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MODERN LIABILITY RULES AND POLICIES REGARDING COLLEGE STUDENT ALCOHOL INJURIES: REDUCING HIGH-RISK ALCOHOL USE THROUGH NORMS OF SHARED RESPONSIBILITY AND ENVIRONMENTAL MANAGEMENT*

PETER F. LAKE** & JOEL C. EPSTEIN***

The hottest questions for colleges and universities today regarding student life and safety are student/alcohol issues.¹ Even in 1989, approximately two-thirds of college and university presidents who were surveyed ranked high-risk alcohol use as a "moderate" or "major" problem on their campuses.² Concerns about the problem of high-risk alcohol use have risen since then.³ Pennsylvania State University President Graham Spanier stated in a recent address:

A companion concern to academic integrity is the challenge of developing character, conscience, citizenship, and social responsibility in our students. In my view, this is one of the most fundamental problems facing higher education today. No aspect of this challenge is

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1. See Carolyn Kleiner, *Turning Off the Tap*, U.S. NEWS & WORLD REP., Aug. 30, 1999, at 74.

2. CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, *CAMPUS LIFE: IN SEARCH OF COMMUNITY* (1994).

3. See Higher Educ. Ctr. for Alcohol & Other Drug Prevention, *Be Vocal, Be Visible, Be Visionary: Recommendations for College and University Presidents on Alcohol and Other Drug Prevention* (visited Feb. 28, 2001) <<http://www.edc.org/hec/pubs/plgvisionary.htm>>; see also *The National Association of State University and Land Grant Colleges Fall 1999 Ad Campaign* (visited Oct. 9, 2000) <<http://www.nasulgc.org/bingedrink/>> (NASULGC has replaced this ad with a newer ad design, but a hard copy of the referenced advertisement is on file with the *Oklahoma Law Review*). Regrettably, NASULGC's "Binge Beer" ad campaign is likely to be remembered more for its attractive bottle and label than for its message to parents that they should talk with their college-bound sons and daughters about high-risk drinking. The advertisement offers no clear advice about how either college presidents or parents are to combat the problem.

greater for our young adults than the excessive consumption of alcohol and the behaviors that surround it.⁴

Recent statistics show that presidential concerns are legitimate.⁵ The 1997 Harvard School of Public Health's College Alcohol Study — a survey of 116 nationally representative colleges and universities in the late 1990s — found that "binge drinking" has flourished on American campuses.⁶ The 1997 survey discovered that the percentage of those students who drank to get drunk rose significantly from 39% in 1993 to 52% in 1997.⁷ The percentage of drinkers who reported that they were drunk three or more times in the past month, also increased significantly.⁸ By 1997, binge drinking was a fixture of fraternity and sorority (Greek) life; nearly 80% of Greek membership were binge drinking.⁹

The latest survey offers some hope. The researchers found that the reported rate of binge drinking dropped very slightly from 1993 to 1997.¹⁰ The rate of frequent binge drinkers rose, yet the 1997 study showed an increase in bystanders abstaining from the binge drinking culture — 19% in 1997, as compared to 15.6% in 1993.¹¹ The researchers saw the rise in abstinence as the cause of the negligible drop in overall binge rates.¹² Yet, the intensity of drinking among those students who drank was manifest. The survey documented the rise in the number of students whose motive for drinking was intoxication, the increased frequency of such intoxication, and the continued problems of alcohol use and operation of vehicles.¹³

As the study's principal investigator stated,

4. Graham B. Spanier, *Remarks to the National Press Club, August 26, 1999* (visited Feb. 28, 2001) <<http://www.psu.edu/ur/GSpanier/speeches/pressclub.html>>.

5. See Henry Wechsler et al., *Changes in Binge Drinking and Related Problems Among American College Students Between 1993 and 1997: Results of the Harvard School of Public Health College Alcohol Study*, 47 J. AM. COLLEGE HEALTH 57 (1998).

6. *Id.* The College Alcohol Study adopts the term "binge drinking" and defines it as the consumption of at least five drinks in a row for men or four drinks in a row for women during the two weeks before the students completed the questionnaire. See *id.* Many researchers, including William DeJong, Ph.D., Director of The Higher Education Center for Alcohol and Other Drug Prevention, prefer the use of terms like "high-risk drinking" to describe the sort of drinking behavior Wechsler and his colleagues describe. William DeJong & Helen C. Stubbs, Letter to the Editor, *Focus on the Consequences of Drinking, Not the Number of Drinks Consumed*, CHRON. HIGHER EDUC., Apr. 21, 2000, at B3; see also William DeJong, U.S. Dep't of Educ., *A Message from the Director: Language Matters*, CATALYST (Higher Educ. Ctr. for Alcohol & Other Drug Prevention, Newton, Mass.), Summer/Fall 1998, at 5 (vol. 4, no. 1), available at <<http://www.edc.org/hec/pubs/catalyst11.pdf>>.

7. See Henry Wechsler et al., *National College Alcohol Study Finds College Binge Drinking Largely Unabated, Four Years Later* (visited Nov. 18, 2000) <<http://www.edc.org/hec/thisweek/tw980910.html>>.

8. See *id.* (reporting a 22% rise).

9. See *id.*

10. See *id.* (explaining that the reported rate of binge drinking in 1993 fell from 44.1% to 42.7% in 1997).

11. See *id.* (reporting a rise in frequent binge drinking from 19.5% in 1993 to 20.7% in 1997).

12. See *id.*

13. See *id.*

Despite highly publicized tragedies and continuing examinations of college alcohol policies, the data indicate that, at the national level thus far, the extent and nature of binge drinking has not changed In fact, there has been an intensification of severe drinking behavior among drinkers. Fraternity and sorority members, and especially students who live in the houses, continue to be at the center of the campus alcohol culture. If colleges are to have an impact on their alcohol problems, they must drastically change this way of life.¹⁴

The direct problems of high-risk drinking have made national news with alarming frequency; student deaths caused by alcohol overdose, like those at prestigious universities such as MIT¹⁵ and LSU,¹⁶ are a salient primary risk.¹⁷ However, high-risk drinking cultures on many campuses cause and facilitate many secondary risks. These risks include sexual assault and rape, increased risks of physical and verbal assault by peers and others, higher rates of unwanted pregnancy and sexually transmitted diseases, property damage, nuisance and noise problems, campus disorder, and even civil unrest (see, e.g., recent riots at some institutions over loss of "beer rights").¹⁸ Other impacts include diminishment of academic programs through poor attendance, low retention rates, and lower performance on other academic indicators. Moreover, a recent study funded by the Robert Wood Johnson Foundation shows disturbing connections between high-risk alcohol and drug use and gun possession.¹⁹

The severity and intensity of the problems on many American campuses have now gained the attention of the civil justice system. Historically, American courts were reluctant to intercede in the college alcohol culture. Indeed, the decisions of courts in previous decades may have facilitated, indirectly, the patterns of high-risk

14. *Id.*

15. See Leo Reisberg, *MIT Pays \$6-Million to Settle Lawsuit over a Student's Death*, CHRON. HIGHER EDUC., Sept. 29, 2000, at A49.

16. See *NBC Nightly News: Universities Trying to Combat Student Binge Drinking* (NBC television broadcast, Sept. 13, 1999).

17. See Richard Chacon, *MIT Enacts Drinking Penalties: Students Cited in Underage Violations May Be Fined, Expelled*, BOSTON GLOBE, Feb. 5, 1998 at A1; Richard A. Knox, *Binge Drinking Can Be Curbed, Colleges Show*, BOSTON GLOBE, Oct. 5, 1997, at B4; Leef Smith, & Jay Matthews, *In Va., a Sobering Lesson Doesn't Sink In*, WASH. POST, Dec. 7, 1997, at B1; *Universities to Get Tough on Campus Alcohol Use*, CHI. TRIB., Aug. 29, 1999, at 10.

18. See JOEL EPSTEIN & PETER FINN, HIGHER EDUC. CTR. FOR ALCOHOL AND OTHER DRUG PREVENTION, PREVENTING ALCOHOL-RELATED PROBLEMS ON CAMPUS: VANDALISM (1997), available at <<http://www.edc.org/hec/pubs/vandal.htm>>; HIGHER EDUC. CTR. FOR ALCOHOL AND OTHER DRUG PREVENTION, INTERPERSONAL VIOLENCE AND ALCOHOL AND OTHER DRUG USE (2001), available at <http://www.edc.org/hec/pubs/factsheets/fact_sheet4.pdf>; HIGHER EDUC. CTR. FOR ALCOHOL AND OTHER DRUG PREVENTION, SEXUAL ASSAULT AND ALCOHOL AND OTHER DRUG USE (2001), available at <http://www.edc.org/hec/pubs/factsheets/fact_sheet1.pdf>; see also Dave Curtin, *Folsom Beer Ban Extended: CU Regents Endorse Limits*, DENVER POST, Sept. 11, 1998, at B1; Lou Mio, *Police Gas Students, Others Near U. of Akron*, CLEVELAND PLAIN DEALER, Sept. 21, 1998, at 1B; J.L. Nicklin, *Colleges Report Increases in Arrests for Drug and Alcohol Violations*, CHRON. OF HIGHER EDUC., May 28, 1999, at A39.

19. See Matthew Miller et al., *Guns at College*, 48 J. AM. COLLEGE HEALTH 7, 8-10 (1999).

drinking behavior we observe today by creating de facto legal free space to drink unlawfully, yet with little disciplinary or academic consequence, in college. Now, in very recent times, courts have demonstrated that they will impose civil liability upon colleges, fraternities, and individuals for physical injury caused to students in the context of the high-risk alcohol culture. The tide has turned.

Part I of this article discusses the historical developments of alcohol liability law as they have related to the college environment. In Part II, the article turns to a discussion of the evolution of social science in regard to high-risk alcohol use. Part II also details the emergence of so-called environmental management strategies. Part III discusses scientific foundations of environmental management and how those strategies are mirrored in legal changes that reflect attitudes of shared responsibility for alcohol risks. Part IV treats specific prevention steps that may be taken to fight high-risk alcohol use; Part V draws attention to a valuable resource in the field — the Higher Education Center for Alcohol and Other Drug Prevention.

I. Historical Perspective of the College Alcohol Culture and the Law

A. A Brief History of the College Alcohol Culture in Relation to the Law Predating the 1990s

1. Common Law

Traditionally, the common law responded to injuries caused by alcohol consumption and service with strong focused norms of personal accountability of the drinker. Thus, the drinker — not the server of alcohol, facilitator of alcohol use, alcohol vendor/manufacturer, college or Greek organization, *inter alia* — was considered the *sole proximate* (or legal) *cause* of harm²⁰ as a matter of law. While it was conceivable that lawsuits against fellow students whose intoxication caused injury were possible, prior to 1960 it was common for courts to completely bar recovery whenever a plaintiff engaged in unreasonable conduct (contributory negligence) or voluntarily assumed a known risk.²¹ Because many students injured in the context of high-risk alcohol culture were (and are) often at some level participants in that culture, the viability of a student's claim against a fellow student was limited.

20. See *Brigance v. Velvet Dove Restaurant, Inc.*, 725 P.2d 300, 302 (Okla. 1986). As that court stated:

At common law a tavern owner . . . is not civilly liable for a third person's injuries that are caused by the acts of an intoxicated patron. Such rule is principally based upon concepts of causation that, as a matter of law, it is not the sale of liquor by the tavern owner, but the voluntary consumption by the intoxicated person, which is the proximate cause of resulting injuries, so that the tavern owner is therefore not liable for negligence in selling the liquor.

Id. (footnote omitted); see also *Snyder v. Viani*, 885 P.2d 610 (Nev. 1994) (retaining traditional proximate cause rule).

21. See *Butterfield v. Forrester*, 103 Eng. Rep. 926 (1809) (holding contributory negligence is a complete bar); see also *Rickey v. Boden*, 421 A.2d 539 (R.I. 1980) (finding that assumption of risk remains a complete bar to recovery even after the adoption of comparative fault).

2. Emergence of Dram Shop Legislation

By the 1970s, alcohol rules based upon proximate causation of the drinker were largely rejected. Jurisdictions passed dram shop or similar legislation and/or adopted new rules of civil alcohol responsibility in case law.²² Certain common features emerged in most, but not all, states.²³ First, the dram shop legislation or new rules held commercial vendors of alcohol for on-premises consumption liable for serving alcohol to a visibly and/or noticeably intoxicated patron if that service were the proximate cause of harm to a third person.²⁴ Second, commercial vendors of liquor for on-premises consumption generally become civilly responsible for knowingly and/or willfully serving minors.²⁵ Third, courts adopted rules of negligent entrustment that create civil liability for providing certain chattels (especially vehicles) to intoxicated individuals.²⁶ And fourth, courts recognized that alcohol use creates enhanced physical risks to patrons of premises designed for on-premises consumption and announced rules of landowner responsibility for foreseeable dangers (including dangerous individuals and patterns of dangerous behavior) on and around such premises.²⁷

3. Social Host Immunity

One critical aspect of the fall of the common law norms of personal accountability is that it was partial and not absolute. Hence, for the most part, other situations involving unreasonable alcohol risk were *not* subject to civil responsibility. For example, a principal idea remained that "social hosts" were not subject to civil responsibility.²⁸ The social host scenario includes private parties, fraternal gatherings, office parties, and most college-aged drinking on campus or in fraternity or dormitory housing, for example. Again, in a social host context, the drinker could be liable, but the server, facilitator, etc. could not.

The emergence of social host immunity for irresponsible alcohol risk creation was not indigenous to colleges. Social host rules were a firm feature of the general social environment and to a large extent remain so even today.²⁹ Nonetheless, this

22. See *Rappaport v. Nichols*, 156 A.2d 1 (N.J. 1959); *Brigance*, 725 P.2d at 302.

23. Virginia, for example, has not enacted dram shop legislation. See *Robinson v. Johnson*, 48 Va. Cir. 66 (Va. Cir. Ct. 1999).

24. See DAN B. DOBBS & PAUL T. HAYDEN, *TORTS & COMPENSATION* 478 n.6 (West 3d ed. 1997); *Brigance*, 725 P.2d at 304 (explaining that states are often reluctant to permit the drinker to sue for injuries).

25. See *Brigance*, 725 P.2d at 304 n.7 (citing 37 OKLA. STAT. § 537 (Supp. 1985)).

26. See *West American Ins. Co. v. Turner*, No. C-890024, 1990 WL 2322, at *2 (Ohio Ct. App. Jan. 17, 1990); see also *Leppke v. Segura*, 632 P.2d 1057, 1059 (Colo. Ct. App. 1981) (liability for jump starting a drinker's car).

27. See *Greco v. Sumner Tavern, Inc.*, 128 N.E.2d 788, 789 (Mass. 1955); see also *RESTATEMENT (SECOND) OF TORTS* § 344 (1967).

28. See *DOBBS & HAYDEN*, *supra* note 24, at 478 n.6.

29. See *id.* There has, however, been a slow but steady erosion of social host immunity. For example, some jurisdictions have created rules that no longer categorically protect the office party or other work-related alcohol functions. See generally Jon R. Erickson & Donna Hamilton, *Liability of Commercial Vendors, Employees and Social Hosts for Torts of the Intoxicated*, 19 WAKE FOREST L.

development was particularly important in college and university law in the 1970s and 1980s, because *other* protective legal doctrines — such as *in loco parentis*, governmental and charitable immunity, etc.³⁰ — had fallen or eroded completely.³¹ This was also a time when larger numbers of students were going to college, and alcohol and other drug issues were rising.

The courts that had granted significant new civil rights to college students,³² that had sanctioned broad social host immunity in society at large, and that were aware of the surge of new students in college, protected colleges from liquor liability in the 1970s, 1980s, and even into the 1990s. Courts ruled regularly in this period that colleges owed "no duty" to prevent alcohol related injuries to "adult" students.³³ Even into the 1990s, courts have stated that there is no general duty to students regarding alcohol risks.³⁴

B. Changes in Legal Approaches to College Alcohol Risks in the 1990s

While the history of exempting colleges and universities from legal responsibility for alcohol risks to students is long, in very recent times several courts have begun to reject college alcohol risk immunity and/or have signaled a potential willingness to do so in future cases. A major transition in college alcohol law is underway. The shift is away from (1) pure norms of the personal accountability of drinkers and (2) "liability free" zones of unreasonable alcohol behavior, towards notions of (a) shared responsibility for alcohol risks in the college culture and (b) legal responsibility to create a more responsible alcohol culture.

Perhaps the first signal of changing judicial attitudes occurred in the 1980s when courts began imposing liability upon fraternities — usually the local chapter — for alcohol risks.³⁵ These cases constituted a shift away from notions of exclusive

REV. 1013 (1983). Some courts have acknowledged social host liability. *See, e.g.*, *Hickingbotham v. Burke*, 662 A.2d 297, 302 (N.H. 1995). *But see* CAL. CIV. CODE § 1714(c) (Deering 2000) (abolishing social host liability).

30. *See* Peter F. Lake, *The Rise of Duty and the Fall of In Loco Parentis and Other Protective Doctrines in Higher Education Law*, 64 MO. L. REV. 1, 4 (1999).

31. *See id.*

32. *See id.* at 9-11.

33. *Id.* at 14-17; *see also* *Bradshaw v. Rawlings*, 612 F.2d 135, 140 (3d Cir. 1979); *Baldwin v. Zoradi*, 176 Cal. Rptr. 809, 818 (Cal. Ct. App. 1981); *Rabel v. Illinois Wesleyan Univ.*, 514 N.E. 2d 552, 562 (Ill. App. Ct. 1987); *Beach v. University of Utah*, 726 P.2d 413, 416 (Utah 1986).

34. *See, e.g.*, *Booker v. Lehigh Univ.*, 800 F. Supp. 234, 241 (E.D. Pa. 1992) (noting under Pennsylvania law, "the fact an alcohol policy was implemented to give the college the ability to allow alcoholic beverages to those who were of legal drinking age does not give rise to a special duty to control the actions of those students who are determined to acquire intoxicating beverages, even though they are underage.").

35. *See* Susan J. Curry, *Hazing and the "Rush" Toward Reform: Responses From Universities, Fraternities, State Legislatures and the Courts*, 16 J.C. & U.L. 93, 94-95 (1989); Cheryl M. Bailey, Annotation, *Tort Liability of College, University, Fraternity, or Sorority for Injury or Death of Member or Prospective Member by Hazing or Initiation Activity*, 68 A.L.R.4TH 228 (1987). Cases imposing liability upon fraternities have increased in the 1990s. *See, e.g.*, *Delta Tau Delta v. Johnson*, 712 N.E.2d 968, 973 (Ind. 1999) (holding that fraternity owes duty of care to protect against foreseeable sexual assault).

student personal responsibility for high-risk drinking injuries. Courts were beginning to reimagine responsibility for alcohol risks in terms of shared responsibility. In this vein, courts in the 1990s became willing to increase the responsibility of colleges and universities for high-risk alcohol behavior.³⁶ In some recent cases, colleges and universities have won cases involving injuries arising from or facilitated by high-risk drinking, but in *dicta* courts have signaled a willingness to impose liability in other situations.³⁷ In other case law, courts have considered alcohol issues in non-university concepts that nonetheless have very clear implications for university litigation.³⁸ In still other cases, courts have reconceptualized alcohol risk scenarios in terms of premises responsibility issues, e.g., duties to protect against foreseeably dangerous individuals and to provide safe living conditions.³⁹

Courts have shown a willingness to break overtly from tradition and to impose liability on colleges and university for alcohol risks.⁴⁰ For example, in *Knoll v. University of Nebraska*, the Nebraska Supreme Court recently ruled that universities have a duty to prevent hazing/alcohol injuries, even when they occur off university premises.⁴¹ In that case, a student was abducted and held by active members of a fraternity and then consumed large quantities of alcohol. The student attempted escape from the "hazing" and was injured.⁴² The Nebraska court — in what will be a much discussed decision — focused upon the fact that the fraternity in question had a history of hazing and other incidents. The case extended tort responsibility to fraternity-owned premises because the university considered fraternity houses as student housing and also as subject to student conduct codes and disciplinary procedures.⁴³ *Knoll* underscores the serious risks of the alcohol/hazing culture and the willingness that some courts have to extend liability rules to deter such conduct by creating norms of shared responsibility for high-risk alcohol culture.⁴⁴ Thus, the 1990s have shown a demonstrable increase in judicial willingness to expand the sphere of accountability for high-risk college drinking. As judicial recognition of

36. For many, the seminal case is *Furek v. University of Delaware*, 594 A.2d 506 (Del. 1991), holding that when a university has actual or constructive knowledge of dangerous fraternity hazing activities and fails to exercise reasonable care to prevent foreseeable student injury, that university may be liable. *See id.* at 522. While not technically an alcohol case per se, *Furek* involved a pattern of high-risk behavior — hazing — that was in fact associated with patterns of high-risk drinking. *See id.* at 518.

37. *See, e.g., Booker*, 800 F. Supp. at 240 (recognizing potential liability where college, as a social host, "knowingly furnished" alcohol to an underage student); *Lloyd v. Alpha Phi Alpha Fraternity*, No. 96-CV-348, 1999 WL 47153, at *7-9 (N.D.N.Y. Jan. 26, 1999).

38. *See Rust v. Reyer*, 693 N.E.2d 1074, 1076 (N.Y. 1998) (noting that alcohol-infused house party creates liability when one facilitates underage drinking).

39. *See, e.g., Delta Tau Delta*, 712 N.E.2d at 971; *Morrison v. Kappa Alpha Psi Fraternity*, 738 So. 2d 1105, 1116 (La. Ct. App. 1999); *see also Nichols v. Northeast La. Univ.*, 729 So. 2d 733, 735 (La. Ct. App. 1999).

40. *See Furek*, 594 A.2d at 524; *Coghlan v. Beta Theta Pi Fraternity*, 987 P.2d 300, 312 (Idaho 1999); *Knoll v. University of Neb.*, 601 N.W.2d 757, 764-65 (Neb. 1999).

41. *See Knoll*, 601 N.W.2d at 765.

42. *See id.* at 760.

43. *See id.* at 764.

44. The university attempted to characterize the scenario as "horseplay." *Id.* at 762. The court flatly rejected that argument.

the current social problem increases, the authors anticipate increased responsibility as more courts move from a personal accountability to a shared responsibility model.⁴⁵

II. Social Science and Shared Responsibility: Lessons Learned from Alcohol and Other Drug Prevention Research

For various historical policy reasons, colleges and universities traditionally put emphasis on the education of individual students, and on intervention with respect to individual students, in trying to fight high-risk alcohol use.⁴⁶ Until relatively recently, high-risk drinking — including alcoholism — was commonly considered an individual problem that arose out of personal choices and weak character. To a certain extent, individuals were considered to be unfortunate in their life experiences or to have inherited genetic propensities for high-risk alcohol use. A consistent theme in traditional efforts to prevent high-risk drinking has been a focus on individuals and their ability to determine the course of their own lives.⁴⁷

A. Campus-wide Educational Programs

This long-standing attitude regarding alcohol and other drug prevention efforts has translated into college efforts in various forms. Campuses have developed, for example, alcohol awareness programs, awareness weeks, peer education programs, special events associated with preventing high-risk alcohol use, and other education and informational programs. In keeping with traditional norms, even faculty have begun, in recent times, to bring messages of prevention and education into their assigned courses; this process is widely known as "curriculum infusion."⁴⁸ Again, it has traditionally been thought that if people are made aware of various legal rules and various dangers regarding high-risk alcohol use, they are more likely to exercise self-determination and resist high-risk drinking.

The ideology of individual education as prevention has been so strong that evaluations of educational programs used in the collegiate environment have been

45. This does not mean that some courts will not continue to promote strong personal accountability norms. *See, e.g., Rhodes v. Illinois Cent. Gulf R.R.*, 665 N.E.2d 1260, 1273 (Ill. 1996) (declining to hold that public transit owed a duty to a drunk and injured college student who wanders onto a train platform). Whereas some courts identify strong personal accountability norms as conservative norms, antipathy to excessive alcohol use, especially by minors, is an equally powerful conservative norm. Only the most extreme libertarian/liberal norms identify a "right" by minors to drink in a high-risk context. Safer, and perhaps stricter, alcohol rules are compatible with, and in fact facilitate, basic student rights on campus as well as facilitate an environment where personal accountability can flourish.

46. *See generally* WILLIAM DEJONG, & STACIA LANGENBAHN, U.S. DEPT OF EDUC., SETTING AND IMPROVING POLICIES FOR REDUCING ALCOHOL AND OTHER DRUG PROBLEMS ON CAMPUS: A GUIDE FOR ADMINISTRATORS (1997).

47. *See* LAWRENCE WALLACK & WILLIAM DEJONG, U.S. DEPT OF HEALTH & HUMAN SERVS., *Mass Media and Public Health: Moving the Focus of Change from the Individual to the Environment*, in *THE EFFECTS OF THE MASS MEDIA ON THE USE AND ABUSE OF ALCOHOL* 253 (Susan E. Martin ed., 1995).

48. BARBARA E. RYAN & WILLIAM DEJONG, U.S. DEPT OF EDUC., MAKING THE LINK: FACULTY AND PREVENTION 14 (1998).

relatively rare. However, some research suggests that educational strategies are a necessary, but not sufficient, part of strategies to reduce high-risk alcohol use.⁴⁹

Traditional educational strategies have mutated into a promising new form in recent years — the so called "social norming" approach.⁵⁰ The principal idea has been to provide sufficient and accurate information about the real patterns of high-risk alcohol use on campus.⁵¹ Research has indicated that students tend to believe that their peers drink more heavily than they actually do. However, the belief — or misbelief — that students drink more heavily than they actually do, can be a powerful force in determining campus culture. Thus, where expectations regarding other students' alcohol use are out of sync with the reality of alcohol use, peer pressure to drink in a high-risk way may be greater. This presents an important opportunity to correct misbeliefs in order to potentially reduce the rates of high-risk drinking.⁵² Changing the overall social environment of college students through social norming has shown great potential as a prevention strategy when coupled with other prevention strategies and traditional educational approaches.⁵³

It has been clear for some time to those involved in prevention efforts aimed at high-risk alcohol use that education strategies (even including the new social norming approaches) are simply not enough. Some programs must be aimed directly at harm reduction. Colleges, for example, have designed programs for safe rides and also programs to facilitate designated drivers. Also, modern college campuses increasingly feature risk management strategies that work to reduce harms associated with high-risk alcohol culture — including premises maintenance strategies. Nonetheless, some harm reduction programs cannot reduce all risks to students. For example, students who consistently engage in patterns of high-risk drinking may not drive, may not jump on a trampoline, or may not engage in other harmful events associated with high-risk alcohol use. However, over time, these students may face very significant health, and ultimately safety risks, as well. There is a tendency to view the college health issue of high-risk alcohol use in terms of the four, or several year, experience while a student is in college. Yet, students may carry patterns of high-risk alcohol use into their lives after college and may also do

49. See Cheryl L. Perry et al., *Project Northland: Outcomes of a Communitywide Alcohol Use Prevention Program During Early Adolescence*, 86 AM. J. PUB. HEALTH 956, 956-65 (1996).

50. See Higher Education Center for Alcohol and Other Drug Prevention, U.S. Department of Education (visited Nov. 18, 2000) <<http://www.edc.org/hecd/>>.

51. See ROBERT ZIMMERMAN, U.S. DEPT OF EDUC., SOCIAL MARKETING STRATEGIES FOR CAMPUS PREVENTION OF ALCOHOL AND OTHER DRUG PROBLEMS (1997), available at <<http://www.edc.org/hecd/pubs/soc-marketing-strat.html>>.

52. See H. Wesley Perkins & Henry Wechsler, *Variation in Perceived College Drinking Norms and Its Impact on Alcohol Abuse: A Nationwide Study*, 26 J. DRUG ISSUES 961-74 (1996).

53. See Michael Haines & Sherilynn F. Spear, *Changing the Perception of the Norm: A Strategy to Decrease Binge Drinking Among College Students*, 45 J. AM. C. HEALTH 134 (1996); MICHAEL HAINES, U.S. DEPT OF EDUC., A SOCIAL NORMS APPROACH TO PREVENTING BINGE DRINKING AT COLLEGES AND UNIVERSITIES (1996), available at <<http://www.edc.org/hecd/pubs/socnorms.html>>; see also *Correcting Misperceptions of Norms on Seven Campuses*, CATALYST (Higher Educ. Ctr. for Alcohol & Other Drug Prevention, Newton, Mass.), Summer/Fall 1998, at 6 (vol. 4, no. 1), available in <<http://www.edc.org/hecd/pubs/catalyst11.pdf>>.

permanent damage that will manifest years later. The research literature now advocates general approaches that seek to alter the range of environmental conditions that facilitate and enable high-risk drinking patterns in college.⁵⁴

B. Environmental Approach to Reducing College Alcohol Risks

A comprehensive environmental approach does not limit itself to educational harm reduction programs and also does not limit itself to one level of impact. Instead, the perspective of a comprehensive environmental approach is to focus not upon the individual in isolation, but upon bringing about fundamental changes in the array of institutional, community, and public policy forces that may have, inadvertently, facilitated high-risk alcohol use.⁵⁵ The environmental management approach draws its force from the well-accepted notion in public health policy that individual choices regarding alcohol use will (at least in part) revolve around various factors in the environment in which individuals reside. The environment includes a number of factors including social factors, economic factors, background legal rules, the physical environment in which students reside and the datascape in which they are immersed. The college student's environment is not a constant or static feature of his or her existence. In fact, deliberate efforts by higher education administrators, individuals involved with the law and people trained in areas of prevention can have a dramatic effect on the overall environmental factors that foster or diminish high-risk alcohol use. The research in this area, particularly as applied to the college environment, is still forming, but it is clear to social scientists that more research is appropriate to gain an even deeper understanding of how various conditions and factors influence high-risk drinking, and to study the magnitude of the problems that students face as a result of high-risk drinking.⁵⁶

The environmental management model faces some serious hurdles in its quest to succeed in reducing high-risk drinking on modern college campuses. College students have received enumerable representations regarding high-risk alcohol use before they even reach college. Thus, for example, students are bombarded with messages about alcohol use in movies, billboards, advertisements, books, magazines, etc. In many ways, the messages that students receive before they come to college glorify the high-risk alcohol culture and minimize the risks and long-term damages associated with it. Moreover, once students reach the college community they may find, all too frequently, a system in place that is anxious to facilitate high-risk alcohol use. For example, students will sometimes find that local convenience and liquor stores will fail to require proper identification for the sale of alcoholic beverages; students will also be confronted with various alcohol promotional events (often styled as "happy hours") where they may be able to purchase alcohol at

54. See WILLIAM DEJONG, U.S. DEPT OF EDUC., PREVENTING ALCOHOL-RELATED PROBLEMS ON CAMPUS: IMPAIRED DRIVING (1995).

55. See DEJONG & LANGENBAHN, *supra* note 46.

56. See WILLIAM DEJONG ET AL., HIGHER EDUC. CTR. FOR ALCOHOL AND OTHER DRUG PREVENTION, ENVIRONMENTAL MANAGEMENT: A COMPREHENSIVE STRATEGY FOR REDUCING ALCOHOL AND OTHER DRUG USE ON COLLEGE CAMPUSES 31-32 (1998), available at <<http://www.edc.org/hec/pubs/enviro-mgmt.pdf>>.

extremely low prices and in very large quantities. Students will also be bombarded with advertising aimed directly at them to promote high-risk alcohol culture; and students may find a dearth of options for recreational activity in lieu of high-risk alcohol use. The environmental management model must confront the reality that alcohol use is often very functional behavior for students, despite its many dysfunctional effects.

The rise of the research university may have taken its toll as well. Faculty may interact very obliquely with students regarding the high-risk alcohol culture, offering little or no mentoring and not linking academic performance to various consequences of high-risk alcohol use (such as attendance). Students may also come to campus and face a facially strict set of rules and polices that prohibit high-risk alcohol use, but a high-risk alcohol culture on campus may exist in spite of those facially strict rules. One of the foremost lessons of the environmental management movement has been to recognize that simply telling students that the campus is or should be one way is not sufficient when the real campus culture functions in an entirely different way.⁵⁷ The other major lesson is that alcohol risk management programs and policies must be evaluated in light of how they actually work, not just in terms of their facial strictness or plausibility.⁵⁸

III. The Environmental Management Model for Evaluating the College Alcohol Culture

A. Environmental Management: Shared Responsibility and Public Health Models

For an environmental management approach regarding high-risk alcohol use to work, college officials must work with the greater campus environment, including the local community in which the college sits. Traditionally, campuses and communities drafted and enforced their rules separately. To an extent, the de facto environmental "model" emerged. That "model" was more the function of the synergy of the two independent forces than a conscious coordinated effort. A modern public health perspective suggests that a greater impact can occur on rates of high-risk drinking by bringing together campus and community programs, policies, and *educational* campaigns to fight high-risk drinking.⁵⁹ Again, this type of approach is fundamentally different from an approach that focuses upon individuals and individual choices. The environmental management approach looks to coordinate the campus and the local community to create a large-scale impact on all of the environmental factors that contribute directly or indirectly to high-risk alcohol use. In many ways, the environmental management approach is *The Field of Dreams*.⁶⁰ If we build the environmental features that discourage the high-risk alcohol culture, a safer student culture will emerge.

57. See *id.* at 5.

58. For example, in *Coghlan v. Beta Theta Pi Fraternity*, 987 P.2d 300 (Idaho 1999), a student was injured despite the fact that a party management system was in place. See *id.* at 312.

59. See DEJONG ET AL., *supra* note 56.

60. FIELD OF DREAMS (Universal City Studios 1989).

The environmental management approach finds its roots in developments in the field of public health research. For some time now, the field of public health has recognized that physical, cultural, social, and institutional forces can contribute to problems of human health. In some cases, these forces are much stronger than individual choice.⁶¹ One of the pioneers of the modern public health field was Dr. John Snow. In the mid 1800s, deadly cholera coursed through major cities in Europe, including his home, London. The disease was devastating and could kill several hundred people in just a matter of days. There was widespread scientific ignorance about the causes and the cures for the disease. In the face of the devastating epidemic, Dr. Snow tried a novel approach. He documented where each victim had lived in the city of London and was able to determine that the victims occurred within just a few hundred yards of a water pump on a particular street. Again, Snow did not know what cholera was or how to cure it, but he had a very basic and commonsensical idea — he arranged to have the pump removed. His theory worked and the outbreak quickly ended.⁶² Snow taught a profound lesson. By managing environmental factors, we can sometimes achieve incredibly powerful results without necessarily dealing directly with the root or deep causes of public health risks.⁶³

The environmental management lessons that we have learned from Dr. Snow have application in our modern and more complex society. For example, environmental management models have helped to reduce injuries to individuals arising from driving under the influence of alcohol. In 1982, for example, approximately 50% of all fatal crashes in the United States involved alcohol; by 1995 alcohol was involved in only 41% of the fatal crashes.⁶⁴ Various factors contributed to this significant change.⁶⁵ Among the environmental factors that have impacted the overall decrease in alcohol-related fatalities have been grassroots efforts to change attitudes about drunk driving (such as those by Mothers Against Drunk Driving) and changes in laws regarding drunk drivers, particularly repeat offenders. Laws and social attitudes regarding drinking in the workplace and underage drinking have shifted. The police have instituted a variety of policies aimed at deterring drinking and driving, including checkpoints and crackdowns on drunk drivers. Moreover, the decline in alcohol fatalities is no doubt due in part to changes in seatbelt laws and media campaigns regarding seatbelt use, which have increased seatbelt use and dropped injury rates.⁶⁶ Certainly, legal changes can have important effects on environmental conditions. Changes in seatbelt laws are particularly interesting,

61. See LAWRENCE WALLACK ET. AL., *MEDIA ADVOCACY AND PUBLIC HEALTH: POWER FOR PREVENTION* (1993).

62. See JOHN SNOW, *ON THE MODE OF COMMUNICATION OF CHOLERA* (London, John Churchill 1855), available at <http://www.ph.ucla.edu/epi/snow/snowbook_a4.html>.

63. See THOMAS MOORE, *LIFESPAN* 59 (1993). It remains important to focus on deep causes as well.

64. See DEJONG ET AL., *supra* note 56.

65. See National Highway Traffic Safety Admin. (NHTSA), U.S. Dep't of Transp., *Alcohol Traffic Safety Facts 1995* (visited Feb. 28, 2001) <<http://nhtsa.dot.gov/people/nca/FactPrev/alcfacts.html>>.

66. David E. Nelson et al., *Trends in Safety Belt Use by Demographics and by Type of State Safety Belt Law, 1987 Through 1993*, 88 AM. J. PUB. HEALTH 245-49 (1998).

because they are targeted at people who are not drinking and driving as well as those who are. What we have learned is that by increasing safety efforts aimed at people who are not drinking and driving, we may reduce alcohol-related fatalities.

Environmental management has had its impact in crime prevention. In recent times there has been quite a bit of emphasis on new law enforcement strategies, including so called "fixing broken windows" strategies aimed at remedying apparently minor nuisances and targeting petty crimes.⁶⁷ Modern policing has learned that an environment that is conducive to crime may actually promote or engender crime. Conversely, reducing opportunities for criminality by fixing broken windows, improving lighting, putting police in community positions, etc. may reduce overall rates of criminality. Changing the environment for criminals can lower rates of criminality. Environmental management strategies present, therefore, an important and potentially radical shift in the way we have dealt with high-risk alcohol use on college campuses. The new research is very promising.⁶⁸ It demonstrates the need for new methods of reimagining prevention efforts on campuses and new ways to use the law to shape the environment in which alcohol use on campuses occurs.

B. Environmental Management: How the Evolving Legal Perspective Has Changed the College Culture

Remarkably, the environmental management approach that is popular in the social science literature can find substantial support in recent judicial decisions and emerging thoughts about institutional duties and responsibilities to college students (and others) in the campus environment. The authors have effectively argued that at one time, American law may have contributed to the environmental conditions under which the high-risk alcohol culture could flourish.⁶⁹ During the 1970s and 1980s, the law effectively encouraged college officials to resist articulating clear alcohol standards and policies and to avoid being overly involved in the alcohol culture, for fear that they could become liable in courts of law for such behavior.⁷⁰

The law has now changed. So has public and media attention regarding high-risk alcohol use. Even Congress has changed its attitude. For example, the Drug Free School and Campus Act, in Higher Education Amendment section 120, has required colleges to develop, announce, and enforce policies for preventing alcohol misuse

67. J.D. FEINS ET. AL., NATIONAL INSTITUTE OF JUSTICE, U.S. DEPARTMENT OF JUSTICE, SOLVING CRIME PROBLEMS IN RESIDENTIAL NEIGHBORHOODS: COMPREHENSIVE CHANGES IN DESIGN, MANAGEMENT, AND USE (1997); James Q. Wilson & George Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29; George L. Kelling, *U.S. Dep't of Justice "Broken Windows" and Police Discretion* (visited Nov. 15, 2000) <<http://www.ojp.usdoj.gov:80/nij/pubs-sum/178259.htm>>; see also Joel Epstein, *Fixing Broken Barroom Windows* (visited Nov. 18, 2000) <<http://www.edc.org/hecl/pubs/articles/fixwindows.html>>.

68. DEBORAH A. FISHER, PACIFIC INST. FOR RESEARCH & EVALUATION, ENVIRONMENTAL STRATEGIES TO PREVENT ALCOHOL PROBLEMS ON COLLEGE CAMPUSES (2000), available at <<http://www.pire.org/udetc/documents/EnviroStrat.pdf>>.

69. See ROBERT BICKEL & PETER LAKE, THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISK OF COLLEGE LIFE? ch. 4 (1999).

70. See *id.*

on campus, *inter alia*.⁷¹ Congress has clearly expressed its acceptance of so-called "parental notification" in the fight against high-risk alcohol use.⁷² Rulings of various state supreme courts have reinforced the environmental management model as well. The Supreme Court of Delaware held the University of Delaware responsible with respect to environmental factors leading up to a hazing injury.⁷³ The Supreme Court of Idaho held the University of Idaho responsible for preventing dangers associated with high-risk alcohol use to college freshmen participating in Greek-like activities, and the University of Nebraska has been asked by the Supreme Court of Nebraska in *Knoll* to prevent fraternity/hazing risks related to alcohol posed to its students.⁷⁴ Moreover, the grand jury investigation during the fall of 1997 of MIT freshmen Scott Krueger has been an important force in higher education to change attitudes regarding environmental management.⁷⁵ For example, as a result of the Krueger incident, MIT has decided to alter freshman living patterns in an effort to create a safer student environment.⁷⁶

IV. Fighting High-Risk Alcohol Use on Campus: Legal/Policy Steps for Prevention

A variety of environmental factors facilitate high-risk alcohol use. The major aspects of the typical campus environment that can be the focus of future environmental change efforts include:

(A) Many Students — certainly not all — have a tremendous amount of unstructured time and often a great deal of disposable income.

(B) Alcohol is typically available and often extremely inexpensive. (Anecdotally, the authors have heard that one student commented that there is no beverage within a hundred miles of a college campus as inexpensive as a beer).

(C) Students frequently encounter messages regarding high-risk alcohol use that glorify high-risk alcohol use and minimize its risk.

(D) Social and recreational alternatives to high-risk alcohol activity are not always readily available.

71. See Higher Education Amendments of 1998, 20 U.S.C. § 1011(i) (1998); see also Joel Epstein, *The Higher Education Amendments* (visited Nov. 15, 2000) <<http://www.edc.org/hec/pubs/prev-updates/higher-ed-amend.html>>.

72. See Joel Epstein, *Parental Notification: Fact or Fiction*, in PREVENTION FILE (San Diego: The Silver Gate Group, Spring 1999), available at <<http://www.edc.org/hec/pubs/articles/parentalnotification.html>>.

73. *Furek v. University of Del.*, 594 A.2d 506, 522 (Del. 1991).

74. See *Coghlan v. Beta Theta Pi Fraternity*, 987 P.2d 300, 312 (Idaho 1999); *Knoll v. University of Neb.*, 601 N.W.2d 757, 764-65 (Neb. 1999).

75. See Joel C. Epstein, *MIT Fraternity Getting Off Easy*, BOSTON GLOBE, Nov. 16, 1998, at A15. Regarding the impact of the Krueger death on attitudes towards high-risk college student drinking, see also Terry Vau Dell, *Three Fraternity Members Draw 30-Day Jail Term in Connection with Binge-Drinking Death*, CHICO ENTERPRISE-RECORD, Feb. 6, 2001, available at <<http://www.chicoer.com/archives/index.inn?loc=detail&doc=/2001/February/06-165-news3.txt>> and David Enders, *Third Student Jailed in FSU Alcohol Fatality*, MICH. DAILY, Sept. 20, 2000, available at <<http://www.pub.umich.edu/daily/2000/sep/09-20-2000/news/05.html>>.

76. See Reisberg, *supra* note 15.

(E) Some students engage more frequently in high-risk alcohol use and may also facilitate that behavior for others. These students are not typically identified as such, nor dealt with appropriately. Enforcement of policies and regulations on and off campus is not always coherent or targeted to specific objectives and is not always open to evaluation and reevaluation in light of short term experience.

From an environmental management perspective, there are various levels at which to address these factors. The college, the local community, and the state and federal governmental levels all can have an impact. A typical college campus requires a campus-wide task force to evaluate its environmental factors and then to link the campus to the greater community. The communities in which colleges reside can develop programs, rules, and ordinances that can help to facilitate campus and community coalitions. Also, state and federal governments can alter public policy through legislation, court decisions, etc. At this level, college presidents have a unique and important role to play in fighting high-risk drinking.

A. Campus-Based Task Forces

From our experience, the emerging industry custom is to create campus-based task forces. A task force typically requires representatives from the broad spectrum of campus interests and constituencies. This includes, but is not limited to, students, faculty, university attorneys, alumni, parents, various community representatives, and others. For the task force to be successful, it must directly report to the highest levels — the college president — and should also have a strong hand in all phases of policy creation, enforcement, and evaluation.

A principal goal of a task force is to maintain prevention efforts as a top priority for the college as a whole. Moreover, emerging custom shows that task forces increasingly involve themselves in media and social marketing campaigns to help create an environment where true social norms are known and communicated.

Such a campus task force has several important duties. Perhaps the first duty is to conduct a needs assessment, which includes, at a minimum, a comprehensive assessment of high-risk drinking problems on and off campus and a comprehensive review of policies, programs, and prevention efforts that are occurring on and off campus. Moreover, such a task force should be charged with exploring the overall structure of the institution and its basic educational focus to see how that relates to high-risk alcohol use. Our experience has shown that colleges can benefit tremendously from outside assistance in the evaluation process. Institutions of higher education often feature strong aspects of their feudal origins and are often somewhat politically insulated. There are tremendous risks to insiders in a college community who try to institute change on their own. For example, an individual who attempts to change high-risk behaviors at athletic events may be met by resistance — or worse — by other forces on and off campus.⁷⁷

Once the task force has completed a needs evaluation and assessment, it must create a strategic plan for future programs and policies. The authors believe that

77. See MURRAY SPERBER, *BEER AND CIRCUS: HOW BIG-TIME COLLEGE SPORTS IS CRIPPLING UNDERGRADUATE EDUCATION* (2000).

such prevention efforts begin with the admissions process itself. To recognize this is a somewhat novel policy approach,⁷⁸ one which is likely to meet resistance, given the institutional relations of admissions committees to the greater collegiate environment. Nonetheless, questions to consider must be whether or not a college's admissions should be altered to create a student body that is less at risk for high-risk alcohol use. Moreover, the admissions process is integral in creating images through promotional literature and campus tours that may either attract high-risk or low-risk students. The admissions process can do a great deal to establish the expectations regarding a student's behavior when they arrive on campus and can also be the foundation of statements made by students regarding their values as they enter their college. The process does not stop with admissions, however; in conducting their work and research, the authors have often heard from students that they would like to have more recreational and entertainment options as alternatives to the high-risk alcohol culture. Students also often voice the desire for more structure.

The campus task force can study the ways in which a college can create infrastructure to support alternatives to the high-risk alcohol culture, including student centers, dormitory commons areas, greater athletics facilities with better hours, coffeeshouses, etc. No doubt one of the principal issues that will confront any campus task force is the relationship of that college to its Greek — fraternity and sorority — life. The authors' experience has taught that draconian responses with respect to Greek life may not be the most appropriate ones. Greek life is a long-standing feature of most college campuses and can, with appropriate restructuring, be an incredible asset in the fight to reduce high-risk alcohol use.

Some environmental management activities should directly target alcohol availability and the circumstances under which alcohol is consumed. One thing a college will need to consider through its task force is the extent to which, if at all, it collaborates in marketing activities with respect to alcohol use by college-aged students. Campus task forces, for example, can focus upon issues associated with the price and availability of alcohol and also the nature of servers who may be in the immediate vicinity of the college campus.

The authors offer these observations as examples of the ways an environmental management approach may begin to address the range of issues associated with creating a safer campus where learning can occur.

Systems can either facilitate high-risk alcohol use or de-facilitate high-risk alcohol use. Each aspect of the college environment plays a role in student drinking, and each has a potential role as part of a comprehensive prevention strategy focused on environmental change. The recognition that sound public health policy and legal

78. See, e.g., Joseph S. Pete, *Transfer Screening Process Implemented After Slaying* (last modified July 2, 2000) <<http://www.idsnews.com/news/2000.07.03/campus/2000.07.03.transfer.html>>. Recently, Indiana University has altered its policies regarding admissions in light of a tragic slaying. See *id.* By the end of Fall 2001, Indiana University will be requiring all incoming freshman and transfer students to provide information about any criminal convictions on their admissions forms. See *id.* This question was voluntary previously. See *id.* The Code of Ethics has been changed to allow the university to dismiss students who lie on their applications. See *id.*

norms on shared responsibility support the same objectives is the salient development in the fight to reduce high-risk alcohol use by college students.

B. Making Practical Use of Law as Part of an Environmental Management Strategy — Example: Beer Bullies

Law is particularly helpful in two specific ways in establishing an ordered *environment* and in finding proper *enforcement* mechanisms.

First, the law can facilitate identification of problems associated with alcohol abuse and devise and then enforce *environment* rules that are aimed to reduce the associated disorder. For example, "hard partiers" often cause minor property damage, initiate noise disturbances, tend to vomit in residence halls and elsewhere, and get caught more often urinating in public. Identifying specific problems associated with abusive or unlawful drinking, and adopting and enforcing rules regarding these problems will reduce alcohol-related disorders and dangers. Students with multiple violations will often be major risk creators as well. In this way, then, utilizing the law can establish an environment where alcohol associated disorders are identified and subject to enforcement.

Second, using the law can lead to creative enforcement strategies. The authors speak of *identifying and disciplining "beer bullies."*⁷⁹ "Beer bullies" are students who facilitate significant alcohol risks for others.⁸⁰ These individuals often arrange and "plan" abusive alcohol situations, encourage others to do dangerous drinking or related activities, seek criminal or quasi-criminal cooperation from outside entities, etc.⁸¹ While these "beer bullies" constitute only a tiny fraction of a student population, such students can create an environment at odds with the environment sought by the university. Poorly thought-out rules and strategies can actively facilitate these individuals; well thought-out strategies can weaken their power.⁸²

C. Law and "Due" Process: Successful Environmental Management Involves Creative Rethinking of Process "Rights"

The leading model for student judicial process is Edward N. Stoner's Model Student Disciplinary Code.⁸³ The essential elements of the model code include: "notice to students, faculty and administrators concerning the institution's policies and procedures" and a process that insures against arbitrary action, or unfair treatment of students.⁸⁴ The Code anticipates a specification of (1) the authority of the institution's "judicial" bodies; (2) a description of misconduct covered by the code; (3) an outline of procedures for bringing "charges" of misconduct, holding "hearings," and deciding "appeals;" and (4) a procedure for interpreting and revising the code.⁸⁵ The "Model Code" is a direct reaction to "due process" case law⁸⁶ and

79. BICKEL & LAKE, *supra* note 69, at 208-09.

80. *Id.*

81. *See id.*

82. *See id.*

83. *See* Edward N. Stoner II & Kathy L. Cerminara, *Harnessing the "Spirit of Insubordination": A Model Student Disciplinary Code*, 17 J.C. & U.L. 89 (1990).

84. *Id.* at 91.

85. *Id.* at 94.

reinforces a traditional "law enforcement" and "judicial" approach to rules, regulations, and enforcement on campus.

Landmark cases in the 1960s, like *Dixon v. Alabama State Board of Education*,⁸⁷ held that the summary expulsion of students at public colleges in retaliation for their participation in the civil rights movement violated constitutional norms of due process.⁸⁸ Later cases, like *Tinker v. Des Moines Independent Community School District*,⁸⁹ *Healy v. James*,⁹⁰ and *Papish v. Board of Curators of University of Missouri*,⁹¹ extended fundamental constitutional protections at public colleges to student speech, association, and newspapers. Private colleges came to have very similar responsibilities to students, albeit, under "contract" or other theories.⁹² So it was that "due process" notions came to campus. Somehow, however, these cases led to the development of highly "judicial" student discipline models, which frequently include formal hearings and appeals that mimic a trial and appellate court culture.⁹³ The student civil rights cases (and related cases) involving expulsion demanded fundamental due process — notice, a specification of charges, a summary of the evidence of misconduct, a "fundamentally fair" hearing that included an opportunity for "give and take," and an adequate record of the proceedings leading to disciplinary action in cases implicating significant rights — but they never demanded university disciplinary models that mirror criminal or civil courts in structure.⁹⁴

It is noteworthy that most public and private colleges and universities now engage in more "process" than either constitutional or contract law demand.⁹⁵ Courts have observed in student discipline cases that the student plaintiff was afforded more due process than was legally required.⁹⁶

D. New Models

Melinda Grier, General Counsel to the University of Oregon, has argued that it is time to simplify student discipline procedures.⁹⁷ Due process, in the context of the most serious college student discipline, at a minimum consists of: (1) fair notice of charges and conduct supporting the charges; (2) notice of hearing; (3) notice of

86. See *id.*; *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961).

87. 294 F.2d 150 (5th Cir. 1961).

88. See Robert D. Bickel & Peter F. 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, 267-69 (1994).

89. 393 U.S. 503 (1969).

90. 408 U.S. 169 (1972).

91. 410 U.S. 667 (1973).

92. See *Schaer v. Brandeis Univ.*, 735 N.E.2d 373, 377 (Mass. 2000).

93. See *id.* at 377 n.6.

94. See *Board of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 86-88 (1978).

95. See *Schaer*, 735 N.E.2d at 381.

96. See *id.*

97. See Melinda Grier, *Student Disciplinary Procedures: Is it Time to Simplify the Process?* (Conference Proceedings, Stetson University College of Law, Twentieth Annual National Conference on Law and Higher Education, Clearwater Beach, Fla., Feb. 11-13, 1999).

evidence; (4) the opportunity to 'confer' with legal counsel; (5) and opportunity to defend *against* the charges; (6) an impartial decision maker; and (7) entitlement to the expectation that the university will substantially comply with its own procedures.⁹⁸ College conduct codes need not be as specific as criminal statutes, or agency regulations; they must establish enforceable standards that will not result in arbitrary or discriminatory adjudication.⁹⁹ Grier correctly notes that courts have been reluctant to require confrontation and cross-examination of witnesses,¹⁰⁰ and generally do not recognize an entitlement to participation of legal counsel, except in an advisory capacity.¹⁰¹

Critically, due process is an inherently flexible concept, which means that the amount of process required in less serious matters — and even in matters of pure academic discipline — may be lower. Successfully fighting high-risk alcohol use will require retooling complex, overly processed codes to meet the disciplinary needs of the modern college community.

*V. A Concluding Thought on Some Resources: The U.S. Department of
Education and the Higher Education Center for Alcohol
and Other Drug Prevention*

The Higher Education Center for Alcohol and Other Drug Prevention¹⁰² offers a variety of resources and services to help reduce alcohol injury and liability. The U.S. Department of Education created the Higher Education Center in 1993 with the following mission: "to assist colleges and universities in developing and carrying out alcohol and other drug prevention policies and programs that will promote campus and community safety and nurture students' academic and social development."¹⁰³

The Center serves the higher education community by developing, implementing, and evaluating policies and programs in light of environmental management strategies. Through training and ongoing technical assistance, the Center also supports statewide initiatives aimed at reducing alcohol and other drug use through the work of local campus and community coalitions.

To accomplish its mission, the Center conducts regional training in conjunction with national and regional organizations, organizes professional development

98. *See id.*

99. *See Horowitz*, 435 U.S. at 86-88.

100. Courts have generally been satisfied, Grier observes, when questions are submitted to the hearing officer who then directed the questions to witnesses. *See Grier, supra* note 97.

101. Grier emphasizes that it is especially appropriate to allow the student to confer with legal counsel on issues of self-incrimination, where the student is charged in a parallel criminal proceeding. *See id.*

102. This section draws upon materials generated by the Higher Education Center to describe its work and to facilitate its mission. The Center may be contacted at the following address: The Higher Education Center for Alcohol and Other Drug Prevention Education Development Center, Inc., 55 Chapel Street, Newton, Mass. 02458-1060. Other means of contact are: phone (800) 676-1730, fax (617) 928-1537, e-mail HigherEdCtr@edc.org, and website www.edc.org/hecl.

103. *Higher Education Center for Alcohol and Other Drug Prevention* (visited Jan. 20, 2001) <http://www.edc.org/hecl/abouthec.htm#1>.

workshops for experienced prevention specialists and program evaluators, gives presentations at national and regional meetings, and trains a cadre of regionally based trainers (*Center Associates*). The Center also provides specialized training and technical assistance on compliance with the Drug Free Schools and Campuses Act of 1989.

People associated with colleges and universities or other organizations can access the Center's technical assistance services by telephone, fax, via email, or via an online form. An initial consultation may result in distribution of materials, referral to other resources, review of publications and other prevention materials, review of implementation and evaluation plans, additional telephone consultations with senior Center staff or consultants, and onsite consultation.

The Center's publications constitute its "textbooks," and thus play a vital role in its provision of training and technical assistance services. Currently, there is still a lack of quality prevention material and research on alcohol and other drug prevention in higher education. The Center identifies the need for material and publications in order to fill existing voids.

In 1998, the Center created a *Presidents Leadership Group*. A report of the Presidents' recommendations, *Be Vocal, Be Visible, Be Visionary*, and a copy of a twenty-one-minute video that shows the recommendations of the Presidents Leadership Group in action and highlights the Center's environmental approach is available from the Center.