesced to their demands.[27] Because tort liability requires a showing that the defendant has a duty of care, the court examined whether universities had a duty to protect adult students.

First, the court rejected that a university regulation prohibiting students from drinking at college sponsored events created a custodial relationship because the regulation merely

[24] Robert Bickel and Peter Lake, *Reconceptualizing the university's duty to provide a safe learning environment: A criticism of the doctrine of in loco parentis and the Restatement (Second) of Torts,* 20 J. C. & U.L. 261, 270 (Winter 1994).
[25] Beach v. Univ. of Utah, 726 P.2d 413 (Utah 1986).
[26] *Rawlings*, 612 F.2d at 138.
[27] *Id* at 139.

reinforced state law barring underage consumption.[28] Further, the court predicted "the Pennsylvania courts would not hold that by promulgating this regulation the college had voluntarily taken custody of Bradshaw so as to deprive him of his normal power of self-protection or to subject him to association with persons likely to cause him harm."[29] Next, it rejected that the university's knowledge that alcohol would be served at the picnic created a special relationship between it and Bradshaw. The court based its rejection on the fact that the Pennsylvania Supreme Court had refused to find a special relationship would require a host to protect a third party from the negligence of guests who become intoxicated. The Third Circuit felt it even less likely the Pennsylvania Supreme Court would find a special relationship required universities to protect third parties from students.[30] Finally, it rejected that "beer-drinking by underage college students, in itself, creates the special relationship on which to predicate liability and, furthermore, that the college has both the opportunity and means of exercising control over beer drinking students at an off campus gathering."[31] The court reasoned the prevalence of beer drinking—in society generally and by underage college students in particular despite state prohibitions—would make the imposition of a university duty to protect against injuries related to beer drinking an impossible burden.[32]

In Beach, Danna Beach enrolled in a freshmen-level field biology class taught by tenured professor Orlando Cuellar.[33] At the time, Beach was a twenty-year-old student living on her own. During a required class trip to Lake Powell, Beach consumed wine and fell asleep in a group of

[28] *Id.* at 141.
[29] *Id.* at 141.
[30] *Id.*
[31] *Id.* at 142.
[32] *Id.*
[33] *Beach*, 726 P.2d at 414.

bushes after wandering away from the group; she later told Cuellar "the incident was unusual."[34] During the final required trip, the class visited Deep Creek Mountains; they hiked, rappelled, and attended a cookout hosted by a local rancher. While at the cookout, Beach again consumed alcohol. Cuellar also admitted to drinking and testified he assumed the students drank as well. After returning to the group's campsite, Beach fell down a cliff face; her injuries left her in a disabled state.

Subsequently, Beach brought suit against the University of Utah, the president of the University, other university officials, and Cuellar. On appeal from summary judgment, Beach asserted "a special relationship existed between the parties which gave rise to an affirmative duty on Cuellar's part to supervise and protect her."[35] Beach conceded that student-teacher did not give rise to a special relationship, nor did Cuellar need to walk each student to their tent. Rather, Beach based her claim upon the Lake Powell incident. She argued Cuellar "knew or should have known of her propensity to become disoriented after drinking."[36]

The court acknowledged no duty normally exists toward a person who becomes voluntarily intoxicated; consequently, it stated it would only impose an affirmative duty to act if a special relationship existed. The court cited *the Restatement (Second) of Torts §314(A)* and stated "these relationships generally arise when one assumes responsibility for another's safety or deprives another of his or her normal opportunities for self-protection."[37] In its analysis, the court first found Beach did not become disoriented at Lake Powell until after she left the group. Second, it found Beach told Cuellar the incident was abnormal. Third, it found no other incidents occurred on any other field trip Beach attended. Instead, she demonstrated "the judgment and

[34] *Id*.
[35] *Id*. at 415.
[36] *Id*. at 416.
[37] *Id*. at 415.

skills of any normal twenty-year-old college student."[38] Fourth, on the Deep Creek trip, the court found Beach testified that she did not "act inebriated or in any way impaired, but appeared to be well-oriented and alert."[39] Further, the court found she stated she exited the van and headed toward her tent without incident. Fifth, the court found Cuellar testified that he did not know that Beach specifically had consumed alcohol and that she did not act intoxicated or disoriented. Based upon these five findings, the court held "as a matter of law that Beach's situation was not distinguishable from that of the other students on the trip; therefore, no special relationship arose between the University and Beach."[40]

After dismissing Beach's other arguments, the court dealt with Cuellar's failure to enforce university and state laws regarding underage drinking at university functions. The court acknowledged Cuellar's failure raised "a more difficult issue."[41] Specifically, the court questioned whether a state law or university regulation regarding underage alcohol consumption created a special relationship that required Cuellar and the University to protect a student from "voluntary intoxication during a field trip sponsored by the University."[42] The court characterized this as a policy argument that would recognize a custodial relationship between an adult student and a large, modern university.

It rejected such a relationship on two grounds. First, the court was persuaded by the reasoning in Rawlings. Second, the court pointed to the demise of *in loco parentis* during the Student Rights movement of the 1960s as evidence universities treated students as adults, unlike high schools and elementary schools. The court found treating university students as adults

[38] *Id*. at 416.
[39] *Id*. at 415.
[40] *Id*. at 416.
[41] *Id*. at 417.
[42] *Id*.

allowed them to mature, which kept with a central purpose of higher education and satisfied an important public interest. Furthermore, the court found recognizing a custodial relationship between universities and students would require institutions to babysit students at an exorbitant expense.[43] Accordingly, the court stated, "if the duty is realistically incapable of performance or if it is fundamentally at odds with the nature of the parties relationship, we should be loath to term that relationship 'special' and to impose a resulting 'duty' . . . ." [44]

Based on the oft-cited Rawlings and Beach decisions, tort litigation attempts to impose a duty of protection on universities that would prevent and ameliorate student alcohol abuse. In theory, risk adverse universities would do more to stop alcohol abuse. However, courts have been unwilling to recognize that universities should be held responsible for the injuries of adults who become voluntarily intoxicated. It is fair to say that these two decisions demonstrate that tort is an ineffective legal tool for addressing the public health issue of college student alcohol abuse. The analysis cannot stop there, however, as both Rawlings and Beach have been subjected to a variety of criticism.

In response to Rawlings and Beach, legal theorists argued for the adoption of new tort rules that would impose greater university liability for student injury.[45] Theorist often point to alcohol abuse as a justification for new rules. They also cite risk management and loss-spreading as justifications for greater liability. Two of the earliest and most prolific writers on the subject, Robert Bickel and Peter Lake, argue universities can do more to control alcohol use and would

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[43] *Id*. at 419.
[44] *Id.* at 418.
[45] *See* Bickel and Lake, *supra* note 24. *Accord* Robert Bickel and Peter Lake, *The emergence of new paradigms in student-university relations: From "in loco parentis" to bystander to facilitator,* 23 J. C. & U. L. 755 (1997); Jane Dall, *Determining duty in collegiate tort litigation: Shifting paradigms of the college-student relationship,* 29 J. C. & U. L. 485 (2003); Kristen Peters, *Protecting the Millennial College Student,* 16 SO. CAL. REV. L. & SOC. JUST 431 (2007).

impose a university duty to "exercise reasonable care when it has actual or constructive knowledge of acts or behavior including the acts or behavior of students or student groups, or of historical events or occurrences, which present a known or foreseeable, and unreasonable, risk to a foreseeable student or class of students."[46] The hopes of legal theorists have been buoyed by a small number of court decisions that imposed university liability for student injuries—though not always in context of alcohol abuse.[47] These courts often based university duty on landlord-invitee relationships.[48] Additionally, proposals for greater university liability gained traction with the *Restatement (Third) of Torts*, which added school-student to its list of special relationships.[49]

Despite the criticism and possible shift to greater university liability, tort still fails as an external legal tool to prevent and ameliorate harms associated with college student alcohol abuse. The goal of indirect tort regulation is to reduce public health harms by making behaviors too expensive to sustain or allow. Similarly, critics of Rawlings and Beach reason greater liability will cause universities to reduce alcohol use in order to avoid liability.[50] This stance is naïve in the context of higher education.

Due to the unique nature of higher education, traditional management theories and accountability techniques applied in business do not translate to universities.[51] Unlike corporations producing widgets, universities do not have decision makers that wield the power

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[46] Bickel and Lake *supra* note 24, at 290.
[47] *See* Furek v. Univ. of Del., 594 A.2d 506, (Del. 1991) where the Supreme Court of Delaware disagreed with the decision in Bradshaw v. Rawlings and held a university could be held liable for a breach of duty to protect a fraternity pledge burned by a lye-based liquid poured on him during pledging.
[48] Robert Bickel and Peter Lake, *The emergence of new paradigms in student-university relations: From "in loco parentis" to bystander to facilitator*, 23 J. C. & U. L. 755, 761 (1997).
[49] RESTATEMENT (THIRD) OF TORTS § 41 proposed final draft 1 (2005).
[50] Jane Dall, *Determining duty in collegiate tort litigation: Shifting paradigms of the college-student relationship*, 29 J. C. & U. L. 485, 522-523 (2003).
[51] ROBERT BIRNBAUM, HOW COLLEGES WORK: THE CYBERNETICS OF ACADEMIC ORGANIZATIONS AND LEADERSHIP 28-29 (1991).

necessary to directly influence risk management. Power is diffused throughout the organization. State and federal governments, board of trusts, administrators, faculty, alumni, and students all play a role in institutional decision making.[52] These decision makers have independent goals that may or may not align.

The independent goals allowed by power diffusion lead organizational theorists to characterize universities as open systems, in which "system parts are themselves systems; they constantly change as they interact with themselves and with the environment."[53] These interactions are described as "loosely-coupled," which is to say "connections between organizational subsystems that may be infrequent, circumscribed, weak in their mutual effects, unimportant, or slow to respond."[54] These connections lead to probabilistic cause-and-effect within the organization, as opposed to a deterministic system of choices-and-outcomes.[55] A decision maker can say what outcomes are possible by undertaking risk management efforts, but cannot predict the consequences with certainty.[56]

For example, the president of a university might ask a tenured faculty member to change a course activity in order to avoid scenarios such as those in Rawlings and Beach. However, the professor may ignore the request for a multitude of reasons and properly assert academic freedom as a bar against the president's interference. While legal theorists wrestle with the level of control a university has over its students, the greater question is who constitutes the university and what controls, if any, do they possess. As this example illustrates, risk management fails as

[52] *See generally, Id.*
[53] *Id*. at 35.
[54] *Id*. at 38.
[55] *Id.*
[56] *Id*.

a method for controlling public health harms associated with college student alcohol abuse and as a justification for the expansion of university liability.

The failure of risk management means any attempt to control college student alcohol abuse through tort will inevitably lead to the associated costs being spread through tuition, which raises a host of other issues. From 1982 to 2006 college tuition and fees grew by 439%, whereas healthcare costs increased by only 251% over the same period.[57] Flat or declining growth in family income over the past three decades exacerbated the impact of tuition increases.[58] The burden of paying for college has been felt by all families; however, it has become particularly acute for "low- and middle-income families, even when scholarships and grants are taken into account."[59] Students who choose to still attend college must take on more debt than ever before; student borrowing nearly doubled from 1997 to 2007.[60] These concerns mirror the acknowledged drawbacks to indirect tort regulation of public health. Gostin states litigation, "increases the cost of doing business, thus driving up the price of consumed products. It is important to note that tort actions can deter not only socially harmful activities (e.g., unsafe automobile designs) but also socially beneficial ones (e.g. innovation in vaccine development)."[61]

IV. The Argument for State Regulation as a Direct External Control Measure

Tort fails as an indirect legal tool to prevent or ameliorate alcohol abuse by college students. Universities are not good risk managers due to decentralized power structures; consequently, the use of tort to force universities to reduce risky drinking behaviors resulting in liability is frustrated. Rather, the costs arising from tort liability pass to students through tuition.

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[57] NAT'L CTR. FOR PUB. POLICY & HIGHER EDUC., MEASURING UP 8 (2008).
[58] *Id*.
[59] *Id*.
[60] *Id*.
[61] Gostin, *supra* note 2, at 37.

Tuition loss-spreading disproportionally impacts low- to middle-class students who must choose to either forgo a college degree or assume an ever-increasing debt load. Consequently, other external legal tools are needed to augment university efforts aimed at preventing and ameliorating public health harms stemming from student alcohol abuse.

The Department of Health and Human Services found scientific evidence increasingly demonstrated alcohol policy affects drinking behaviors and alcohol-related problems for college students.[62] State laws and policies, in particular, have been shown to be "important predictors of alcohol consumption and alcohol-related problems among adults and underage youth."[63] In turn, binge drinking by adults and high school students are significant predictors of alcohol abuse by college students.[64] Building off this information, researchers studied the relationship between alcohol abuse by college students and state alcohol control policies.[65] The study examined 40 states with nearly 21,000 respondents.[66] The results showed that in states with less than four alcohol control laws 48.3% of college students engaged in binge drinking; whereas, only 33.1% of students in states with four or more alcohol control laws abused alcohol.[67] Enforcement of laws also played a key role. The study used ratings of state law enforcement and found: 34.2% of college students abused alcohol in states with a B+ or better rating, 44.7% abused alcohol in states with a C+ to B rating, 49.4% abused alcohol in states with a D+ to C rating, and 45.7% abused alcohol in states with a F to D rating.[68]

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[62] Nelson, *supra* note 15, at 444.
[63] Id. at 441.
[64] *Id.* at 444-445.
[65] *Id.* at 441.
[66] *Id.* at 444.
[67] *Id. See also Id.* at 442 defining binge drinking/alcohol abuse as 5 or more drinks in a row for men and 4 or more drinks in a row for women, at least once in the past two weeks.
[68] *Id.* at 444.

Because state of residence has a profound effect on the percentage of students abusing alcohol, it seems reasonable that state regulation of alcohol will work as an external legal tool to prevent and ameliorate public health harms caused by college student alcohol abuse. In eight of the forty states studied, the presence of stronger alcohol control polices conclusively acted as a protective measure against binge drinking among college students.[69] In addition to augmenting internal university measures to curb student alcohol abuse, state regulation will extend prevention and amelioration measures to areas outside the control of universities. Extension is warranted based on research showing that "[m]ost alcohol purchase and consumption among college students occurs off-campus."[70]

State regulation will also work better than tort as an external legal tool. First, unlike tort, state regulation of alcohol abuse will not make community welfare dependent upon higher education's diffuse power structures that poorly manage risk. The state clearly has greater authority and means to enact and enforce alcohol regulation than a university president or dean of students. The federal government tying highway funding to a minimum drinking age of 21 serves as just one example of authority and means. Second, unintended costs of state regulation can be spread more efficiently than costs associated with tort. Fundamental to loss-spreading as a justification for tort liability is "the real burden of a loss is smaller the more people share it."[71] Based on this basic principle, state regulation is preferable to tort as a public health legal tool. The state can choose to spread costs amongst all taxpayers. Tort, on the other hand, would only spread costs amongst people paying tuition at the institution being sued. Consequently, tort loss-spreading represents a larger burden compared to state regulation loss-spreading. Alternatively,

[69] *Id.* at 444.
[70] *Id.*
[71] Guido Calabresi, *Some thoughts on risk distribution and the law of torts*, 70 YALE L. J. 499, 517 (1961).

the state can choose to spread costs more narrowly through an alcohol tax. Though narrow loss-spreading might result in a larger burden on users of alcohol compared to the burden tort would spread to individuals paying college tuition, deterring alcohol use through price increases is preferable to deterring college attendance through tuition increases.

The central drawback to any state regulation of public health is the concern that it will infringe on civil liberties such as autonomy, privacy, and liberty.[72] Here, civil liberties will be infringed when the state makes it harder for an individual to drink alcohol. However, society has already accepted some infringement of that right as evidenced by a minimum drinking age of 21, illegalization of drunk driving, and adoption of blue laws. As with these examples, states can point to their power to protect the safety and morality of citizens as authorizing further infringement of a person's right to drink alcohol. Nevertheless, states should still be cognizant of the civil liberty concern when adopting regulation to control college alcohol abuse.

A secondary concern arising from state regulation is the fear it will negatively impact private enterprise by deterring entrepreneurs from entering the market.[73] However, survey data shows gross sales from liquor, beer, and wine stores in 2008 was $40,085,000,000, which outpaced the gross sales of shoes stores, jewelry stores, men's clothing stores, women's clothing stores, home furniture stores, and many other retailers. From 1998 to 2008, the gross sales of liquor, beer, and wine stores increased by $14,552,000,000, which represented 64% growth. The growth over that period dwarfed most other retail areas. For example, in a decade where laptops, smart phones, mp3 players, and flat screen televisions became must have items, the gross sales of

[72] Gostin, *supra* note 2, at 36.
[73] *Id.*

electronic and appliance stores grew 68%.[74] The gross sales of liquor, beer, and wine stores compared to other forms of retail coupled with the explosive growth of sales from 1998 to 2008 makes it unlikely that state regulation will deter entrepreneurs from entering the marketplace.

State regulation of college student alcohol abuse can prevent and ameliorate public health harms better than tort without significant negative effects to civil liberty or private enterprise. Universities and public health advocates should approach state legislatures and city or county officials with rule proposals aimed at the participant, campus, and local communities. Dan Stier, director of the Public Health Law Network, suggested state and local lawmakers respond better to 'menus' of possible statutes (personal communication, October 18, 2010). Menus provide flexibility and allow lawmakers to select rules that fit specific governmental needs, political climates, and personal views.

When drafting and presenting a menu of possible statutes, universities and public health advocates should match their proposals to their political clout. For example, a state flagship university, such as the University of Tennessee, that has built relationships with lawmakers during appropriation hearings may have more leverage at the state legislature level than a private institution. These relationships may help state universities to better overcome local resistance as well. Anecdotally, the University of North Carolina, one of the state's two flagship institutions, overturned building code regulation in the town of Chapel Hill by appealing to the General Assembly, North Carolina's state legislature.

Universities and public officials should also consider the location of higher education institutions when drafting menus. For instance, a proposed rule targeting college student alcohol

[74] U.S. CENSUS BUREAU, ESTIMATED ANNUAL SALES OF U.S. RETAIL AND FOOD SERV. FIRMS BY KIND OF BUS.: 1992 THROUGH 2008, *available at* http://www2.census.gov/retail/releases/current/arts/sales.pdf (retrieved October 27, 2010).

abuse at bars may have a better chance of passage if a state's universities are all located in college town. Alternatively, a proposed rule intended to prevent or ameliorate college student alcohol abuse at bars would likely miss targeted populations and run into greater opposition when a campus is located in a large metropolis where tourists and locals—as well as college students—patronize bars. A menu allows universities and public officials to present a rule designed for urban campuses and a rule designed for non-urban campuses.

To help universities and public health officials begin their advocacy, a small sample menu of rules aimed at preventing and ameliorating public health harms associated with college student alcohol abuse is provided. Brackets highlight information that should be adapted to particular circumstances. A discussion of the rule's purpose, implementation, and impact to civil liberty or private enterprise follows the sample statutory language.

Sample Menu of Statutes

- *Rule 1: This act imposes a [state/local] sales tax on all alcohol of [3]%.*
- Reasoning: Tax increases are not always popular given certain political stances or environments, which demonstrates the handiness of the menu approach. However, tax increases can prevent and ameliorate college student alcohol abuse. Research shows increases in state and local alcohol tax effectively prevent alcohol abuse.[75] . Increasing the price of alcohol affects younger drinkers more than older drinkers.[76] Further, higher alcohol prices "have also been found to reduce alcohol-related problems such as motor vehicle fatalities (13, 39, 62), robberies, rapes, liver cirrhosis deaths (11, 13, 61), sexually transmitted diseases (9), and child abuse (46,47)."[77]

[75] Nelson, *supra* note 15, at 445.
[76] Hingson, *supra* note 1, at 271. *Accord* Nelson, *supra* note 15, at 444.
[77] Hingson, *supra* note 1, at 271.

The income from taxes can be used to prevent or ameliorate alcohol abuse as well. Universities and public health advocates may want to suggest an addendum requiring a portion of tax revenue be earmarked for local police DUI checkpoints or training,[78] for bureau of alcohol efforts to ensure retailers check age identification before selling alcohol,[79] or for university alcohol education efforts.

Though increased taxation imposes on a person's liberty to purchase alcohol, the imposition is not a complete bar to alcohol use. Furthermore, the imposition focuses narrowly be taxing alcohol users. Finally, those who bear the brunt of civil liberty infringement are alcohol users who drink the most and, therefore, are the likely target of public health concerns. Next, there is some threat increased taxation will reduce alcohol sales and deter private enterprise, so special attention should be paid to rate chosen. The amount of the proposed tax rate should consider alcohol taxation already in place.

- *Rule 2: All alcohol sales to the public shall be for [cash] only and payment by [checks, credit cards, charge cards or any form of deferred payment] is prohibited. For the purposes of this rule "cash" means coins or notes. Nothing in this rule shall be construed as prohibiting or restricting the sale of alcohol by distributors to retailers through any form of payment.*
- Reasoning: This rule uses language adapted from the Tennessee statute on lottery ticket sales.[80] That statute demonstrates the state's interest in deterring individuals from funding their gambling through check fraud or credit card debt. Similarly, this rule can be used to

[78] *Id.* at 270 stating, "Young drivers may be more likely to drink at locations where DWI enforcement resources are less likely to be deployed. Young drivers with high BACs also are more likely to be missed by police at sobriety checkpoints (82)."
[79] *Id.* at 271 stating, "Stepped-up enforcement of alcohol purchase laws aimed at sellers and buyers can be effective if resources are made available for this purpose."
[80] TENN. CODE ANN. § 4-51-108 (2003).

deter individuals from funding their drinking through fraud or debt. The rule narrowly tailors itself to the prevention and amelioration of college student alcohol abuse because one can reasonably assume college students have less access to cash than individuals working full-time.

The rule poses little risk to civil liberty because nothing guarantees people the right to items they cannot pay for. The real drawback to this rule is the loss of sales for private enterprise. However, retailers may support the rule as cash-only would allow them to refuse credit cards and the associated fees retailers must pay to credit card companies. Lawmakers could adapt the rule to allow debit card purchases so as not to frustrate the purchase of alcohol by people who do not carry cash.

- *Rule 3: (A) Any structure in which a [liquor, beer, or wine] store is the principal or accessory use shall be separated by a distance of at least [one thousand five hundred (1,500) feet] from a university or college. A [liquor, beer, or wine] store lawfully operating as a conforming use is not rendered a nonconforming use by the subsequent location of a university or college within [one thousand five hundred (1,500) feet]. (B) Any structure in which a [liquor, beer, or wine] store is the principal or accessory use shall be separated by a distance of at least [one thousand (1,000) feet] from any other [liquor, beer, or wine] store.*
- Reasoning: This rule is adapted from a Charlotte, North Carolina city ordinance dealing with pornography stores locations.[81] The dual distance requirements makes alcohol less

[81] CHARLOTTE, N.C., CODE, APP. A §12.518 (2008).

accessible to college students. Research shows limiting alcohol outlet density effectively prevents alcohol abuse.[82]

The rule raises a civil liberties concern based on a person's ability to buy alcohol, but the rule only inconveniences a person's ability to buy alcohol and targets communities whose welfare is at issue. Private enterprise advocates may resist the rule to a greater degree. The rule acts as a barrier to entry for new entrepreneurs seeking to sell alcohol, because it effectively gives a monopoly to first-comers. It will also shut down businesses within the restricted distance unless those establishments are grandfathered in. Consequently, universities and public health advocates may find this rule difficult to pass.

If passage seems unlikely, the rule could be changed from a restriction on stores to a restriction on alcohol containers. The rule could state kegs, half-gallon bottles of liquor, and other large alcohol containers cannot be sold within 1500 feet of a university or college. Like alcohol outlet density, research shows that "availability of large volumes of alcohol (24- and 30-can cases of beer, kegs, party balls) . . . were also associated with higher binge drinking rates [on college campuses]."[83]

- *Rule 4: Institutions of higher education shall notify a parent or legal guardian of a student under twenty-one (21) years of age if the student has committed a disciplinary violation with respect to the use or possession of alcohol or a controlled substance that is in violation of any federal, state, or local law, or of any rule or policy of the institution. Institutions of higher education will not be required to provide notifications that are prohibited by the Family Educational Rights and Privacy Act (FERPA).*

[82] Nelson, *supra* note 15, at 445. *Accord* Hingson, *supra* note 1, at 271.
[83] Hingson, *supra* note 1, at 272.

- Reasoning: This language comes directly from a Tennessee statute requiring public universities to notify parents of underage students of alcohol violations; the statute also states public welfare necessitated its passage.[84] Inherent in public health regulation of societal welfare is paternalism; it is assumed the government can make better health decisions than the individual. This rule puts paternalism in the hands of parents, allowing them to address their adult child's drinking habits. The intervention hopefully prevents or ameliorates future abuse of alcohol. Involving parents is an inexpensive measure that can be administered by university personnel. FERPA provides very little protection to students in the way of discussing violations of university codes of conduct or state law;[85] therefore, the rule can be administered effectively.

  Individuals concerned with civil liberty may resist sharing private information pertaining to an adult with a parent. However, adult college students are often counted as a parent's dependent for tax purposes, remain on a parent's health insurance, and receive financial assistance from parents for their education. All of which makes the civil liberties concern less persuasive. This rule would not affect private enterprise

- *Rule 5: It is unlawful for any person to drive or to be in physical control of any automobile or other motor driven vehicle on any of the public roads and highways of the state, or on any streets or alleys, or while on the premises of any shopping center, trailer park or any apartment house complex, or any other premises that is generally frequented by the public at large, while: (1) the alcohol concentration in the person's blood or breath is [eight-hundredths of one percent (.08%)] or more for individuals 21 years of*

[84] TENN. CODE ANN. § 49-7-146 (2008).
[85] *See* 34 C.F.R. § 99.31 (2010); 34 C.F.R. § 99.36 (2010).

age or older; or (2) the alcohol concentration in the person's blood or breath is [one-hundredths of one percent (.01%)] or more for individuals under the age of 21.

- Reasoning: The rule uses language from Tennessee's drunk-driving statute with the addition of a zero-tolerance policy for individuals under 21.[86] Illegalizing driving for individuals under 21 after any amount of drinking has "contributed to declines in alcohol-related traffic deaths among people younger than 21."[87] The prevention of deaths related to drunk-driving falls squarely within the purview of public health and justifies a zero-tolerance policy for underage drunk-drivers. Research demonstrates that students who abuse alcohol are more likely to drive. Though students who abuse alcohol may surpass .08% BAC, research has found "[y]oung drivers with high BACs also are more likely to be missed by police at sobriety checkpoints."[88] The effectiveness of drunk-driving statutes depends upon vigorous enforcement.[89] A zero-tolerance policy for individuals under 21 gives officers probable cause to check sobriety based upon the smell of alcohol alone; they need not depend on other evidence such as swerving or slurred speech.

Society has approved of infringing on a person's liberty to drive after drinking and for limiting alcohol use by persons under the age of 21. Therefore, a zero-tolerance rule should not raise a civil liberties issue. Private enterprise also fails to raise a red flag with a zero-tolerance policy, because places that would sell alcohol to a driver cannot serve individuals under the age of 21.

V. Conclusion

[86] TENN. CODE ANN. § 55-10-401 (2002).
[87] Hingson, *supra* note 1, at 270.
[88] *Id.*
[89] *Id.*

College student alcohol abuse is a public health problem affecting the students that abuse alcohol, their peers who do not, and the wider community in which they live. For the participant community, college student alcohol abuse contributes to a great number of deaths, injuries, and incidents of unsafe sex. For the campus community, the abuse results in large number of assaults and unwanted sexual advances. For the local community, college student alcohol abuse makes roads unsafe as students drink off-campus a majority of the time and drive intoxicated at a higher rate than peers not in college.

Public health issues led to the development of numerous legal tools to address community welfare. These tools require an enforcement entity charged with prevention and amelioration of public health harms. For college student alcohol abuse, three entities primarily enforce prevention and amelioration efforts. Internally, universities create policies aimed at prevention and amelioration. Externally, courts and governments have attempted to prevent and ameliorate college student alcohol abuse to varying degrees of success.

Courts, through tort suits, have predominantly found universities do not owe adult students a duty of care or protection. Therefore, the public health goal of tort, which is to make risky activities too expensive to continue, is frustrated. Though some courts and a number of legal theorists have challenged the predominant view, tort would still fail as a public health legal tool in the context of higher education even with the adoption of new tort rules. If more universities were held liable in tort, it would not necessarily reduce student alcohol abuse. Universities operate as loosely-coupled systems with power diffused throughout an institution. Loosely-coupled systems make universities poor risk managers because system inputs do not dictate system outputs. Consequently, tort liability for college student alcohol abuse would not

result in prevention or amelioration; rather, tort liability would result in tuition increases that disproportionately impact low- to middle-income students.

State regulation, through statutes and alcohol policies, effectuate public health changes in college student alcohol abuse better than courts. Research shows greater enactment and enforcement of state regulation corresponds to lower levels of college student alcohol abuse. States can choose to spread regulation costs either broadly, through general taxation, or narrowly, through alcohol taxation. Either form of state loss-spreading is more fair than loss-spreading through tort. General taxation reduces the individual burden more than tuition increases, while alcohol taxation targets at-risk populations better. Unlike tort, state regulation does create civil liberty and private enterprise concerns. However, society already accepts some infringement of civil liberties related to alcohol as evidenced by the number of laws already regulating its purchase and use. Further, alcohol is a booming business that will attract private enterprise despite further regulation. Universities and public health officials can help state lawmakers prevent and ameliorate the public health harms of college student alcohol abuse and limit regulation's effects on civil liberties and private enterprise by presenting menus containing a variety of possible regulation from which lawmakers can select. The flexibility of menus makes them an extremely useful advocacy tool. Considering the totality of the circumstances, state regulation is a better tool for preventing and ameliorating public health harms associated with college student alcohol abuse than tort. Universities should seek state regulation to augment their internal efforts to control student alcohol abuse, and states are well-advised to consider additional regulation in order to ensure public welfare.