

MAKING CAMPUSES SAFER FOR STUDENTS: THE CLERY ACT AS A SYMBOLIC LEGAL REFORM

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I. INTRODUCTION

Elected officials at all levels of government pass laws in response to issues that rise to the top of their policy agenda. Laws serve two functions: (1) symbolic and (2) substantive. The symbolic function of law includes such goals as reaffirming cherished values and showing that “something is being done” about a perceived social problem. The Clery Act¹ is one such law. It appeases the interests of those who advocated for, or perhaps were interested in, its passage, regardless of its substantive impact. The substantive function of law, on the other hand, involves introducing changes that have demonstrable utility — changes that essentially help to alleviate or solve the problem the law addresses.

During the late 1970s and 1980s, several movements emerged independently to raise public awareness about crime on

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1. 20 U.S.C. § 1092(f) (2000).

college and university campuses.² First, on the heels of the feminist movement and the rape-law-reform movement of the 1970s, Mary P. Koss and her colleagues published their pathbreaking national-level study published in 1987.³ This research established that sizable proportions of college women had experienced unwanted sexual contact, sexual coercion, and attempted and completed rape within the last year.⁴ Second, campus-crime victims and their families filed a considerable number of civil lawsuits claiming that colleges and universities were negligent in failing to provide a safe and secure campus.⁵ In a number of precedent-setting cases, courts ruled that institutions of higher education (IHEs) have legal duties to take reasonable steps to prevent “foreseeable” crime and to provide an adequate level of security.⁶ The third and final movement that raised public awareness was the lobbying efforts of grassroots, student-advocacy groups.⁷ In particular, efforts of the advocacy group Security on Campus, Inc. — founded by the parents of Jeanne Ann Clery, who was murdered in her Lehigh University dormitory room in 1986 — led to the passage of state-level legislation to address college-student victimization.⁸ In 1988, for example, Pennsylvania became the first state to pass a campus-security reporting law.⁹ Sixteen other states currently have laws pertaining to campus-crime-statistics reporting and to campus-security policies and procedures.¹⁰

2. Bonnie S. Fisher, *Crime and Fear on Campus*, 539 *Annals Am. Acad. Pol. & Soc. Sci.* 85 (May 1995).

3. Mary P. Koss, Christine A. Gidycz & Nadine Wisniewski, *The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students*, 55 *J. Consulting & Clinical Psychol.* 162 (1987).

4. *Id.* at 169.

5. See Fisher, *supra* n. 2, at 87 (discussing the evolution of lawsuits against colleges and universities).

6. Michael Clay Smith & Richard Fossey, *Crime on Campus: Legal Issues and Campus Administration* 50–52 (ORYX Press 1995).

7. Fisher, *supra* n. 2, at 86.

8. Tamu K. Walton, Student Author, *Protecting Student Privacy: Reporting Campus Crimes as an Alternative to Disclosing Student Disciplinary Records*, 77 *Ind. L.J.* 143, 160–161 (2002); Security on Campus, Inc., *What Jeanne Didn't Know* <<http://campussafety.org/about/soc/didntknow.html>> (accessed June 23, 2002).

9. Fisher, *supra* n. 2, at 96 (referring to 24 Pa. Consol. Stat. § 2502:1-5 (1991)).

10. Cal. Educ. Code §§ 67380–67385, 94380–94385 (West Supp. 2001); Conn. Gen. Stat. Ann. §§ 10a:55a–55c (West 1996); Del. Code Ann. tit. 14, §§ 9001–9007 (1999); Fla. Stat. §§ 240.2682–2683, 3815 (2001); Ga. Code Ann. §§ 20:2:1184–1185 (2001); Ky. Rev. Stat. Ann. § 164.948–9487 (LEXIS L. Publg. Supp. 2001); La. Stat. Ann. § 17-3351C (2001); Mass. Ann. Laws ch. 6, § 168C (LEXIS L. Publg. 1999); Mass. Ann. Laws ch. 41, § 98F (LEXIS L. Publg. 1993 & Supp. 2002); Mass. Ann. Laws ch. 66, § 15 (LEXIS L.

By the end of the 1980s, these three movements coalesced to define campuses not as “ivory towers” but as “dangerous places” or “hot spots” where heinous violent crimes happen routinely.¹¹ As discussed in more detail below, these images of college campuses were actively carried over into the next decade. During this period, the Clerys’ activism provided the vehicle for concerns about the safety of college students to remain on the elected officials’ active policy agenda, and in particular, on Congress’s policy agenda.¹²

Eventually, the awareness of campus-crime-related issues catapulted to the top of the active congressional policy agenda.¹³ Congress’s interest in campus crime as a social problem in need of federal intervention culminated in the passage of the federal Crime Awareness and Campus Security Act of 1990.¹⁴ It is found in Title II of the Student Right-to-Know and Campus Security Act of 1990.¹⁵ Amendments to this act in 1998 renamed it the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (hereafter referred to as the Clery Act).¹⁶ The main goal of the Clery Act was to ensure that when selecting an IHE to attend, current and prospective students, as well as their parents, would be able to obtain accurate “official” statistics about how much crime had occurred on a respective IHE’s campus.¹⁷ They also could gain knowledge of the security procedures that each school had in place.¹⁸ This information would then allow students

Publg. 1991); N.Y. Educ. Laws § 355(17) (McKinney 2000); Okla. Stat. Ann. tit 74, §§ 360:15–21 (West 2002); Tenn. Code Ann. § 49:7:2201–2206 (1996); Tex. Educ. Code Ann. § 15.216 (1996); Va. Code Ann. §§ 23-9:1, 232.2 (2000); Wash. Rev. Code § 28B.10.569 (1997); W. Va. Code § 18B:4-5a (2001 & Supp. 2001); Wis. Stat. Ann. § 36.11(22) (West 2002).

11. See Fisher, *supra* n. 2, at 85–101 (discussing the effect of campus-crime-prevention movements on the perception of colleges and universities).

12. Walton, *supra* n. 8, at 160–161.

13. Fisher, *supra* n. 2, at 86.

14. *Id.* at 86, 91; Michael C. Griffaton, Student Author, *Forewarned Is Forearmed: The Crime Awareness and Campus Security Act of 1990 and the Future of Institutional Liability for Student Victimization*, 43 Case W. Res. L. Rev. 525, 527 (1993). This Act has been codified as 20 U.S.C. § 1092(f).

15. 20 U.S.C. § 1092(f).

16. Walton, *supra* n. 8, at 161.

17. *Id.* at 162.

18. *Id.*

and their parents to weigh crime issues when making college enrollment decisions.¹⁹

A secondary goal of the Clery Act was to create congressional pressures for IHEs to take steps to become safer social domains — to take crime and student safety more seriously than had been done previously.²⁰ Underlying this goal was the notion that if the extent of campus crime were known, then this information could be used to identify unsafe campuses.²¹ Presumably, institutions with a higher prevalence of campus crime would be at a competitive disadvantage in attracting students if they did not take security and prevention steps to lower crime on campus.

The purpose of this Article is to assess whether the Clery Act has achieved its main goal of providing accurate statistics on the relative safety of higher-educational institutions. More specifically, we will examine whether the Clery Act is meeting its substantive function in providing an accurate portrayal of the extent and nature of campus crime. We also will comment, though in less specificity, on whether the Clery Act policy may have increased the attention universities have given to crime and student safety. In the end, we argue that although some substantive changes may have been achieved, the Clery Act mainly has been a symbolic legal intervention of questionable value to the 14.55 million college and university students²² and their parents. Moreover, although the Act's specified goals seemed reasonable and attainable, they actually have presented a daunting challenge that is unlikely to be addressed successfully by IHEs.

II. A STUDENT'S RIGHT TO KNOW: THE CLERY ACT

Before the passage of federal and state legislation on campus-crime statistics, students and their parents, as well as research-

19. *Id.*; Fisher, *supra* n. 2, at 91; Griffaton, *supra* n. 13, at 536.

20. Griffaton, *supra* n. 14, at 568; Walton, *supra* n. 8, at 162.

21. See Griffaton, *supra* n. 14, at 568 (explaining that the amendments that made up the Act would heighten awareness about campus crime); Walton, *supra* n. 8, at 162 (indicating that the purpose of the Act was to provide students with the information needed to make their decisions about enrolling or continuing at a postsecondary institution).

22. This is the total 1998 enrollment for four-year and two-year degree-granting institutions that were eligible to participate in Title IV federal financial aid programs. Thomas Snyder & Charlene Hoffman, *Digest of Education Statistics 2000*, at ch. 3, tbl. 173 <<http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2001084>> (Jan. 26, 2001).

ers, had access to little information concerning campus crime.²³ This lack of information was, in part, because there was no federal or state requirement that IHEs report any campus crime to the Federal Bureau of Investigation's Uniform Crime Reports.²⁴ During this time, as well as currently, schools voluntarily reported their Index Crimes.²⁵ However, in any given year from 1972–1993, only a small percentage of all IHEs reported their campus-crime statistics to the UCR.²⁶ “In 1991, for example, only 12 percent of [IHEs] reported their [Index] crime statistics to the [UCR].”²⁷ An even smaller number of schools routinely reported their crime statistics across all years, which resulted in inconsistent information.²⁸ Some schools reported for a year or two and then did not report again, whereas other schools reported again in subsequent years but did so inconsistently.²⁹ Hence, only an incomplete, and most likely distorted, picture of the extent of campus crime could be gleaned from the UCR.

Access to campus-crime statistics was complicated further by the interpretation of the Family Education Rights and Privacy Act (FERPA), often called the Buckley Amendment.³⁰ Supported by the U.S. Department of Education, several IHEs relied on FERPA “as the basis for refusing to disclose campus police records about crimes in which students were involved.”³¹ Citing FERPA, IHEs asserted that campus-crime records contained information in which a student could be personally identified and that such a violation of privacy could lead to the loss of federal

23. See Fisher, *supra* n. 2, at 91 (discussing the extreme lack of reporting and reporting consistency of colleges and universities before the Clery Act and other similar legislation).

24. *Id.*

25. See *id.* (discussing colleges' and universities' sporadic reporting of campus crime before the implementation of mandatory reporting legislation). Index Crime offenses include the following: criminal homicide, rape, robbery, aggravated assault, burglary, theft, arson, and motor vehicle theft. FBI, *Crime in the United States 1996: Uniform Crime Reports* 1, 395 (FBI 1997). These crimes are referred to as “Index Crimes,” in part, because they create an arrangement or grouping of the most serious crimes, most frequently occurring crimes, and crimes that are most likely to be reported. *Id.* at 1.

26. Fisher, *supra* n. 2, at 91.

27. *Id.*

28. *Id.*

29. *Id.*

30. FERPA is codified as 20 U.S.C. § 1232(g) (2000).

31. Smith & Fossey, *supra* n. 6, at 215.

funds.³² Some critics, however, charged that IHEs were using FERPA to serve two purposes. First, some claimed that IHEs were steadfastly attempting to maintain the wall of silence about campus crime,³³ especially because many campus administrators adopted the traditional legal view of their *in loco parentis* role.³⁴ Second, others claimed that campus crime and violence were the “dirty little secrets” of higher education that administrators feared revealing, given the legal precedents that could lead to more civil lawsuits and negative publicity.³⁵

By the early 1990s, several events relevant to the disclosure of campus-crime issues arose. First, both “campus and professional journalists had begun suing [IHEs] to obtain access to campus crime statistics.”³⁶ Court challenges to the claim that FERPA covered campus-crime statistics came in *Campus Communications v. Criser*³⁷ and *Bauer v. Kincaid*.³⁸ “In these two cases, the courts ruled that campus crime incident reports and statistics were not protected as educational records [under FERPA].”³⁹

Second, congressional testimony by Dorothy Siegel, a faculty member at Towson State University, revealed the results of the first-ever, national-level study of the extent of campus crime.⁴⁰ In

32. See Maureen P. Rada, Student Author, *The Buckley Conspiracy: How Congress Authorized the Cover-Up of Campus Crime and How It Can Be Undone*, 59 Ohio St. L.J. 1799, 1814–1820 (1998) (exploring the reasons colleges and universities interpret Buckley in a manner that allows concealment of a broad range of records).

33. See *id.* at 1815–1816 (discussing the concealment of campus crime statistics and incidents).

34. The traditional theory of the college or university as *in loco parentis* was explained as follows in *Gott v. Berea College*, 161 S.W. 204, 206 (Ky. 1913):

College authorities stand *in loco parentis* concerning the physical and moral welfare and mental training of the pupils, and we are unable to see why, to that end, they may not make any rule or regulation for the government or betterment of their pupils that a parent could make for the same purpose. Whether the rules or regulations are wise or their aims worthy is a matter left solely to the discretion of the authorities or parents, as the case may be, and, in the exercise of that discretion, the courts are not disposed to interfere, unless the rules and aims are unlawful or against public policy.

35. Rada, *supra* n. 32, at 1814.

36. Smith & Fossey, *supra* n. 6, at 215.

37. 19 Fla. Supp. 2d 97 (Fla. 8th Cir. 1986); Fisher, *supra* n. 2, at 91.

38. 759 F. Supp. 575 (W.D. Mo. 1991); Fisher, *supra* n. 2, at 91; Walton, *supra* n. 8, at 150.

39. Fisher, *supra* n. 2, at 91.

40. *Id.* at 91 n. 27; H.R. Educ. & Lab. Comm., *The Crime Awareness and Campus Security Act of 1989: Hearings on H.R. 3344*, 101st Cong. 27 (Mar. 14, 1990) [hereinafter

a survey of almost 2,000 students, “roughly 1 in 3 report[ed] being the victim of at least one crime during their university experience” and “nearly 10% reported having committed such a crime.”⁴¹ Before Seigel’s study and corresponding testimony, less than a handful of published studies had examined the extent of campus victimization or campus-crime rates. These studies were limited because they focused either on an individual campus⁴² or on a small number of campuses.⁴³ The shortage of research was likely, in part, due to the lack of the availability of campus-crime statistics. As a result, only a limited amount of evidence existed on the magnitude and nature of on-campus crime and victimization.

Third, coinciding with IHE disclosure and liability court cases and congressional testimony, was a growing sentiment that the public — in particular students and their parents — had a right to know the details concerning campus crimes.⁴⁴ In part, the media’s growing coverage of violence occurring on campuses fueled this sentiment.⁴⁵ The media’s portrayal of campuses as dangerous places helped to shatter the image of college campuses as tranquil, tree-lined havens where the development and free flow of ideas shut out many of the fears and threats of everyday life.

Howard and Connie Clery — the parents of Jeanne Clery — capitalized on the momentum created by the successful passage of campus-crime-reporting legislation in Pennsylvania, congressional testimony, the courts’ decisions in the cases involving challenges to FERPA and liability suits (including their own out-of-court settlement with Lehigh University), and the media’s attention.⁴⁶ Using this momentum, the Clerys successfully lobbied Congress to pass legislation forcing IHEs to report publicly their cam-

Hearing on H.R. 3344].

41. *Hearings on H.R. 3344, supra* n. 40, at 27.

42. *E.g.* Robert T. Sigler & Nancy Koehler, *Victimization and Crime on Campus*, 2 *Intl. R. Victimology* 331, 331–343 (1993).

43. *E.g.* Lee R. McPheters, *Econometric Analysis of Factors Influencing Crime on the Campus*, *J. Crim. Justice* 47, 49 (1978) (examining a small sample of campuses that reported complete crime statistics for his empirical study).

44. *Infra* n. 75–76 and accompanying text.

45. *E.g.* Todd S. Purdum, *The Reality of Crime on Campus*, *N.Y. Times* 12, 47 (Apr. 10, 1988).

46. *See* Fisher, *supra* n. 2, at 91 (stating that the Campus Security Act was enacted “in response to the testimony in the 1990 hearings on the issue of on-campus crime, the Clerys’ activism, increased media coverage, and the . . . court decisions” (citation omitted)).

campus-crime statistics and security policies.⁴⁷ Congress passed the Student Right-to-Know and Campus Security Act in October 1990.⁴⁸ In November 1990, President George H. Bush signed it into law.⁴⁹ Responsibility for its administration rests with the U.S. Department of Education.⁵⁰

The preamble to Title II — the Crime Awareness and Campus Security Act of 1990 — states that

- (5) students and employees of institutions of higher education should be aware of the incidence of crime on campus and policies and procedures to prevent crime or to report occurrences of crime;
- (6) applicants for enrollment at a college or university, and their parents, should have access to information about the crime statistics of that institution and its security policies and procedures; and
- (7) . . . there is a clear need —
 - (A) to encourage the development on all campuses of security and polices and procedures;
 - (B) for uniformity and consistency in the reporting of crimes on campus; and
 - (C) to encourage the development of policies and procedures to address sexual assaults and racial violence on college campuses.⁵¹

Based on these goals and needs, the Act originally required both private and public IHEs receiving federal funds to report publically their (1) statistics of specific on-campus FBI Crime Index offenses, (2) arrests for liquor and drug violations and for weapon possession, and (3) crime prevention and security policies and procedures in an annual security report.⁵² With regard to crime statistics, the original Act required that the number of on-campus crimes — including murders, rapes, robberies, aggravated assaults, burglaries, and motor vehicle thefts — that were reported to campus authorities be reported publically.⁵³ The regula-

47. *Id.*

48. H.R. Rpt. 101-518, at 1 (June 5, 1990).

49. Fisher, *supra* n. 2, at 91.

50. Security on Campus, Inc., *The Jeanne Clery Act* <<http://www.campussafety.org/schools/cleryact/cleryact.html>> (accessed June 23, 2002).

51. Pub. L. No. 101-542, §§ 202, 204, 104 Stat. 2385, 2385–2386 (1990).

52. *Id.*

53. *Id.*

tions specified that IHEs must report statistics on rape for periods before August 1, 1992, and sex offenses, both forcible and non-forcible, for periods on or after August 1, 1992.⁵⁴ Annual reports also must indicate whether any of the reported murder, forcible rape, and aggravated assault incidents were “hate crimes.”⁵⁵

Beginning September 1, 1992 and for each year thereafter, IHEs are mandated to prepare, publish, and distribute an updated annual security report to all current students and employees.⁵⁶ Any prospective student or employee who requests one also must be given a copy of the annual security report.⁵⁷ The report must be published and distributed by October 1 of each year and contain the three most recent calendar years of crime statistics.⁵⁸

Since the passage of the original Act, it has been amended three times.⁵⁹ First, the Act was amended in 1992 to require IHEs to develop and distribute a description of the respective IHE’s sexual assault policy, including (1) an outline of the procedures to be followed once a sex offense occurred, (2) a clear statement as to the procedures for campus disciplinary action, (3) details of options to notify law-enforcement authorities, (4) a description of available counseling services, and (5) a statement regarding housing options.⁶⁰ The amendment requires that, in cases of an alleged sex offense, “the accuser and the accused are entitled to the same opportunities to have others present during a campus disciplinary

54. 59 Fed. Reg. 22314 (Apr. 29, 1994). Rape must be defined by the definition in the *UCR Handbook*, whereas definitions for forcible and nonforcible sex offenses must be consistent with those in the National Incident-Based Reporting System edition of the *UCR Handbook*. *Id.* Forcible rape is “[a]ny sexual act directed against another person, forcibly and/or against that person’s will or not forcibly or against that person’s will in instances where the victim is incapable of giving consent” and includes forcible rape, except statutory rape, forcible sodomy, sexual assault with an object, and forcible fondling. FBI, *National Incident-Based Reporting System* <www.search.org/nibris/PDFs/FBIv1.pdf> (Aug. 2000). Nonforceable sex offenses include incest and statutory rape. *Id.*

55. Pub. L. No. 105-244, § 486(e), 112 Stat. 1742, 1743 (1998). The U.S. Department of Justice defines a hate crime “as a crime which in whole or part is motivated by the offender’s bias toward the victim’s status.” U.S. Dept. Just., Community Relations Serv., *Responding to Hate Crime and Bias-Motivated Incidents on College/University Campuses* <<http://www.campusafety.org/schools/hatecrimes.html>> (June 1, 2000).

56. Security on Campus, Inc., *supra* n. 50.

57. *Id.*

58. *Id.*

59. Security on Campus, Inc., *Clery Act History* <<http://www.campusafety.org/congress/cleryhistory.html>> (accessed June 23, 2002).

60. Pub. L. No. 102-355, § 486(c)(2), 106 Stat. 621, 621–622 (1992); Security on Campus, Inc., *Victim Assistance: Campus Sexual Assault Victim’s Bill of Rights* <<http://www.campusafety.org/victims/billofrights.html>> (accessed June 23, 2002).

proceeding,” and both must be “informed of the outcome of any campus disciplinary proceeding brought alleging a sexual assault.”⁶¹ The provisions of this amendment are part of the Higher Education Amendments of 1992 and are known as the Campus Sexual Assault Victims’ Bill of Rights Act of 1991 or the Ramstad Amendment.⁶²

In 1998, Congress passed a second set of amendments to clarify some of the ambiguity in the reporting requirements that plagued the original Act.⁶³ In early October 1998, President William Jefferson Clinton signed these amendments into law as part of the Higher Education Amendments of 1998.⁶⁴ The new amendments (1) expanded the reporting requirements to include new crime categories (e.g., manslaughter and arson), (2) required geographic breakdowns for reporting crime statistics (e.g., on campus, residential facilities for students on campus, noncampus buildings, and on public property such as streets and sidewalks), (3) mandated that a daily crime log be kept by the campus police or campus security department, (4) made changes in the record-keeping requirements, such as mandating that the security report be distributed annually by October 1, and (5) expanded the hate crime disclosure requirements.⁶⁵ The 1998 amendments also formally renamed the original Act the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act in memory of Howard and Connie’s daughter, Jeanne Ann Clery.⁶⁶ This new provision to the Clery Act provided that IHEs are now also subject to a monetary sanction (up to \$25,000) for their failure to disclose accurate crime statistics.⁶⁷ This sanction is in addition to IHEs being suspended from participating in student financial aid programs.⁶⁸

For clarification, the crime statistics that IHEs are required to disclose must be obtained from various sources. These sources

61. 106 Stat. at 621–622; Security on Campus, Inc., *supra* n. 59.

62. Security on Campus, Inc., *supra* n. 59.

63. *See id.* (explaining that the 1998 amendment to the Act added new crime statistics categories and Megan’s law notification requirements).

64. *Id.*

65. 112 Stat. at 1742–1745; 64 Fed. Reg. 43583, 43586–43588 (Aug. 10, 1999); Security on Campus, Inc., *supra* n. 59.

66. 112 Stat. at 1745; Security on Campus, Inc., *supra* n. 59.

67. Security on Campus, Inc., *supra* n. 59.

68. *Id.*

include campus-security authority, local law enforcement, “and other school officials who have ‘significant responsibility for student and campus activities’ such as student judicial affairs directors.”⁶⁹ Pastoral and professional counselors are exempt from the reporting requirements.⁷⁰

The Campus Sex Crimes Prevention Act contains the third set of amendments to the Clery Act.⁷¹ These amendments were passed in 2000 and will take effect in 2003.⁷² They require IHEs to notify the campus community about where to obtain public “Megan’s Law”⁷³ information about registered sex offenders on campus.⁷⁴

Clearly, among the goals of the Clery Act is increasing the availability of different types of campus-crime statistics to the campus community.⁷⁵ The reason behind access to the extent of campus crime statistics was two-fold: (1) for prospective students, their parents, and employees to be informed as to campus safety and security issues when making enrollment or employment decisions and (2) to heighten awareness about campus crime among both current students and employees.⁷⁶ Having campus-crime statistics available on an annual basis is of substantive value to the campus community, especially considering that before the Clery Act, information on campus safety was not consistently available to students, parents, and employees.⁷⁷

Another purpose of the Clery Act was to encourage all IHEs to develop security policies and procedures, especially ones to address sexual assault and racial violence on campuses.⁷⁸ Again, this is a goal that could have substantive value, especially at those

69. Security on Campus, Inc., *supra* n. 50. The term “campus-security authority” refers to a campus police department or campus security. *Id.*

70. 34 C.F.R. § 668.46(c)(6) (2002).

71. Pub. L. No. 106-386, § 1601, 114 Stat. 1537, 1537–1538 (2000); Security on Campus, Inc., *supra* n. 59.

72. Security on Campus, Inc., *supra* n. 59.

73. “Megan’s Law” is codified at 42 U.S.C. § 13701 (2000).

74. 114 Stat. at 1537–1538; Security on Campus, Inc., *supra* n. 59.

75. See H.R. Rpt. 101-518, at 7 (stating that “[s]tudents, faculty, and employees . . . should be made aware of occurrences of crimes committed . . . to make informed decisions about their own safety”).

76. *Id.*

77. *Supra* nn. 23–29 and accompanying text.

78. See *supra* nn. 51–58 and accompanying text (describing the Crime Awareness and Campus Security Act of 1990).

schools where no such policies and procedures existed before the Clery Act.

The specified “consumer protection” goals of the unfunded mandates in the Clery Act — although seemingly reasonable and attainable — actually present daunting challenges that are unlikely to be addressed successfully by IHEs. In the sections that follow, we explore the reasons for these challenges.

III. THE NATURE OF CRIME STATISTICS

In estimating levels of crime in a social domain — whether it be an entire country, state, city, or college campus — there are two fundamental sources of data: (1) official statistics and (2) victimization-survey statistics. Since the early 1930s, the Uniform Crime Reports (UCR) has annually published statistics on various crimes, including Index Crimes that are singled out for their seriousness, frequency of occurrence, and likelihood of being reported to the police.⁷⁹ As noted previously, at present, there are eight Index Crime offenses: (1) arson, (2) burglary, (3) larceny-theft, (4) motor vehicle theft, (5) robbery, (6) aggravated assault, (7) murder, and (8) one form of sexual victimization — forcible rape.⁸⁰ For each Index Crime offense, the FBI reports the frequency of occurrence of crimes known to the police.⁸¹ This figure includes crimes that the police discover, but it comprises primarily offenses that are reported to the police by victims and others (e.g., witnesses).⁸²

The limitations of the UCR method of measuring crime, as well as why the UCR’s estimates diverge from other national-level sources of crime data (e.g., the National Crime Survey and the National Crime Victimization Survey), are well documented in the criminological and survey methodology research.⁸³ The most noted limitation is that the UCR tabulates only crimes known to law enforcement;⁸⁴ therefore, it measures only a fraction of crimes

79. FBI, *supra* n. 25, at 1.

80. *Supra* n. 25 (listing the Index Crime Offenses).

81. FBI, *supra* n. 25, at iii, 1.

82. *Id.* at iii.

83. David Cantor & James P. Lynch, *Self-Report Surveys as Measures of Crime and Criminal Victimization*, in *Criminal Justice 2000*, at vol. 4, 85 (July 2000) (available at <http://www.ncjrs.org/criminal_justice2000/vol_4/04c.pdf>).

84. *Id.* at 87.

that actually happen.⁸⁵ The size of this “fraction,” however, is difficult to determine, in part because the exact number of crimes that go unreported remains unknown.⁸⁶ Additionally, most estimates of victims not reporting the incident to the police vary considerably depending on the type of crime.⁸⁷ For example, motor vehicle theft is one of the most-often-reported crimes.⁸⁸ Estimates of unreported motor vehicle theft have consistently been less than twenty-five percent.⁸⁹ Rape is perhaps the most widely underreported violent crime.⁹⁰ In fact, one study found that fewer than five percent of rapes, both completed and attempted, were reported to authorities.⁹¹

Critics, such as William G. Doerner and Steven P. Lab, have argued that official statistics compiled exclusively by the police overlook the “dark figure” of crime, and by doing so “[reflect] police — and not necessarily criminal — activity.”⁹² Another concern is that the UCR reflects police-recording practices.⁹³ These practices may vary to serve the interests of the police department by masking crime problems or by manipulating incidents, downgrading certain types of offenses and upgrading others to “boost their image.”⁹⁴

It was not until the mid-twentieth century that criminologists first critiqued the UCR’s official crimes statistics and began to develop alternative measures to measure the amount of crime, such as victimization surveys.⁹⁵ Victimization surveys are surveys administered to probability samples of the general population that attempt to measure the prevalence and/or incidence of different types of victimization.⁹⁶ In essence, this approach asks re-

85. *Id.* at 86–87.

86. *See id.* (comparing victim surveys with statistics based on police reports).

87. *See id.* (discussing crimes regularly reported to police).

88. *See* Callie Marie Rennison, *Criminal Victimization 2000: Changes 1999–2000 with Trends 1993–2000*, at 10 (NCJ 187007, Bureau of Just. Statistics June 2001).

89. *Id.* at 10, tbl. 7.

90. *See* Bonnie S. Fisher, Francis T. Cullen & Michael G. Turner, *The Sexual Victimization of College Women 23* (NCJ 182369, U.S. Dept. Just. Dec. 2000).

91. *Id.*

92. William G. Doerner & Steven P. Lab, *Victimology* 24–25 (2d ed., Anderson Publg. Co. 1998).

93. *Id.* at 25.

94. *Id.*

95. *Id.* at 27–28.

96. *E.g.* Patricia Tjaden & Nancy Thoennes, *Stalking in America: Findings from the National Violence against Women Survey* (NCJ 169592, Natl. Inst. Just. Apr. 1998) (meas-

spondents whether they have been victims of a variety of crimes, and if so, how many times.⁹⁷ Their reports would include not only victimizations they reported to the police but also those not reported to the police.⁹⁸

During the 1960s, the President's Commission on Law Enforcement and Administration of Justice, commonly known as the Crime Commission, sponsored several methodological efforts to develop more reliable information on the distribution of crime.⁹⁹ These research efforts revealed that the actual volume of crime was much greater than that indicated by the official statistics of the time — the UCR.¹⁰⁰ During the late 1960s, a series of surveys sponsored by the U.S. Bureau of the Census identified the need for victimization surveys.¹⁰¹ From 1974–1976, the Law Enforcement Assistance Administration (LEAA), along with the National Research Council, undertook a series of preliminary field studies of the measurement of victimization.¹⁰² The results from these studies laid the groundwork for the U.S. Bureau of Census personnel to develop the content and procedures of the National Crime Survey (NCS) for the LEAA.¹⁰³ In late 1979, the NCS was transferred to the Bureau of Justice Statistics (BJS) where it remains today.¹⁰⁴

The NCS is a national-level victimization survey of selected housing units that remain in the sample for three and one half years.¹⁰⁵ The NCS contains two parts: (1) a main questionnaire with screen questions¹⁰⁶ and (2) an incident report¹⁰⁷ that records

uring the incidence of stalking in the United States by use of a victim survey).

97. *E.g. id.* at 17 (showing a chart listing screening questions in the National Violence against Women survey).

98. *E.g. id.* at 9–10 (showing incidents of stalking reported to the police and those incidents not reported).

99. Cantor & Lynch, *supra* n. 83, at 98.

100. *Id.* at 105.

101. *Id.* at 96.

102. *Id.* at 108.

103. *Id.* at 110.

104. *Id.* at 96.

105. *Id.* at 93.

106. An example of a screen question used in the NCS is, "Did anyone THREATEN to beat you up or THREATEN you with a knife, gun, or some other weapon, not including telephone threats?" Ronet Bachman & Linda E. Saltzman, *Violence against Women: Estimates from the Redesigned Survey 8* (NCJ 154348, Bureau of Just. Statistics Aug. 1995).

107. The NCS incident report

contains detailed questions about the nature of the incident (e.g., month, time, and place of incident; characteristics of the offender; police reporting behavior). It in-

the details of each specific incident.¹⁰⁸ “The intent of the screen questions is to . . . jog [the respondent’s] memory as to whether [the respondent] had experienced a criminal victimization within the 6-month reference period.”¹⁰⁹ Thus, these questions were simple and syntactically correct, were “intended not to be redundant” with one another, and were “designed to elicit a ‘yes’ or ‘no’ regarding victim incidents. When a respondent [said] ‘yes’ to any screen question, the interviewer then ask[ed] him or her . . . ‘how many times?’ that type of incident occurred during the reference period.”¹¹⁰ “[T]he screen questions are, in essence, ‘gatekeepers’ to the respondent proceeding on to complete an incident report.”¹¹¹

An incident report is completed for each time the respondent indicated that type of incident had happened.¹¹² Within the incident report, a series of questions are asked so as to categorize the incident as to the type of victimization that occurred.¹¹³ Also, questions are asked about whether the respondent reported the incident to law enforcement.¹¹⁴ Hence, a key difference between the NCS and the UCR is that the former measures both crimes reported to the police and crimes that are not reported to the police.

During the 1980s, plans were well under way to revise the NCS to respond to the National Academy of Science’s evaluation of the survey in 1976 and subsequent internal reviews that identified aspects of the methodology and scope of the survey that could be improved.¹¹⁵ During this time, researchers had begun to criti-

cludes questions that ask whether the offender hit, tried to attack, or threatened the respondent, how the respondent was attacked or threatened, and whether injuries were suffered.

It is essential to understand that the [incident report is used] *to determine, and thus count, whether a victimization has occurred* [and what type of victimization].

Bonnie S. Fisher & Francis T. Cullen, *Measuring the Sexual Victimization of Women: Evolution, Current Controversies, and Future Research*, in *Criminal Justice 2000* vol. 4, 317, 323–324 (July 2000) (emphasis in original) (available at <http://www.ncjrs.org/criminal_justice2000/vol_4/04g.pdf>).

108. *Id.* at 323.

109. *Id.*

110. *Id.*

111. *Id.* at 327.

112. *Id.* at 323.

113. *Id.* at 324.

114. *Id.* at 323.

115. Michael R. Rand, James P. Lynch & David Cantor, *Criminal Victimization, 1973–95*, at 5 (NCJ 163069, Bureau of Just. Statistics Apr. 1997).

cally question the estimates of the NCS.¹¹⁶ This was especially true of completed rape and attempted rape, because of the disparities found between the NCS estimates and those derived from studies using different methods for measuring sexual victimization.¹¹⁷ Almost all of the “studies of rape in the United States have reported estimates much higher than those found by the NCS.”¹¹⁸

During the late 1980s, after a multi-year effort to evaluate the weaknesses in the NCS, the BJS began a three-phase process gradually to implement changes in the design of the survey.¹¹⁹ Beginning in January 1992, the redesigned survey, now known as the National Crime Victimization Survey (NCVS), was phased into the sample.¹²⁰ Among the noted changes were new screen questions.¹²¹ New response sets also were added to the incident form to put the new definition of rape and a new crime category — sexual assault — into use.¹²² Revised procedures also were implemented (e.g., in handling series crimes,¹²³ a larger percent of

116. See Cantor & Lynch, *supra* n. 83, at 109 (discussing why the NCS underestimated crime); Fisher & Cullen, *supra* n. 107, at 334 (discussing the criticism that the NCS underestimated rape incidents).

117. Fisher & Cullen, *supra* n. 107, at 325.

118. *Id.*

119. Bruce M. Taylor & Michael R. Rand, *The National Crime Victimization Survey Redesign: New Understanding of Victimization Dynamics and Measurement* (ASA Annual Meeting Aug. 13–17, 1995) (available at <<http://www.ojp.usdoj.gov/bjs/ncusrd96.txt>> (accessed June 23, 2002)).

120. Bachman & Saltzman, *supra* n. 106, at 1.

121. *Id.* An example of a screen question from the NCVS is:

Has anyone attacked or threatened you in any of these ways — a. With any weapon, for instance, a gun or knife — b. With anything like a baseball bat, frying pan, scissors, or stick — c. By something thrown, such as a rock or bottle — d. Include any grabbing, punching, or choking — e. Any rape, attempted rape or other type of sexual assault — f. Any face to face threats — OR g. Any attack or threat or use of force by anyone at all? Please mention it even if you were not certain it was a crime.

Id. at 8.

122. *Criminal Victimization in the United States, 1994*, at 2 (NCJ 162126, Bureau of Just. Statistics May 1997). According to the Bureau of Justice Statistics, sexual assault is defined as:

A wide range of victimizations, separate from rape or attempted rape. These crimes include attacks or attempted attacks generally involving unwanted sexual contact between victim and offender. Sexual assaults may or may not involve force and include such things as grabbing or fondling. Sexual assault also includes verbal threats.

Id. at 149.

123. A series is “[s]ix or more similar but separate events, which the respondent is unable to describe separately in detail to the interviewer.” *Criminal Victimization in the United States, 1995*, at 175 (NCJ 171129, Bureau of Just. Statistics May 2000).

the sample was interviewed using computer-aided telephone interviewing (CATI)).¹²⁴

Estimates of personal and property victimization from the redesigned NCVS were made available starting in 1993.¹²⁵ Like the NCS, the NCVS showed that a large percent of victimizations go unreported to law enforcement.¹²⁶ The percent change for personal victimizations¹²⁷ reported to the police between 1993 and 2000 was four percent.¹²⁸ The percent change for property victimizations¹²⁹ between the same time period was two percent.¹³⁰

Beginning in the late 1970s and continuing through the 1980s, several smaller-scale victimization surveys were administered by researchers to examine the extent and nature of victimization among the adult population.¹³¹ For example, as we previously discussed, Koss and her colleagues executed the first-ever, national-level study of the sexual victimization of college women.¹³² Wesley G. Skogan and Michael G. Maxfield's study administered victimization surveys to randomly selected samples in three cities — Chicago, Philadelphia, and San Francisco.¹³³ Many other studies were conducted using a convenience sample of college students or a sample of women from a single city to examine primarily the extent of sexual victimization.¹³⁴ Despite methodological differences (e.g., question wording, sample composition), a consistent finding across all these studies is that a large proportion of victims decide not to report their victimization to law enforcement officials.¹³⁵

Notably, the crime-statistics mandate — the core idea of the Clery Act — was based on the decision to rely exclusively on data that are based on official statistics such as those reported in the

124. *Criminal Victimization in the United States, 1994*, *supra* n. 122, at 2, 140–142.

125. Rennison, *supra* n. 88, at 11.

126. *Id.* at 10.

127. Personal victimizations include rape, sexual assault, robbery, aggravated assault, and simple assault. *Id.* at 11.

128. *Id.* at 10.

129. Property victimizations include burglary, motor vehicle theft, and theft (but not pocket picketing, purse snatching, or attempted purse snatching). *Id.* at 11.

130. *Id.* at 10.

131. *E.g. infra* nn. 134–137 and accompanying text.

132. *Supra* nn. 3–4 and accompanying text.

133. Wesley G. Skogan & Michael G. Maxfield, *Coping with Crime: Individual and Neighborhood Reaction* vol. 124, 20 (Sage Publications, Inc. 1981).

134. *E.g.* Fisher & Cullen, *supra* n. 107, at 336.

135. *Id.* at 376.

UCR.¹³⁶ For IHEs, official statistics are those that are compiled by campus law enforcement or security departments or campus officials, based on reports of victimizations by students and employees.¹³⁷ In making this choice, those lobbying for the campus crime statistics requirement, those writing the law, and, subsequently, Congress, ignored longstanding criminological knowledge on how to measure the extent of crime in a social domain — such as a college or university campus. In particular, they ignored the finding that such official statistics systematically under-reported crime victimizations because they do not include the substantial number of crime victims who did not report their experiences to law enforcement officials. Thus, the crime statistics published to satisfy the Clery Act mandate are incomplete, if not inaccurate. We will return to this point in more detail in the following sections.

IV. IS THERE A NEED FOR STUDENTS TO HAVE A “RIGHT-TO-KNOW”?

Although it is not the main focus of this Article, we want to briefly discuss a central presumption of the Clery Act — that students have a right to know about crime on campuses because IHEs are potentially dangerous places. To a degree, it is difficult to argue against students having more knowledge about the safety risks of the IHEs that they are attending or may choose to attend. However, using the law to address social problems, such as crime and safety, is not cost free. It is burdensome on the IHEs to have to implement an unfunded mandate that requires them to collect crime statistics for several categories of offenses broken down by geographic location and to publish and distribute annual security reports.¹³⁸ In this regard, it seems reasonable to place the Clery Act in an appropriate social context about whether college and university campuses are, in fact, sufficiently dangerous places to warrant legislatively mandated oversight.

136. *Supra* n. 52 and accompanying text.

137. *Supra* n. 69 and accompanying text.

138. The geographic locations include: (1) on campus (including residence halls), (2) residence halls, (3) noncampus, and (4) public property. 64 Fed. Reg. 43582, 43585–43586 (Aug. 10, 1999).

Joel Best, in his book about child victims, has referred to highly celebrated crime events as “atrocities tales.”¹³⁹ These types of criminal victimizations do occur on campuses, on occasion. After all, it was such a heinous crime that helped to prompt the passage of the Clery Act (i.e., the brutal murder of Jeanne Clery in her dormitory room at Lehigh University by a fellow student).¹⁴⁰ Overall, however, it is not clear that campuses are particularly dangerous social domains. Although campuses are not immune from violent victimizations, with the exception of rape, violence is a rare event.¹⁴¹ For example, of the 483 IHEs that reported to the UCR in 2000,¹⁴² three homicides occurred. In other words, ninety-nine percent of the college campuses reporting to the UCR did not experience a murder or nonnegligent manslaughter for this period.¹⁴³ More supportive evidence is found in the college and university campus-crime statistics, collected under the Clery Act, that are available from the Department of Education.¹⁴⁴ These data show that of 139,218 crimes recorded by campus police or security from more than 6,000 schools in 2000, by far the largest proportion of crime was property crimes: forty-nine percent of all the crimes were burglary and twenty-two percent were motor vehicle thefts.¹⁴⁵ Twenty-seven percent of all crime was characterized as forcible sex offenses, nonforcible sex offense, robbery, or aggravated assault.¹⁴⁶ Less than one percent (0.35%) were murder

139. Joel Best, *Threatened Children: Rhetoric and Concern about Child-Victims* 28 (U. Chi. Press 1990).

140. *Supra* nn. 46–50 and accompanying text.

141. See Security on Campus, Inc., *FBI URR 2000 Statistics* <<http://www.campussafety.org/crimestats/2000.html>> (accessed June 23, 2002) (listing violent crime incidents at colleges and universities).

142. *Id.*

143. See *id.* (listing the number of murders and nonnegligent manslaughters at colleges and universities).

144. U.S. Dept. Educ., Off. Postsecondary Educ., *Data on Campus Crime/Summary of Criminal Statistics* <<http://www.ed.gov/offices/OPE/PPI/security.html>> (last updated Apr. 10, 2002). According to Security on Campus, Inc.,

There are several key differences between how crime statistics are reported under the UCR program and the Clery Act. The UCR program is a voluntary program where law enforcement agencies submit monthly reports, while reporting under the Clery Act is mandatory and not limited to crimes reported to law enforcement. Before the year 2000 Clery Act statistics were never centrally collected.

Security on Campus, Inc., *Jeanne Clery Act FAQ* <<http://www.campussafety.org/schools/cleryact/faq.html>> (accessed June 23, 2002).

145. U.S. Dept. Educ., Off. Postsecondary Educ., *supra* n. 144.

146. *Id.*

or negligent manslaughter.¹⁴⁷ Arson was just over one percent (1.4%) of all the crimes.¹⁴⁸

Further, of all the offenses mandated to be respected in the Clery Act, 29.9% happened on campus (including residence halls), and the remaining crimes happened either at a noncampus building or on public property.¹⁴⁹ Of all the offenses that happened on campus, nearly thirty-six percent (35.97%) of them happened in residence halls.¹⁵⁰

Studies using official crime statistics from selected schools further support the notion that campuses are not particularly dangerous environments. Using data on offenses known to campus police or campus security at 546 IHEs with at least 3,000 enrolled students, John J. Sloan, a faculty member in the criminal justice department at the University of Alabama–Birmingham, reported that sixty-four percent of the offenses involved a burglary or theft; only 5.9 percent involved violent crime and two percent involved serious violent crime.¹⁵¹ The remaining offenses were vandalism (18.8%) and drinking- and drug-related offenses (11.3%).¹⁵²

Studies further suggest that students are safer on campus than off campus. For example, Max L. Bromley, in his study titled *Campus and Community Crime Rate Comparisons: A Statewide Study*, examined violent- and property-crime rates of Florida's public state universities and their respective adjacent cities and surrounding counties.¹⁵³ He concluded that the universities had had lower violent- and property-crime rates than the cities and the counties in which they were located.¹⁵⁴

Evidence also suggests that there is a downward trend in campus violent-crime rates countering the upward trend in violence nationwide in the early 1990s.¹⁵⁵ Using official crime statis-

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. John J. Sloan, *The Correlates of Campus Crime: An Analysis of Reported Crimes on College and University Campuses*, 22 J. Crim. Just. 51, 52–53, 54, 55 (1994).

152. *Id.* at 54, 55.

153. Max L. Bromley, *Campus and Community Crime Rate Comparisons: A Statewide Study*, 15 J. Sec. Administration 49 (1992).

154. *Id.* at 54.

155. J. Fredericks Volkwein, Bruce P. Szelest & Alan J. Lizotte, *The Relationship of Campus Crime to Campus and Student Characteristics*, 36 Research Higher Educ. 647,

tics from 416 schools, J. Fredericks Volkwein, Bruce P. Szelest, and Alan S. Lizotte reported in the *Research in Higher Education* journal that not only is violent crime on campus much lower than for the nation in general, but also that campus violent-crime rates have been decreasing steadily since 1974.¹⁵⁶

Results from college-student- and faculty-victimization studies echo the low rates of violence reported in the studies using official crime statistics. First, a nationally representative study of victimization among 3,472 undergraduate and graduate students revealed that, while on campus during the current academic year, nearly one-fourth (23.7%) of the student respondents had been victimized on campus at least once.¹⁵⁷ However, only one student respondent had been robbed (0.3 per 1,000 students) and nine had experienced an aggravated assault (2.6 per 1,000 students).¹⁵⁸ Among crimes of violence, simple assault was the most common type of violent victimization (12.1 per 1,000 students).¹⁵⁹ Overall, personal larceny without contact was the most frequent victimization across all offenses measured in this study (109.5 per 1,000 students).¹⁶⁰ Second, a faculty victimization survey of full-time faculty members at one urban campus reveals similar conclusions as to the amount of on-campus victimization.¹⁶¹ During a one-year period, twenty-seven percent of the faculty reported experiencing a property crime.¹⁶² Only five percent reported experiencing a personal crime.¹⁶³

One area of concern among college students is sexual victimization. Numerous studies have shown that college women are at an elevated risk for such victimization.¹⁶⁴ Assessing the extent to which female college students are in fact sexually victimized is a

656–657 (1995).

156. *Id.* at 656–651, 656–657.

157. Bonnie S. Fisher et al., *Crime in the Ivory Tower: The Level and Sources of Student Victimization*, 36 *Criminology* 671, 683, 690 (1998).

158. *Id.* at 691.

159. *Id.*

160. *Id.*

161. John D. Woolredge, Francis T. Cullen & Edward J. Latessa, *Victimization in the Workplace: A Test of Routine Activities Theory*, 9 *Just. Q.* 325 (1992).

162. *Id.* at 329. “Property crimes included burglary, stolen property, and damage to personal property.” *Id.* at 328.

163. *Id.* at 329. “Personal crimes included robbery, aggravated assault, sexual assault, and assault with a deadly weapon.” *Id.* at 328.

164. Fisher, Cullen & Turner, *supra* n. 90, at 1.

daunting challenge because estimates of victimization often hinge on a variety of methodological choices.¹⁶⁵ Even so, there is evidence that a substantial proportion of college women experience sexual victimization while students. Studies reveal that during their time in college, between eight and fifteen percent of women are victims of forced sexual intercourse.¹⁶⁶ During an academic year, Fisher and her colleagues estimated from a national-level survey of 4,446 college women

that for every 1,000 women attending [an IHE], there may well be 35 incidents of rape victimization in a given academic year (based on a victimization rate of 35.3 per 1,000 women). For a campus with 10,000 women, this would mean that the number of rapes could exceed 350.¹⁶⁷

It also is instructive that, using NCVS methodology in a survey of college students, the Fisher group found that the rate of rape victimization in the sample of college students was approximately three times higher than that reported for the 1993 NCVS general population of the same age.¹⁶⁸

Both the official crime statistics and the results from college-student- and faculty-victimization surveys suggest that campuses are not the “hot spots” of routine violence that the media has led the public to believe. Overall, with the exception of sexual victimization, the “dangers” on campus are likely not high. This is not to say that college campuses are stereotypical ivory towers in which students and faculty are completely protected from the possibility of experiencing criminal victimization. Even so, there is little evidence that the nation’s campuses are especially unsafe. In this context, the requirement that the IHEs collect and publish crime statistics and safety reports is potentially problematic as public policy.

165. Fisher & Cullen, *supra* n. 107, at 320.

166. Joanne Belknap & Edna Erez, *The Victimization of Women on College Campuses: Courtship Violence, Date Rape, and Sexual Harassment*, in *Campus Crime: Legal, Social, and Policy Perspectives* 156, 163 (Bonnie S. Fisher & John J. Sloan, III eds., Charles C. Thomas 1995).

167. Fisher, Cullen & Turner, *supra* n. 90, at 3, 11.

168. Fisher et al., *supra* n. 157, at 699.

V. THE LIMITS OF THE CLERY ACT: WHAT CAN
STUDENTS REALLY KNOW?

Recall that a key assumption of the Clery Act was that the crime statistics policies, if mandated would, in fact, “produce valid and reliable statistics concerning [the frequency of] on-campus” (1) murder, nonnegligent manslaughter, and negligent manslaughter, (2) forcible sex offenses and nonforcible sex offenses, (3) robbery, (4) aggravated assault, (5) burglary, (6) motor vehicle theft, and (7) arson.¹⁶⁹ These crime statistics rely on victims or witnesses to report criminal victimizations to campus police or security departments or to university administrators who, under the Clery Act, must report these crimes to campus police or security departments.¹⁷⁰ A key assumption to the validity and reliability of campus crime statistics is that *crimes reported to these officials* are an accurate measure of the true levels of crimes that actually occur. This is a troublesome assumption.

Results from victimization surveys have repeatedly shown that a substantial proportion of victims do not report their experience to law enforcement.¹⁷¹ As discussed previously, incidents in which a victim or a witness decides not to call law enforcement are excluded from the UCR figures.¹⁷² This critical limitation has prompted critics to argue that the UCR grossly underestimates the true level of crime in society, or in any given social domain — such as college and university campuses.¹⁷³

Results from three national-level student victimization surveys support the fact that very few students report their victimizations either to campus law enforcement or security or to other campus authorities. First, in their national-level study of college student victimization at randomly selected four-year IHEs, Fisher and her colleagues found that 75.2% of the on-campus burglaries went unreported to either campus police or other campus offi-

169. John J. Sloan III, Bonnie S. Fisher & Francis T. Cullen, *Assessing the Student Right-to-Know and Campus Security Act of 1990: An Analysis of the Victim Reporting Practices of College and University Students*, 43 *Crime & Delinquency* 148, 149 (Apr. 1997).

170. *Id.*

171. *E.g.* Fisher, Cullen & Turner, *supra* n. 90, at 23.

172. *Supra* n. 165 and accompanying text.

173. Sloan, Fisher & Cullen, *supra* n. 169, at 152.

cials.¹⁷⁴ Of all the violent crimes,¹⁷⁵ 78.9% were unreported to either of these two entities.¹⁷⁶ Second, Fisher, Cullen, and Turner examined sexual victimization of college women.¹⁷⁷ Their national-level study of 4,446 female students enrolled at 233 randomly-selected two-year or four-year IHEs revealed that sexual victimization is largely unreported to either campus police or other campus officials.¹⁷⁸ It is noteworthy that women told someone other than the police or campus authorities about the rape in 66.2% of the incidents.¹⁷⁹ Even so, 96.8% of rapes were not reported to campus authorities.¹⁸⁰ The findings from a third national-level study by Fisher and Cullen of 4,436 female students enrolled at 233 randomly selected two-year or four-year IHEs are consistent with the previous research: a large percent of college students do not report their victimizations to campus authorities.¹⁸¹ To illustrate, of the incidents that occurred on campus, seventy-five percent of the aggravated assaults, sixty percent of the rapes, and fifty percent of the robberies went unreported to campus police.¹⁸²

What reasons do victims give for not reporting these incidents? Consistent with previous reporting research and results from the NCVS, the most common reason was that the college-student victims "did not think it was serious enough to report."¹⁸³ This was also the case in at least three of the national-level studies on college-student victimizations.¹⁸⁴ On a related note, the respondents in these three studies also stated with some frequency that the police would not think the incident was serious and that

174. *Id.* at 159.

175. The crimes used in this calculation are rape, sexual assault, robbery, aggravated assault, and simple assault. *Id.*

176. *Id.*

177. Fisher, Cullen & Turner, *supra* n. 90.

178. *Id.* at 3, 23.

179. Bonnie S. Fisher et al., *Reporting Sexual Victimization to the Police and Others: Results from a National-Level Study of College Women*, in *Criminal Justice and Behavior* tbl. 3 (forthcoming 2002).

180. *Id.* This includes campus law enforcement, residence-hall advisor, dean or professor, other college authority, on-campus employer, or supervisor.

181. Bonnie S. Fisher & Francis T. Cullen, *The Extent and Nature of Violent Victimization among College Women* 124 (unpublished report 2000) (submitted to U.S. Dept. Just., Bureau of Just. Statistics).

182. *Id.*

183. Fisher, Cullen & Turner, *supra* n. 90, at 26.

184. Fisher & Cullen, *supra* n. 107; Fisher, Cullen & Turner, *supra* n. 90, at 26; Fisher et al., *supra* n. 179, at 19.

they were “not clear it was a crime or that harm was intended.”¹⁸⁵ Another common answer was that the victims “lacked proof that the incident happened.”¹⁸⁶ Fear of reprisal also was cited as a reason for not reporting.¹⁸⁷ Finally, among sexually related victimizations, not wanting family or other people to know about the incident was an obstacle to reporting victimizations to the police.¹⁸⁸

What conclusions can be drawn from these three national-level college-student-victimization studies about the accuracy of the crime statistics required by the Clery Act? Collectively, the results suggest that the crime statistics generated by the Clery Act underestimate the actual volume of on-campus crimes, especially those involving students. Why? Because students do not report on-campus crimes to campus police or security or to other campus officials who are covered by the Clery Act. Accordingly, a substantial number of crimes are not represented in campus-crime statistics. In turn, the crime statistics that students and staff receive in their respective annual security report are inherently inaccurate. They provide little basis for knowing the true level of crime on any campus. In other words, campus-crime statistics mandated by the Clery Act provide very little accurate information that students, their parents, or staff can use to make informed decisions about the relative safety of a college campus.

Furthermore, the statistics mandated by the Clery Act overemphasize the seriousness of crimes occurring on campuses. Note that the types of offenses reported under the Clery Act do not include larceny-theft. This offense is included in the UCR,¹⁸⁹ yet IHEs are not required to report the frequency of larceny-theft. As we noted previously, several research studies and the UCR university- and college-property-crime statistics have consistently shown that larceny-theft is by far the most-frequently-occurring crime on campuses.¹⁹⁰ The exclusion of larceny-theft is yet another reason to question the utility of the Clery Act to produce

185. Fisher & Cullen, *supra* n. 181, at 124; Fisher, Cullen & Turner, *supra* n. 90, at 25; Fisher et al., *supra* n. 179, at 19.

186. Fisher, Cullen & Turner, *supra* n. 90, at 24; Fisher et al., *supra* n. 179, at 19.

187. Fisher, Cullen & Turner, *supra* n. 90, at 26; Fisher et al., *supra* n. 179, at 19.

188. Fisher & Cullen, *supra* n. 181, at 125; Fisher, Cullen & Turner, *supra* n. 90, at 24-90; Sloan, Fisher, & Cullen, *supra* n. 169, at 164.

189. FBI, *supra* n. 25.

190. *Supra* n. 160 and accompanying text.

statistics that provide an accurate picture as to the volume of campus crime.

In the end, the Clery Act provides the campus community with the “right to know” crime-statistics information that is questionable at best and, at worst, misleading. The reliance on official statistics that underestimate the extent and overemphasize the seriousness of campus crimes place the Clery Act’s substantive value in doubt.

VI. THE DIFFICULTIES OF INSTITUTIONAL COMPLIANCE

Compliance with the requirements of the Clery Act has captured the attention of Congress and the U.S. Department of Education. In March 1997, the U.S. General Accounting Office released a report that detailed the problems that IHEs were having implementing the regulations of the Crime Awareness and Campus Security Act of 1990.¹⁹¹ The subsequent amendments and policy guidance by the Department of Education were, in part, made to address some of the reporting difficulties IHEs were having in attaining consistency and completeness in their campus crime reporting.¹⁹²

Compliance remains an issue among IHEs, as recent evidence from two sources reveals. First, a recent congressional-mandated study of the content of the annual security report from 1,015 randomly selected two-year and four-year IHEs covered by the Clery Act provided insight into IHEs’ compliance with the Clery Act.¹⁹³ Overall, compliance varied across the different requirements.¹⁹⁴ For example, the Clery Act specifies that the past three years of crime statistics should be included in the annual security report.¹⁹⁵ For IHEs that included crime statistics in their annual security report (74.2%), 84.2% included the past three years’ sta-

191. U.S. Gen. Acctg. Off., *Campus Crime: Difficulties Meeting Federal Reporting Requirements* (GAO/HEHS-97-52 Mar. 11, 1997).

192. *Id.* at 4–7.

193. Heather M. Karjane, Bonnie S. Fisher & Francis T. Cullen, *Campus Sexual Assault: How America’s Institutions of Higher Education Respond* (unpublished report Oct. 2001) (submitted to Natl. Inst. Just.). Included in the sample were nine different types of schools: (1) four-year public, (2) four-year private nonprofit, (3) two-year public, (4) two-year private nonprofit, (5) two- and four-year private for-profit, (6) less than two-year public and nonprofit, (7) less than two-year private for-profit, (8) historically Black, and (9) Native American. *Id.* at 40.

194. *Id.* at tbls. 3.6, 3.7, 3.8.

195. 20 U.S.C. § 1092(f)(1)(F).

tistics.¹⁹⁶ In contrast, there was less apparent compliance with the Clery Act's stipulation that sexual offenses be divided into forcible offenses and nonforcible offenses.¹⁹⁷ Only 36.5% of the IHEs reported crime statistics that fully complied with this reporting requirement.¹⁹⁸ Interestingly, there was much variation across the different types of schools.¹⁹⁹ Almost half (48.5%) of the four-year public IHEs and forty-three percent of the four-year private non-profit IHEs fulfilled the requirement.²⁰⁰ However, less than a quarter of the two-year public (23.2%), two- and four-year private for-profit (22.7%), two-year public and nonprofit (19.4%), historically black (24.3%), and Native American (20.0%) colleges and universities reported the breakdown for sexual offenses in a manner that was fully consistent with the Clery Act.²⁰¹

Second, the Security on Campus, Inc. Web site lists IHEs that have been found in violation of the Clery Act "through campus security focused 'program reviews' conducted by the U.S. Department of Education."²⁰² Officially, eleven IHEs from 1996 through 2002 have been found in violation of the Clery Act.²⁰³ The most-frequently-cited violations included the accuracy of the crime statistics.²⁰⁴ For example, six IHEs were cited for not accurately disclosing "crime statistics in the annual security reports, and five IHEs were cited for not accurately compiling the crime statistics."²⁰⁵ Overall, despite the clarifications of the Clery Act by the U.S. Department of Education and Congress, the evidence suggests that IHEs are experiencing some difficulty with compliance.

196. Karjane, *supra* n. 193, at tbl. 3.7.

197. *Id.* at tbl. 3.8.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. Security on Campus, Inc., *Jeanne Clery Act Violators* <<http://www.campussafety.org/schools/cleryact/violators.html>> (accessed June 23, 2002).

203. *Id.* These institutions include Moorhead State University, Virginia Tech., Miami University of Ohio, Clemson University, The University of Pennsylvania, West Virginia Wesleyan College, Mount St. Claire College, The College of New Jersey, Ranupo College of New Jersey, Salem International University, and Saint Mary's College in Indiana.

204. *Id.*

205. *Id.*

VII. CONCLUSION: THE CLERY ACT AS SYMBOLIC REFORM

The Clery Act can be viewed as a symbolic effort at “doing something” about crime and crime-related issues occurring at our nation’s IHEs.²⁰⁶ One positive aspect of the Clery Act is that it has encouraged “an openness about the crime problem” by possibly increasing the willingness of campus administrators to discuss crime issues with the campus community.²⁰⁷ It may have made campuses more aware of crime and more likely to have developed and implemented crime-prevention seminars and security policies and practices. Whether any of these strategies have had a meaningful impact on crime, however, remains to be demonstrated. Another positive aspect is that the act has motivated campus advocacy groups to keep their vigilance over what IHEs are doing to address campus crime issues.²⁰⁸ Furthermore, Congress has maintained a steady interest in campus-crime issues, especially issues related to violence against college women.²⁰⁹ Monies have been appropriated to the National Institute of Justice to award grants to “colleges and universities to combat sexual assault, domestic violence, and stalking.”²¹⁰ For example, in 2000, twenty schools were awarded a total of \$6.8 million to address these three campus issues.²¹¹ In addition to funding new programs at a limited number of IHEs, Congress also authorized a multi-site evaluation of the programs and policies implemented at all the grantee IHEs.²¹²

Overall, however, the Clery Act likely did not fulfill its substantive goal of providing the campus community with valid and reliable information about the safety of the IHEs. One fundamental limitation is that the Clery Act pays scant attention to the difficulty of accurately measuring crime in any social domain. By ignoring criminological research and the decades of work on the

206. Sloan, Fisher & Cullen, *supra* n. 169, at 163.

207. Magnus J. Seng & Nancy S. Koehler, *The Crime Awareness and Campus Security Act: A Critical Analysis*, 16 J. Crime & Just. 97, 103 (1993).

208. *E.g.* Security on Campus, Inc. <<http://www.campussafety.org>> (accessed June 23, 2002).

209. Fisher, Cullen & Turner, *supra* n. 90, at 1.

210. *Id.* at 2.

211. *Id.*

212. *Id.*

challenges of measuring crime, the Clery Act created a means of providing annual crime statistics to the campus community that is inherently flawed. The failure to take into account the extent of nonreporting by victims in the production of crime statistics is a gross oversight. Simultaneously, the Act imposed on IHEs a laundry list of crimes for which statistics must be reported. As we argued, lacking in these statistics is the most-frequently-occurring crime — larceny–theft. If the substantive goal is to provide an accurate portrait of crimes occurring at IHEs, one can question whether this goal can be obtained with the exclusion of larceny–theft. In the end, the intentions of the Clery Act were a noble step toward providing the campus community with information about the extent of crime and the institutional response. In practice, however, the actual results of the Clery Act have been more symbolic than substantive.