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A Sobering Conflict: The Call for Consistency in the Message Colleges Send About Alcohol

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A Sobering Conflict: The Call for Consistency in the Message Colleges Send About Alcohol

Marc Edelman^{*}
David Rosenthal^{**}

INTRODUCTION	1390
I. BINGE DRINKING AND ALCOHOL ABUSE ON COLLEGE CAMPUSES	1392
A. <i>Alarming Overall Statistics</i>	1392
B. <i>Binge and Underage Drinking Among Student- Athletes</i>	1394
C. <i>Ways Colleges Have Discouraged Binge and Underage Drinking</i>	1395
D. <i>The Current Status of Beer Advertising in College Sports</i>	1397
II. THE NCAA, ITS SOCIAL RESPONSIBILITY, AND ITS MORE RECENT COMMERCIAL MOTIVES	1397
A. <i>Founding of the NCAA</i>	1398
B. <i>The NCAA as an Ethical Body</i>	1399

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1390	<i>FORDHAM INTELL. PROP. MEDIA & ENT. L.J.</i> [Vol. 20:1389]	
	C. <i>The NCAA Expands into Hosting Sporting Events....</i>	1399
	D. <i>A Commercially Motivated NCAA Emerges Under Walter Byers.....</i>	1400
	E. <i>Dick Schultz Tries to Scale Back College Alcohol Advertising</i>	1402
	F. <i>Cedric Dempsey Takes a More Hands-Off Approach to Alcohol Ads.....</i>	1404
	G. <i>NCAA Alcohol Policy Continues to Stagnate Under Miles Brand.....</i>	1405
III.	WHY A RELATIONSHIP BETWEEN COLLEGE ATHLETICS AND BEER COMPANIES MAY BE ESPECIALLY INAPPROPRIATE TODAY	1407
IV.	THREE POTENTIAL WAYS TO FIX THE ALCOHOL DOUBLE STANDARD	1409
	A. <i>Banning Alcohol Sales and Advertisements in College Sports</i>	1409
	1. <i>Changing Alcohol Policy at the Individual College Level.....</i>	1409
	2. <i>Changing Alcohol Policy at the NCAA Level... </i>	1412
	3. <i>Changing Alcohol Policy at the Congressional Level</i>	1413
	B. <i>Introducing Legislation to Lower the Legal Drinking Age from Twenty-One to Eighteen.....</i>	1415
	C. <i>Separating College Sports from the Rest of Higher Education</i>	1416
	CONCLUSION.....	1417

INTRODUCTION

It is not surprising that college students are often confused about the dangers of alcohol.¹ On one hand, many college

¹ See, e.g., CHARLENE A. GALARNEAU & EDITH B. BALBACH, THE TUFTS UNIVERSITY ALCOHOL STUDY 25 (2001), available at <http://ase.tufts.edu/healthservice/documents/Alcoholstudy.pdf> (noting focus group study finding about student confusion over alcohol policy); Bharat Ayyar, *Alcohol Law Blurs Duties of College Heads*, YALE DAILY NEWS, Nov. 13, 2007, <http://www.yaledailynews.com/news/university-news/2007/11/13/alcohol-law-blurs-duties-of-college-heads> (noting that “[d]runkenness

administrators have gone to great lengths to deter students from binge and underage drinking, sometimes even inviting local police to campus to arrest students who violate anti-drinking laws.² Yet, on the other hand, some of these same college administrators also allow beer companies to sell and advertise their products during college sporting events and telecasts.³

This double standard about alcohol use confuses students and sends a mixed message about colleges' overall mission.⁴ As reporter Mike Bianchi recently asked in his *Orlando Sentinel* column, "How can colleges arrest their students for drinking beer . . . when they are using their student-athletes to peddle beer . . . ?"⁵

This Article sets forth the argument that college administrators must adopt a more uniform policy about alcohol use. Part I of this Article describes the use of alcohol by college students and the efforts made by college administrators to discourage binge and underage drinking. Part II explains the history of the National Collegiate Athletic Association (the "NCAA" or "Association") and discusses how the NCAA's financial interests have led to the

is not the only thing leaving students confused about the impact of Connecticut's year-old alcohol laws on campus").

² See, e.g., *infra* notes 32–34 and accompanying text.

³ See Jeff D. Opdyke & David Kesmodel, *Beer Sales Make a Comeback at College Stadiums*, WALL ST. J., Sept. 12, 2009, at A5; Kelly Whiteside, *Beer Sales at Memphis Game a Boon for City*, USA TODAY, Sept. 10, 2009, at 1C.

⁴ See Mike Bianchi, *Tragedy Won't Change Hypocrisy of Beer and Sports*, ORLANDO SENTINEL, Sept. 28, 2005, at D1; Nancy Clark, *NCAA Rolls Out Barrel as Schools Battle Binge*, DES MOINES REG., Nov. 18, 2003, at C1 ("The new beer campaign, on the other hand, points out what should have been obvious were we only paying attention: that college administrators who are trying to cut down on underage drinking on campus look the other way when it comes to beer ads."); Tim Dahlberg, *Hypocrisy Abounds in NCAA*, PITTSBURGH POST-GAZETTE, Dec. 11, 2005, at D2 ("Despite calls by the American Medical Association and others to ban beer advertising on televised games, the NCAA has no problem allowing the ads to be targeted toward impressionable minds."); Sandy Grady, *End 'Malt Madness'*, USA TODAY, Mar. 4, 2005, at 19A ("[I]t seems like raw hypocrisy to use college athletes to peddle beer ads when college presidents know their No. 1 campus problem is binge drinking."); *Organization Won't Agree to Ban on Alcohol Ads*, INDIANAPOLIS STAR, Jan. 11, 2004, at C1 ("George A. Hacker, director of the Center for Science in the Public Interest's alcohol policies project, said in November that schools are being hypocritical."); Doug Robinson, *NCAA Predictably Wimps Out on Logical Request*, DESERET NEWS, Aug. 13, 2008, at D1.

⁵ Bianchi, *supra* note 4.

selling and advertising of beer at college sporting events. Part III discusses why a relationship between college sports and the beer industry is inconsistent with the goals of higher education. Part IV discusses ways to reconcile the differences between the way in which colleges and their athletic departments handle alcohol.

I. BINGE DRINKING AND ALCOHOL ABUSE ON COLLEGE CAMPUSES

A. *Alarming Overall Statistics*

In recent years, many college administrators have come to believe that alcohol (including beer) plays a dangerous role in the lives of their students.⁶ While college students do not drink alcohol more often than other segments of the U.S. population, studies show that college students engage in more dangerous drinking behaviors.⁷ For example, rather than drink moderately throughout the week, college students typically consume all of their weekly alcohol in a single sitting.⁸ This type of behavior is known as binge drinking.⁹

The physical harms caused by binge drinking vary based on one's body chemistry.¹⁰ Some college students who binge drink

⁶ See Robinson, *supra* note 4 (“According to a report by the Center for Science in the Public Interest, more than 40 percent of college students binge drink—consuming five or more drinks on at least one occasion in the past 30 days. Among college students between the ages of 18 and 24, alcohol is involved in approximately 599,000 injuries, 696,000 assaults, 97,000 sexual assaults and 1,700 deaths from unintentional injuries, including from car crashes, each year.”).

⁷ See *Spring Break Boosts Binge Drinking Amongst College Students*, HINDUSTAN TIMES, Mar. 1, 2009, http://www.thaindian.com/newsportal/lifestyle/spring-break-boosts-binge-drinking-among-college-students_100161279.html.

⁸ *Id.* (“On average, college students drink a little more than adults, but what makes college drinking so risky is the pattern. Instead of drinking small amounts all through the week, they’re more likely to save it up and drink it all at once.” (quoting Scott Walters, associate professor at The University of Texas School of Public Health)).

⁹ Darin Erickson, Ph.D., Rebecca J. Mitchell, M.P.H. & Traci L. Toomey, Ph.D., *Alcohol Policies on College Campuses*, 53 J. AM. C. HEALTH 149, 149 (2005); see also Crystal Garcia, *Drinking Age Debate Continues*, AUGUSTA CHRON., Sept. 1, 2008, at B11; Robinson, *supra* note 4.

¹⁰ See *infra* notes 11–12 and accompanying text.

suffer merely from headaches and hangovers;¹¹ others suffer from more serious symptoms such as alcohol poisoning, memory loss, or even death.¹²

Binge drinking also may cause psychological harm to college students.¹³ For example, a recent study by Columbia University's National Center on Addiction and Substance Abuse (the "CASA") found that 23% of college students suffer from a psychological disorder related to alcohol use.¹⁴ Meanwhile, a study conducted by the Alcoholic Beverage Control Commission concluded that repeated alcohol use by college-aged students negatively affects the cognitive and impulse control regions of the brain.¹⁵

Binge drinkers also are more likely to harm themselves and others while under the influence of alcohol.¹⁶ According to a study

¹¹ See Sharif Durhams, *51% of Students in UW System Report Binge Drinking: Numbers Lower than in Previous Surveys*, MILWAUKEE J. SENTINEL, Dec. 11, 2009, at B1 (noting that consequences of students binge drinking range "from hangovers and memory loss to missed classes and drunken driving episodes").

¹² See Erickson et al., *supra* note 9, at 149.

¹³ See *infra* notes 14–15 and accompanying text.

¹⁴ See Press Release, The Nat'l Ctr. on Addiction & Substance Abuse at Columbia Univ., *Wasting the Best and Brightest, New CASA Report Finds Half of College Students Binge Drink, Abuse Prescription and Illegal Drugs* (Mar. 15, 2007) [hereinafter *CASA, Wasting the Best and Brightest*], available at <http://www.casacolumbia.org/absolutenm/templates/PressReleases.aspx?articleid=477&zoneid=65>; see also Judith G. McMullen, *Underage Drinking: Does Current Policy Make Sense*, 10 LEWIS & CLARK L. REV. 333, 341 (2006) (noting that those who begin drinking at a younger age are also more likely to suffer psychological disorders related to alcohol); *National Report Suggestions for Reducing Substance Abuse*, SEATTLE TIMES, Oct. 26, 2007, http://seattletimes.nwsourc.com/html/entertainment/2003976405_collwebalcohol.html; Justin Pope, *Campus Drinking, Use of Drugs Intensifying*, BUFFALO NEWS, Mar. 16, 2007, at A7.

¹⁵ See Jay Evensen, *Lowering Legal Drinking Age Is Absurd Idea*, DESERET NEWS, Aug. 24, 2008, at G1 ("Two years ago, the state Alcoholic Beverage Control Commission and various private organizations held town hall meetings across Utah to discuss new evidence showing how anyone under [twenty], and even many people well into their [twenties] suffer far greater damage from alcohol consumption than do older adults. Specifically, they suffer irreparable harm to parts of the brain that are developing the ability to make sound judgments, decide important matters or control destructive impulses. Alcohol also can harm a young person's ability to learn and remember."); see also McMullen, *supra* note 14, at 341 (noting that research suggests "alcohol can have an especially detrimental effect on the developing brain").

¹⁶ See, e.g., *Califano Urges NCAA to Ban All Beer and Alcohol Ads at Broadcast Events*, REUTERS, July 1, 2008, <http://www.reuters.com/article/idUS148991+01-Jul->

released by CASA in March 2007, 1700 college students die each year as the result of alcohol poisoning, alcohol-related assaults, and drunk driving.¹⁷ In addition, more than 800,000 college students become the annual victims of alcohol-related physical or sexual assaults.¹⁸

Finally, binge drinking might even hurt society overall by leading to the loss of many of America's great minds from the higher education system.¹⁹ According to former U.S. Secretary of Health, Education and Welfare, Joseph A. Califano, America is "losing thousands of our nation's best and brightest to alcohol and drugs, and in the process robbing them and our nation of their promising futures."²⁰

B. Binge and Underage Drinking Among Student-Athletes

While both binge and underage drinking pose serious concerns throughout higher education,²¹ these behaviors are especially prevalent in the student-athlete community.²² The worst recorded case of alcohol abuse by student athletes involved members of the 2002 University of Colorado football team, which allegedly engaged in a string of alcohol-related rapes.²³ Another instance of team-wide alcohol abuse involved the University of California-Chico women's softball team, which in 2006 held an alcohol-

2008+MW20080701 [hereinafter *Califano Urges*] (noting the link between binge drinking and physical injuries); Durhams, *supra* note 11.

¹⁷ See *Califano Urges*, *supra* note 16 (noting the study on college student deaths related to alcohol abuse); see also McMullen, *supra* note 14, at 342 (noting that the National Highway Traffic Safety Administration estimates that changing the national drinking age to twenty-one has saved over 20,000 teens from serious car crashes).

¹⁸ See *Califano Urges*, *supra* note 16; see also McMullen, *supra* note 14, at 343 (noting that "[a]lcohol abuse appears to increase the likelihood that young people will engage in unprotected sex or acquaintance rape, suicide, and other violent behavior").

¹⁹ H.R. Res. 145, 109th Cong. (2005); H.R. Res. 575, 108th Cong. (2004).

²⁰ See CASA, *Wasting the Best and Brightest*, *supra* note 14.

²¹ See McMullen, *supra* note 14, at 340 (noting that alcohol use among eighteen to twenty-one year olds is "rampant" and that alcohol use is even higher among the segment of this population that attends college).

²² See Toben F. Nelson & Henry Wechsler, *School Spirits: Alcohol and Collegiate Sports Fans*, 28 ADDICTIVE BEHAVIORS 1, 1 (2003).

²³ See Mindy Sink, *Football; Many at Fault in Scandal*, *Barnett Says*, N.Y. TIMES, Apr. 14, 2004, at D7; see also Associated Press, *Chronology of Events at Colorado*, OKLAHOMAN, Oct. 7, 2004, at 4C.

themed party which led to one of their freshman recruits being hospitalized for alcohol poisoning.²⁴

In recent years, even Ivy League athletes have struggled with alcohol abuse.²⁵ For example, at the University of Pennsylvania, a men's freshman basketball player in the 1990s was rushed to the hospital after becoming violently ill from consuming too much alcohol.²⁶ He thereafter spent two days in a coma.²⁷ Likewise, a Harvard University football player in 2006 was arrested for driving under the influence, and two other Harvard football players that season were arrested for engaging in alcohol-related altercations.²⁸ According to Harvard's football coach Tim Murphy, even at Harvard, "We're in an era that you can't escape these things."²⁹

C. Ways Colleges Have Discouraged Binge and Underage Drinking

Fearing the loss of more young lives to alcohol, college administrators have begun to take stronger steps to deter binge and underage drinking.³⁰ Some colleges such as the University of

²⁴ See *2006 Softball Season*, CAL. ST. U., CHICO, OFF. PRESIDENT, <http://www.csuchico.edu/prs/documents/otherDocuments/softball.shtml> (last visited May 30, 2010).

²⁵ See *infra* notes 26–29 and accompanying text. For a more general discussion of binge drinking on Ivy League campuses, see *Initiations Hospitalize 12 Princeton Students: Alcohol Was Served at Off-Campus Clubs*, STAR LEDGER (Newark, N.J.), Feb. 10, 2009, at 25; *Report Examines Student Drinking*, PROVIDENCE J. BULL., Mar. 10, 2006, at B1 (discussing how a single weekend of drunken revelry landed about thirty Brown University students in area hospitals).

²⁶ See Rod Kurtz, *The Consultation Process*, DAILY PENNSYLVANIAN, Mar. 29, 1999, <http://media.www.dailypennsylvanian.com/media/storage/paper882/news/1999/03/29/Resources/The-Consultation.Process-2164894.shtml>; Aliya Sternstein, *Seniors Talk on Alcohol Abuse*, DAILY PENNSYLVANIAN, Feb. 17, 1999, <http://media.www.dailypennsylvanian.com/media/storage/paper882/news/1999/02/17/Resources/Seniors.Talk.On.Alcohol.Abuse-2164303.shtml>.

²⁷ See Kurtz, *supra* note 26; see also Sternstein, *supra* note 26.

²⁸ See *Off Field Problems Rock Crimson Football Team*, PROVIDENCE J. BULL., Sept. 21, 2006, at C1.

²⁹ *Id.*

³⁰ See Peter F. Lake & Joel C. Epstein, *Modern Liability Rules and Policies Regarding College Student Alcohol Injuries: Reducing High-Risk Alcohol Use Through Norms of Shared Responsibility and Environmental Management*, 53 OKLA. L. REV. 611, 618 (2000).

Pennsylvania have increased their funding for alcohol education programs.³¹

Others have asked the local police to assist in deterring student drinking.³² For example, at both the University of Massachusetts and Radford University, college administrators have invited the local police to visit campus and strenuously enforce campus alcohol policies.³³ Meanwhile, at the University of Northern Colorado and at the University of Nevada-Reno, local police have enforced special citation systems under which students found to be under the influence of alcohol are required to undergo an intensive alcohol education program.³⁴

Still other schools have turned to the aid of medical personnel to help curb binge and underage drinking.³⁵ William & Mary College and the University of Minnesota-Duluth, for instance, require students cited for public drunkenness to undergo a chemical dependency evaluation.³⁶ The goal of this evaluation is to help identify and treat students with psychological disorders related to alcohol.

³¹ 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 3, 134 (1996) (noting that Northern Illinois University (“NIU”) was the first university to use the social norming strategy to combat binge drinking as NIU saw it as the best way to fight the problem); see also Karen Thomas, *The Kids Are All Right*, USA TODAY, May 28, 2002, at D1.

³² See, e.g., *UNR Police Crack Down on Student Drinking*, RENO GAZETTE-J., Mar. 25, 2008, at A3 (noting that “[i]n recognition of the problem of alcohol abuse, Reno and the University of Nevada, Reno police plan to crack down on drinking violations in the campus community during Alcohol Awareness Month in April”).

³³ See Tonia Moxley, *Zero Tolerance*, ROANOKE TIMES, Oct. 4, 2009, at A1; Bill Schackner, *If Colleges Can’t Curb Binge Drinking, It’s Not for Lack of Effort*, PITTSBURGH POST-GAZETTE, May 5, 2007, <http://www.postgazette.com/pg/07126/783812-51.stm>; Sarah Schweitzer, *UMass-Amherst Community, Police Try to Put Lid on Party Life*, BOSTON GLOBE, Oct. 17, 2006, at 1A.

³⁴ See *SCRAM Makes the Grade to Curb Underage Drinking at the University of Northern Colorado*, ALCOHOL MONITORING SERVICE, http://alcoholmonitoring.com/ams_files/case_studies/cs01_greeley.pdf (last visited May 30, 2010); see also *UNR Police Crack Down on Student Drinking*, *supra* note 32.

³⁵ See Jana Hollingsworth, *UMD Weighs Amnesty Policy for Underage Drinkers*, DULUTH NEWS TRIB., Mar. 1, 2009, https://secure.forumcomm.com/?publisher_ID=36&article_id=113665.

³⁶ *Id.*

However, perhaps most notably, more than half of U.S. colleges today have imposed rules to prohibit any alcohol advertisements from appearing in dormitories, game rooms, and student-run newspapers.³⁷ The goal of banning alcohol advertisements from public view is to reduce students' positive associations with alcoholic beverages, and thus their interest in drinking.³⁸

D. The Current Status of Beer Advertising in College Sports

Despite these broad efforts by colleges to deter student drinking, many college athletic departments nevertheless continue to authorize beer signage on their athletic facilities and during televised game broadcasts.³⁹ In addition, the NCAA continues to allow television networks to broadcast one minute of alcohol advertising per every hour of college sports broadcasts.⁴⁰

These pro-alcohol messages seem to conflict with the broader message by colleges discouraging alcohol use. They also perpetuate a double standard in the view of many students.

II. THE NCAA, ITS SOCIAL RESPONSIBILITY, AND ITS MORE RECENT COMMERCIAL MOTIVES

While many decisions about alcohol sales and advertisements are made by individual colleges, college sports' overall accepting attitude toward alcohol is driven primarily by the NCAA—an

³⁷ See Lake & Epstein, *supra* note 30, at 621; see also Erickson et al., *supra* note 9, at 150; Peter F. Lake, *Private Law Continues to Come to Campus: Rights and Responsibilities Revisited*, 31 J.C. & U.L. 621, 644 (2005) (referring to a Pennsylvania law that attempted to ban alcohol advertisements in college newspapers); Carter Strickland, *NCAA Officials Want Beer Ads Shelved for the Tournament*, ATLANTA J.-CONST., Mar. 15, 2006, at D1 (proclaiming that 72% of colleges have banned beer advertising on their campuses).

³⁸ See generally *infra* text accompanying notes 118–19.

³⁹ See Ted Lewis, *NCAA to Review Alcohol Policies*, TIMES-PICAYUNE (New Orleans, La.), Apr. 23, 2005, at 1 (noting that in 2005 approximately one-quarter of all colleges allowed alcohol sales at one or more of their sporting events).

⁴⁰ See *infra* notes 101–02 and accompanying text.

association of over 1200 college athletic departments that plays a major role in setting athletic department policy.⁴¹

A. *Founding of the NCAA*

Originally founded in 1905, the NCAA in its early years focused primarily on protecting college football players from injuries and other playing-field injustices.⁴² The Association was formed as a result of 18 football player deaths and 149 serious injuries during the 1905 college football season.⁴³

United States President Theodore Roosevelt was a driving force behind the founding of the NCAA.⁴⁴ After learning about the high number of football deaths, he summoned the presidents of Harvard, Yale, and Princeton colleges to the White House to discuss how to make college sports safer.⁴⁵ From this meeting, these college presidents, among others, decided to form a formal

⁴¹ See generally Marc Edelman, Note, *Evaluating Amateurism Standards in Men's College Basketball*, 35 U. MICH. J.L. REFORM 861, 861–62 (2002) [hereinafter Edelman, *Evaluating Amateurism Standards*] (noting that as of 2002, the NCAA was composed of 1271 member institutions and their 361,175 student athletes).

⁴² See Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 330–31 (2007) (“Commentators have explained that while the ‘original mission’ of the NCAA ‘focused on providing public goods’ by reducing violence and standardizing play, the NCAA ‘quickly turned its attention from standardizing rules to instituting the outlines of a cartel.’”); see also JOSEPH N. CROWLEY, IN THE ARENA: THE NCAA’S FIRST CENTURY 55 (NCAA 2006); Edelman, *Evaluating Amateurism Standards*, *supra* note 41, at 864 (noting that “[t]he NCAA was initially formed as a quasi-governmental body, responsible for preventing student-athletes from on-the-field injuries”); *NCAA Football History Explained*, C. SPORTS SCHOLARSHIPS, <http://www.college-sports-scholarships.com/ncaa-football-history.html> (last visited May 30, 2010); *The History of the NCAA*, NCAA, http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/ncaa/about+the+ncaa/overview/history.html (last visited May 30, 2010) [hereinafter *The History of the NCAA*].

⁴³ See WALTER BYERS, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETICS 38 (Univ. of Mich. Press 1995); see also KEITH DUNNAVANT, THE FIFTY YEAR SEDUCTION: HOW TELEVISION MANIPULATED COLLEGE FOOTBALL, FROM THE BIRTH OF THE MODERN NCAA TO THE CREATION OF THE BCS 17, 39 (Thomas Dunne Books 2004) (noting that at that time, the sport of football was still fairly new and developing, as the first-ever collegiate football game had been played in 1869).

⁴⁴ See *infra* note 47 and accompanying text.

⁴⁵ See JAMES J. DUDERSTADT, INTERCOLLEGIATE ATHLETICS AND THE AMERICAN UNIVERSITY: A UNIVERSITY PRESIDENT’S PERSPECTIVE 70–71 (Univ. of Mich. Press 2003); see also *The History of the NCAA*, *supra* note 42.

association to maintain “an ethical plane in keeping with the dignity and high moral purpose of education.”⁴⁶

B. The NCAA as an Ethical Body

In the NCAA’s early years, the Association’s leaders resolved many of President Roosevelt’s safety concerns.⁴⁷ First, NCAA board members banned college football’s most dangerous offensive plays such as the Flying Wedge (players grabbed each others’ legs and ran forward while attached) and the Hurdle Play (players lifted the running back and threw both him and the ball over the offensive line).⁴⁸ Then, in 1916, the NCAA instituted a formal code of safety and ethics that extended beyond just football and to all collegiate sports.⁴⁹

C. The NCAA Expands into Hosting Sporting Events

In the years that followed the NCAA’s original safety review, the Association’s leaders began to search for a new mission. Some NCAA members suggested hosting college championship events and setting rules to regulate eligibility for these events.⁵⁰

⁴⁶ ARTHUR A. FLEISHER III ET AL., *THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION: A STUDY IN CARTEL BEHAVIOR* 41 (Univ. of Chi. Press 1992); *see also* BYERS, *supra* note 43, at 39.

⁴⁷ *See* BYERS, *supra* note 43, at 40 (“Thanks to Teddy Roosevelt and the fledgling NCAA, death among football players became rare, and academic cheating and pay-for-play were kept sufficiently under control for the games to go on.”).

⁴⁸ *See* CROWLEY, *supra* note 42, at 36–37.

⁴⁹ *See id.* at 55, 61 (noting that while the safety rules were mandatory, the ethical rules were less so, as the NCAA members initially adopted the principle of “Home Rule,” which meant that each NCAA member institution decided how strictly to enforce the NCAA’s non-safety-related principles); *see also* FLEISHER III ET AL., *supra* note 46, at 44 (noting that this code was then supplemented in 1920 by a more broad set of rules, including those that made students ineligible for collegiate sports if they played for other athletic organizations without permission).

⁵⁰ *See* CROWLEY, *supra* note 42, at 64; *College Track and Field History*, ATHLETIC SCHOLARSHIPS, <http://www.athleticscholarships.net/ncaa-track-and-field-recruiting.htm> (last visited May 30, 2010); *The National Collegiate Championship Series: A Brief Chronological History*, NCAA, http://web1.ncaa.org/web_files/stats/spring_champs_records/2001/nc_champ_series.pdf (last visited May 30, 2010) [hereinafter *Championship Series: A Brief History*] (noting that this event took place at the University of Chicago); *see also* *The History of the NCAA*, *supra* note 42.

The first NCAA championship event was held in 1921 in the sport of men's track and field.⁵¹ The event, which was hosted at the University of Chicago, featured sixty-two college teams and showcased four athletes from the previous year's Olympic Games.⁵² One of the event's most highlighted contestants was former Canadian gold-medal hurdler Earl Thompson, who at the time was studying at Dartmouth College.⁵³

With many sports fans enthralled by the NCAA's 1921 track and field event, the Association soon began to host championships in other sports.⁵⁴ In 1924, the NCAA held its first National Swimming Championships at the U.S. Naval Academy.⁵⁵ Then, in 1928, the NCAA launched a National Wrestling Championship at Iowa State University.⁵⁶ Meanwhile, in 1949, the NCAA organized its first annual men's college basketball tournament—an event that has since proven to be the most popular and profitable of all NCAA championships.⁵⁷

D. A Commercially Motivated NCAA Emerges Under Walter Byers

As the NCAA began hosting more championship events, its role in the world of college athletics began to change. Along with the new championship events came more paperwork, more responsibility, and a desire for more direct involvement in the games themselves. Thus, in 1951, the NCAA's member schools voted to expand the NCAA headquarters from a backroom of the Big Ten Conference's offices into its own office space.⁵⁸ The

⁵¹ *Championship Series: A Brief History*, *supra* note 50; *see also* CROWLEY, *supra* note 42, at 44.

⁵² *See* CROWLEY, *supra* note 42, at 44, 64; *see also* Jack Copeland, *First NCAA Championship Event Set Standard for the 87 that Followed*, NCAA NEWS (July 17, 2006), http://web1.ncaa.org/web_files/NCAANewsArchive/2006/Association-wide/focus%2B-%2Bdefining%2Bmoments%2B-%2Btracking%2Bchampionships%2B-%2B7-17-06%2Bncaa%2Bnews.html.

⁵³ *See* Copeland, *supra* note 52.

⁵⁴ *See infra* text accompanying notes 55–57.

⁵⁵ *See* CROWLEY, *supra* note 42, at 44 (noting that this event was held on April 11–12).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *See* BYERS, *supra* note 43, at 90; *see also* DUNNAVANT, *supra* note 43, at 20.

NCAA member schools also decided to elect their first executive director.⁵⁹

For the position of executive director, the NCAA's voting members selected Walter Byers—a former assistant with the Big Ten college football conference.⁶⁰ To an NCAA outsider, Byers was, at the time, a complete unknown.⁶¹ However, within just a few years, Byers emerged as the man most responsible for reshaping college sports.

During his early days in office, Byers showed a great sense of enthusiasm for regulating individual sporting events, placing this aspect of his job above all others.⁶² However, as Byers came to understand the NCAA's financial limits, he began to shift his attention to a different goal: attracting new revenue streams to the NCAA through commercial pursuits.⁶³

It was not long after taking office that Byers began to act on these commercial aspirations.⁶⁴ Within months of his initial appointment, Byers signed a contract with the National Broadcast Company (“NBC”) that paid the NCAA \$1.14 million for television rights to college football's “Game of the Week.”⁶⁵

Two years later, Byers then invited more television stations to bid for rights to college football's “Game of the Week.”⁶⁶ In this second bidding cycle, American Broadcasting Corporation

⁵⁹ See BYERS, *supra* note 43, at 5; see also DUNNAVANT, *supra* note 43, at 21.

⁶⁰ See BYERS, *supra* note 43, at 5; see also DUNNAVANT, *supra* note 43, at 20.

⁶¹ See generally DUNNAVANT, *supra* note 43, at 21.

⁶² See CROWLEY, *supra* note 42, at 103 (noting that at the beginning, Byers “passionately believed NCAA rules could preserve the amateur collegiate spirit [he] so much loved”).

⁶³ See generally DUNNAVANT, *supra* note 43, at 73.

⁶⁴ See *infra* note 65 and accompanying text.

⁶⁵ See BYERS, *supra* note 43, at 79; CROWLEY, *supra* note 42, at 86; see also DUNNAVANT, *supra* note 43, at 9–15, 30 (noting that at the time, only a few colleges, such as the University of Pennsylvania, Notre Dame University, and Georgia Tech, had been selling their game broadcasts to television stations); *id.* at 30 (also noting that at the time NBC's only sponsor of its telecast was U.S. automobile manufacturer General Motors).

⁶⁶ DUNNAVANT, *supra* note 43, at 48.

(“ABC”) outbid NBC for rights by bidding more than double what NBC had paid just two years earlier.⁶⁷

During the late 1950s and into the 1960s, NCAA broadcast revenues continued to rise dramatically.⁶⁸ By 1966, the NCAA had increased its total national broadcast rights package revenues to around \$31 million per year.⁶⁹ Then, by the 1970s, this amount had reached nearly \$40 million per year, with ABC launching a new television deal to showcase college football games at night.⁷⁰ As ABC’s relationship with the NCAA grew stronger, Byers agreed to allow ABC the right to experiment with broadcasting beer commercials for one minute-per-hour during each college football game.⁷¹

By the time Byers retired from the NCAA in 1987, the NCAA had come to yield over \$110 million in annual revenues from national television broadcasts, with \$74.2 million in annual revenue coming from college football broadcasts and another \$36 million per year coming from college basketball broadcasts.⁷²

Alcohol advertising had also become an especially important revenue stream, as in Byers’s later years, the NCAA expanded the time devoted to beer advertisements in all NCAA television contracts from sixty to ninety seconds-per-hour.⁷³

E. Dick Schultz Tries to Scale Back College Alcohol Advertising

When Byers retired from the NCAA in 1987, the Association’s executive directors intended to hire a successor who would

⁶⁷ *Id.* (indicating that Byers also convinced ABC to purchase the broadcast rights to other NCAA sports programming, including collegiate baseball and basketball games).

⁶⁸ *See id.*

⁶⁹ *See* CROWLEY, *supra* note 42, at 87; *see also* DUNNAVANT, *supra* note 43, at 84 (describing a four-year, \$32.2 million broadcast contract between ABC and the NCAA).

⁷⁰ *See* DUNNAVANT, *supra* note 43, at 87–88.

⁷¹ *See id.*

⁷² *See* BYERS, *supra* note 43, at 92; *see also* CROWLEY, *supra* note 42, at 101.

⁷³ *See* Steve Nidetz, *\$1 Billion for NCAA Tourney Rights*, CHL. TRIB., Nov. 22, 1989, at 9. *See generally* Joseph White, *NCAA Going Ahead with Coaches’ Academic Progress Scorecard*, DESERET NEWS, Jan. 17, 2009, at D2 (showing the value today of beer advertising to television broadcaster of college sporting events).

continue to promote commercial growth.⁷⁴ After considering numerous candidates, the executive directors settled upon Richard (“Dick”) Schultz—a former athletic director at the University of Virginia.⁷⁵ Schultz had a longstanding business relationship with the NCAA.⁷⁶ However, one area in which he disagreed with Byers was on the Association’s alcohol policy.

Unlike Byers, Schultz was somewhat apprehensive about the relationship between college sports and beer manufacturers.⁷⁷ This concern was first brought to the public’s attention in October 1988, when, in an interview with *Sports Inc.* magazine, Schultz suggested eliminating beer advertisements entirely from the NCAA Men’s Basketball Tournament—an idea that most of Byers’s disciples protested.⁷⁸

Schultz’s apprehension about beer advertisements likely came from many sources, including his longstanding personal beliefs,⁷⁹ and pressure from U.S. Surgeon General C. Everett Koop.⁸⁰ He also thought that maintaining NCAA beer advertisements would make the NCAA susceptible to a Congressional investigation.

Yet, despite Schultz’s best efforts to end the NCAA’s relationship with beer manufacturers, the NCAA’s fourteen-member executive committee repeatedly voted to overrule Schultz

⁷⁴ See David Pickle, *Deliberation the Common Threat for Previous NCAA Transitions*, NCAA NEWS (Sept. 21, 2009), http://www.ncaa.org/wps/ncaa?key=/ncaa/ncaa/ncaa+news/ncaa+news+online/2009/associationwide/deliberation+the+common+thread+for+previous+ncaa+transitions_09_21_09_ncaa_news.

⁷⁵ See Andrew Logue, *Schultz Changed Image of the NCAA*, DES MOINES REG., Aug. 10, 2003, at 1C, available at <http://www.desmoinesregister.com/apps/pbcs.dll/article?AID=/20030810/SPORTS11/50710002>; see also CROWLEY, *supra* note 42, at 123.

⁷⁶ See Logue, *supra* note 75; see also CROWLEY, *supra* note 42, at 123–25.

⁷⁷ Emily Badger, *Dry Run: A Group Wants Beer Ads Off College Game Telecasts*, ORLANDO SENTINEL, Sept. 27, 2004, at C1.

⁷⁸ *Id.*

⁷⁹ See *Schultz to Schools: ‘Drink Up’ Not Right Message*, RICHMOND TIMES-DISPATCH, Feb. 22, 1989, at C1 (discussing Schultz’s preference toward banning all alcohol advertisements in college sports); see also Norman Chad, *Mixing Athletes, Beer Makes Schultz Froth*, TIMES-PICAYUNE (New Orleans, La.), Feb. 5, 1989, at C3.

⁸⁰ See Chad, *supra* note 79; see also James Cox, *Koop’s New Target, Alcohol: Will He Try to Ban TV Commercials? Industry Could Face Big Changes*, USA TODAY, May 31, 1989, at B1; *Koop: Restrict Alcohol Advertising*, NEWSDAY (N.Y.), June 1, 1989, at 6.

on this issue.⁸¹ The lone concession that the NCAA executive committee made to Schultz was the promise to reduce the amount of time devoted to beer advertisements from ninety to sixty seconds-per-hour—a change that has proven more meaningful in form than substance.⁸²

F. Cedric Dempsey Takes a More Hands-Off Approach to Alcohol Ads

Once Schultz decided to leave the NCAA in favor of the U.S. Olympic Committee, the NCAA's executive committee next named Cedric Dempsey as the Association's leader.⁸³ Dempsey had previously served as the Athletic Director at the University of Arizona⁸⁴ and as the former Secretary-Treasurer of the NCAA.⁸⁵ Whereas Schultz had always maintained strong reservations about the NCAA's position on alcohol advertising, Dempsey was a much closer adherent to Byers's practices on simple revenue maximization.⁸⁶

Under Dempsey's leadership, the number of colleges that sold beer at their home football stadiums increased, as well as the number of schools that allowed beer commercials during their local game broadcasts.⁸⁷ Dempsey also negotiated two college basketball television deals with CBS, each of which yielded billion

⁸¹ See Badger, *supra* note 77; see also Steinbrenner Overrules Green and Guidry Returns, PHILA. INQUIRER, Feb. 4, 1989, at D6; Barry Witt, *Ban Proposed on Coliseum Beer, Drinking Ads*, SAN JOSE MERCURY NEWS, Dec. 4, 1991, at 1B.

⁸² See Badger, *supra* note 77; see also Tom Farrey, *Questioning Link Between Beer, Sports*, SEATTLE TIMES, Mar. 10, 1994, at C1; Jeff Gordon, *Over a Barrel: Sports, Breweries Respond to Forces of Change*, ST. LOUIS POST-DISPATCH, June 11, 1991, at 1C ("In 1988, NCAA executive director Dick Schultz had discussed eliminating beer ads from the NCAA basketball tournament. The old contract, which ended in 1989, limited beer companies to 90 seconds an hour during the tournament."); Matthew Littwin, *NCAA's Schultz Looks to the Future*, BALTIMORE SUN, Dec. 31, 1989, at C6.

⁸³ See CROWLEY, *supra* note 42, at 136.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 137–38.

⁸⁷ See Jerry Wizig, *Baylor-Tulsa Summary*, HOUSTON CHRON., Sept. 3, 1995, at 10 (noting that Tulsa University became the ninth NCAA Division I-A school to include beer at a university-owned stadium, with Syracuse, Cincinnati, Fresno State, Nevada, UNLV, Colorado, Colorado State, and San Jose State at the time being the others).

dollar revenue streams and allowed for sixty seconds-per-hour of alcohol advertisements.⁸⁸

Unlike Schultz, Dempsey appeared outwardly indifferent toward the White House's preference to remove beer advertisements from college sports.⁸⁹ At one point, U.S. Secretary of Health and Human Services, Donna Shalala, specifically requested that the NCAA "get behind a no-drinking resolution."⁹⁰ On behalf of the NCAA, Dempsey refused.⁹¹

Dempsey has since attempted to explain his reluctance to follow Schultz's efforts to end beer advertisements by pointing to his belief that it would have been "a hard time getting institutions to go along."⁹² Yet, according to the official NCAA spokesperson at the time, Wallace Runfro, Dempsey and the NCAA executive directors shared the view that "[a]lcohol is a legal product [and while the NCAA is] against the abuse of the product . . . that is not the same thing as [being] against alcohol."⁹³

G. NCAA Alcohol Policy Continues to Stagnate Under Miles Brand

By the time Cedric Dempsey announced his retirement from the NCAA in 2002, a growing number of college presidents had begun to call for institutional reform on a wide range of issues, including the Association's alcohol policy.⁹⁴

To satisfy pressure for reform, the NCAA executive directors on January 1, 2003 elected one of their own as its fourth leader, Myles Brand: a former Professor of Philosophy and President of

⁸⁸ See MURRAY SPERBER, *BEER AND CIRCUS: HOW BIG-TIME COLLEGE SPORTS HAS CRIPPLED UNDERGRADUATE EDUCATION* 37 (Holt Paperbacks 2000).

⁸⁹ See DUDERSTADT, *supra* note 45, at 75.

⁹⁰ Susan Yerkes, *NCAA Brew Ban: Madness Sober but Wiser*, SAN ANTONIO EXPRESS, Mar. 25, 1998, at 1G.

⁹¹ See *infra* text accompanying notes 92–93.

⁹² Bob Baptist, *Newspapers to Feel Anti-Gambling Push*, COLUMBUS DISPATCH, Jan. 12, 1997, at 10E.

⁹³ See Howard Manley, *Bad Call: Tradition Sells Out*, BOSTON GLOBE, June 28, 1998, at D7.

⁹⁴ See CROWLEY, *supra* note 47, at 138, 226.

Indiana University.⁹⁵ At Indiana University, Brand had exhibited a strong track record of enforcing the University's mission.⁹⁶ He had not only banned alcohol on the University of Indiana campus,⁹⁷ but he also had fired the school's long-time basketball coach Bob Knight for engaging in behavior detrimental to higher education.⁹⁸

In his inaugural speech, Brand acknowledged that the NCAA's "commercial interests overwhelm the game" and promised that change was on the horizon.⁹⁹ This speech provided hope to many that the relationship between beer and college sports was about to change.

However, despite Brand's strong initial words, he ultimately led the NCAA through six years of moral stagnation.¹⁰⁰ Although the NCAA reviewed its alcohol policy twice during Brand's tenure, the NCAA never reformed the policy.¹⁰¹ Upon Brand's first review in 2005, he decided to continue allowing one minute-per-hour of beer advertising during each national college broadcast, and chose not to interfere with individual school's practices about alcohol sales and advertisements.¹⁰² According to Brand, he believed that banning alcohol advertisements did not make sense because it was not "going to change the behavior of adolescents."¹⁰³

⁹⁵ See *id.* (noting that his philosophy of increased enforcement was analogous to that of Dempsey).

⁹⁶ See generally Mark Alesia, *Organization Won't Agree to Ban on Alcohol Ads During TV Games*, INDIANAPOLIS STAR, Jan. 11, 2004, at 1C.

⁹⁷ Lewis, *supra* note 40.

⁹⁸ Terry Hutchens, *Taking a Stand, Withstanding the Fallout*, INDIANAPOLIS STAR, Sept. 17, 2009, at A8.

⁹⁹ Christian Dennie, *Amateurism Stifles a Student-Athlete's Dream*, 12 SPORTS LAW. J. 221, 225 (2005) (quoting Myles Brand, NCAA President, State of Association Speech at the National Collegiate Athletic Association Annual Convention (Jan. 2003)).

¹⁰⁰ See generally *infra* notes 101–03 and accompanying text.

¹⁰¹ Grady, *supra* note 4; see also Robinson, *supra* note 4; Ira Teinowitz, *NCAA Keeps Beer Ads*, ADVERTISING AGE, Aug. 11, 2008, at 2; Alice Thomas, *OSU to Ban Alcohol Ads on Radio Broadcasts*, COLUMBUS DISPATCH, Nov. 21, 2003, at 1A [hereinafter Thomas, *OSU to Ban Alcohol Ads*] (noting that Ohio State University was among the first schools to ban alcohol advertisements on its local broadcasts after an alcohol-related riot plagued the campus in 2002).

¹⁰² Lewis, *supra* note 40.

¹⁰³ *Id.*

Then, in 2008, the NCAA again voted in favor of keeping the status quo on alcohol advertisements, even though more than one hundred university presidents had come to call for change.¹⁰⁴ In the face of this growing criticism from university presidents, NCAA Spokesman Bob Williams explained that “[a]s for the prospects of a full alcohol ban . . . ‘the decision is to keep the policy the way it is.’”¹⁰⁵ The Chairman of the NCAA’s Executive Committee, Michael Adams, further explained his belief that the NCAA is already taking a “very sensible, very rational . . . approach.”¹⁰⁶

III. WHY A RELATIONSHIP BETWEEN COLLEGE ATHLETICS AND BEER COMPANIES MAY BE ESPECIALLY INAPPROPRIATE TODAY

Whether the NCAA’s approach to alcohol sales and advertisements is actually “sensible” in light of today’s educational values is subject to debate.¹⁰⁷ In recent years, even Walter Byers has come to lament that “the NCAA, [while] effective in eliminating the carnage on the playing field [has been] unable to rein in the . . . colossus [of commercialism].”¹⁰⁸

Although Byers was responsible for the NCAA’s original decision to allow beer advertisements, he did so in a very different era, when student drinking was perceived as more acceptable.¹⁰⁹ During that era, colleges generally lacked qualms about tavern advertisements appearing in student-run newspapers, and it would be rare, if ever, that a college administrator would invite the police onto campus to arrest students for drinking alcohol. Many colleges even sold beer in their student unions.¹¹⁰

Today, however, societal norms have changed.¹¹¹ In 1984, Congress persuaded all states to raise the minimum drinking age to twenty-one by threatening to take away 10% of their federal

¹⁰⁴ See Robinson, *supra* note 4.

¹⁰⁵ White, *supra* note 73.

¹⁰⁶ Robinson, *supra* note 4.

¹⁰⁷ See generally *id.*

¹⁰⁸ See BYERS, *supra* note 43, at 97.

¹⁰⁹ See, e.g., *infra* text accompanying note 110.

¹¹⁰ See BYERS, *supra* note 43, at 139.

¹¹¹ See *infra* notes 112–13 and accompanying text.

highway funding if they did not do so.¹¹² As of this Article's publication, every U.S. state has complied in changing its drinking age.¹¹³

In addition, the U.S. medical community has recently taken a much stronger position against binge and underage drinking.¹¹⁴ In 2002, the American Medical Association (the "AMA") publicly called for an end to beer advertisements during college sporting events, citing "[t]he prevalence of alcohol advertising in college sports [as sending] a damaging message about the core values of the NCAA and higher education."¹¹⁵ The National Center on Addiction and Substance Abuse has also crafted numerous letters in opposition to college alcohol sales and advertisements.¹¹⁶ Meanwhile, most vocal in today's movement against college beer advertisements is the Center for Science in the Public Interest (the "CSPI"), which describes today's policy as "a cavalier, devil-may-care attitude about exposing kids to beer ads."¹¹⁷

As a result of these societal changes, the public at large seems to now strongly oppose the intertwining of college sports with alcohol. For example, a recent poll indicates that over 70% of Americans believe that showing alcohol commercials during televised sporting events is inconsistent with the positive role sports should play in children's lives.¹¹⁸ Further, 96% of Americans believe that airing beer commercials during college

¹¹² See Garcia, *supra* note 9 (noting that in 1971 many states dropped the drinking age to eighteen; however, in 1984, the federal government forced states to restore the twenty-one-year-old minimum or lose a portion of their federal highway money); Jerome Wright, *Is 18 Old Enough to Drink? National Debate Growing over Reducing the Legal Age for Alcohol*, MEMPHIS COM. APPEAL, May 31, 2009, at V1.

¹¹³ See McMullen, *supra* note 14, at 340.

¹¹⁴ See Teinowitz, *supra* note 101; Tad Walch, *Utah College Chiefs Want Liquor-Free Sports TV*, DESERET MORNING NEWS, Aug. 8, 2008, at A1; see also Jeff Darlington, *Alcohol Ads on NCAA's Agenda; AMA Supports Ban; Decision Will Wait*, CHI. TRIB., Apr. 28, 2005, at S12; Emily Krone, *College Presidents: Athletes, Alcohol Just Don't Mix*, DAILY HERALD (Chi., Ill.), Apr. 13, 2008, at 1.

¹¹⁵ See Jennifer Silverman, *AMA: Ban Booze Ads at NCAA Events*, FAM. PRAC. NEWS, June 15, 2005, at 64; see also Krone, *supra* note 114.

¹¹⁶ See Califano *Urges*, *supra* note 16.

¹¹⁷ Kimberly Miller, *Colleges Slam Beer Ad Binge*, PALM BEACH POST, Apr. 11, 2008, at 1A.

¹¹⁸ See H.R. Res. 145, 109th Cong. (2005); H.R. Res. 575, 108th Cong. (2004).

sporting events is inconsistent with the mission of colleges and universities.¹¹⁹

IV. THREE POTENTIAL WAYS TO FIX THE ALCOHOL DOUBLE STANDARD

There are three potential ways to fix the inconsistency in colleges' message about alcohol use: (1) challenging individual colleges, the NCAA, or Congress to ban alcohol sales and advertisements at college sporting events; (2) introducing federal legislation to lower the drinking age from twenty-one to eighteen, thus reducing colleges' more general interest in deterring binge and underage drinking; and (3) encouraging major colleges to divest of their athletic programs to outside parties, thus separating the conduct and values of amateur athletic programs from those of mainstream higher education.

A. *Banning Alcohol Sales and Advertisements in College Sports*

The first potential approach to reconcile colleges' double standard about alcohol involves banning alcohol sales and advertisements from collegiate sports. Achieving this goal can occur by targeting individual colleges, the NCAA, or Congress.

1. Changing Alcohol Policy at the Individual College Level

The movement to change alcohol policy on the individual college level emerges from three premises: that alcohol advertising is more important to certain colleges than others; that colleges have different codes of ethics about alcohol; and that once a few prominent colleges ban alcohol sales and advertisements, others will follow.

Thus far, efforts to convince individual colleges to ban alcohol sales and advertisements have yielded some positive results.¹²⁰ For

¹¹⁹ See H.R. Res. 145, 109th Cong. (2005) (noting that according to the same survey "71 percent of adults support a ban on all alcohol advertisements on televised college games, and strong majorities of both parents (77 percent) and adults (73 percent) say it is wrong for colleges and universities to take money from beer companies that promote student drinking while discouraging underage and binge drinking among their students"); H.R. Res. 575, 108th Cong. (2004).

example, at the University of Southern California, college officials agreed in 2005 to end beer sales at home football games.¹²¹ At the University of Miami (Florida), college administrators have ended their sports sponsorships with Coors Brewing (beer) and Bacardi (rum and wine coolers).¹²² Meanwhile, at Ohio State University, college administrators have agreed to end all alcohol sponsorships, as well as to refuse any television contracts that allow for beer advertisements.¹²³

The change in culture at Ohio State University has been the most dramatic—perhaps because it occurred through the greatest external pressure. Beginning in the late 1980s and continuing through the 1990s and into the early 2000s, Ohio State University had developed a reputation of ignoring the high rate of alcohol abuse both among its football players and overall student body.¹²⁴ On November 21, 2003, the *Columbus Dispatch* published a hard-hitting editorial that blamed Ohio State University's administrators for turning a blind eye to students' longstanding drinking problems.¹²⁵ A post-football game riot just two weeks later, which included "burning cars and [students] pelting firefighters with beer

¹²⁰ See *infra* notes 121–23 and accompanying text; see also Steve Wieberg, *Colleges Are Reaching Their Limits on Alcohol*, USA TODAY, Nov. 17, 2005, at 1A (noting that Kentucky University has terminated alcohol advertising on their local game broadcasts).

¹²¹ See Wieberg, *supra* note 120.

¹²² See *id.*

¹²³ See *infra* note 129 and accompanying text.

¹²⁴ See *id.*; see, e.g., *Alcohol Counseling for Katzenmoyer*, AKRON BEACON J., Feb. 28, 1998, at D3 (discussing another drunk driving arrest of a star player on the Ohio State football team); Tony Barnhart, *Colleges: Alcohol a Significant Factor in Fan Violence*, ATLANTA J.-CONST., Feb. 21, 2003, at C5 ("Nine Ohio State students were arrested for their part in a violent celebration off campus after the Buckeyes' football victory over Michigan on Nov. 23."); *Geiger, Cooper Stick with Finkes*, COLUMBUS DISPATCH, May 19, 1996, at 2E (discussing the arrest of two Ohio State college football players for purportedly engaging in a drunken fight); George Hostettler, *Advice from Another Beleaguered Coach: It Will Be Alright*, FRESNO BEE, Aug. 21, 1994, at A22 (noting the arrest of numerous Ohio State football players for alcohol-related conduct, including drunk driving); Tim May, *Cooper Suspends Malfatt*, COLUMBUS DISPATCH, July 28, 1994, at 1D (noting that the Ohio State backup kicker was suspended from the team after stealing \$445 worth of beer from a local convenience store); *Ohio State Suspends Bellisari*, S. FLA. SUN-SENTINEL, Nov. 17, 2001, at 6C (noting the suspension of Ohio State's quarterback after a drunk driving arrest); Thomas, *OSU to Ban Alcohol Ads*, *supra* note 101.

¹²⁵ Thomas, *OSU to Ban Alcohol Ads*, *supra* note 101.

bottles,” brought further negative publicity to the school.¹²⁶ In the face of this growing criticism, Ohio State University finally agreed to conduct an internal audit.¹²⁷

Although Ohio State University never published the results of this audit, Athletic Director Andy Geiger conceded months later at an NCAA meeting that “it might be hypocritical for college athletics to decry the negative impact of alcohol while accepting millions in advertising revenues from beer companies.”¹²⁸ Since then, Ohio State University has banned all alcohol advertisements at its college sporting events and has refused to sign any individual or conference-wide television contract involving beer ads.¹²⁹ In doing so, Ohio State University has proven that a change in athletic culture is possible.

Nevertheless, even at schools where cultural change has been possible, targeting individual colleges is an imperfect approach. First, there is no guarantee that every college will follow the ethical leader.

In addition, as long as colleges such as Ohio State University choose to remain part of the NCAA, their players will continue to appear in NCAA-sanctioned championship tournaments alongside beer ads. Due to the dominance the NCAA has over the college sports market, it is not feasible for any college—not even one with as heralded a sports tradition as Ohio State University—to withdraw from the NCAA just to maintain a consistent position about alcohol.¹³⁰

¹²⁶ It was an event that led Ohio State University President, Karen Holbrook, years later to remark that at Ohio State “[w]hen you win a game, you riot[, and w]hen you lose a game, you riot.” *Ex-Ohio State President Complains About School’s Culture of Rioting, Then Softens Remarks*, USA TODAY, Aug. 30, 2007, http://www.usatoday.com/sports/2007-08-30-96037153_x.htm.

¹²⁷ See *infra* notes 128–29 and accompanying text.

¹²⁸ Barnhart, *supra* note 124.

¹²⁹ See Bob Condor, *Winning Idea: Drop Beer Ads in College Sports*, CHI. TRIB., Nov. 23, 2003, at Q9. See generally Wieberg, *supra* note 120 (noting the change in Ohio State University’s policy on alcohol commercials during television broadcasts).

¹³⁰ See Lazaroff, *supra* note 42, at 329 (noting the NCAA “dominates contemporary regulation of intercollegiate sports, making it virtually impossible for colleges and universities to engage in high quality interscholastic competition without complying with [its policies]”).

2. Changing Alcohol Policy at the NCAA Level

Given the limits to changing alcohol policy at the individual college level, a slightly different approach would be to target changing alcohol policy at the NCAA level. This could occur by pressuring the NCAA to take two important steps: (1) declaring any college that sells and advertises alcohol at its sporting events ineligible for post-season play; and (2) agreeing to terminate all alcohol advertisements during the broadcast of NCAA championship events.

The benefit of targeting change in alcohol policy at the NCAA level is that it would lead to a uniform policy throughout higher education. In addition, it might be less expensive for those advocating change to target the NCAA in its entirety rather than each individual college.

Nevertheless, there are two difficulties with attempting to eradicate college alcohol sales and advertisements at the NCAA level.¹³¹ First, the NCAA executive board has long been hostile toward efforts to end beer sales and advertising.¹³² Indeed, a majority of colleges still wish to pocket the proceeds they currently derive from beer sponsorships.¹³³

In addition, even if the NCAA were to pass a bylaw banning beer sales and advertisements at all college sporting events (even non-championship events), the bylaw would be ripe for challenge under section 1 of the Sherman Act,¹³⁴ because the bylaw would represent a potentially illegal agreement among NCAA member schools to restrain trade in the market for college sports advertising.¹³⁵ Any lawsuit of this kind would have a reasonable

¹³¹ See *infra* notes 132–37 and accompanying text.

¹³² See Robert King, *TV Beer Ads Leave Sour Taste*, INDIANAPOLIS STAR, Oct. 26, 2008, at A13 (noting that recently 60 Division I college presidents, 240 athletic directors, and 101 football and basketball coaches signed a letter encouraging the NCAA to forgo beer advertisements during sporting broadcasts).

¹³³ See Keith Morelli, *USF Doesn't Join Push to Get Beer Ads Off Televised Games*, TAMPA TRIB., Aug. 7, 2008, <http://www2.tbo.com/content/2008/aug/07/usf-doesnt-join-push-get-beer-ads-televised-games>.

¹³⁴ See 15 U.S.C. § 1 (2006) (“Every contract, combination . . . or conspiracy, in the restraint of trade or commerce . . . is declared to be illegal.”).

¹³⁵ Marc Edelman & Brian Doyle, *Antitrust and ‘Free Movement’ Risks of Expanding Professional Sports Leagues into Europe*, 29 NW. J. INT’L L. & BUS. 403, 412–13 (2009)

chance of prevailing because the Supreme Court has already ruled that the NCAA's bylaws represent a form of horizontal agreement among member schools,¹³⁶ and antitrust defenses based on public policy and safety do not override economic realities in a proper § 1 analysis.¹³⁷

3. Changing Alcohol Policy at the Congressional Level

A third strategy to end beer sales and advertisements in college sports would involve passing a statute based on Congress's power to regulate interstate commerce. The advantage to pursuing change by statute, rather than through the NCAA or individual colleges, is twofold. First, unlike targeting individual colleges, a statute would apply universally to all NCAA member schools. Second, unlike targeting the NCAA directly, those colleges that prefer to continue profiting from beer sales and advertisements would not have a vote on the issue.¹³⁸

(noting this section of antitrust law governs agreements to fix prices, fix wages, allocate markets, and refuse to deal with third parties). *See generally* Marc Edelman & C. Keith Harrison, *Analyzing the WNBA's Mandatory Age/Education Policy from a Legal, Cultural, and Ethical Perspective: Women, Men, and the Professional Sports Landscape*, 3 Nw. J.L. & Soc. POL'Y 1, 12–13 (2008) (discussing the elements of section 1 of the Sherman Act).

¹³⁶ *See* Nat'l Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 99–100 (1984).

¹³⁷ *See* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 696 (1978) (stating that safety concerns are not pro-competitive benefits); *id.* at 688 (“Contrary to its name, the Rule [of Reason] does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint’s impact on competitive conditions.”); *see also* FTC v. Ind. Fed’n of Dentists, 476 U.S. 447, 462–63 (1986) (stating that public policy matters are not in themselves pro-competitive benefits under antitrust law). *See generally* Marc Edelman, *Are Commissioner Suspensions Really Any Different from Illegal Group Boycotts? Analyzing Whether the NFL Personal Conduct Policy Illegally Restrains Trade*, 58 CATH. U. L. REV. 631, 646 (2009) [hereinafter Edelman, *Are Commissioner Suspensions Really Any Different*] (“Although courts until the late 1970s had considered this prong of the Rule of Reason to allow intermingling social policy with economic analysis, the Supreme Court explained in the seminal case *National Society of Professional Engineers v. United States* that pro-competitive effects relate only to an agreement’s economic effects, and not to social ones.”).

¹³⁸ *See* Morelli, *supra* note 133 (noting University of South Florida’s refusal to support a measure ending beer advertisements).

Yet, there are also challenges with the statutory approach. The primary challenge with attempting to end alcohol sales and advertising by statute is that Congress has historically voted against attempts to restrict alcohol advertisements in college sports, perhaps due to the financial power of the beer industry.¹³⁹

The second challenge is that although the regulation of college sports broadcasts clearly falls within the scope of Congress's interstate commerce power,¹⁴⁰ beer companies may contend that regulating the sale of locally-brewed beer at individual sporting events is not within Congress's power based on two Supreme Court rulings that attempt to reign in the interstate commerce clause: *United States v. Lopez*¹⁴¹ and *United States v. Morrison*.¹⁴² Any legal challenge to the statutory regulation of college alcohol sales, however, is very likely surmountable, given that the Supreme Court most recently held in *Gonzales v. Raich*¹⁴³ that

¹³⁹ For example, most recently in 2005, former University of Nebraska football coach turned Representative Tom Osborne led a bipartisan effort to both fund alcohol education programs in college and ban beer ads from television. See Dave Johnson, *Is End of Beer Ads for College Games on Tap?*, DAILY PRESS (Newport News, Va.), May 15, 2005, at C1. While both the House and the Senate passed the funding aspect of the bill, the Senate ultimately struck all language from the bill that would have ended college beer advertisements perhaps due to strong pressure from Anheuser-Busch and the beer lobby. See *Anheuser Busch Targets Drinking Bill, Lobbies Bill to Combat Underage Drinking*, BELLEVIEW NEWS-DEMOCRAT, Oct. 8, 2005, at B5.

¹⁴⁰ U.S. CONST. art. I, § 8, cl. 18 (proclaiming that Congress shall have the power "[t]o make all laws which shall be necessary and proper"); U.S. CONST. art. I, § 8, cl. 3 (providing that Congress shall have the power "[t]o regulate Commerce . . . among the several States").

¹⁴¹ See 514 U.S. 549, 552 (1995) (holding that the Gun-Free School Zones Act of 1990 lies outside of Congress's power to regulate interstate commerce because it did not regulate any economic activity and did not contain any requirement that the possession of a gun have any connection to past interstate activity or a predictable impact on future commercial activity).

¹⁴² See 529 U.S. 598, 602 (2000) (holding that Congress could not use its interstate commerce power to implement the Violence Against Women Act because despite Congressional claims to the contrary, violent crimes against women did not actually affect interstate commerce). Prior to the Supreme Court's rulings in *Lopez* and *Morrison*, the Court had long interpreted the Interstate Commerce Clause broadly, making any action with even a tangential link to interstate commerce seem to fall within its limits. See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 133 (1942) (finding interstate commerce even where the relevant act's effect on such commerce is remote). See generally Edelman, *Are Commissioner Suspensions Really Any Different*, *supra* note 137, at 642.

¹⁴³ 545 U.S. 1 (2005).

Congress may regulate the intrastate distribution and sale of medical marijuana because doing so involves a “class of activities” that has a “predictable impact on future commercial activity.”¹⁴⁴ Like the sale of medical marijuana, the sale of alcohol involves the specific act of purchasing and could have a cumulative effect extending beyond state lines.

B. Introducing Legislation to Lower the Legal Drinking Age from Twenty-One to Eighteen

An entirely different approach to resolving colleges’ alcohol conflict would involve reducing the legal drinking age from twenty-one to eighteen, and allowing colleges across the board to take a more hands-off approach to student alcohol use.¹⁴⁵

Reducing the drinking age would not affect athletic departments’ current practice of selling and advertising beer. However, it would likely lead to colleges returning to their more traditional practices of selling beer at their student unions and allowing student-run newspapers to advertise local taverns. Thus, with a lower drinking age, colleges could implement the consistent message that alcohol use is acceptable as long as it is done responsibly.

The movement to reduce the drinking age from twenty-one to eighteen has garnered some recent support within higher education. For example, in June 2008, former Middlebury College President, Dr. John McCardell, launched the Amethyst Initiative to target lowering the U.S. drinking age to eighteen.¹⁴⁶ As part of the Amethyst Initiative, 135 college presidents have signed a proposal to change the drinking age to eighteen based on their belief that a

¹⁴⁴ See *id.* at 17, 23.

¹⁴⁵ See H.R. 864, 109th Cong. (2005); S. 408, 109th Cong. (2005); Pope, *supra* note 14; see also George A. Hacker, *NCAA Sides with Beer Industry at Expense of Students*, STREET & SMITH’S SPORTSBUSINESS J., Sept. 2008, at 37 (noting that a 1997 Harvard School of Public Health College Alcohol Study (“CAS”) found that the heavy binge drinking of students is the most serious public health problem facing colleges in the United States).

¹⁴⁶ See Moxley, *supra* note 33; see also Wright, *supra* note 112 (“[T]he name is derived from ancient Greeks’ belief that amethyst jewelry made people immune to the intoxicating effects of alcohol.”).

lower drinking age will reduce binge drinking by making incoming freshmen more experienced with alcohol.¹⁴⁷

Nevertheless, other prominent groups believe that reducing the drinking age would only exacerbate today's culture of alcohol abuse. For example, Mothers Against Drunk Driving ("MADD") believes that lowering the drinking age would prompt an increase in drunk driving accidents, citing the drop in the number of these accidents that coincided with the earlier increase in drinking age.¹⁴⁸ In addition, research from Washington University School of Medicine concludes that a lower drinking age would lead to higher rates of binge drinking in all segments of the population.¹⁴⁹ Meanwhile, a recent study conducted at the University of Georgia concludes that a lower drinking age would "increase unplanned pregnancies and pre-term births among young people."¹⁵⁰

C. *Separating College Sports from the Rest of Higher Education*

Finally, a third possible way to resolve the double standard about college alcohol use would entail the far less conventional approach of having colleges spin off their athletic programs (or at least their commercial sports teams) to third parties. This approach would fully separate the function of commercial athletics from the function of traditional education, thus ending any inconsistent messages coming from colleges about alcohol use. This type of spinoff, albeit unconventional, would likely be feasible, given that many European countries already have a thriving amateur athletics model in which education and athletics are fully separated.¹⁵¹

¹⁴⁷ See Wright, *supra* note 112; see also Pablo Andreu, *Lower Drinking Age Could Help Reduce the Number of Binge Incidents*, KAN. CITY STAR, July 1, 2009, at A19 (citing the number of college presidents that have joined this initiative as over 100).

¹⁴⁸ Andreu, *supra* note 147.

¹⁴⁹ See *Higher Drinking Age Significantly Reduces Binge Drinking*, THAINDIAN NEWS, June 23, 2009, http://www.thaindian.com/newsportal/health/higher-drinking-age-significantly-reduces-binge-drinking_100208417.html.

¹⁵⁰ See *Study: Lower Drinking Age Increases Poor Birth Outcomes*, UGA OFF. PUB. AFFAIRS, NEWS SERVICE (May 21, 2009), <http://www.uga.edu/news/artman/publish/090521drinking.shtml>.

¹⁵¹ See generally Edelman & Doyle, *supra* note 135, at 409 (noting that "FIFA recently passed a series of rules that ensure minors receive appropriate academic support while playing professionally, and that minors are not transferred away from their families' homes").

The main advantage to spinning off college athletics would be to maintain consistency in higher education's overall values system. As former University of Michigan President James Duderstadt explained in his 2000 book *Intercollegiate Athletics and the American University*:

Big-time college athletics [today] has little to do with the nature or objectives of the contemporary university. Instead, it is a commercial venture, aimed primarily at providing public entertainment for those beyond the campus and at generating rewards for those who stage it.¹⁵²

Like each of the above approaches, however, separating college sports from higher education also has its drawbacks. First, college athletics serves as an important marketing tool for colleges. When college students attend a commercial sporting event as part of a community, they feel a sense of camaraderie that helps to build positive feelings about the overall college experience. Without commercial athletics, college administrators might struggle to replace this important community building resource.

In addition, if colleges spin off their athletic departments, it would be conceding the failure of President Roosevelt's original goal of using higher education's strong value system to promote safety and ethics within amateur sports. While spinning off college athletics would indeed end the double standard about alcohol use in higher education, it might also leave student-athletes even more vulnerable to exploitive relationships as members of privately-owned amateur teams.

CONCLUSION

As college athletics enters its second century, the question of mission effectiveness remains an important one, especially as it relates to colleges selling and advertising alcoholic beverages.

While the NCAA and its over 1200 member schools enjoy great profitability from selling and advertising alcohol, their continued practice of selling and advertising alcohol, along with

¹⁵² DUDERSTADT, *supra* note 45, at 11.

the more general practices of reprimanding students for drinking alcohol, does not seem to “keep[] with the dignity and high moral purpose of education.”¹⁵³

Given reasonable doubts about whether selling and advertising alcohol at college sporting events is consistent with the values of higher education, our society needs to move in one of three directions. One approach would involve ending colleges’ sale and advertising of alcoholic beverages, thus making colleges’ anti-alcohol message stronger and more consistent. A second approach calls for Congress to reduce the drinking age from twenty-one to eighteen, thus allowing colleges to adopt an overall laissez-faire approach to alcohol use. Finally, a third approach would entail colleges divesting of their athletic departments (or at least their commercialized athletic teams) so that these teams’ new “owners” may continue to sell and advertise alcohol without producing a conflict of interest.

It is not altogether clear which of these three approaches would be most appropriate. However, it is likely that college students are more apt to seek guidance from those they respect, and that by sending a consistent message about alcohol, college administrators will earn students’ respect.

Therefore, adopting any one of these three approaches would likely make college personnel better suited to help students with questions or concerns about alcohol. In addition, adopting any of these three proposals would mark an important step toward resolving colleges’ sobering conflict about how to provide students with a consistent message about alcohol.

¹⁵³ FLEISHER III ET AL., *supra* note 46, at 41.