ALCOHOL: TRUTH AND CONSEQUENCES ON CAMPUS

Time to Change College Binge Drinking Culture Once and For All

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Abstract

Ensuring the safety and mental health of college students is critical to give students the potential for educational success. This paper focuses on the elephant in the room – alcohol abuse – and encourages Congress to address this endemic, long-standing issue in the Reauthorization of the Higher Education Act.

A historical review of federal action alongside current research demonstrates college alcohol abuse is a stubborn, pervasive, and devastating problem which demands renewed attention. Disregarding the intertwined nature of alcohol, and sexual misconduct, the Obama administration avoided incorporating the topic into the administration's campus sexual assault campaign. Nonetheless, evidence shows the Obama administration was successful in altering the culture on campus. As a result, there is space to utilize its blue print to address binge drinking.

I propose Congress create a Health and Campus Safety Center, a federal multi-agency initiative, to coordinate the informational services and oversight required to ensure a much-needed campus alcohol culture change.

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"Binge drinking, or heavy episodic drinking, is higher education's dirty little secret. It is arguably the number one public health problem facing American college students. Despite considerable recent effort, rates of college student binge drinking haven't changed much."[1]

–Sen. Joseph R. Biden, Jr., 2000

INTRODUCTION

The Kavanaugh Supreme Court confirmation hearings were a reminder of the common knowledge that high-risk drinking frequently results in unexpected, unintended, and out-of-character consequences. In the search for evidence about whether an attempted sexual assault occurred thirty years prior, Senators grilled Judge Kavanaugh live on television about his drinking habits in high school and college.[2] The media and the public also focused on Kavanaugh's relationship with alcohol by analyzing the verbal exchanges in the hearings, scouring the memories of Kavanaugh's friends, and searching dusty yearbooks.[3] After Kavanaugh was confirmed and sworn in as an Associate Justice, concerns about the impact the hearings had on sexual assault remained in the headlines[4] while the worrisome link to the topic of high-risk drinking quietly slipped away.[5] This paper confronts our

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1 JOSEPH R. BIDEN, JR., EXCESSIVE DRINKING ON AMERICA'S COLLEGE CAMPUSES (2000), at 5, *available at* http://compelledtoact.com/Involvement_categ/Federal_law/Biden_Resol_Report.pdf.

2 *See* PBS NewsHour, *We 'Drank Beer' and Sometimes Had Too Many, Kavanaugh Says at Hearing*, YouTube (Sept. 27, 2018), https://www.youtube.com/watch?v=AOr808UXOgE; *see also* CBS This Morning, *Amid FBI Probe, New Questions Over Kavanaugh Testimony on Drinking Habits*, YouTube (Oct. 1, 2018), https://www.youtube.com/watch?v=Woq-XC33kyE.

3 *See* Glenn Kessler, *Brett Kavanaugh and Alcohol: Two Dueling Narratives*, Wash. Post (Oct. 2, 2018), https://www.washingtonpost.com/politics/2018/10/02/brett-kavanaugh-alcohol-two-dueling-narratives/?utm_term=.57c88d5a0c95; *see also* Mike McIntire & Ben Protess, *At the Center of the Kavanaugh Accusations: Heavy Drinking*, N.Y.T. (Sept. 26, 2018), https://www.nytimes.com/2018/09/26/us/politics/kavanaugh-drinking-yale-high-school.html; see *also* Martin Longman, *Kavanaugh's Drinking Has Caused All His Problems*, Wash. Monthly (Oct. 1, 2018), https://washingtonmonthly.com/2018/10/01/kavanaughs-drinking-has-caused-all-his-problems/.

4 *See, e.g.* Christal Hayes, *'We Believe Survivors'; BrettKavanaugh.com Now an Outlet for Sexual Assault, Rape Victims*, USA Today, (Oct. 10, 2018, 5:12 PM), https://www.usatoday.com/story/news/politics/onpolitics/2018/10/10/brett-kavanaugh-website-sexual-assault-survivors/1591819002/; *see also, e.g.*, Joe Heim, Steve Hendrix, and Mike DeBonis, *Demonstrators at U.S. Capitol protest Kavanaugh Confirmation*, Wash. Post (Oct. 6, 2018), https://www.washingtonpost.com/local/demonstrators-at-us-capitol-protest-impendng-kavanaugh-appointment/2018/10/06/0b40cb10-c98e-11e8-b1ed-1d2d65b86d0c_story.html?utm_term=.5c3e09f02f41 (protestors chanting "we believe survivors"); *see also, e.g.*, Sabrina Issa, *Brett Kavanaught's Confirmation Reveals the Moral Rot that Allows America to Ignore so Many Assault Survivors*, NBCNews (Oct. 6, 2018, 12:10 PM), https://www.nbcnews.com/think/opinion/brett-kavanaugh-s-confirmation-reveals-moral-rot-allows-america-ignore-ncna917341; *see also, e.g.*, Sheryl Stolberg, *Kavanaugh Is Sworn In After Close Confirmation Vote in Senate*, N.Y.T. (Oct. 6, 2018), https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html (Kavanaugh confirmation process "concluded with a national reckoning over sexual misconduct"); *see also, e.g.*, Roxanne Jones, et al., *After Kavanaugh, What Have We Learned?*, CNN (Oct. 6, 2018, 6:00 PM), https://www.cnn.com/2018/10/06/opinions/supreme-court-brett-kavanaugh-vote-reaction/index.html (contains nineteen references to the impact on sexual assault survivors but does not include a single reference to alcohol abuse).

5 The author found countless articles in a wide spectrum of news outlets addressing sexual assault concerns *after* the confirmation of Kavanaugh to the Supreme Court, *see* fn. 4, infra; however, the

national reluctance to tackle the alcohol abuse culture on campus and encourages Congress to empower a much needed sea change.

The tentacles of the toxic campus drinking culture can reach even those students whose best intentions are to be diligent, law abiding citizens. There are then repercussions for the wider society when young-drinking students metamorphosis into adult alcoholics entering the workforce. Public reporting of student deaths due to overindulgence in alcohol[6] strike fear in the heart of every parent and administrator in institutions of higher education (colleges).[7] In terms of the number of students involved and the breadth of adverse consequences, campus alcohol abuse[8] is the largest problem colleges face.[9] And yet, drinking remains ubiquitous on campus.[10] According to the Surgeon General, "alcohol is the

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author only found three articles post Kavanaugh's confirmation on October 6, 2019 stating the proposition that the takeaway from the hearings should include both confronting alcohol abuse culture and reducing sexual assault. *See* Bill Schier, *After Kavanaugh, #MeToo Should Launch a New Temperance Movement*, Politico (Oct. 9, 2018), https://www.politico.com/magazine/story/2018/10/09/kavanaugh-metoo-temperance-suffragettes-221141; *see also* Nicole Russell, *3 Things We Learned From the Kavanaugh Drama That Have Nothing to Do With Politics*, https://www.washingtonexaminer.com/opinion/3-things-we-learned-from-the-kavanaugh-drama-that-have-nothing-to-do-with-politics ("underage drinking ... is not only common but was the elephant in the room in one of the most controversial confirmation hearings"); *see also* Dillon Browne, *Trauma 101 in the Aftermath of the Ford-Kavanaugh Saga*, The Conversation (Oct. 11, 2018, 5:58 PM), http://theconversation.com/trauma-101-in-the-aftermath-of-the-ford-kavanaugh-saga-104313 ("any serious initiative to curb sexual assault must also take a close look at binge-drinking culture").

6 *See e.g.* Caitlin Flanagan, *Death At A Penn State Fraternity*, *The Atlantic* (Nov. 2017 issue), *https://www.theatlantic.com/magazine/archive/2017/11/a-death-at-penn-state/540657/*; *see also* Sarah Ellis, *Coroner: USC Student Terreni Died Of 'Toxic' Blood Alcohol Level (+Video)*, *The State* (Apr. 8, 2015 12:41 PM), http://www.thestate.com/news/local/article17854100.html.

7 *See e.g.* Lisa C. Johnson, *Using a Public Health and Quality Improvement Approach to Address High-Risk Drinking with 32 Colleges and Universities*, at iv, (March 2014) (White Paper Nat'l. C. Health Improvement Program), *available at https://safesupportivelearning.ed.gov/sites/default/files/NCHIP%20WhitePaper%205%208%2014FINAL.pdf.*

NCHIP, at iv. [hereinafter NCHIP] (reporting the "biggest fear as a college president [is] receiving a middle-of-the-night phone call that a student had been injured or died from an incident involving acute alcohol intoxication").

8 Acknowledging there are definitional differences between the terms alcohol abuse, high-risk drinking, risky drinking, binge drinking, and black-out drinking, for the purposes of this paper the terms will used interchangeably, except where noted otherwise, both because college students colloquially treat them interchangeably and generally the consequences are equivalent.

9 *See* Darby Dickerson & Peter F. Lake, *Alcohol and Campus Risk Management* (labeling alcohol the highest risk factor for colleges), 18 *Campus Activities Programming*, Oct. 2006, at 19, *available at https://ssrn.com/abstract=1097120*; *see also See* Henry Wechsler & Toben Nelson, *What We Have Learned from the Harvard School of Public Health College Alcohol Study: Focusing Attention on College Student Alcohol Consumption and the Environmental Conditions That Promote It*, 69 *J. Stud. Alcohol and Drugs* 1, 3-4 (2008) [hereinafter Wechsler & Nelson *Harvard*]; *see also See* Henry Wechsler & Toben F. Nelson, *Will Increasing Alcohol Availability by Lowering the Minimum Legal Drinking Age Decrease Drinking and Related Consequences Among Youths?* 100 Am J Public Health 986, 987 (June 2010) [hereinafter Wechsler & Nelson *Consequences*]; *see also U.S. Dep't of Health and Human Servs., Nat'l Inst. of Health, Nat'l Inst. on Alcohol Abuse and Alcoholism, College Drinking* (Dec. 2015), *available at https://pubs.niaaa.nih.gov/publications/collegefactsheet/Collegefactsheet.pdf* [hereinafter *College Drinking*].

10 Because some college students are over twenty-one years old and drink responsibly, not all campus drinking is problematic or illegal.

most widely used substance of abuse among America's youth."[11] Approximately 16 million students, equaling 80.5 percent of all college students, drink.[12] It is estimated that 40 percent of college students binge drink, roughly eight million students,[13] which is a higher rate than their non-college peers.[14] College alcohol abuse is a problem for both sexes because males and females on campus engage in binge drinking in almost equal numbers.[15]

The head-in-the-sand refusal to confront assumptions about the inevitability and inconsequential nature of the campus drinking culture has frightening consequences for students and the public.[16] While not every student engages in risky drinking, the majority of college students are impacted directly or indirectly. The problems that result from campus drinking fall into four categories: safety, health, civic impact, and academic performance. First, safety concerns include drinking and driving, sexual assault, injuries, and physical assaults.[17] Second, health issues include alcohol use disorder, alcohol poisoning, risky sexual behavior, pregnancy, sexually transmitted diseases, negative interplay with eating disorders, depression, suicide, and other mental health issues.[18] Third, civic impact results from students

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11 *See U.S. Dep't of Health and Human Servs., Off. of the Surgeon Gen., The Surgeon General's Call to Action To Prevent and Reduce Underage Drinking* (2007), at v, *available at* http://www.camy.org/_docs/resources/fact-sheets/Call_To_Action.pdf [hereinafter *Surgeon General's Call to Action*].

12 *See* U.S. Dep't of Health and Hum. Servs., 5 Ann. Rep. to Congress on the Prevention and Reduction of Underage Drinking (2013), *available at* http://www.nabca.org/sites/default/files/assets/files/Report-to-Congress-on-Prevention-Reduction-Underage-Drinking.pdf; https://store.samhsa.gov/shin/content/PEP13-RTCUAD/PEP13-RTCUAD.pdf, at 10. [hereinafter Rep. Underage Drinking]; *see also* Fast Facts, Nat'l Center for Educ. Stats., U.S. Dep't of Educ., https://nces.ed.gov/fastfacts/display.asp?id=372 (last visited Jan. 11, 2019) (calculating the number of students who drink by applying the percentage of students who drink to total number of college students) [hereinafter Fast Facts].

13 *See* Wechsler & Nelson *Harvard*, *supra* note 9, at 3; *see also* Fast Facts, *supra* note 12, (calculating the number of students who drink by applying the percentage of students who drink to total number of college students).

14 *See* Wechsler & Nelson *Consequences*, *supra* note 9, at 987.

15 U.S. Dep't of Health and Hum. Servs., Ctr. for Disease Control and Prevention, Press Release on Binge Drinking is an Under-Recognized Problem Among Women and Girls (2013). Available at https://www.cdc.gov/media/releases/2013/p0108_binge_drinking.html; *see also* Cara Rosenbloom, *New Concern On College Campuses: 'Drunkorexia,' A Combination Drinking And Eating Disorder,* Wash. Post (Mar. 11, 2019), https://www.washingtonpost.com/lifestyle/wellness/new-concern-on-college-campuses-drunkorexia-a-combination-drinking-and-eating-disorder/2019/03/08/093cf47c-4028-11e9-9361-301ffb5bd5e6_story.html?utm_term=.c89da024730e (reporting between 34 to 81 percent students, mostly college women, dangerously combine starvation with binge drinking).

16 Amanda Tidwell, *Generation Addicted: College Students Lobby For Campus Cops, Ras To Carry Narcan*, College Fix (Jan. 30, 2018), http://www.thecollegefix.com/post/41444/ (assuming a student was drunk masked an opioid overdose which lead to death).

17 *See* Wechsler & Nelson *Harvard*, *supra* note 9, at 3-4; *see also* Nat'l Inst. on Alcohol Abuse and Alcoholism, U.S. Dep't of Health and Human Servs., NIH Pub. No. 02-5010, A Call to Action: Changing the Culture of Drinking at U.S. Colleges (2002) at 4, 9 [hereinafter A Call to Action]; *see also* Surgeon General's Call to Action, *supra* note 11, at 10-11; *see also* Rep. Underage Drinking, *supra* note 12, at 57-62; *see also* College Drinking, *supra* note 9.

18 *See id.*

causing property damage or law enforcement entanglement.[19] Fourth, academic problems related to drinking include missing classes, falling behind with work, and poor grades.[20] Lastly, there is also a growing understanding that non-drinkers face second-hand effects, such as disruption of sleep or study, from their classmates drinking.[21] And the effects of the toxic drinking culture also migrate off campus. When students graduate, incorporating binge drinking into their adult lifestyle, the economic cost to society is estimated to be a quarter trillion dollars.[22]

Having excised a similarly unhealthy, albeit trendy phenomena, in smoking, Congress should be confident that the normalization of campus alcohol abuse can be reformed. With the Obama administration's actions in the rearview mirror[23] and the Trump administration yet to take a stance on campus alcohol policy, the current reauthorization of the Higher Education Act of 1965 (HEA) creates the opportunity for Congress to incentivize colleges to reduce high-risk drinking on campus by emphasizing prevention through culture change.

In Part I of this paper, I will argue that the Obama administration missed an important opportunity to address the wide-spread problem of alcohol abuse on campus when they excised drinking from the multi-agency campaign to stop college sexual assault.[24] The discussion begins with a historical framework, demonstrating that the federal government's plethora of legislative actions and reports leave no doubt that high-risk drinking at colleges is a long-standing recognized national problem.[25] At colleges, one consequence of the ubiquitous commingling of risky drinking and sex is that at times it is necessary to address the topics of alcohol abuse and campus assault together.[26] However, the policy decision to uncouple high-risk drinking from sexual assault prevention led to the complete bifurcation of the two issues in the Obama administration's actions.[27]

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19 *See id.*

20 *See id.*

21 *See* Wechsler & Nelson *Harvard*, *supra* note 9, at 4.

22 *See* Centers for Disease Control and Prevention, U.S. Dep't of Health & Human Servs., *Excessive Drinking is Draining the U.S. Economy*, https://www.cdc.gov/features/costsofdrinking/index.html (July 13, 2018).

23 *See* Press Release from U.S. Dep't of Educ., Department of Education Issues New Interim Guidance on Campus Sexual Misconduct (Sept. 22, 2017), *available at* https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct (rescinding the 2011 Dear Colleague guidance document which was the basis for much of the Obama administration's sexual assault policy).

24 The term sexual assault in this paper encompasses all activities defined as sexual harassment in the educational setting. *See* U.S. Dep't of Educ., Off. Of Civil Rights, *Sexual Harassment: It's Not Academic*, (2008) (defining sexual harassment as "conduct that 1) is sexual in nature; 2) is unwelcome; and 3) denies or limits a student's ability to participate in or benefit from a school's education program").

25 Argued in further detail in Section I.A., *see specifically* the 1976 National Institute on Alcohol Abuse and Alcoholism report *The Whole College Catalog About Drinking: A Guide to Alcohol Abuse*, *infra* note 44.

26 Argued in further detail in Section I.B., *see specifically* Biden, *supra* note 1, at 51 ("Alcohol is involved in violence against college women").

27 Argued in further detail in Section I.C., *see specifically* U.S. Dep't of Justice, Off. On Violence

At the same time, the Obama administration reinitiated enforcement of the previously ignored federal regulations pertaining to college alcohol policies.[28] Due to the lack of governmental support, including defunding of the center explicitly tasked with providing colleges compliance and prevention assistance as well as conveying confusing signals regarding alcohol in the sexual assault realm, these efforts were insufficient to impact the drinking culture on campus.[29]

Nonetheless, I explain in Part II that the Obama administration was successful in empowering a change in the campus culture surrounding sexual assault.[30] The policy choice to work across agencies,[31] utilize monetary levers,[32] increase regulation oversight,[33] employ publicity,[34] and engage community volunteers[35] was effective in gaining the attention of college officials and students. The result was a shift in attitudes and policies surrounding campus sexual assault.

Part III focuses on suggestions for the HEA reauthorization. There is a need for continued action as the current campus culture demonstrates the alcohol problem has not abated and continues to create serious and far reaching consequences. HEA is the right vehicle to provide colleges with incentives and oversight; but, the proposed legislation in the House of Representatives from both parties must be revamped to focus on preventing alcohol abuse.[36] Moreover, federal action coordinated through the Department of Education (ED) and the Centers for Disease Control (CDC) is the proper remedy in order to influence all students

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Against Women, OMB No. 1122-0020, Grants to Reduce Sexual Assault, Domestic Violence, Dating Violence and Stalking on Campus Program Solicitation (2011) *infra* note 140 (denying grants aimed at preventing college sexual assault if linked to addressing substance abuse).

28 Argued in further detail in Section I.D., *see specifically The Resurgence of the Drug-Free Schools and Communities Act: A Call to Action*, at 3, *infra* note 171.

29 Argued in further detail in Section I.D., *see specifically* Higher Education Center *infra* note 113 (defunding of the Higher Education Center in 2011); *see also* Rep. Underage Drinking *supra* note 12, at 10 (finding college drinking rates have shown little decline since 1993).

30 Argued in further detail in Section II., *see specifically* It's On Us, *infra* note 191 (wide-spread success of the Obama administration's sexual assault prevention campaign in engaging students and influence the campus conversation).

31 Argued in further detail in Section II., *see specifically* The Second Report, *supra* note 135, at 24 (promoting grants through DOJ, OVW, the HHS's Office of Women's Health, and the CDC by the Obama administration).

32 Argued in further detail in Section II., *see specifically* Dear Colleague Letter *supra* note 99, at 16 (threatening the loss of all federal funding for noncompliance with the 2011 DCL)..

33 Argued in further detail in Section II., *see specifically Jacob Gersen & Jeannie Suk, The Sex Bureaucracy*, *supra* note 187 (ED oversight resulted in the creation of a Title IX bureaucracy)..

34 Argued in further detail in Section II., *see specifically,* White House, Off. Of the Press Sec'y on The "It's On Us" Campaign Launches new PSA, *infra* note 193.

35 Argued in further detail in Section II., *see specifically,* It's On Us *infra* note 191 (encouraging campus activism).

36 Argued in further detail in Section III.A., *see specifically* Prosper Act *infra* note 226 (Republican proposed HEA legislation); *see also* Aim Higher Act, *infra* note 228 (Democrat proposed HEA legislation).

enrolled at both public and private colleges throughout the country.[37] A jointly created campus health and safety team complemented by the ED's financial tools and accurate public campus alcohol information will provide the launching pad to empower all stakeholders to change the pernicious drinking culture.

I. FEDERAL ACTION RELATED TO ALCOHOL ON CAMPUS

Federal policy makers from both parties over the past four decades have taken the stance that the alcohol culture on campus must change for the well-being of all college students. However, the Obama administration minimized the college drinking issue in their efforts to protect students from sexual assault when the ED focused their college safety efforts on Title IX,[38] the White House led interagency task force publicized reducing campus sexual assault as a presidential priority,[39] the Department of Justice (DOJ)'s sexual assault grant program was expanding while continuing to exclude funding for programs which addressed alcohol abuse,[40] and the CDC obscured the connection to alcohol in their college sexual abuse prevention publications.[41] Furthermore, while the Obama administration rightly drew attention to the widespread lack of compliance with federally mandated campus alcohol requirements, offering a pathway to address campus drinking, the lack of support for prevention programming was a missed opportunity to change the wider campus culture.[42] Given the all-encompassing high-risk drinking culture which affects almost every aspect of campus life with consequences inclusive of sexual assault, Congress should not be distracted by allowing alcohol abuse to remain a "dirty little secret."[43]

A. Federal Government's History on Campus Drinking

In recognizing the role government can play to protect students, the federal government took an important step to address student drinking in 1976, during

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37 Argued in further detail in Section III.B., *see specifically* Congressional Research Service, The Higher Education Act (HEA): A Primer 1 *infra* note 221 (authorizing ED to administer the HEA authorized federal aid to colleges); *see also* CDC, *infra* note 231 (the CDC is "the nation's health protection agency).

38 Argued in further detail in Section I.C.1., *see specifically* Dear Colleague Letter, *infra* note 99.

39 Argued in further detail in Section I.C.2., *see specifically* Memorandum from the White House, Off. Of the Press Sec'y on Establishing a White House Task Force to Protect Students from Sexual Assault, *infra* note 122.

40 Argued in further detail in Section I.C.3., *see specifically* U.S. Dep't of Justice, Off. On Violence Against Women, OMB No. 1122-0020, Grants to Reduce Sexual Assault, Domestic Violence, Dating Violence and Stalking on Campus Program Solicitation (2011), at 4, *infra* note 140.

41 Argued in further detail in Section I.C.4., *see specifically* Report for the *White House Task Force to Protect Students from Sexual Assault*, *infra* note 128.

42 Argued in further detail in Section I.D., *see specifically compare* Michael M. DeBowes, *The Resurgence of the Drug-Free Schools and Communities Act: A Call to Action, infra* note 171; *with* Higher Education Center, *infra* note 113 (defunding the organization tasked with supporting colleges in developing alcohol prevention programming).

43 *See* Biden, *supra* note 1, at 5.

the Ford administration, when the National Institute on Alcohol Abuse and Alcoholism (NIAAA) issued the report, *The Whole College Catalog About Drinking: A Guide to Alcohol Abuse Prevention*.[44] Driven by the belief that high-risk drinking was "one of the great enormous problems of our times," the catalog's purpose was to be a resource document for colleges to create programs to prevent alcohol abuse.[45]

The legal landscape for college-age drinking was foundationally laid by Congress during the Reagan administration. In 1984, the National Minimum Drinking Age Act[46] was enacted with the stated purpose to reduce drunk driving. The effect of the Supreme Court upholding the constitutionality of conditioning federal highway funds on states adopting a minimum drinking age in *South Dakota v. Dole*[47] led to every state adopting 21 as the legal drinking age.[48] It also created a culture shift in the American attitude toward driving under the influence of alcohol. But in encouraging the establishment of a universal drinking age, applicable to the majority of college-age students, Congress also created federal ramifications to colleges which would subsequently be required to police illegal drinking.

As much of the drinking on campus was now illegal, Congress in the 1980's and 1990's was in a position to address campus "alcohol abuse [which was] widespread among the Nation's students," and "constitute[d] a grave threat to their physical and mental well-being and significantly impede[d] the learning process."[49] Utilizing their spending powers, Congress amended the HEA in 1989 with the Drug-Free Schools and Communities Act Amendments (DFSCA) attaching federal funding to the condition that colleges establish alcohol prevention programs.[50] The DFSCA required the ED Secretary to periodically review college prevention programs with the authority to impose sanctions for non-compliance.[51] Additionally, to create transparency and gather data on the extent of illegal drinking, Congress enacted the Crime Awareness and Campus Security Act,[52] also known as the Clery Act.[53] The Act required all colleges to report campus crimes, including sexual assault and illegal drinking, granting the ED Secretary the authority to impose financial penalties for misrepresentations.[54]

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44 U.S. Dep't of Health, Educ., and Welfare, The Whole College Catalog About Drinking (1976), *available at* https://archive.org/details/ERIC_ED140152 [hereinafter Whole College Catalog].

45 *Id.* at xii.

46 23 U.S.C. § 158 (2012).

47 *See S. Dakota v. Dole*, 483 U.S. 203 *(1987)*.

48 Mary Pat Treuthart, *Lowering the Bar: Rethinking Underage Drinking*, 9 N.Y.U. J. Legis. & Pub. Pol'y 303, 312 (2006).

49 Drug-Free Schools and Communities Act of 1986, Pub. L. No. 99-570, § 4102, 100 Stat. 3207-125 (prior to 1988 amendment).

50 Drug-Free Schools and Communities Act Amendments of 1989, Pub. L. No. 101-226, § 1213, 103 Stat. 1928 (1989).

51 20 U.S.C. § 1011i(c)(1)(B) (1998).

52 Student Right–To–Know and Campus Security Act, Title II, Pub. L. 101–542, 104 Stat 2381 (1990).

53 20 U.S.C. § 1092(f)(18) (1990).

54 20 U.S.C. § 1092(f)(13) (1990).

Federal agencies devoted resources to help colleges adopt policies to reduce the drinking culture on campus in furtherance of Congress' goals. In 1995, during the Clinton administration, the ED created the Higher Education Center (HEC)[55] "to assist institutions of higher education in developing, implementing, and evaluating alcohol and other drug abuse and violence prevention policies and programs that will foster students' academic and social development and promote campus … safety."[56] The HEC also produced a guide for colleges entitled, *Complying with the Drug-Free Schools and Campuses Regulations*.[57]

Congress once again took legislative action in the late 1990's demonstrating frustration that colleges had not decreased their student alcohol problems. Congress amended the HEA in 1998 to include the Collegiate Initiative to Reduce Binge Drinking and Illegal Alcohol Consumption. The Act created federal grant programs aimed at reducing the use of alcohol and mandating every college president create an alcohol task force.[58] Congress also established the Enforcing Underage Drinking Laws Program within the U.S. Department of Justice.[59]

These Congressional actions were followed by several government reports reinforcing the position that college alcohol abuse was a major policy concern. In 2000, the Surgeon General's *Healthy People 2010* defined binge drinking as a national problem particularly for young adults who attend college.[60] The same year, Senator Joseph R. Biden, Jr.'s *Excessive Drinking on America's College Campuses* report urged colleges to end the silence and denial surrounding binge drinking and take action on this major public health problem facing their students.[61] The NIAAA published *A Call to Action: Changing the Culture of Drinking at U.S. Colleges* in 2002.[62] The NIAAA outlined the severe consequences of college drinking suggesting a three-in-one framework approach addressing individual drinkers, the entire student body, and the college within its greater community.[63]

Taking the message of the reports seriously, Congress acted again in 2006. It passed the Sober Truth on Preventing Underage Drinking Act (STOP Act), establishing the Interagency Coordinating Committee on the Prevention of Underage Drinking (ICCPUD) with representatives from six agencies and

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55 *See* Higher Education Center, http://hecaod.osu.edu/about/ (last visited on Jan. 11, 2019) (stating in the brief background that the now private HECAOD is based upon ED's HEC which was publicly funded from 1995 to 2012).

56 U.S. Dep't of Educ., Higher Education Center for Alcohol and Other Drug Abuse and Violence Prevention, Complying with the Drug-Free Schools and Campuses Regulations (2006), at last page, *available at* http://www.higheredcompliance.org/resources/resources/dfscr-hec-2006-manual.pdf.

57 *See id.*

58 Higher Education Amendments Of 1998, Pub. L. No. 105–244, §119-120, 112 Stat 1581 (1998).

59 *See* Dep't of Justice, Off. of Justice Program, DOJ 06-045, (News Release) Department of Justice Announces $17 Million In Awards To Enforce Underage Drinking Laws (Apr. 13, 2006).

60 *See* Biden, *supra* note 1, at 41.

61 *See* Biden, *supra* note 1, at 52-53.

62 *See* A Call to Action, *supra* note 17.

63 *See* A Call to Action, *supra* note 17, at ix-x.

multiple sub-agencies. The committee was tasked with issuing annual reports summarizing all federal agency activities related to the problem[64] and creating grants to "reduce the rate of underage alcohol consumption including binge drinking among students at institutions of higher education."[65] The HEA 2008 reauthorization included additional reporting requirements for colleges regarding alcohol violations and fatalities on their campuses.[66]

Additional reports published during the Bush administration confirmed the alcohol problem on college campuses, reinforcing the necessity of an all hands on deck approach with Congressional, intra-branch, and multi-agency action. The NIAAA Task Force published *What Colleges Need to Know Now: An Update on College Drinking* in 2007.[67] The report detailed the increased rate of serious alcohol related consequences since the first 2002 report and found college students were more likely to drink than their non-college peers.[68] Also in 2007, the U.S. Surgeon General in collaboration with NIAAA and the Substance Abuse and Mental Health Services Administration (SAMHSA)[69] issued the *Call to Action to Prevent and Reduce Underage Drinking*.[70] Colleges were admonished to "change [their] campus culture that contributes to underage alcohol use"[71] because college drinking has become normalized by administrators, parents, and students with the unacceptable drinking rate of eighty percent of college students drinking and forty percent engaging in binge drinking.[72] Three years later, the Office of Disease Prevention and Health Promotion in the Department of Health and Human Services, in conjunction with an interagency workforce, published *Healthy People 2020*[73] including as an objective a recommendation to reduce the number of college students who binge drink.[74]

The insistent call for action on campus drinking that transcended administrations and political parties continued during the Obama administration. The NIAAA

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64 Sober Truth on Preventing Underage Drinking Act, Pub. L. No. 109–422, §2(b)(1), 120 Stat 2890 (2006).

65 *Id.* at §2(e)(1).

66 Higher Education Opportunity Act, Pub. L. 110–315, § 107, 122 Stat 3078 (2008).

67 *See* U.S. Dep't of Health and Hum. Servs., Nat'l Insts. of Health, Nat'l. Instit. on Alcohol Abuse and Alcoholism, Pub. No. 07-5010, What Colleges Need to Know Now *An Update on College Drinking Research* (2007) [hereinafter What Colleges Need to Know], *available at* https://pubs.niaaa.nih.gov/publications/UpdateCollegeDrinking/1College_Bulletin-508_361C4E.pdf.

68 *See generally,* id.

69 SAMHSA is an agency within the U.S. Dep't of Health and Hum. Services.

70 *See Surgeon General's Call to Action*, *supra* note 11.

71 *Surgeon General's Call to Action*, *supra* note 11, at 41.

72 *Id*. at 12.

73 *See generally,* Press Release from U.S. Dep't of Health and Hum. Servs., OASH Press Office on HHS Announces the Nation's New Health Promotion and Disease Prevention Agenda (Dec. 2, 2010), *available at* https://www.healthypeople.gov/sites/default/files/DefaultPressRelease_1.pdf.

74 *See HealthyPeople 2020,* U.S. Dep't of Health and Hum. Servs., Off. of Disease Prevention and Health Promotion, https://www.healthypeople.gov/2020/topics-objectives/topic/substance-abuse/objectives#5205 (last modified 3/16/18).

formed the College Presidents Working Group in 2011 to bring national attention to high-risk alcohol prevention at colleges.[75] The 2013 ICCPUD *Report to Congress on the Prevention and Reduction of Underage Drinking* emphasized the need for more research, collaboration, and commitment to address the underage drinking problem on campus by the federal government agencies, colleges, and researchers[76] as "underage alcohol use is not inevitable, and parents and society are not helpless to prevent it."[77] The report found (1) "alcohol consumption rates on college campuses constitute a significant public health problem;"[78] (2) college underage drinking is the only category where efforts to reduce alcohol consumption have not been effective;[79] and (3) "approximately 25 percent of college students report academic consequences of their drinking, including missing class, falling behind, doing poorly on exams or papers, and receiving lower grades overall."[80] In other words, binge drinking not only plays a part in college students dying, developing life-long health issues, and suffering sexual assaults, but also strikes at the heart of the mission of the college— the ability for 20 percent of students to obtain full educational benefits.[81] Most recently in 2015, the NIAAA launched the *CollegeAIM*[82] website enabling colleges to access comprehensive data on research, strategies, and prevention programs in order to design a bespoke overall campus strategy to address high-risk drinking by combining individual and environmental level programming.[83]

Currently, the absence of public comment means it is unknown if the Trump administration will echo the refrain of "change the campus drinking culture." The federal government will be acting soon as both the HEA is up for reauthorization this year and the ED initiated the notice and comment process for a new Title IX regulation in November 2018.[84]

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75 *See* U.S. Dep't of Health and Hum. Servs., Nat'l Insts. of Health, Nat'l. Institt. on Alcohol Abuse and Alcoholism, Summer 2011 Issue 23, NIAAA News NIAAA College Presidents Working Group (2011), *available at* https://pubs.niaaa.nih.gov/publications/Newsletter/Summer2011/article03.htm.

76 *See* Rep. Underage Drinking, *supra* note 12, at 16.

77 *Id.* at 26.

78 *Id.* at 14.

79 *Id.* at 10.

80 *Id.* at 14.

81 The author calculated 20 percent of all college students report adverse academic consequences from drinking because the 25 percent of students who drink and report academic consequences, *see infra* note 80, out of the 80.5 percent of all college students who drink, *see infra* note 12, equals 20.125 percent of all students.

82 *See The NIH Almanac,* U.S. Dep't of Health and Hum. Servs., Nat'l. Inst. of Health, (last modified 5/9/17), *available at* https://www.nih.gov/about-nih/what-we-do/nih-almanac/national-institute-alcohol-abuse-alcoholism-niaaa; *see also* Event Announcement from the U.S. Dep't of Health and Hum. Servs., Nat'l. Inst. Of Health on NIAAA CollegeAIM Launch (Sept. 22, 2105), *available at* https://www.niaaa.nih.gov/news-events/meetings-events-exhibits/niaaa-collegeaim-launch.

83 CollegeAIM alcohol Intervention, Nat'l Inst. on Alcohol Abuse and Alcoholism, https://www.collegedrinkingprevention.gov/CollegeAIM/EnvironmentalStrategies/default.aspx#close (last visited Jan. 11, 2019) [hereinafter CollegeAIM].

84 *See* Press Release from U.S. Dep't of Educ., Press Office of Secretary DeVos: Proposed Title IX Rule Provides Clarity for Schools, Support for Survivors, and Due Process Rights for All (Nov.

The federal government's past actions throughout Democratic and Republican administrations repeatedly emphasized both the need to address the dangerous drinking culture on college campuses and that it is government's role in a deliberative democracy to lead on issues where there is a collective desire for change. Between 1989 and 2006, after national establishment of 21 as the drinking age, Congress addressed the campus drinking problem in five pieces of legislation. Over fifteen federal agencies are involved in efforts to reduce dangerous underage drinking.[85] Since the first NIAAA warning in 1976, the federal government has remained consistent in the message that alcohol abuse is a major health and safety risk to America's college students.

B. High-Risk Drinking and Sexual Assault

Campus alcohol abuse results in safety, health, and academic consequences. One high-risk situation, both for health and safety reasons, is when college students who are drinking engage in sexual activity. The Obama administration prioritized preventing campus sexual assault without addressing the complex relationship between drinking and college sex. Approximately 72 percent of students who allege sexual assault on campus were under the influence of alcohol at the time of the incident.[86] An ethnographer involved in a large campus sexual assault study found the project challenging as "he had not dealt with as many people who were using substances, especially alcohol" in his previous research, finding "there's a lot of drunk sex, and it's actually kind of intentional."[87] The confluence of drinking and sexual assault is especially difficult to tease apart as many college students consume alcohol purposefully as "drunk hooking up is part of the fun."[88]

Being careful to avoid victim blaming, but acknowledging the correlation between drinking and sexual assault, Sen. Biden, in a report addressing the college alcohol problem, wrote in 2000:

> Alcohol is involved in violence against college women. While the precise causal role alcohol plays in such violence is still to be determined, enough evidence exists for its powerful correlation with violence perpetration and victimization to warrant special attention. Recent evidence suggests that alcohol plays much more than an exacerbating role, and probably plays a causal role in violent crime, both in perpetration and in raising the risk of victimization. While it is absolutely correct that alcohol use should never

16, 2018), *available at* https://www.ed.gov/news/press-releases/secretary-devos-proposed-title-ix-rule-provides-clarity-schools-support-survivors-and-due-process-rights-all.

85 *See* Sober Truth on Preventing Underage Drinking Act, Pub. L. No. 109–422, 120 Stat. 2890 (2006).

86 Meichun Mohler-Kuo et al., *Correlates of Rape while Intoxicated in a National Sample of College Women*, J. OF STUD. ON ALCOHOL, Jan. 2004, at 37, 42, *available at* http://archive.sph.harvard.edu/cas/Documents/rapeintox/037-Mohler-Kuo.sep1.pdf.

87 Marc Parry, *The Sex Study That Could Alter Our Understanding of Campus Assault*, CHRON. OF HIGHER EDUC. (Feb. 9, 2018), https://www.chronicle.com/article/The-Sex-Study-That-Could-Alter/242484.

88 *See id.*

function as an excuse for violence, it is also true that alcohol abuse plays a role in creating violence.[89]

Furthermore, the Obama administration relied upon the one in five women are sexually assaulted during college figure from the 2007 *Campus Sexual Assault Study* (CSA) as the basis for taking imperative action.[90] Significantly, the report concluded that colleges "need to incorporate alcohol and drug messages into sexual assault prevention and risk reduction programming."[91]

Reardless that it might seem logical to combine the advice from the highly vaunted CSA Study with Biden's conclusion about excessive drinking on campus, especially as many experts subsequently have also opined that sexual assault prevention programs should be combined with alcohol abuse programs,[92] the Obama administration chose a different path. Sexual assault specialists understand "interventions that target binge drinking 'offer the most hope' as the vast majority of sexual assaults on college campuses involve alcohol"[93] and that colleges will not solve the problem of sexual assault "unless we also address the issue of excessive drinking."[94] Addressing alcohol abuse in coordination with sexual assault prevention programs, if framed properly, will avoid victim blaming and can be especially empowering for women.[95] Nevertheless, as the next section illustrates, the Obama administration chose to avoid the binge drinking topic when addressing campus sexual assault.

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89 Biden, *supra* note 1, at 51.

90 *See generally* Dear Colleague Letter: Sexual Violence Background, Summary, and Fast Facts, U.S. Dep't of Educ., Off. For Civil Rights (Apr. 4, 2011), at 1 n.4, available at https://obamawhitehouse.archives.gov/sites/default/files/fact_sheet_sexual_violence.pdf; *see also* Christopher Krebs et al., The Campus Sexual (CSA) Study: Final Report xviii (Dec. 2007), https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf [hereinafter CSA Study]; *see also* Emily Yoffe, *The Problem with Campus Sexual Assault Surveys,* Slate (Sept. 24, 2015, 3:34 PM), http://www.slate.com/articles/double_x/doublex/2015/09/aau_campus_sexual_assault_survey_why_such_surveys_don_t_paint_an_accurate.html.

91 *See* CSA Study, *supra* note 90, at vii.

92 *See* Mohler-Kuo et al, *supra* note 86, at 37; *see also* Elizabeth A. Armstrong et al., *Sexual Assault on Campus: A Multilevel, Integrative Approach to Party Rape*, 53 Soc. Probs. 483, 496 (2006) ("[endorsing] a focus on the role of alcohol in sexual assault"); Rana Sampson, *Acquaintance Rape of College Students*, Pub. Health Resources, Aug. 2003, at 25, http://digitalcommons.unl.edu/publichealthresources/92 (stating "researchers agree about the importance of combining rape prevention programs for college students with substance abuse prevention programs, especially regarding binge drinking"); Lloyd Vries, *Binge Drinking, Rape Are Related*, CBS/AP (Feb. 12, 2004, 12:38 PM), https://www.cbsnews.com/news/binge-drinking-rape-are-related/ ("I think it's very important to do the education about alcohol consumption, together with education about rape, since such a large proportion of rapes are connected to drinking," Wechsler said.).

93 Alice Park, *Frats ask for Sexual Assault Workshops,* Yale News (Mar. 28, 2018), https://yaledailynews.com/blog/2018/03/28/frats-ask-for-sexual-assault-workshops/.

94 Raynard S. Kington, *The Missing Factor,* Inside Higher Ed (May 8, 2014), https://www.insidehighered.com/views/2014/05/08/essay-asks-why-white-house-efforts-combat-sexual-assault-arent-more-focused-alcohol.

95 Antonia Abbey et al., *Alcohol and Dating Risk Factors for Sexual Assault Among College Women*, 20 Psychology of Women Quarterly 147, 165 (1996); *see also* Sarah Brown, *'Empowerment Self-Defense' Programs Make Women Safer. Why Don't More Colleges Use Them?*, The Chron. of Higher Educ., Apr. 19, 2019, *available at* https://www.chronicle.com/article/Empowerment-Self-Defense-/246144 (finding self-defense classes "cut the women's rate of sexual victimization by 37 percent").

C. Purging Alcohol from the Sexual Assault Debate

It is important to distinguish prevention from determinations of responsibility in individual situations. The purpose of prevention is "the action of stopping something from happening or arising."[96] Risk reduction, "a decrease in the probability of an adverse outcome,"[97] is an important component of prevention. As the consequences of sexual assault are potentially severe, taking every possible precaution to lessen the likelihood of an incident is preferable to allowing harm to occur and then determining punishment.

Sexual assault prevention is distinct from and must be divorced from discussions of after the fact punishment or blame. The Obama administration neglected to address this important distinction and thereby missed the opportunity to address the interplay between alcohol and college sexual assault. On April 4, 2011, the ED's Office of Civil Rights (OCR) distributed a "significant guidance document,"[98] referred to as the 2011 Dear Colleague Letter (DCL), to provide the public and colleges information on the Obama's administration's interpretation of Title IX rights and requirements.[99] The DCL which purportedly "explains schools' responsibility to take immediate and effective steps to end sexual harassment and sexual violence,"[100] has three paragraphs outlining education and prevention whereas the remainder of the nineteen pages addresses reporting, treatment, and adjudication for sexual violence.[101]

The campus sexual assault messaging from the Executive Branch was framed in victim centered language with the focus on never blaming the alleged victim.[102] The concern for victims is undeniably important and the Obama Administration's description of the problem works well in many formats. However, without losing sight of the need to stop "rapists [who] are primarily responsible for preventing rape,"[103] it is also possible to simultaneously focus on prevention through the lens

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96 English Oxford Living Dictionaries, https://en.oxforddictionaries.com/definition/prevention (last visited Jan. 11, 2019).

97 Medical Dictionary, https://medical-dictionary.thefreedictionary.com/risk+reduction (last visited Jan. 11, 2019).

98 *See* Jared P. Cole and Todd Garvey, Cong. Research Serv., R44468, General Policy Statements: Legal Overview (2016) (explaining guidance documents are exempt from the Administrative Procedure Act (APA) whereas "'legislative rules' carry the force of law and are required to undergo the notice and comment procedures of the [APA]").

99 *See generally* Dear Colleague Letter: Sexual Violence from Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., Off. For Civil Rights (Apr. 4, 2011) available at https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

100 *Id.* at 2.

101 *See id.*

102 *See generally* White House Task Force to Protect Students from Sexual Assault, Office of the Vice President and White House Council on Women and Girls, Not Alone, (Apr. 2014) *available at* http://www.changingourcampus.org/resources/not-alone/WH_Task_Force_First_Report.pdf [hereinafter White House Task Force to Protect Students from Sexual Assault 2014].

103 *See* Tara Culp-Ressler, *Obama Launches Initiative To Combat Rape: 'I Want Every Young Man To Feel Some Strong Peer Pressure,'* ThinkProgress (Jan. 22, 2014), https://thinkprogress.org/obama-launches-initiative-to-combat-rape-i-want-every-young-man-to-feel-some-strong-peer-pressure-566ab3bbb2a2/;

of reducing the number of high risk situations all college students face, which by definition includes sexual violence.[104]

Additionally, college policies based on personal responsibility that do not encompass the message that alcoholic abuse is detrimental to decision making are ineffective, especially in relation to a harm that mostly occurs within the confines of the campus drinking culture.[105] In an effort to encourage reporting, the Obama administration decided to rely primarily on bystander intervention, consent education, and the threat of punishment to prevent sexual assault.[106] If students are drunk when attempting to apply their training from either bystander intervention or consent education, both programs are likely to be ineffective.[107] Similarly, an incapacitated or highly inebriated student is likely not focused on the long-term consequences of their actions. Thus, reducing binge drinking is important to ensure proper implementation of sexual assault prevention policies. Nonetheless, the messaging from ED, the White House, the DOJ, and the CDC ensured the topic of alcohol consumption was excised from the college sexual assault conversation by removing drinking from prevention materials.

1. Department of Education

The DCL, which primarily focused on the alleged victim, laid out procedural requirements by mandating each college designate a Title IX coordinator and implement proscribed grievance processes, investigation parameters, remedies, enforcement, as well as preventive education.[108] When addressing prevention, the DCL uses the word "alcohol" twice; not in reference to stopping sexual assault, but to ensure colleges understand it "never makes the victim at fault for sexual violence" and underage drinking should not deter reporting.[109] Both of the references refer to a post hoc look at an alleged victim's alcohol consumption, completely ignoring the importance in curbing excessive drinking to reduce the occurrence of assaults in the first place.

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see *also* Vries, *supra* note 92 ("rapists alone are responsible").

104 *See* Robin Wilson, *Why Campuses Can't Talk About Alcohol When It Comes to Sexual Assault*, The Chron. of Higher Educ., Sept. 4, 2014, *available at* https://www.chronicle.com/article/Why-Campuses-Can-t-Talk/148615; *see also* Emily Yoffe, *Emily Yoffe Responds to Her Critics*, Slate (Oct. 18, 2013 12:05 PM), http://www.slate.com/blogs/xx_factor/2013/10/18/rape_culture_and_binge_drinking_emily_yoffe_responds_to_her_critics.html (discussing the response to her article advising women that the binge drinking culture is toxic was personal attack that she was promoting a rape culture).

105 *See* Meichun Mohler-Kuo et al,, *supra* note 86, at 27, 42.

106 *See* Fact Sheet from the White House, Off. Of the Press Sec'y on Final It's On Us Summit and Report of the White House Task Force to Protect Students from Sexual Assault (Jan. 5, 2017), *available at* https://obamawhitehouse.archives.gov/the-press-office/2017/01/05/fact-sheet-final-its-us-summit-and-report-white-house-task-force-protect [hereinafter Final It's On Us Summit]; *see also* Dear Colleague Letter, at 9–12, *supra* note 99.

107 *See* Ruschelle Leone & Dominc Parrott, *Acute Alcohol Intoxication Inhibits Bystander Intervention Behavior for Sexual Aggression Among Men with High Intent to Help*, 43 Alcoholism: Clinical and Experimental Research 170, 178 (2019) (finding to be effective bystander intervention programs should incorporate alcohol abuse prevention). A person incapacitated due to alcohol is incapable of gaining or giving consent.

108 *See* Dear Colleague Letter, *supra* note 99.

109 *Id.* at 15.

Sublimating alcohol abuse prevention to sexual assault prevention may not necessarily create the desired outcome in reporting. In a footnote, the DCL refers to the HEC as a resource for colleges to develop best practices for addressing alcohol problems.[110] However, the context of the reference is not sexual assault prevention but the possible "chilling effect" of alcohol disciplinary policies on the reporting of sexual assaults.[111] Ensuring barriers to reporting sexual assault are minimized is a laudable goal but is not unrelated to the purpose of the HEC—to reduce alcohol and substance abuse. If fewer students abuse alcohol, fewer students will be fearful of being blamed when reporting sexual assault. Significantly, a student cannot be fearful of reporting that they were unable to give consent due to incapacitation if the school has successfully educated that student not to binge drink in the first place. Eliminating alcohol abuse can be an additional tool to increase reporting.

Unfortunately, the HEC which was funded by the Secretary with the ED's discretionary fund,[112] was eliminated within a year of promulgating the DCL.[113] With the termination of the program, a 2011 guidance letter intended for every college president "[making] the case that addressing alcohol and other drug abuse on [college] campuses is critical to meeting [college] academic goals, as well as meeting the President's College Graduation Goal"[114] was apparently never sent.[115] The Office of Safe and Drug-Free Schools that had housed the HEC was renamed the Office of Safe and Healthy Students and subsumed within the Office of Elementary and Secondary Education in 2011.[116] By placing the student alcohol and drug programs under the auspices of an office focusing on preschool through high school students, the ED thereby effectively eliminated the programming connections with colleges. The Obama administration shifted priorities from funding the HEC, which combined college alcohol, drug, and violence prevention under one roof to focusing almost exclusively on efforts to combat campus sexual assault. In addition, by 2011 the discretionary grant programs managed by the ED which specifically addressed high-risk drinking among college students had been defunded.[117]

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110 *See id.* at n.40.

111 *See id.* at 15.

112 E-mail from William DeJong, Prof. Dep't of Cmty. Health Sci., Boston U. Sch. Pub. Health, to author (March 7, 2018, 16:54 EST) (on file with author).

113 *See* Higher Education Center, http://hecaod.osu.edu/about/ (last visited Jan. 11, 2019).

114 Dep't of Educ., Off. Of Safe and Drug-Free Schs., Working Draft on Recovery/Relapse Prevention in Educational Settings, (May 13, 2011), *available at* https://www2.ed.gov/about/offices/list/osdfs/recoveryrpt.pdf at 15.

115 The author could not find any evidence the HEC draft guidance letter was finalized, approved, or sent.

116 Off. of Safe and Drug-Free Schs., Dep't of Educ., https://www2.ed.gov/about/offices/list/osdfs/index.html (July 22, 2018).

117 *See* Prevention Grants Inventory, Off. Of Safe and Drug-Free Schools, Dep't of Educ.,*available at* https://obamawhitehouse.archives.gov/sites/default/files/ondcp/prevention/safe_and_drug-free_schools_and_communities_national_activities.pdf; *see also* Funding Status Grant Competition to Prevent High-Risk Drinking or Violent Behavior among College Students, U.S. Dep't of Educ., *available at* https://www2.ed.gov/programs/dvphighrisk/funding.html; *see also* Funding Status Grants for Coalitions to Prevent and Reduce Alcohol Abuse at Institutions of Higher Education, U.S. Dep't of Educ., *available at* https://www2.ed.gov/programs/stopact/funding.html; *see also* Funding

Furthermore, the ED's promotion of sexual assault and alcohol misconduct campus crime statistics that are not formulated on a comparable basis misrepresent the frequency of alcohol induced harms. The federal Clery Act statute requires colleges that receive federal funding to maintain and disclose campus crime statistics.[118] However, the data underreports alcohol violations compared to sexual assault because the threshold for including a particular crime for the two categories is fundamentally different. All reported sexual misconduct complaints are tallied, even if not investigated, not proven in a college disciplinary proceeding, or recanted;[119] whereas, only liquor violations contrary to state law for which the college has made a positive determination and may impose a disciplinary sanction are recorded.[120] Alcohol problems that are not counted unless there was a disciplinary referral include drunkenness, driving under the influence, and alcohol disciplinary actions where sanctions are imposed but the law was not violated.[121] The result is an apples to oranges problem wherein every sexual assault complaint is considered a crime regardless of the existence of any level of evidence yet only the subset of student alcohol misconduct violations that are proven illegal are included. Given the variability in harm suffered for all but the most heinous crimes, the numbers can only show the likelihood of an individual becoming the victim of a given type of crime on campus. The combination of counting even unproven sexual assaults while undercounting alcohol problems skews the perception of the relative risks to students on campus.

2. The White House

The White House, too, sought to downplay the role of alcohol in their public campaign to end college sexual assault. President Obama announced the formation of an interagency White House Task Force to protect students from sexual assault on January 22, 2014.[122] The group's remit included "providing institutions with evidence-based best and promising practices for preventing … rape and sexual assault."[123] In the Task Force's first report titled *Not Alone* in April 2014, the word

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Status Models of Exemplary, Effective, and Promising Alcohol or Other Drug Abuse Prevention Programs on College Campuses, U.S. DEP'T OF EDUC., *available at* https://www2.ed.gov/programs/dvpcollege/funding.html.

118 *See* FED. STUDENT AID, U.S. DEP'T OF EDUC., available at https://studentaid.ed.gov/sa/about/data-center/school/clery-act-reports.

119 *See The Handbook for Campus Safety and Security Reporting*, U.S. DEP'T OF EDUC. (2016) *available at* https://ifap.ed.gov/eannouncements/attachments/HandbookforCampusSafetyandSecurityReporting.pdf (a Clery crime may be categorized as unfounded only if law enforcement determine "the crime did not occur and was never attempted").

120 *See The Handbook for Campus Safety and Security Reporting*, U.S. DEP'T OF EDUC. (2016) *available at* https://ifap.ed.gov/eannouncements/attachments/HandbookforCampusSafetyandSecurityReporting.pdf.

121 *See id.*

122 *See generally* Memorandum from the White House, Off. Of the Press Sec'y on Establishing a White House Task Force to Protect Students from Sexual Assault (Jan. 22, 2014), *available at https://obamawhitehouse.archives.gov/the-press-office/2014/01/22/memorandum-establishing-white-house-task-force-protect-students-sexual-a* (including in the membership of the Task Force: Att'y Gen., Sec'y Interior, Sec'y Health and Human Servs., Sec'y, U.S. Dept. of Ed., as well as "heads of agencies or offices as the Co Chairs may designate").

123 *See id.*

"alcohol" did not appear in the section on prevention.[124] The report promoted Bystander Intervention programs, which encourage witnesses to take action if they see someone at risk of assault, as a promising prevention strategy with plans for the President to support the concept in Public Service Announcements.[125]

The Task Force's silence on alcohol is at best an oversight or at worst, purposely misleading. Within the twenty-page *Not Alone* document, the word "alcohol" appears only once referencing facilitated assaults.[126] However, an electronic link for "best practices for better prevention"[127] leads to the CDC's *Preventing Sexual Violence on College Campuses: Lessons from Research and Practice*.[128] Within the second document, under promising strategies, the CDC finds that as "research has shown that alcohol use and sexual violence are associated … alcohol policy has the potential to prevent or reduce sexual violence perpetration."[129] The CDC further references research finding that "alcohol policy approaches may be useful components of comprehensive sexual violence perpetration prevention strategies."[130] This suggests the Task Force was aware that alcohol is a risk factor in sexual assault, yet the *Not Alone* report does not recommend teaching students to refrain from excessive drinking. In an effort to make victims feel comfortable reporting, the Obama administration removed references to alcohol thereby ignoring risk reduction as a component of prevention in the campus environment.

The White House launched the high profile "It's On Us" program on September 19, 2014 "to advance the goal of preventing sexual assault."[131] The public awareness and education campaign supported by public-private partners "focused on three core pillars—consent education, increasing bystander intervention, and creating an environment that supports survivors."[132] Obama mentioned "bystander" eight times during the "It's On Us" rollout but never addressed the topic of alcohol.[133]

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124 *See* White House Task Force to Protect Students from Sexual Assault 2014, *supra,* note 102, at 9-10.

125 *See id.*

126 *Id.* at 13.

127 *Id.* at 9.

128 *See* Report for the *White House Task Force to Protect Students from Sexual Assault,* Centers for Disease Control and Prevention (2014) *available at* https://www.justice.gov/ovw/page/file/909811/download.

129 *Id.* at 10.

130 *Id.* at 10.

131 *See generally* Fact Sheet from the White House, Off. Of the Press Sec'y on Launch of the "It's On Us" Public Awareness Campaign to Help Prevent Campus Sexual Assault (Sept. 19, 2014), *available at* https://obamawhitehouse.archives.gov/the-press-office/2014/09/19/fact-sheet-launch-it-s-us-public-awareness-campaign-help-prevent-campus.

132 *See generally* Final It's On Us Summit, *supra* note 106.

133 *See* Remarks by The President At "It's On Us" Campaign Rollout, 2014 WL 4651795, at *5; *see also* Fact Sheet: Resource Guide And Recent Efforts To Combat Sexual Violence On College And University Campuses, 2015 WL 5460724.

The initiative disregarded considerations that limiting drinking could decrease sexual assaults or even the possibility that inebriated bystanders will be ineffective.[134]

The Task Force's second report on January 5, 2017 continued to endorse bystander initiatives and did not include the word "alcohol" in the twenty-five page document except once in an appendix.[135] The report linked to the group's *Guide for College Presidents, Chancellors, and Senior Administrators*.[136] Once again, the prevention section within the referenced guide did not mention the word "alcohol"; moreover, alcohol was not included anywhere in the document.[137] Thus, by 2017, the Task Force had moved away from suggesting the broader campus community, including bystanders, should even consider alcohol in the same conversation as sexual assault prevention.

3. Department of Justice

The DOJ also refused to endorse sexual assault prevention programming that included decreasing alcohol consumption as part of the solution. The DOJ's Office on Violence Against Women (OVW) administers a grant program, originally created in 2000,[138] to develop comprehensive campus sexual assault prevention and response programs.[139] The grant solicitation guidance explicitly excludes funding for "projects that focus primarily on alcohol and substance abuse" as "Out-of-Scope Activities."[140] This constraint is significant given comparable programs addressing campus alcohol problems had been eliminated by the ED. In 2011, the year of the DCL, the grant solicitation document overview for the first time included three paragraphs drawing attention to the rationale for denying funds for

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134 *See* Dominic Parrott & Ruschelle Leone, *Alcohol probably makes it harder to stop sexual violence – so why aren't colleges talking about?*, The Conversation (Feb. 20, 2018 6:40 AM), *https://theconversation.com/alcohol-probably-makes-it-harder-to-stop-sexual-violence-so-why-arent-colleges-talking-about-it-87048*; *see also* CollegeAIM, *supra* note 83 (ranking by *CollegeAIM* of bystander interventions in the lowest category as "too few robust studies to rate effectiveness—or mixed results").

135 *See generally* White House Task Force to Protect Students from Sexual Assault, Office of the Vice President and White House Council on Women and Girls, The Second Report, (Jan. 5, 2017), *available at* https://obamawhitehouse.archives.gov/sites/obamawhitehouse.archives.gov/files/images/Documents/1.4.17.VAW%20Event.TF%20Report.PDF [hereinafter The Second Report].

136 *Id.* at 2.

137 *See* White House Task Force to Protect Students from Sexual Assault, Office of the Vice President and White House Council on Women and Girls, Preventing and Addressing Campus Sexual Misconduct: A Guide for University and College Presidents, Chancellors, and Senior Administrators, (Jan. 2017) at 8 – 9, *available at* https://obamawhitehouse.archives.gov/sites/obamawhitehouse.archives.gov/files/images/Documents/1.4.17.VAW%20Event.Guide%20for%20College%20Presidents.PDF.

138 *See* Garrine P. Laney, *Violence Against Women Act: History and Federal Funding*, Congressional Research Service (2010), https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1716&context=key_workplace (VAWA 2000 "created new grant programs to address sexual assaults on campuses").

139 42 U.S.C. §14045b (2017).

140 U.S. Dep't of Justice, Off. On Violence Against Women, OMB No. 1122-0020, Grants to Reduce Sexual Assault, Domestic Violence, Dating Violence and Stalking on Campus Program Solicitation (2014), at 13-14, *available at* https://www.justice.gov/sites/default/files/ovw/legacy/2014/01/14/fy2014-campus-solicitation.pdf.

alcohol projects.[141] The OVW explained that alcohol abuse "is disproportionately high among college students … [and] may be an important, and all too frequent, exacerbating factor" in campus assault, but that "addressing substance abuse will solve only the substance abuse problem" and can inhibit reporting of campus crimes.[142] The statement by the OVW is contradictory. If decreasing substance abuse will eliminate a "frequent, exacerbating factor" in sexual assaults, reducing the number of students abusing alcohol will mitigate the offenses to some degree and increase the effectiveness of bystander intervention. Additionally, if reporting is inhibited by having to acknowledge personal alcohol abuse, the first step to increase reporting would be to ensure the students are not abusing alcohol. By eliminating binge drinking and removing this inextricably entwined factor, campuses would expect to see decreases in violence, increases in reporting, or at a minimum put to rest the correlation versus causation uncertainty surrounding campus sexual assault and alcohol.

The subsequent grant solicitation materials effectively eliminated the references to high-risk drinking. The word "alcohol"[143] appeared only one or two times in each of the 2012 to 2015 solicitation documents.[144] The 2016 and 2017 documents, each over sixty pages in length, both used the word "alcohol" twice with a secondary purpose to express the mandate that grantees train all disciplinary panels "on the issue of consent in … alcohol and drug facilitated sexual assault."[145]

After the OVW started collaborating on campus issues with the Obama White House in 2014,[146] the Congressionally funded grant program grew from $6 million

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141 *See* U.S. Dep't of Justice, Off. On Violence Against Women, OMB No. 1122-0020, Grants to Reduce Sexual Assault, Domestic Violence, Dating Violence and Stalking on Campus Program Solicitation (2011), at 4, *available at* https://apply07.grants.gov/apply/opportunities/instructions/oppOVW-2011-2901-cfda16.525-instructions.pdf.

142 *See id.*

143 Alternatives for the word "alcohol" also did not appear in the documents.

144 *See* U.S. Dep't of Justice, Off. On Violence Against Women, OMB No. 1122-0020, Grants to Reduce Sexual Assault, Domestic Violence, Dating Violence and Stalking on Campus Program Solicitation (2012), *available at* https://www.justice.gov/archive/ovw/docs/campus-solicitation.pdf; *see also* U.S. Dep't of Justice, Off. On Violence Against Women, OMB No. 1122-0020, Grants to Reduce Sexual Assault, Domestic Violence, Dating Violence and Stalking on Campus Program Solicitation (2013), *available at* https://www.justice.gov/archive/ovw/docs/2013-campus-program.pdf; *see also* U.S. Dep't of Justice, Off. On Violence Against Women, OMB No. 1122-0020, Grants to Reduce Sexual Assault, Domestic Violence, Dating Violence and Stalking on Campus Program Solicitation (2014), *available at* https://www.justice.gov/sites/default/files/ovw/legacy/2014/01/14/fy2014-campus-solicitation.pdf; *see also* U.S. Dep't of Justice, Off. On Violence Against Women, OMB No. 1122-0020, Grants to Reduce Sexual Assault, Domestic Violence, Dating Violence and Stalking on Campus Program Solicitation (2015), *available at* https://www.justice.gov/sites/default/files/ovw/pages/attachments/2015/02/09/campus_program_solicitation2.pdf.

145 *See* U.S. Dep't of Justice, Off. On Violence Against Women, OMB No. 1122-0020, Grants to Reduce Sexual Assault, Domestic Violence, Dating Violence and Stalking on Campus Program Solicitation (2016), at 5, *available at https://www.justice.gov/ovw/file/811241/download; see also* U.S. Dep't of Justice, Off. On Violence Against Women, OMB No. 1122-0020, Grants to Reduce Sexual Assault, Domestic Violence, Dating Violence and Stalking on Campus Program Solicitation (2017), at 5, *available at https://www.justice.gov/ovw/page/file/923431/download*.

146 *See* U.S. Dep't of Justice, Off. On Violence Against Women, Accomplishments of the Office

awarded to eighteen colleges in 2014 to $25 million awarded to forty-five colleges in 2016.[147] The DOJ's grant program aimed at reducing sexual assault on campus not only ignored the fact that alcohol can be an important factor but, given the demise of other ED college alcohol programs,[148] denied the opportunity for a school to develop programming focused on high-risk drinking.

One of the grants from the OVW funded the Center for Changing Our Campus Culture: An Online Resource to Address Sexual Assault, Domestic Violence, Dating Violence, and Stalking.[149] Alcohol is not mentioned on the website.[150] In the ninety-three-page comprehensive report entitled *Addressing Gender-Based Violence on College Campuses: Guide to a Comprehensive Model*, the sole reference to alcohol appears under the community engagement goals as a warning that "some people … still misconstrue risk reduction (… watching your alcohol consumption …) as prevention."[151] The OVW rightly understands that blaming the victim after the fact for drinking is not prevention and is counterproductive; but, reducing alcohol abuse can allay a major risk factor for campus assault.[152] If the goal is elimination of college sexual assault, stopping excessive drinking is a necessary preventative piece of the puzzle.

The OVW went as far as to ask a presenter at one of their functions to remove the word "alcohol" from the title of her talk "Hooking Up, Alcohol, and Sexual Assault: Understanding the Connections and Reducing the Problem."[153] The DOJ considered highlighting the uncontroverted connection between high-risk drinking and sexual assault to be controversial.

4. Centers for Disease Control and Prevention

The CDC could not avoid the issue of alcohol when writing about sexual assault, but the agency buried the connection in their documents. As previously mentioned, the CDC's report to the White House's task force, *Preventing Sexual Violence on College Campuses: Lessons from Research and Practice,* calls out "alcohol policy [as

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on Violence Against Women (Jan. 2017), at 3, *available at* https://www.justice.gov/ovw/page/file/929506/download.

147 *See* The Second Report, *Supra* note 135; *compare to* Press Release from U.S. Dep't of Justice, Office of Public Affairs on Justice Department Awards $25 Million to Address Sexual Violence on Campuses (Sept. 29, 2016), *available at* https://www.justice.gov/opa/pr/justice-department-awards-25-million-address-sexual-violence-campuses.

148 *See* Section I.C.1., *supra*.

149 Center for Changing Our Campus Culture, http://changingourcampus.org (last visited Jan. 11, 2019).

150 *See id.*

151 *Addressing Gender-Based Violence on College Campuses: Guide to a Comprehensive Model,* Off. On Violence Against Women, Dep't. of Just. Grant No. 2015-TA-AX-K063
(2017), at 13, *available at* http://changingourcampus.org/documents/FINAL-GBV-Comprehensive-Model-22117.pdf.

152 *See CSA Study*, *supra* note 90, at 2-6.

153 Wilson, *supra* note 104.

having] the potential to prevent or reduce sexual violence perpetration."[154] The report suggests that "college prevention efforts should focus on risk and protective factors that are most relevant in young adulthood and in the college environment, such as … alcohol use."[155] Nonetheless, alcohol is minimized in the document and is not included in the full page highlight section of the document.[156] Alcohol is not included in the descriptions of the four selected best prevention programs. Similarly, only one of the 135 CDC-funded Rape Prevention and Education (RPE) programs were related to decreasing drinking.[157]

The second CDC report for the White House Task Force, focusing on "Strategies for Prevention," in 2016 included a few more references to alcohol, but the topic continues to be minimized.[158] The report acknowledged that "the use of alcohol and drugs can contribute to perpetration and victimization," while making it clear that "victim-blaming should never occur and always be taken into consideration when developing prevention messages."[159] Reduction of alcohol use is to be accomplished solely by limiting student access to alcohol or enforcement of drinking laws, as opposed to educating individuals not to binge drink by teaching students responsibility for their own behavior.[160] The message is reinforced in the CDC's two-page summary of approaches to stop sexual assault where alcohol falls under the category of a community-level risk which should be managed by the government and businesses, as opposed to assigning primary responsibility to colleges or students.

Most telling is that neither the current CDC activity summary document on *Preventing Sexual Violence on College*[161] nor the CDC's "Sexual Violence: Prevention Strategies" webpage include the words "drinking" or "alcohol".[162]

D. Missed Opportunity – Underutilizing The Drug-Free Schools and Communities Act

In direct contrast to the attention and resources given to Title IX and the Clery Act by the Obama administration, the enforcement efforts aimed at the DFSCA

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154 Report for the *White House Task Force to Protect Students from Sexual Assault*, *supra* note 128, at 10.

155 *Id.* at 36.

156 *Id.* at 2.

157 *Id.* at 19–27.

158 Dills J, Fowler D, Payne G. *Sexual Violence on Campus: Strategies for Prevention.* Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, 2016. https://www.cdc.gov/violenceprevention/pdf/campussv-prevention.pdf.

159 *Id.* at 10.

160 *Id.* at 16

161 *See* Centers for Disease Control and Prevention, Preventing Sexual Violence On College And University Campuses: A Summary Of CDC Activities, https://www.cdc.gov/violenceprevention/pdf/campusvsummary.pdf (last visited on Jan. 11, 2019).

162 *See* Centers for Disease Control and Prevention, Sexual Violence: Prevention Strategies, https://www.cdc.gov/violenceprevention/sexualviolence/prevention.html (last visited Jan. 11, 2019).

mandated campus alcohol policies have remained largely under supported. The ED demonstrated an initial surge of support in the form of establishing the HEC in 1995, which then published a DFSCA compliance handbook in 1997.[163] The handbook was subsequently updated in 2006.[164] Regardless that the ED was tasked with enforcing compliance with the regulations and authorized the ED Secretary to issue monetary penalties for noncompliance,[165] in 2012 the Office of Inspector General found the ED "performed no oversight activities of [colleges] … alcohol abuse prevention programs from 1998 to 2010."[166] In a 2011 "Dear Higher Education Partner" letter, the Obama administration reminded colleges of their obligations to address high-risk drinking and put colleges on notice that the ED would increase monitoring of college compliance.[167] The ED secretary promised colleges expanded resources would be available from the HEC for the creation of effective programming, educational campaigns, and grant investments for a "Healthy Colleges Campuses competition."[168] It is unclear if or in what form the ED provided assistance to colleges with managing their DFSCA compliance;[169] but as previously mentioned, the HEC was defunded in 2011, within months of the letter from the ED secretary effectively abandoning his pledge. On the other hand, the ED did follow through with additional oversight of the DFSCA requirements.[170]

The increased enforcement by the ED did not initially lead to colleges proactively complying with the DFSCA. A survey of colleges in 2015 suggests that close to half of all colleges were out of compliance.[171] During 2014 and 2015, fifty-seven colleges were found out of compliance with the DFSCA regulations and six colleges were fined. In 2016, a letter announcing the outcome of the two-year Penn State Sandusky investigation included ten violations of the Clery Act and

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163 U.S. Dep't of Educ., Pub. No. ED/OPE97-2, Complying with the Drug-Free Schools and Campuses Regulations [EDGAR part 86]: A Guide for University and College Administrators (1997).

164 U.S. Dep't of Educ., Pub. No. ED-04-CO-0137, Complying with the Drug-Free Schools and Campuses Regulations [EDGAR part 86]: A Guide for University and College Administrators (2006).

165 34 C.F.R. § 86.301 (1996).

166 Letter from Wanda A. Scott, Asst. Inspector Gen., U.S. Dept. of Ed. Off. Of Inspector Gen., to James W. Runcie, Chief Operating Officer, U.S. Dept. of Ed., Federal Student Aid, *Institution of Higher Education Compliance with Drug and Alcohol Abuse Prevention Program Requirements* (Mar. 14, 2012), at 1, *available at* https://www2.ed.gov/about/offices/list/oig/aireports/i13l0002.pdf.

167 *See* Letter from Arne Duncan, Sec'y, U.S. Dept. of Ed., R. Gil Kerlikowske, Dir., Off. Of Natl. Drug Control Policy, to Inst. Of Higher Ed. Administrators, *2011 National Drug Control Strategy for Inst. Of Higher Ed.* (Sept. 23, 2011), *available at* https://obamawhitehouse.archives.gov/sites/default/files/ondcp/ondcp_higher_ed_letter.pdf.

168 *See id.*

169 The author could not find records on the "Healthy Colleges Campuses" competition or Federal educational campaigns aimed at college high-risk drinking.

170 *See* Michael M. DeBowes, *The Resurgence of the Drug-Free Schools and Communities Act: A Call to Action*, StanleyCSS.com (2016), at 3, *available at* https://info.stanleycss.com/rs/692-VCY-483/images/Resurgence-of-the-Drug-Free-Schools.pdf?aliId=11153710.

171 David S. Anderson & Glenn-Milo S. Santos, *Results of the 2015 College Alcohol Survey* (2015), https://caph.gmu.edu/assets/caph/CollegeAlcoholSurvey2015FinalResults.pdf (finding 53% of sample institutions failed to comply with evaluating program effectiveness as mandated by 34 C.F.R. 86.100(b) in the required biannual review of campus drug and alcohol programs).

one of the DFSCA.[172] Penn State was fined over $2 million and the DFSCA portion was 1.1 percent of the total.[173] Though 2018, the ED continues to find colleges in violation of the DFSCA[174] and yet has not provided the resources to update the 2006 compliance handbook.

Paradoxically, during the years the federal government insufficiently supported colleges in alcohol abuse prevention efforts while prioritized the fight against sexual violence on campus, DFSCA determinations drew the connection that ignoring high-risk drinking obligations could create liability for violence that occurred on campus. DFSCA program review reports during 2014 included the statements "data compiled by the Department shows that … alcohol abuse is highly correlated to increased incidents of violent crimes on campus"[175] and that "more than 90% of all violent campus crimes are drug and alcohol-related."[176] The Penn State letter directly connected the dots between campus alcohol abuse and crime prevention—the need to abide by the DFSCA in order to avoid liability for violent campus crimes,[177] which by definition includes sexual assault.

The campus drinking culture results in wide ranging consequences to a large number of students and to colleges as institutions. As reducing alcohol abuse on campus is arguably more imperative now then it was when the federal government first rang the warning bell in 1976, binge drinking must be addressed to solve the wide-ranging health and safety problems that include sexual assault.[178]

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172 *See* Letter from Susan D. Crim, Dir., Admin. Actions & Appeals Service Group, Fed. Student Aid Enforcement Unit, to Eric J. Barron, Pres., Pa. St. U., OPE-ID 00332900 (Nov. 3, 2016), https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/cleryact/pennstate/PennStateFineLetter.pdf [hereinafter Penn. State Letter].

173 *See* Letter from Susan D. Crim, Dir., Admin. Actions & Appeals Service Group, Fed. Student Aid Enforcement Unit, to Eric J. Barron, Pres., Pa. St. U., OPE-ID 00332900 (Nov. 3, 2016), https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/cleryact/pennstate/PennStateFineLetter.pdf (total fine of $2,397,500 of which DFSCA was $27,500).

174 *See* Letters published on U.S. Dep't of Educ. website: https://studentaid.ed.gov/sa/about/data-center/school/clery-act-reports (post Penn State 2016 letter, at least eleven colleges received Determination Letters which included findings of noncompliance with DFSCA).

175 Letter from Ralph LoBosco, Div. Dir., U.S. Dep't of Educ., to Steven Spann, Pres., John A. Gupton C., OPE-ID-00885900 (June 10, 2014), at 15, *available at* https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/library/FPRD/JohnAGuptonCollege_TN_008859_06102014_FPRD.pdf.

176 Letter from Ralph LoBosco, Div. Dir., U.S. Dep't of Educ., to Carla Sunberg, Pres., Nazarene Theological Seminary (June 17, 2014), (OPE-ID-00249400), at 15, *available at* https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/library/FPRD/NazareneTheologicalSeminary_MO_002494_06172014_FPRD.pdf.

177 *See* Letter from James L. Moore, III, Sen. Advisor, Clery Act Compliance Team, to Eric J. Barron, Pres., Pa. St. U., OPE-ID 00332900 (Nov. 3, 2016), *available at* https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/cleryact/pennstate/PSCFPRD10327991.pdf (the language used in the Pa. St. U. determination is commonly inserted in program review letters, including those of Occidental College, South Carolina State University, University of Jamestown, University of St. Thomas, and Green River College all published in 2017 – 2018, *available at* https://studentaid.ed.gov/sa/about/data-center/school/clery-act-reports).

178 *See* Andrew Johnson, *Alcohol, Drugs a Factor in Vast Majority of Campus Sexual Assaults, University Finds,* The College Fix (Feb. 28, 2018), https://www.thecollegefix.com/post/42423/.

II. EMPOWERING CAMPUS CULTURE CHANGE

The actions by the Obama administration significantly transformed the campus culture by eliminating the silence and stigma surrounding campus sexual assault. To promote the federal government's Title IX policy many levers of power were utilized, all coordinated by the executive branch. The Obama administrative incentivized campus action through creating multiple grant programs. Funding opportunities were available to address sexual assault for the purposes of prevention, enforcement, services, and research.[179] In 2017, the White House promoted grant programs totaling more than $17 million available through the DOJ's OVW, the HHS's Office of Women's Health, and the CDC.[180]

The Obama administration utilized Title IX as a monetary lever. Through threatening the loss of all federal funding for noncompliance with the DCL, the government affected the way colleges addressed sexual assault claims.[181] The ED interpreted Title IX to require every college to have at least one Title IX coordinator.[182] In response, colleges not only complied but created an industry of Title IX administrators, which were nonexistent prior to 2011, and grew to over 5,000 members in 2016.[183] Harvard has over 50 Title IX administrators and Yale nearly 30.[184] Colleges are spending millions of dollars on "Title IX employees, … lawyers, investigators, case workers, survivor advocates, peer counselors, workshop leaders and other officials" to comply with federal regulations.[185] In response to federal pressure, an entirely new field of Title IX bureaucracy was created.[186]

To influence school policy, OCR publicly announced college Title IX investigations. The ED published what some have referred to as a "list of shame" denoting every

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179 *See generally* Release from the White House, Off. Of the Vice President, FACT SHEET: Resource Guide and Recent Efforts to Combat Sexual Violence on College and University Campuses (Sept. 17, 2015), *available at* https://obamawhitehouse.archives.gov/the-press-office/2015/09/17/fact-sheet-resource-guide-and-recent-efforts-combat-sexual-violence. [hereinafter FACT SHEET].

180 *See* THE SECOND REPORT, *supra* note 135, at 24.

181 *See* Dear Colleague Letter, *supra* note 99, at 16; *see also* Will Creely, *Why the Office for Civil Rights' April 'Dear Colleague Letter' Was 2011's Biggest FIRE Fight*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Jan. 3, 2102), https://www.thefire.org/why-the-office-for-civil-rights-april-dear-colleague-letter-was-2011s-biggest-fire-fight/.

182 *See generally* Dear Colleague Letter on Title IX Coordinators from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., Office for Civil Rights (Apr. 24, 2015), at 2, available at https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf.

183 *See* Anemona Hartocollis, *Colleges Spending Millions to Deal With Sexual Misconduct Complaints,* N.Y. TIMES (Mar. 29, 2016), https://www.nytimes.com/2016/03/30/us/colleges-beef-up-bureaucracies-to-deal-with-sexual-misconduct.html.

184 *See id.*

185 *See id.*

186 *See generally* Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy,* 104 Cal. Law Review 881 (2016); *see also,* Kylie Cheung, et al., *Federal Government Concludes Investigation into USC's Title IX policies, Finds USC Complied with Recommended Changes,* DAILY TROJAN (Mar. 16, 2018), https://dailytrojan.com/2018/03/16/federal-government-concludes-investigation-into-uscs-title-ix-policies-finds-usc-complied-with-recommended-changes/ (listing in timeline format over twenty different title ix committees, new employees, training programs, and resources put in place from 2013 to 2017 at USC).

campus that was under investigation for possible Title IX violations.[187] OCR's policy was to list the names of all colleges that had current open investigations for possible violations of the law. Many people, and the press, interpreted the list to mean colleges were presumed guilty prior to a final determination of wrongdoing. While originally proclaiming the list served the purpose of "[driving] a national conversation on sexual violence,"[188] the publication of college names under investigation was later justified as important for transparency and accountability purposes.[189] The decision to publicly promote a list of names based merely on the opening of an investigation likely influenced colleges to behave in a manner to avoid being included among the named and shamed.

Publicity was also utilized to promote a national conversation and encourage student activism. Utilizing the internet and mass media, the Obama administration's message permeated the country. The executive branch's "It's On Us" campaign was promoted through a website with an on-line pledge capability and merchandise shop.[190] "It's On Us" delivered materials to at least 500 campuses, has over eighty sponsors, and has trained almost 5,000 student leaders.[191] The White House launched multiple public service announcements with famous actors and artists, utilizing more than 20,000 media outlets and reaching more than ten million viewers.[192] Inspired by the Obama administration's actions, including his proclamation creating an annual sexual assault awareness month,[193] multiple activist groups were started by college

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187 *See* Press Release from U.S. Dep't of Educ., Press Off. On U.S. Dep't of Educ. Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations (May 1, 2014), *available at* https://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations; *see also* Amy Rock, *Dept. of Ed. Publishes Database of Pending Civil Rights Investigations*, Campus Safety (Jan. 19, 2018), https://www.campussafetymagazine.com/university/dept-ed-civil-rights-database/.

188 Nick Anderson, *At First, 55 Schools Faced Sexual Violence Investigations. Now the List Has Quadrupled*, The Wash. Post (Jan. 18, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/01/18/at-first-55-schools-faced-sexual-violence-investigations-now-the-list-has-quadrupled/?utm_term=.e4a037c32541.

189 Jennifer Steinhauer and David Joachim, *55 Colleges Named in Federal Inquiry Into Handling of Sexual Assault Cases*, N.Y. Times (May 1, 2014), https://www.nytimes.com/2014/05/02/us/politics/us-lists-colleges-under-inquiry-over-sex-assault-cases.html.

190 *See It's On Us*, *http://www.itsonus.org* (last visited Jan. 11, 2019).

191 *See id.*

192 *See* Fact Sheet from the White House, Off. Of the Press Sec'y on The "It's On Us" Campaign Launches new PSA, Marks One-Year Since Luanch of "It's On Us" Campaign to End Campus Sexual Assault (Sept. 1, 2015), *available at https://obamawhitehouse.archives.gov/the-press-office/2015/09/01/fact-sheet-its-us-campaign-launches-new-psa-marks-one-year-launch; see also 1 Is 2 Many*, The White House, Pres. Barack Obama, *https://obamawhitehouse.archives.gov/1is2Many* (last visited Jan. 11, 2019) (includes 1 is 2 Many PSA video).

193 *See* Press Release from Off. Of the Press Sec'y, Presidential Proclamation Marking National Sexual Assault Awareness Month, 2009 (Apr. 8, 2009), *available at* https://obamawhitehouse.archives.gov/the-press-office/presidential-proclamation-marking-national-sexual-assault-awarness-month-2009; *see also* Press Release from Off. Of the Press Sec'y, Presidential Proclamation—National Sexual Assault Awareness and Prevention Month (Mar. 31, 2011), https://obamawhitehouse.archives.gov/the-press-office/2011/03/31/presidential-proclamation-national-sexual-assault-awareness-and-preventi; *see also* Press Release from Off. Of the Press Sec'y, Presidential Proclamation — National Sexual Assault Awareness and Prevention Month, 2013 (Mar. 29, 2013) https://obamawhitehouse.archives.

women.[194] The campus advocates reacted vigorously and loudly, most famously with the Columbia "mattress girl" whose "Carry That Weight" performance art piece was recreated on campuses all over the United States and earned her an invitation to the State of the Union from Sen. Gillibrand.[195] "The Hunting Ground," a movie about campus sexual assault, was promoted by vice-president Biden at the Oscars,[196] screened at the White House[197] and on more than 1,000 campuses.[198] The film's website is digitally linked to "It's On Us."[199] Paradoxically, the White House and the ED were marginally involved in the Rolling Stone's Jackie of UVA article[200] that set off arguably the most controversial campus moral panic[201] post the Duke lacrosse scandal.[202] The extensive publicity allowed the administration's message to influence activities on almost every college campus.

Furthermore, the tactics utilized by the Obama administration not only spread their message by changing the campus conversation concerning sexual assault

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gov/the-press-office/2013/03/29/presidential-proclamation-national-sexual-assault-awareness-and-preventi.

194 *See generally* Know Your Title IX, https://www.knowyourix.org (last visited on Jan. 11, 2019); *with* End Rape On Campus, http://endrapeoncampus.org (last visited on Jan. 11, 2019); *with* SurvJustice, http://www.survjustice.org (last visited on Jan. 11, 2019); *with* Callisto, https://www.projectcallisto.org (last visited on Jan. 11, 2019); *with* Ultraviolet, https://weareultraviolet.org (last visited on Jan. 11, 2019).

195 *See* Alexandra, Svokos, *Students bring Out Mattresses In Huge 'Carry That Weight' Protest Against Sexual Assualt*, HuffPost (Oct. 29, 2014 4:21 PM, updated Dec. 6, 2017), https://www.huffingtonpost.com/2014/10/29/carry-that-weight-columbia-sexual-assault_n_6069344.html; *see also* Kirsten Gillibrand, *Carrying Their Weight: Giving Voice to Survivors of Campus Sexual Assault*, HuffPost (Jan. 21, 2015 11:51 AM, updated Mar. 23, 2015), https://www.huffingtonpost.com/rep-kirsten-gillibrand/carrying-their-weight-giv_b_6516630.html.

196 Leora Yashari, *Documentary The Hunting Ground Are Still Telling Sexual Assault Survivors, "We Believe You"*, Vanity Fair (Jan. 8, 2016 6:01 PM), *available at* https://www.vanityfair.com/hollywood/2016/01/the-hunting-ground-annie-clark-andrea-pino.

197 The Hunting Ground, http://thehuntinggroundfilm.com/story/ (last visited Jan. 11, 2019).

198 Maria Cuomo Cole & Jimmie Briggs, *The Hunting Ground is Shifting the Culture on Campuses,* HuffPost (Jan. 19. 2016 8:09 AM, updated Jan. 19. 2017), https://www.huffingtonpost.com/maria-cuomo-cole/the-hunting-ground-shifting-culture_b_9008356.html.

199 *See* The Hunting Ground, *supra* note 198.

200 *See Eramo v. Rolling Stone*, No. CL15000205-00, complaint (Va. Cir. Ct. May 12, 2015), *available at http://pdfserver.amlaw.com/nlj/Eramo%20v%20Rolling%20Stone%20complaint* (Rolling Stone's author was first introduced to Jackie by Emily Renda); *see also* Renda-Testimony, U.S. Sen. Comm. Health, Educ. Labor & Pensions, https://www.help.senate.gov/download/renda and *https://www.help.senate.gov/imo/media/doc/Renda.pdf* (consulted with the Whitehouse's Task Force to Protect Students from Sexual Assault); *see also* Jeffrey Shapiro, *Rolling Stone Says White House Adviser Introduced U.Va. Rape Accuser,* Wash. Times (Junly 19, 2015), *https://www.washingtontimes.com/news/2015/jul/19/rolling-stone-says-university-of-virginia-rape-acc/* (the ED fact checked Rolling Stone's article before publication).

201 Rolling Stone withdrew the article "A Rape on Campus" in 2015, four months after publication, because the account of Jackie being gang raped at UVA fraternity which was first widely accepted as true was quickly exposed as farcical. The resulting litigation from the article cost Rolling Stone millions of dollars.

202 A rush to judgement similar to the Jackie story occurred in 2016 when members of the Duke Lacrosse team were falsely accused of rape and publicly pilloried. In 2017, the players were declared innocent and the prosecuting attorney was disbarred.

but were overpowering enough that colleges chose to comply even at the risk of suffering a new type of lawsuit with potential significant financial consequences.[203] The DCL arguably increased the legal liability of colleges administratively beyond the pre-existing judicial standard in individual suits for damages under Title IX. In *Davis v. Monroe Cty. Bd. of Educ.*, the Supreme Court held that colleges may be liable in damages for their own misconduct in cases of peer sexual assault.[204] The DCL additionally imposed an affirmative duty of care on colleges to not only respond appropriately, but also to prevent sexual assault. OCR interpreted Title IX without going through the Administrative Procedure Act (APA) rulemaking process[205] yet required "more than what reasonable care would demand in court and [did] so with a massive list of specific compliance requirements."[206] In response to lawsuits, colleges settled multimillion-dollar complaints from alleged college victims.[207] Given the legal precedent, settlements, and additional pressure from the OCR, colleges took notice and changed their Title IX disciplinary procedures to comply with the guidance regardless of concerns that it might result in unfair systems.[208]

An unintended consequence of compliance with the overt pressure applied by the Obama administration on colleges was the filing of close to 400 lawsuits by students accused of sexual misconduct, usually men alleging due process violations or gender discrimination since 2012.[209] As "some federal courts[] have observed … this spate of cases can be traced to the now-rescinded April 4, DCL from the OCR, which, on threat of withholding federal funds, instructed universities to replace the 'beyond a reasonable doubt' or 'clear and convincing' evidence standards previously used by many universities when adjudicating sexual assault complaints with a 'preponderance of the evidence' standard."[210] Moreover,

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203 *See John Doe v. Alger*, No. 5:15-cv-35 (W.D. Va. 2018) (awarding John Doe $849,231.25 in attorney fees and litigation costs); *see also* George Leef, *Another University Will Have to pay for Its Title IX Zealotry*, Forbes (Feb. 25, 2018 10:30 AM), https://www.forbes.com/sites/georgeleef/2018/02/25/another-university-will-have-to-pay-for-its-title-ix-zealotry/#4323c5d9b033.

204 *See Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 640 (1999).

205 Cole, *supra* note 98.

206 Peter F. Lake, The Rights and Responsibilities of the Modern University 194 (2d ed. 2013), at 166.

207 *See* Howard Pankratz, *$2.8 Million Deal In CU Rape Case*, Denver Post (Dec. 5, 2007 7:41 AM), https://www.denverpost.com/2007/12/05/2-8-million-deal-in-cu-rape-case/ (settlement with two women who filed Title IX lawsuits after allegations of rape by classmates); *see also* Tatiana Schlossberg, *Uconn to Pay $1.3 Million to End Suit on Rape Cases*, N.Y. Times (July 18, 2014), https://www.nytimes.com/2014/07/19/nyregion/uconn-to-pay-1-3-million-to-end-suit-on-rape-cases.html (settlement with five students who claimed the school treated them with indifference after bringing claims of sexual assault and harassment).

208 Elizabeth Bartholet et al., *Fairness For All Students Under Title IX*, HLS Scholarly Articles (Aug. 21, 2017), *available at* https://dash.harvard.edu/handle/1/33789434.

209 Title IX For All, http://www.titleixforall.com/data-resources/ (last visited Feb. 20, 2019); *see also* Patricia Hamill and David Rudovsky, *Comments of Concerned Lawyers and Educators in Support of Fundamental Fairness for All Parties in Title IX Grievance Proceedings*, Dep't of Educ. Notice of Proposed Rulemaking Docket No. ED-2018-OCR-0064, RIN 1870–AA14 (submitted Jan. 28, 2019), fn. 2, available at https://conradobrien.com/uploads/attachments/cjrjac2cb0cmt01iw4vzo4aev-comments-of-concerned-lawyers-and-educators-in-support-of-fundamental-fairness-for-all-parties-in-title-ix-grievance-proceedings-1-28-2019.pdf.

210 *Doe v Marymount Univ.*, 297 F.Supp.3d 573 (E.D. Va. 2018).

the men are winning cases with courts finding "reasonable inference of gender discrimination" based upon "external pressure from the federal government … to combat vigorously sexual assault on college campus and the severe potential punishment—loss of all federal funds."[211] An expert in the field of law and policy in higher education said "in over 20 years of reviewing higher education law cases, I've never seen such a string of legal setbacks for universities, both public and private, in student conduct cases. … Something is going seriously wrong. These precedents are unprecedented."[212] Colleges were placed legally between a rock and a hard place. By toeing the line with the Obama administration's Title IX policies, colleges traded the potential risks from noncompliance for institutional liability arising from accused student lawsuits.

The Obama administration's actions changed the campus culture on both student and administrative levels. While there is no apparent evidence that the Obama administration's actions impacted campus sexual assault rates,[213] there are positive takeaways from their policy strategy including increased reporting of sexual assault.[214] The federal government demonstrated the significant impact its actions can have on changing the attitudes, behaviors, and procedures on college campuses. Utilizing financial incentives as a carrot and a stick combined with both positive and negative publicity campaigns, the government created incentives for colleges to comply.

III. PATH FORWARD

The past demonstrates Congress can be confident in their ability to shift the attitude towards campus drinking for the social and economic benefit of all Americans. Once upon a time, smoking was culturally cool and normalized, like alcohol abuse is today on American campuses. More recently, the Obama administration helped change the campus culture surrounding sexual assault.[215] By publicizing the risks and costs associated with binge drinking, similar to how the effective public health messaging regarding the negative effects of smoking shifted the public's view about cigarettes, we need to make campus alcohol abuse

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211 *Doe v. Miami Univ.*, 882 F.3d 579, 594 (6th Cir. 2018).

212 Jake New, *Out of Balance,* Inside Higher Ed (Apr. 14, 2016), https://www.insidehighered.com/news/2016/04/14/several-students-win-recent-lawsuits-against-colleges-punished-them-sexual-assault.

213 *See* Laura Kerner et al., *Sexual Assaults on College Campus,*13 J. of Acad. Admin. In Higher Educ. 41, 41 (2017) (finding it "significant that the percentage of women being sexually assaulted on college campuses has not decreased significantly over the years"); *see also* 2018 Nat'l Crime Victims' Rights Week Resource Guide: Crime and Victimization Fact Sheets, Off. For Victims of Crime, Dep't of Justice, *available at* https://ovc.ncjrs.gov/ncvrw2018/info_flyers/fact_sheets/2018NCVRW_SexualViolence_508_QC.pdf (stating rates of sexual violence between 2006 and 2015 showed no significant change).

214 *See* Musu-Gillette et al., Indicators of School Crime and Safety: 2016, Nat'l Center for Ed. Statistics, Dep't of Ed., Bureau of Justice Statistics, Off. Of Justice Programs, Dept' of Justice, at 122, *available at* https://nces.ed.gov/pubs2017/2017064.pdf (finding the number of reported campus sex crimes increased 34 percent between 2013 and 2014 continuing the trend which showed a 205 percent increase between 2001 and 2014).

215 *See* Section II., *supra*.

and black-out drinking culturally uncool, too.[216] There is no need for Congress to hesitate in heeding the experts' advice and act as "we still have a long way to go in changing the conditions that support underage drinking in our country."[217]

By utilizing the techniques that the Obama administration successfully implemented to empower change in the campus attitude towards sexual assault, the federal government similarly has the capacity to alter the binge drinking culture. Congress can authorize the ED and the CDC to work across agencies, use monetary levers combined with regulation oversight to ensure accurate information is disseminated, and utilize their public platform to ensure buy-in to the cause.

To garner public understanding and support, the message should be trumpeted that Congress is working to save lives, increase educational benefits, make students healthier and safer, as well as protect all citizens from the civic harms associated with drinking. Colleges must be forced to reckon publicly with the aggravating role alcohol plays in almost every facet of campus life. The harms of campus drinking, including the link to encroachment of college's core academic mission for drinkers and non-drinkers alike, must be as clear as damaged lung photos on cigarette packages. On the economic front, Congress can emphasize the benefits to be gained from lowering health care costs, decreasing property damages, and increasing work productivity.[218] It is currently estimated that "the cost of excessive alcohol use in the United States reached **$249 billion** in 2010," which was mostly attributable to binge drinking.[219] Congress in the reauthorization of the HEA should utilize the powers of the purse to empower the ED together with the CDC to apply pressure on colleges to address the campus drinking culture through the following recommendations.

A. Higher Education Act

The federal government has the connections, power, and resources to best influence alcohol policy on colleges. As colleges are located in all fifty states, the federal government is the only entity with the ability to reach every campus. The federal government can spearhead a major cultural change by inspiring college presidents, campus administrators, students, and parents to tackle this difficult issue together. As there is a plethora of information available and many individuals and organizations with good intentions, what is needed is leadership from the federal government to encourage a national movement inclusive of all stakeholders.

The HEA is a vehicle through which the federal government reaches almost every college. The HEA authorizes federal aid to college students and colleges

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216 *See* U.S. Dep't of Health & Human Servs., Nat'l Insts. Of Health, Nat'l Inst. On Alcohol Abuse and Alcoholism, Video Bank: *Alcohol Education, Prevention, and Treatment – Creating a Climate of Trust*,__https://www.niaaa.nih.gov/alcohol-education-prevention-and-treatment-creating-climate-trust (Dec. 27, 2016).

217 Rep. Underage Drinking *supra* note 12, at ii.

218 *See* Centers for Disease Control and Prevention, U.S. Dep't of Health & Human Servs., *Excessive Drinking is Draining the U.S. Economy*, https://www.cdc.gov/features/costsofdrinking/index.html (July 13, 2018).

219 *Id.*

that is administered through the ED.[220] In 2016, the federal government provided approximately $125.7 billion in financial assistance to students and their families as well as $2.2 billion to colleges.[221] As previously stated, the DFSCA currently ties college federal funding to alcohol prevention programs.[222] Therefore, Congress can build on the strong monetary connection between the HEA and colleges to strengthen the pressure on colleges to change the alcohol culture.

The last comprehensive reauthorization of the HEA was the "Higher Education Opportunity Act" of 2008 which included authorizations for most programs through 2014.[223] After Congress provided authorization to extend the expired 2008 HEA, it is currently up for reauthorization this year.[224] Both Republicans and Democrats have proposed changes to the alcohol and drug policy in the HEA. The current proposed Republican legislation in the House of Representatives is named the "Prosper Act" and has been referred to the Committee on Education and Workforce.[225] The bill includes a provision to amend the HEA Alcohol Abuse Prevention section by creating a minimum standard requiring colleges to distribute their alcohol policy, including information on sanctions for illegal alcohol use and descriptions of the available alcohol support programs to all students.[226] Similar to the Obama administration's mistaken strategy, the "Prosper Act" neglects to focus on the importance of stopping alcohol abuse before it occurs and instead relies on institutional after the fact punishment or treatment. Because campus alcohol abuse remains a long-standing problem that states and schools have not adequately adressed through punitive responses, federal efforts should now be focused on promoting risk reduction to significantly limit campus drinking to ensure fewer students need treatment.

The Democrats proposed legislation in the House of Representatives is the "Aim Higher Act."[227] While House Democrats initially proposed eliminating tying federal funding to alcohol and drug prevention programs on college campuses, concerns about the opioid epidemic led to partially reinstating the requirement.[228] The proposal continues the current HEA delineation between alcohol and drug abuse programming, but tweaks the language and places a greater emphasis what is now labeled "substance misuse."[229] The second-place status of alcohol in the proposal furthers the complacency attached to dealing with college drinking

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220 *See* Congressional Research Service, The Higher Education Act (HEA): A Primer 1 (Aug. 25, 2017) (prepared by Alexandra Hegji), *available at* https://fas.org/sgp/crs/misc/R43351.pdf.

221 *See id.*

222 Drug-Free Schools and Communities Act Amendments of 1989, *supra* note 50.

223 Higher Education Opportunity Act, Pub. L. No. 110-315, 122 Stat 3078 (2008).

224 *Id*. at 1.

225 Prosper Act, H.R. 4508, 115th Cong. (2017).

226 *Id.*

227 Aim Higher Act, H.R. 6534, 115th Cong. (2017).

228 Aim Higher Act, H.R. 6534 Bill Summary, House Comm. Educ.& Labor, at 12, *available at* https://edlabor.house.gov/imo/media/doc/Aim%20Higher%20Act%20--%20Bill%20Summary.pdf.

229 Aim Higher Act, H.R. 6534, 115th Cong. (2017).

problems. Congress must do better than the "Prosper Act" or the "Aim Higher Act" by bringing campus alcohol abuse to the forefront of HEA legislation thereby signaling the intent of Congress to support and encourage the eradication of this serious problem.

B. Roles of the Department of Education and Centers for Disease Control and Prevention

The ED and the CDC are the appropriate agencies to run the necessary alcohol prevention programming, research, and oversight necessary to promote safe and healthy campus life because combined the two agencies have the ability to grab the attention of colleges, understand the public health risks, and can communicate effectively with all parties. As the campus binge drinking problem is unique to the campus culture created and sustained by colleges it is important to harness the expertise. The CDC houses the scientific information and connection to leaders in the field on alcohol abuse.[230] Whereas, the ED has demonstrated the ability to command colleges' attention and elicit responses through Title IX and Clery enforcement under the Obama administration. The DFSCA can be leveraged by the ED and CDC team by providing updated compliance handbook, expertise resources, and more powerful enforcement.

Because preventing alcohol abuse on college campuses is a complex problem demanding cultural change, one of the goals of the ED and CDC team must be to foster involvement and investment in developing solutions by all community members. The most promising research by the Government calls for a multi-prong approach simultaneously combining individual interventions, campus-wide programming, and community-based policies.[231] When grassroots efforts emerge, such as college presidents who have shown an interest in working together to combat high-risk alcohol culture on their campuses,[232] the ED and CDC team will be positioned to leverage such initiatives by encouraging other stakeholders to participate or emulate the programs.

Separation of oversight responsibilities for enforcement by the ED as opposed to safety research and prevention by the CDC is practical for procedural and policy reasons. From a management perspective, the current regulations necessitate distinct assessments of compliance and determinations of fines for Title IX, DFSCA, and the Clery Act. Also, to incentivize colleges to utilize the CDC for prevention resources, colleges should not fear punishment when seeking advice or sharing failures as part of the learning process. On the other hand, the safety goals underlying the DFSCA for alcohol, Title IX for sexual assault, and Clery Act for crimes are the same—to protect students. Significantly, the interplay between

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230 *See* Centers for Disease Control and Prevention, gov https://www.cdc.gov/about/organization/mission.htm (last visited on May 6, 2019) (CDC's role is to be "the nation's health protection agency").

231 *See*, WHAT COLLEGES NEED TO KNOW, *supra* note 68, at 3.

232 *See* AMETHYST INITIATIVE, http://www.theamethystinitiative.org/why-sign/ (last visited on Jan. 11, 2019) (creating the Amethyst initiative in 2008 when 136 school Presidents signed on to collaborate on the issue of campus high-risk drinking culture); *see also* NCHIP, *supra* note 7, at iv (creating a coalition of 32 college presidents in 2011 to address high-risk drinking on campus).

alcohol and campus violence as articulated in DFSCA determinations[233] should not be ignored. To effectively address these interrelated campus problems, it is logical to take a unified approach under an ED and CDC partnership to promote prevention.

The ED and the CDC should coordinate a campus safety team.[234] Congress should specify the appropriate role of other agencies including the NIAAA, SAMHSA, and OVW to ensure overlapping college alcohol and safety issues create synergies as opposed to compete with the new ED and CDC team decisions.

C. Legislative Recommendations

In the reauthorization of the HEA, Congress should pool the expertise from all sources to develop comprehensive campus alcohol prevention legislation. The Federal government over the years in reports from multiple offices and agencies has provided the necessary language and tools to successfully address campus drinking problems. Drawing on the lessons from the Obama administration's sexual assault model, the ED and the CDC should be forcefully empowered to utilize a multi-prong approach to combat campus alcohol abuse. There is no need to reinvent the wheel.

Importantly, my solutions are not cost intensive. The Trump administration is unlikely to increase funding to the ED and the CDC, regardless that Trump himself does not drink and might personally support campus alcohol prevention efforts.[235] The utilization of current research available within the CDC; pre-existing DFSA, Title IX, and Clery Act tools; the ED's relationships with colleges; and the reorganization of current agency responsibilities that create synergies for dealing with campus alcohol problem will avoid the need to request additional funding. The proposed legislative changes are to signal a priority shift to focus on alcohol culture change by empowering stakeholders rather than creating additional costs.

First, Congress must start with a clear mission statement as a rallying cry. Second, Congress should authorize a campus health and safety team comprised of ED and CDC personnel. Third, monetary levers must be used to incentivize responses from colleges. Fourth, the extent that alcohol abuse is involved in campus crimes must be reported and published similar to the use by the Obama administration of the one in five women is sexually assaulted statistic.

1. Purpose Statement

Congress should replace "underage" with "college" and adopt the mission statement from SAMHSA's 2013 Report:

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233 *See* Section I.D., *supra.*

234 *See* Section III.C.4., *supra*.

235 Ashley Parker and Philip Rucker, *Kavanaugh likes beer — but Trump is a teetotaler: 'He doesn't like drinkers.'*, WASH. POST (Oct. 2, 2018), https://www.washingtonpost.com/politics/kavanaugh-likes-beer--but-trump-is-a-teetotaler-he-doesnt-like-drinkers/2018/10/02/783f585c-c674-11e8-b1ed-1d2d65b86d0c_story.html?utm_term=.0174c235d3b2 (because of witnessing the negative effects of alcoholism on his brother, Trump abstains from drinking).

> The congressional mandate to develop a coordinated approach to prevent and reduce [college] drinking and its adverse consequences recognizes that alcohol consumption by those [in college] is a serious, complex, and persistent societal problem with significant financial, social, and personal costs. Congress also recognizes that a long-term solution will require a broad, deep, and sustained national commitment to reducing the demand for, and access to, alcohol among young people. That solution will have to address not only the youth themselves but also the larger society that provides a context for that drinking and in which images of alcohol use are pervasive and drinking is seen as normative. … Through leadership and financial support, the federal government can influence public opinion and increase public knowledge about [college] drinking; enact and enforce relevant laws; fund programs and research that increase understanding of the causes and consequences of [college] alcohol use; monitor trends in [college] drinking and the effectiveness of efforts designed to reduce demand, availability, and consumption; and lead the national effort. [236]

2. Campus Health and Safety Center

Congress should put the focus back on prevention by authorizing the ED and the CDC to create a new team modeled after the HEC, the Campus Health and Safety Center (CHSC), as a campus health and safety resource group. A single hub is needed because according to Prof. DeJong, former head of the HEC, "right now, there is no one place, aside from individual consultants … to help colleges and universities do a better job"[237] in addressing campus alcohol prevention. As the consequences of alcohol abuse reach into almost every aspect of college life, the problem cannot be solved in a vacuum. Including sexual assault and crime prevention in the CHSC remit, a one-stop-shopping resource for college safety, will create synergies that benefit all students and colleges. Coordinating DFSCA, Title IX, and Clery regulation requirements from a data collection, education, and prevention perspective makes sense. Including a health component can help colleges not only plan effectively for dealing with the effects of alcohol abuse or violent crimes but also cope with the burgeoning mental health crisis on campus.[238]

Moreover, the CHSC format should serve as a model for campus organizations. To directly address the highly intertwined health and safety issues between alcohol and sexual assault, sexual violence prevention programs on campus should be joined with alcohol abuse programming. The Title IX offices and Deans of Student Life should be partnered, akin to the new ED and CDC team, to prioritize prevention efforts on student health over after-the-fact punishment.[239] Currently,

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236 Rep. Underage Drinking, *supra* note 12, at 68.

237 E-mail from William DeJong, Prof. Dep't of Cmty. Health Sci., Boston U. Sch. Pub. Health, to author (March 7, 2018, 16:54 EST) (on file with author).

238 Campus Mental Health, Am. Psychol. Ass'n, https://www.apa.org/advocacy/higher-education/mental-health/index.aspx (last visited Jan. 11, 2019) (labeling the growing increase in psychological problems on camps a mental health crisis).

239 William DeJong and Kimberly Timpf, *Complying with the Drug-Free Schools and Campuses Regulations [EDGAR Part 86]*, Campus Prevention Network, at 4, *available at https://shs.uconn.edu/wp-*

unlike Title IX, every college does not have a dedicated alcohol prevention coordinator.[240] The CHSC should work with colleges to determine best practices for the administration oversight of safety concerns on campus, recognizing the need for individual campus flexibility. The proposed CHSC would have the bandwidth necessary to tailor responses to individual colleges based on size, location, and other distinguishing campus characteristics.

The CHSC would create a national springboard for experts and colleges to work together on issues which are unique in the campus setting, including sexual assault and alcohol abuse. The CHSC must encourage the development of grassroot efforts to change attitudes surrounding alcohol abuse. The threat of sanctions as a prevention tool has proven ineffective as demonstrated by the continued presence of large-scale drinking problems on campus. Instead, the CHSC will emphasize prevention strategies through managing grants, encouraging research, sharing information, formulating compliance handbooks, and publicity.

In the consultant role, CHSC should evaluate the usefulness of the NIAAA's *CollegeAIM* interactive website, a "College Alcohol Intervention Matrix."[241] The site was developed as "a new resource to help schools address harmful and underage student drinking" which includes the latest research and interventions on all levels which encourages colleges to implement multi-level prevention strategies.[242] CHSC will need a web presence providing access to a wide variety of information in a user friendly format for students, parents, college officials, and experts. It is important that CHSC serves the entire college community.

Lastly, publicity is important to change the culture. The "It's On Us" campaign motivated college students to engage and encouraged dialogue about campus sexual assault.[243] CHSC should develop a creative kick-off video to promote the reinvigorated efforts of Congress to address campus health and safety. Invoking a social media campaign and involving public figures, such as sports stars or actors, similar to the Obama administration's utilization of "The Hunting Ground"[244] would be effective in inducing cultural change.

3. Conditional Spending and Grants

Money speaks and Congress must also effectively use financial incentives to ensure colleges tackle the campus high-risk drinking problem by focusing on prevention at least to the same degree as reporting. The ED currently has the

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content/uploads/sites/344/2018/06/Complying-With-the-Drug-Free-Schools-and-Campuses-Regulations-CPN-final.pdf (suggesting colleges should combine oversight for compliance with Title IX, Clery, and DFSCA as ED determinations are comingling the findings).

240 *See* U.S. Dep't of Health and Human Servs., Nat'l Insts. Of Health, Video Bank: *Targeting Harmful and Underage Student Drinking with NIAAA's CollegeAim,* https://www.niaaa.nih.gov/targeting-harmful-and-underage-student-drinking-niaaas-collegeaim (Apr. 11, 2016).

241 *See* CollegeAIM, *supra* note 83.

242 *See id.*

243 *See* Section III.E., *supra.*

244 *See* Section III.E., *supra.*

power to withhold "funds or any other form of financial assistance under any Federal program" from colleges who do not provide alcohol prevention programs for underage drinkers on their campus.[245] The ED, however, has only scratched the surface in applying their fiscal fire power to DFSCA when compared to Clery fines. The ED Office of Inspector General found in 2012 that there was no assurance of compliance with the statutory requirements[246] for alcohol prevention programs.[247] The lack of monetary support for addressing the alcohol problem was further compounded by the withdrawal of funding since at least 2011[248] for the ED's discretionary alcohol and drug prevention grant programs originally authorized in 1998.[249] While there is no need to create new financial tools, colleges are under the impression that the current laws are not a federal priority and, therefore, will continue to be underenforced and underfunded.

The all or nothing approach to funding is problematic. While the ability to sanction colleges by rescinding all federal education funding appeared to work for the Obama administration as a threat to comply with Title IX mandates,[250] it is heavy handed. Years of inaction on DFSCA statutory requirements were followed by oversight resulting in fines.[251] However, the DFSCA violations were overshadow by the Clery Act within the office of Federal Student Aid (FSA). First, the DFSCA determinations are subsumed in what are publicly titled Clery Act Reports.[252] Second, DFSCA violations cost colleges significantly less in total than Clery Act violations. For HEA violations, the ED Secretary "may impose a fine up to $55,907 per violation."[253] When applied to the DFSCA, if a college is in violation of both prongs of the statutory requirements the maximum assessment is $111,814.[254] In contrast, Clery violations can be found in unlimited quantities.[255] The largest fine

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245 20 U.S.C. § 1011i(a) (1998).

246 34 C.F.R. § 86.101 (2018) (requiring the ED Sec'y to annually conduct a review of college drug prevention program at a selection of college's).

247 U.S. Dep't of Educ., Off. of Inspector Gen., Final Inspection Report on ED's Process for Ensuring Compliance with HEA and Part 86 Requirements (March 14, 2012), *available at* https://www2.ed.gov/about/offices/list/oig/aireports/i13l0002.pdf (documenting the government's lack of oversight to ensure compliance with statutory requirements for college alcohol prevention).

248 *See* Section I.C.1., *supra.*

249 Higher Education Amendments of 1989, Pub. L. No. 105-244, 112 Stat. 1581 (1989).

250 *See* Dear Colleague Letter, *supra* note 99, at 16; *see also* Will Creely, *Why the Office for Civil Rights' April 'Dear Colleague Letter' Was 2011's Biggest FIRE Fight*, Found. for Individual Rights in Educ. (Jan. 3, 2102), https://www.thefire.org/why-the-office-for-civil-rights-april-dear-colleague-letter-was-2011s-biggest-fire-fight/.

251 *See* Section I.D., *infra.*

252 Clery Act Reports, Fed. Student Aid, U.S. Dep't of Educ., https://studentaid.ed.gov/sa/about/data-center/school/clery-act-reports (last visited Jan. 11, 2019) (DFSCA determinations are located within the Clery Report search engine and the website does not inform the public of how to locate DFSCA findings).

253 34 C.F.R. § 668.84 (2019).

254 20 U.S.C. § 1011i (2008) (requirements (1) annually distribute alcohol and drug programming and (2) biennial review of institution's program).

255 *See* Penn State Letter, *supra* note 173 (assessment of fines for each of over 300 separate Clery violations).

ever for Clery violations totaled $2,369,500 to Penn State University.[256] The Penn State case was unusual, but the differential in risk to colleges is unmistakable. Unless the profile of DFSCA is raised to stress the importance of prevention, colleges might understandably view any new alcohol prevention mandates as less important than Clery reporting requirements.

Therefore, in the reauthorization of the HEA, Congress should create new financial incentives tied to alcohol prevention programs by encouraging parity between DFSCA and Clery penalties for violations. The ED should change the FSA website to publicly recognize the oversight and findings of DFSCA distinct from Clery determinations. If the government focuses colleges attention to the investigation and levying fines for failure to meet DFSCA alcohol requirements, similar to the actions for the Clery Act and Title IX colleges will be incentivized to prioritize creating alcohol safe campus communities both to avoid fines and the negative publicity[257] attached to large monetary payouts.

From the positive reinforcement perspective, just as the sexual assault campaign successfully encouraged participation of various groups through grants,[258] Congress should follow the same blueprint for alcohol prevention. The current STOP grant programs should be funded and new grants should be created through the HEA. The Obama administration's successful use of grants to encourage research and implementation for sexual assault programs should be mirrored for alcohol abuse prevention.

4. Accuracy in Reporting the Campus Alcohol Problem

There is power in information. To support efforts in changing the culture, accurate information is essential. To ensure the all stakeholders have access to the data, mandated reporting which already occurs under the Clery Act and DFSCA should be tailored to accurately reflect the scope of the alcohol related problems. Currently, the Clery numbers under-report alcohol violations.[259] The reporting should include alcohol related violations beyond liquor law violations including public drunkenness, noise violations, hospital visits, injuries, missed classes. Additionally, to understand the full extent of alcohol problems, data must be available to document the number of alcohol violations that occur in tandem with other crimes.

In the reauthorization of the HEA, Congress should amend the Clery Act to include a category for crimes that occurred when alcohol abuse was involved.

256 *Id.* (total fine was $2,397,000 comprised of $2,369,500 for Clery violations and $27,500 assessed for DSCA failures).

257 *See* Jake New, *Historic Fine for Penn State,* Inside Higher Ed (Nov. 4, 2016), https://www.insidehighered.com/news/2016/11/04/education-departments-historic-sanction-against-penn-state-clery-violations; *see also* Tyler Kingkade, *Yale Faces $165,000 Clery Act Fine for Failing to Report Sex Offenses on Campus*, HuffPost (May 15, 2013 6:59 PM, updated May 16, 2013), *available at https://www.huffingtonpost.com/2013/05/15/yale-clery-act_n_3280195.html.*

258 *See* The Second Report, *supra* note 135, at 24.

259 *See The Handbook for Campus Safety and Security Reporting, supra* note 94 (reporting encompasses all sexual misconduct allegations regardless of validity while narrows alcohol reports to proven violations of the law notwithstanding that students can be sanctioned for violations of alcohol policies unrelated to the legal system).

The additional classification would mirror the current requirement to "collect[] and report[] crimes according to category of prejudice."[260] I propose the following clause to the Clery Act:

> For all violent crimes[261] in which the victim or perpetrator violates alcohol laws, college alcohol policy, or is incapacitated by alcohol at the time of the incident that are reported to campus security authorities or local police agencies, data shall be collected and reported according to category of alcohol related crimes.

The financial costs of alcohol abuse should be added to the Clery reporting statistics.[262] Actual or estimated dollar values for property damages, medical treatment, insurance, administrative time on disciplinary procedures, legal costs of lawsuits, and other alcohol related consequences can be tabulated. Reporting the number of students affected and the estimated figures of annual costs of underage drinking together would be valuable in educating the public about the full scope of the problem and would be an invaluable tool for publicity campaigns.

Additionally, in the reauthorization of the HEA, the DFSCA should be similarly amended to ensure all violations which involve alcohol abuse are documented and prevention programs evaluated to address the full range of high-risk drinking consequences. I propose adding the italicized language to the current DFSCA statute:

> (A) determine the program's effectiveness and implement changes to the program if the changes are needed;
>
> (B) determine the number of drug and alcohol-related violations and fatalities, *including non-charged alcohol violations where high-risk drinking was involved in student crimes, health issues, and educational failures*
>
> that—
>
> (i) occur on the institution's campus … or as part of any of the institution's activities; and (ii) are reported to campus officials;
>
> (C) determine the number and type of sanctions … that are imposed by the institution as a result of drug and alcohol-related violations*, including sexual assaults involving alcohol abuse*
>
> and fatalities on the institution's campus or as part of any of the institution's activities; and
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> (D) ensure that the sanctions … are consistently enforced [263]

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260 20 U.S.C. § 1092 (f)(1)(F)(ii) (2010).

261 Violent crimes can be designated by reference as in the category of prejudice clause: "of the crimes described in subclauses (I) through (VIII) of clause (i) and in clause (ii), of larceny-theft, simple assault, intimidation, and destruction, damage, or vandalism of property, and of other crimes involving bodily injury to any person" 20 U.S.C. § 1092 (f)(1)(F)(ii) (2010).

262 Alternatively, this could be a project for the CHSC.

263 20 U.S.C. § 1011i(a)(2) (2017) (italicized language added).

Crimes involving alcohol abuse would include instances where either party was in violation of alcohol laws, policies, incapacitated, or black-out drunk. Underage student hospitalizations from alcohol poisoning should be counted as alcohol-related violations even when Good Samaritan policies prohibit punishing the student for their actions. Similarly, if a college is aware that uncharged drinking problems are the cause of missed classes or exams,[264] such alcohol-related problems should be accounted for. The goal in the revised DFSCA is to publicly account for alcohol-related problems, not to double count or increase student sanctions.

IV. Conclusion

Alcohol abuse is a tremendous risk factor for students and colleges with far reaching negative consequences touching every aspect of campus life—health, safety, civic impact, and academics—as well as impacting society in general. The executive branch has demonstrated the ability to change the culture on college campuses surrounding sexual assault through its wide-range of programs, messages, and enforcement of Title IX and the Clery Act. Congress, with affirmation from the Supreme Court, effectively mandated a national underage drinking law and shifted the culture regarding drunk driving. Similarly, the government's actions encompassing the public health risks of cigarettes changed the smoking culture. When the federal government unites behind an issue and uses its power, seismic cultural changes are possible.

The federal government's legacy of legislation and pronouncements clearly identifies alcohol abuse on college as a serious national problem and a priority. Congress is uniquely situated to utilize the spending power to require programing and mandate compliance of all colleges, inclusive of public and private colleges in every state. The reauthorization of the HEA is the opportunity for Congress to exert its influence. Congress can look to the successes of the sexual assault campaign and reconnect the dots to alcohol prevention. By creating the CHSC under the ED and the CDC to function as a safety resource for colleges—collecting data, researching program effectiveness, bringing together experts, encouraging community engagement, and publicizing information—Congress can effectuate its long-standing goal of reducing alcohol abuse on college campuses to save lives and money. There is no need to wait for more students to suffer. The time to act is now with the reauthorization of the HEA.

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264 Colleges may need to rely on self-reporting through surveys or mental health services to account for the academic consequences from alcohol abuse.