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### Campus Sexual Assault Mischaracterized: Exploring Clery Act Shortcomings and Solutions

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**Campus Sexual Assault Mischaracterized:  
Exploring Clery Act Shortcomings and Solutions**  
Alyssa Federoff

At a Greek mixer, a female pledge sister is alone with a brother of the sponsoring fraternity in a bedroom. Although she is under twenty-one, she has been drinking, but not enough to forget she does not want to be intimate with him. He is persistent though, and manages to have sex with her, not quite forcibly but certainly against her will. She feels violated, but she did kiss him earlier in the night, so, she rationalizes, she brought this upon herself.

Under the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, a sexual assault has occurred. Yet, the reporting of this type of forcible sex offense on noncampus property will likely never make its way onto a Clery Act crime statistics report. Societal norms and structural constraints render sexual offense statistics inaccurate. For this sexual assault to appear on a university's Clery Act crime statistics report, many unconventional and uncommon steps must be taken. First, this female student must disclose her assault to someone who recognizes it as a reportable sex offense. Next, this person must report the incident to a Campus Security Authority, perhaps a resident assistant or other student leader. This student leader must recognize the sexual assault, and another disclosure must be made to a supervisor or the department head, who is responsible for compiling information for the crime statistics report of the department.<sup>1</sup> The sexual assault must again be identified, and the department supervisor must further recognize that an off-campus Greek organization's house is considered "noncampus property" to qualify this incident as a Clery violation and ensure the

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<sup>1</sup> For example, this resident assistant must report the incident to his/her resident director.

proper steps are taken, particularly in regard to victim rights. Finally, this incident must appear in the monthly report sent to Public Safety from each department supervisor.<sup>2</sup>

Although Congress posits a nine percent drop in violent crimes and a thirty percent drop in property crimes in the ten years immediately following the enactment of the Clery Act,<sup>3</sup> the White House Task Force to Protect Students from Sexual Assault reports one-in-five women are sexually assaulted in college.<sup>4</sup> While the Clery Act may have significantly increased public awareness and a decline of crime on college campuses, sexual assault remains virtually untouched by the benefits of the legislation. Despite both Congressional and Presidential efforts, sexual assault is largely unreported or misrepresented, and is affecting university students and culture nationwide.

This problem is both societal and inherently structural in the Clery Act, which creates a need for a legislative solution that can effectuate multiple layers of change. The purpose of this article is to propose a unique fusion of legislative and executive efforts already in place to minimize sexual assault on college campuses. While these proposed revisions may be simple, the results could significantly improve the effectiveness of both the Clery Act, as well as governmental efforts to stifle sexual assault. This article is divided into five sections. The first section aims to establish an understanding of the Clery Act through a developmental history and an examination of Clery-specific definitions. Section two summarizes the Clery process in theory, in stark contrast to section three, which consists of both observations and research of the Clery Act in practice. It examines concrete flaws in crime statistic collection and reporting, as well as difficulties in accessing and comprehending crime statistics reports. The final sections of

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<sup>2</sup> Public Safety is the department responsible for compiling crime statistics at Duquesne University.

<sup>3</sup> H.Res. 1069, 111th Cong. (Aug. 10, 2010).

<sup>4</sup> Not Alone: The First Report of the White House Task Force to Protect Students from Sexual Assault, whitehouse.gov, [https://www.whitehouse.gov/sites/default/files/docs/report\\_0.pdf](https://www.whitehouse.gov/sites/default/files/docs/report_0.pdf) at 6 (accessed April 4, 2015) [hereinafter “Task Force Report”].

this article analyzes the results, and offers recommendations to improve both accurate reporting, and effective societal change with regards to sexual assault on college campuses.

## I. The Clery Act: Background

### A. Development

Jeanne Clery was about three quarters into her freshmen year at Lehigh University when she was murdered. After falling in love with the campus instantly, Jeanne spent her first year away from home happy to be at Lehigh. On Friday, April 4, 1986, Jeanne Clery's roommate left for a date and asked Jeanne to leave the door unlocked, as she had misplaced her key.<sup>5</sup> In the early morning hours of April 5, a fellow student whom she had never met, Joseph Henry, awakened Jeanne.<sup>6</sup> Henry, initially intending only to steal from the room, acted brutally to prevent Jeanne from identifying him: "he slashed her neck repeatedly with broken glass, bit her face and breasts, beat her face and body, raped her, sodomized her, and ultimately strangled her to death."<sup>7</sup>

Henry did not reside in Jeanne's building, but his entry to her room was facilitated by a habit of residents propping open locked doors to make visitation easier. Henry entered Stoughton Hall through exterior doors that were propped open, and after finding the male's corridor locked, Henry tried the women's floor; the entryway was also ajar. After Jeanne's death, the Clery family learned of the careless security and escalating crime rate on campus and became infuriated that students and their families received no information regarding these issues and risks.<sup>8</sup> Although there had been at least thirty-eight violent crimes on Lehigh's campus in

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<sup>5</sup> Beverly Beyette, Campus Crime Crusade: Howard and Connie Clery Lost Their Daughter to a Crazy Thief; Now They're Angry and Fighting Back, L.A. Times, August 10, 1989.

<sup>6</sup> Com. v. Henry, 706 A.2d 313, 317 (Pa. 1997).

<sup>7</sup> Id. at 318.

<sup>8</sup> Beyette, supra n. 5.

the three years before Jeanne's murder, this information was not publically available to students or their families.<sup>9</sup>

In the years following their daughter's death, the Clery family founded the Clery Center for Security on Campus, dedicated to establishing a uniform campus crime log that would be publically accessible. After years of lobbying, Congress passed the Student Right-To-Know and Campus Security Act on November 8, 1990.<sup>10</sup> Amending the Higher Education Act of 1965, this foundational act required institutions of higher education participating in federal student aid programs to disclose three years worth of campus crime statistics and security policies. Since the passage of the Student Right-To-Know and Campus Security Act in 1990, various amendments have both broadened and refined the Clery Act. Notably, in 1998, President Clinton renamed the Student Right-To-Know and Campus Security Act as the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, in honor of Jeanne Clery ("Clery Act"), and expanded crime categories significantly.

In the following years, amendments and additions to the act have largely focused on the problem of sex crimes and crimes against women. Today, a university's report must also include how public sex offender registration information can be accessed, as well as universities' policies regarding emergencies, and rights afforded to campus survivors of sex crimes.<sup>11</sup> The most recent change to the Clery Act is the addition of the Campus Sexual Violence Elimination Act, or the Campus SaVE Act, requiring colleges and universities "to increase transparency about the scope of sexual violence on campus, guarantee victims enhanced rights, provide for standards in institutional conduct proceedings, and provide campus community wide prevention educational

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<sup>9</sup> Kathy Ahn, The Pendulum Swings Backwards: The Clery Act Must Be Amended to Address University Policies That Discourage Rape Reporting, 31 Women's Rights L. Rep. 514, 519 (2010).

<sup>10</sup> Clery Center for Security on Campus, Our History, clerycenter.org, <http://clerycenter.org/legislative-history> (accessed March 8, 2015).

<sup>11</sup> Id.

programming.”<sup>12</sup> President Obama signed these regulations into law as part of the Violence Against Women Reauthorization Act of 2013 (“VAWA”) in early 2013, and the United States Department of Education published the final regulations in late 2014, which will become effective July 1, 2015.<sup>13</sup> The final regulations of the Campus SaVE act will vastly expand requirements necessary in sexual assault and dating violence situations under the Clery Act.<sup>14</sup> While the Campus SaVE Act provides considerable updates to the Clery Act that may result in a more accurate representation of sex crimes, this approach is limited, as it lacks significant preventative measures.<sup>15</sup>

## **B. Definitions**

In 2005, the Department of Education published The Handbook for Campus Crime Reporting (“Handbook”), a compendium for university administrators that outlines best practices for Clery compliance in great detail. The Handbook has been amended with the Clery Act, with the most recent version published in 2011. The purpose of the Handbook is to present “step-by-step procedures, examples, and references for higher education institutions to follow in meeting the campus safety and security requirements” of the Clery Act, as amended.<sup>16</sup> The Handbook further includes “examples and enhanced explanation[s]” of many topics based on questions

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<sup>12</sup> Clery Act Information. The Campus Sexual Violence Elimination Act, cleryact.info, <http://www.cleryact.info/campus-save-act.html> (accessed March 8, 2015).

<sup>13</sup> Federal Register – The Daily Journal of the United State Government. Violence Against Women Act – A Rule by the Education Department on 10/20/2014, federalregister.gov, <https://www.federalregister.gov/articles/2014/10/20/2014-24284/violence-against-women-act> (accessed March 8, 2015).

<sup>14</sup> Id.

<sup>15</sup> While I recognize and appreciate the efforts to combat sexual assault on college campuses, these regulations are not effective until July 2015, and therefore are not reflected in the analysis this article sets forth. The statistics published and system considered reflects 2011, 2012, and 2013 crime statistics reports, and practices of the 2014-2015 academic year.

<sup>16</sup> U.S. Department of Education, Campus Security, ed.gov, <https://www2.ed.gov/admins/lead/safety/campus.html> (accessed Mar. 30, 2015).

received over the years since the law's enactment.<sup>17</sup> This resource is available online and easily accessible.

## 1. Geography

Chapter two of the Handbook identifies the physical parameters of crime reporting, clarifying definitions for the Act's geographical disclosure points: (1) on campus; (2) public property within or immediately adjacent to the campus; and (3) non-campus buildings or property that the institution owns or controls. As the Handbook clearly identifies, understanding these categories as defined by the Clery Act is a vital component to compliance.<sup>18</sup>

### a. On Campus

The Clery Act defines "on-campus" to encompass:

(1) Any building or property owned or controlled by an institution within the same reasonably contiguous geographic area and used by the institution in direct support of, or in a manner related to, the institution's educational purposes, including residence halls; and

(2) Any building or property that is within or reasonably contiguous to paragraph [one] of this definition, that is owned by the institution but controlled by another person, is frequently used by students, and supports institutional purposes (such as a food or other retail vendor).<sup>19</sup>

Despite the detailed definition provided by the statute, there remains some ambiguity for university officials particularly regarding property "controlled by" an institution. The Handbook clarifies, "controlled by means that [the] institution rents, leases, or has some other type of written agreement for a building or property, or a portion of a building or property."<sup>20</sup>

Reasonably contiguous, as used in the statutory definition, refers to a property that is considered

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<sup>17</sup> Janice Lee Mann & Diane Ward, The Handbook for Campus Safety and Security Reporting, 1 (U.S. Department of Education 2011).

<sup>18</sup> Id. at 11.

<sup>19</sup> 20 U.S.C. § 1092(f)(6)(A) (2012) (Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act).

<sup>20</sup> Mann & Ward, supra n. 17, at 12.

to be an integral part of campus.<sup>21</sup> An example provided by the Handbook includes a house two blocks from campus converted into an art studio or clinical education facility.

The Clery Act defines on-campus student housing to include any housing facility “that is owned or controlled by the institution, or is located on property that is owned or controlled by the institution, and is within the reasonably contiguous geographic area that makes up the campus.”<sup>22</sup> Aside from on-campus dorms and apartments for students, this definition includes buildings owned by third parties, if there is a written agreement with the institution to provide student housing, as well as “housing for officially and not officially recognized student groups, including fraternity or sorority houses.”<sup>23</sup>

The second part of the definition serves to include buildings and properties on campus that (1) the institution owns but does not control; (2) are frequently used by students; and (3) are used to support the institutions’ educational purpose, such as a bookstore, or restaurant that leases space from the university.<sup>24</sup>

## **b. Public Property**

Under the Clery Act, public property consists of two limited areas: public property within the campus, and public property that immediately borders and is accessible from campus.<sup>25</sup> The examples provided of public property within a campus include a public road or path that runs through campus, in comparison to a privately owned parking lot or private road.<sup>26</sup> “Public property that immediately borders campus and is accessible from campus” includes public

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<sup>21</sup> Id.

<sup>22</sup> §1092(f)(6)(A).

<sup>23</sup> Mann & Ward, supra n. 17, at 18.

<sup>24</sup> Id.

<sup>25</sup> §1092(f)(6)(A).

<sup>26</sup> Mann & Ward, supra n. 17, at 18.



sidewalks, or a public street that borders campus. Crimes that occur on these roads or sidewalks must be included in a university's Clery statistics.<sup>27</sup>

To determine whether public property bordering campus is considered to be “accessible” under this definition, the Handbook looks to one of two conditions: (1) whether there is a barrier between campus and the public property e.g. a fence; or (2) if there is a barrier, whether it is frequently ignored by students it, such as a broken fence.<sup>28</sup>

### **c. Noncampus Buildings**

Within the “noncampus” category, there are two types of properties included:

Any . . . property owned or controlled by a student organization that is officially recognized by the institution or . . . that is used in direct support of, or in relation to, the institution's educational purposes, is frequently used by students, and is not within the same reasonably contiguous geographic area of the institution.<sup>29</sup>

The first definitional prong applies to properties owned or controlled by a recognized student organization. Interestingly, this definition includes Greek organizational housing that is off campus and owned or controlled by a recognized fraternity or sorority.<sup>30</sup> Properties that are “in direct support of, or in relation to, the institution's educational purposes,” commonly refer to athletic fields, classroom or office space, or an off-campus apartment building.<sup>31</sup>

## **2. Campus Security Authority**

Campus Security Authority (“CSA”) is the specific term the Clery Act uses for individuals who are required by law to provide crime statistic reports. The term CSA includes a campus police or security department, any individuals who otherwise have a responsibility for campus security, any individual or organization specified in the institution's statement of campus

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<sup>27</sup> *Id.* at 19.

<sup>28</sup> *Id.*

<sup>29</sup> §1092(f)(6)(A).

<sup>30</sup> Mann & Ward, *supra* n. 17, at 25.

<sup>31</sup> *Id.*

security policy, or any official who has “significant responsibility for student and campus activities.”<sup>32</sup> These categories are function-specific, meaning there is no exhaustive list of position titles that qualify a person as a CSA; instead, a CSA is defined by the responsibilities and authority encompassed in the role.<sup>33</sup>

The Clery Act regulations do not address how to coordinate or effectuate a crime reporting process or training for CSAs. The Handbook provides several recommendations to universities, such as establishing an office to coordinate CSAs and provide training.<sup>34</sup> The Handbook further provides “suggested training elements,” with topics such as describing the role, providing materials, and emphasizing the importance of accurate and timely reports.<sup>35</sup>

### 3. Sex Offenses

Chapter three of the Handbook discusses which crimes must be disclosed and provides educational tools for CSAs to understand when a specific crime has occurred and must be reported. In general, crimes should be classified utilizing the Federal Bureau of Investigation’s Uniform Crime Reporting Handbook (“UCR”), with exception of sex crimes, which have a slightly different definitional system.<sup>36</sup>

The Clery Act separates sex offenses into two categories, forcible and non-forcible. Forcible sex offenses are defined as “any sexual act directed against another person, forcibly and/or against that person’s will; or not forcible or against that person’s will where the victim is incapable of giving consent.”<sup>37</sup> There are four types of forcible sex offenses: rape, forcible

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<sup>32</sup> *Id.* at 79.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> To define sex offenses only, the Clery Act uses the definitions provided by the FBI’s National Incident Based Reporting System, an edition of the Uniform Crime Reporting Handbook. Mann & Ward, *supra* n. 17, at 34.

<sup>37</sup> The Federal Bureau of Investigation, Uniform Crime Reporting Program – National Incident Based Reporting System, fbi.gov, <http://www.fbi.gov/about-us/cjis/ucr/nibrs/2012/resources/nibrs-offense-definitions> (accessed April 3, 2015).

sodomy (oral or anal), sexual assault with an object, and forcible fondling, defined as “the touching of the private body parts of another person for the purpose of sexual gratification.”<sup>38</sup>

Each forcible sex offenses must be either “forcibly and/or against that person’s will; or not forcibly or against the person’s will where the victim is incapable of giving consent because of his/her temporary or permanent mental or physical incapacity or because of his/her youth.”<sup>39</sup>

On the other hand, non-forcible sex offenses are defined as unlawful, non-forcible sexual intercourse, which only includes statutory rape or incest. Because most university students are above the age of consent and the rarity of incest, “forcible sex offenses far outnumber non-forcible ones in Clery crime reports.”<sup>40</sup> Sex offenses are counted one offense per victim, regardless of how many offenders participate or commit a sex offense against one person.<sup>41</sup> Additionally, attempted sex offenses must be reported as the sex crime that was intended.<sup>42</sup>

These definitions are Clery specific and contrast with general conceptions of the law, creating a system prone to improper categorization. For example, the Clery Act requires that an offense must be classified as “forcible” if force was used or threatened, *or* the victim was incapable of giving consent due to age or mental impairment.<sup>43</sup> Having a general knowledge of the law may be misleading in a Clery context, as most criminal statutes define “forcible sex offenses” to include offenses where there has been both force *and* a lack of consent. However, many CSAs are completely unfamiliar with the law, and therefore are likely to use a colloquial understanding of sex offenses.

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<sup>38</sup> *Id.*; Mann & Ward, *supra* n. 17, at 37.

<sup>39</sup> *Id.*

<sup>40</sup> Corey Rayburn Yung, *Concealing Campus Sexual Assault: An Empirical Examination*, 21 *Psychol. Pub. Policy & L.* 1, 2 (2015).

<sup>41</sup> Mann & Ward, *supra* n. 17, at 40.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

Perhaps due in part to this distinction, as well as the general complexity of the definitions of sex offenses, the Handbook explicitly recommends that a university's Clery Act coordinator "double check" all reports of non-forcible sex offenses, implying that it is common or likely that an offense falling under this category may be wrongly classified by the CSA.

## **II. Policy in Theory**

The Clery Act developed from the untimely loss of Jeanne Clery, and her family's dissatisfaction with both parents' and students' lack of knowledge of crimes occurring on and around campus. Growing out of an original intention to inform, the Clery Act has evolved to include a mission to educate and prevent, as well.

The Clery Act has established a tiered system of reporting. A student experiences or witnesses a crime, and reports it to a CSA, most commonly a resident assistant, or another peer in a leadership position. The student-CSA will then report the crime to their department head. The department head not only handles the reported issue, but should also follow the Clery Act procedure of informing the victim and offender of their rights, and properly report the offense in the campus crime log.

Before this hierarchical model can function properly, the university must provide training. While the Handbook reiterates that this component of the Act is not compulsory, there is no way the system will adequately work without properly training university officials and CSAs. The Handbook includes several suggested components to facilitate a successful training and achieve compliance: (1) designate an individual or office to coordinate and oversee CSAs; (2) make sure CSAs know they are CSAs; (3) educate CSAs on Clery Act definitions and other

important information; (4) forward crime reports to campus police; and (5) keep adequate documentation.<sup>44</sup>

Schools of any size should have one specific contact person knowledgeable about the Clery Act to act as a point person for all CSAs, although utilizing this type of system may be especially important for larger schools. This person will be essential in effectuating the other aspects of a Clery-compliant university, such as ensuring CSAs are educated. For obvious reasons, it is essential CSAs recognize their duty to report crimes and understand how crimes fall into Clery categories. Providing training for all CSAs that adequately explains Clery definitions, campus geography, and university-specific policies is an essential component in establishing uniform and proper reporting campus-wide. The Handbook also suggests encouraging CSAs to immediately forward crime reports to campus police, who are better educated on determining when to issue a timely warning.<sup>45</sup>

Universities are expected to make every effort to comply with the Clery Act. To ensure compliance, the Department of Education's Federal Student Aid Office conducts reviews to evaluate an institution's compliance.<sup>46</sup> A review may be initiated "when a complaint is received, a media event raises certain concerns, the school's independent audit identifies serious non-compliance, or through a review selection process. . . ."<sup>47</sup> After the completion of the audit, the Department carefully reviews all findings, and will determine whether there are significant non-compliance concerns, and the amount of the fine, if appropriate.

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<sup>44</sup> *Id.* at 79.

<sup>45</sup> *Id.* at 80.

<sup>46</sup> U.S. Department of Education, [Background Information: Clery Act Reviews](https://studentaid.ed.gov/es/sites/default/files/fsawg/datacenter/cleryact/CleryDataCenterv3.pdf), studentaid.gov, <https://studentaid.ed.gov/es/sites/default/files/fsawg/datacenter/cleryact/CleryDataCenterv3.pdf> (accessed April 4, 2015).

<sup>47</sup> *Id.*

The legislation states that upon determination that a university has “substantially misrepresented” crime statistics, a fine of \$35,000 per offense may be applied, at the Secretary’s discretion.<sup>48</sup> The threat of a fine exists to further encourage universities to comply with the Clery regulations and crime reporting standards.

In addition to accurate crime statistic reports, the Clery Act has two other major tenants: a daily crime log and timely warnings. Any institution with a campus police or security department must create and maintain a daily crime log as a record of criminal incidents and alleged criminal incidents reported to the campus police.<sup>49</sup> Accurately keeping a daily crime log also requires the inclusion of crimes that have occurred within the patrol jurisdiction of the campus police, not just on Clery geography.<sup>50</sup> The Clery Act also requires universities to establish an emergency notification system and provide timely disclosures of potentially dangerous criminal situations.<sup>51</sup> Ideally, these two components, coupled with publically accessible crime statistics, create a more informed and educated student body, resulting in a safer campus.

### III. Policy in Practice

My various experiences within the department of Student Life at a medium-sized university allows me to both understand and further hypothesize how this reporting process works in practice within smaller departments and in larger universities. With regard to Clery Act reporting, Residence Life is one of the most comprehensive and complex departments due to the number of CSAs on staff, the close contact with students’ personal affairs, and the bureaucratic

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<sup>48</sup> 20 U.S.C. § 1092(f)(13); The Clery Center for Security on Campus, Maximum Fines Under the Jeanne Clery Act Increased, clerycenter.org, <http://www.regroup.com/welcome/maximum-fines-under-the-jeanne-clery-act-increased/> (accessed April 4, 2015).

<sup>49</sup> Mann & Ward, supra n. 17, at 89.

<sup>50</sup> Id. at 91

<sup>51</sup> Id. at 96

structure of the department. For this reason, Residence Life makes an effective example for a smaller university, absent the sophistication of a large administrative staff, and highlights how multifaceted departments can fail to report properly even when well-trained on Clery reporting requirements.

Each month, resident directors and all other department heads and university officials receive a request from the assistant chief of campus police explaining to each recipient his or her duty to report crime statistics to the University Department of Public Safety.<sup>52</sup> This generic, monthly email explains that recipients have been “identified by the Clery Act as being an individual who is required to report any crime or incident that appears criminal in nature and which was reported to you, or made known to you in your capacity as a University official.”<sup>53</sup> The email further explains that some people working within the department may also be considered CSAs, and it is the responsibility of the department head to “inquire of subordinates if they are aware of any criminal incidents of which the university should be made aware.”<sup>54</sup>

In response to this monthly email, resident directors and other CSAs are directed to list “all crimes, criminal incidents, and the date of occurrence” that have been reported to them. Interestingly, CSAs are instructed that “[monthly] report [should involve] any incidents that have been brought to your attention and have not already been reported to the University Department of Public Safety.”<sup>55</sup> This caveat leaves significant room for error, requiring CSAs to make assumptions regarding an incident’s report history. While it is obvious a CSA could merely check with Public Safety to minimize error, there is no clear instruction on the best practice. Further, it is unclear whether RDs are supposed to report an incident when information has

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<sup>52</sup> Email from Michael Sippey, Asst. Chief of Public Safety, Duquesne University, to anonymous resident director, Duquesne University, Request for Clery November 2014 (December 3, 2014, 10:24 PM EST).

<sup>53</sup> Id.

<sup>54</sup> Id.

<sup>55</sup> Id.

already been relayed to a Title IX investigator, as there has been no explicit policy communicated.

Within Residence Life, the general hierarchy regarding regulating and combating criminal activity is as follows: different resident assistants (“RAs”) are on “duty” or call every night of the week. If an RA is on call and comes across criminal activity, the RA may, but is not obligated to, call a resident director (“RD”) for back up. If a crime is manageable for student staff to handle, such as an alcohol violation, RAs are encouraged to handle the situation, and send a report to the RD. For many more serious violations, RAs are instructed to immediately call an RD. It is within the discretion of the RD to determine whether the involvement of Public Safety is necessary.

At the end of each month, the building RD compiles the RA reports and his/her own duty reports into one spreadsheet. The spreadsheet contains columns for RDs to state the violation, the students involved, and the outcome. This document will be emailed to the police captain in Public Safety. While I can only speculate on the process, I assume the recipient then reviews close to one hundred documents electronically, and compiles the information into one source.<sup>56</sup> Even if each actor in this series acts with utmost care, there is a significant amount of room for human error.

Further, mandatory reporters are not clearly instructed on what and when they have to report.<sup>57</sup> These ambiguities may cause even more confusion if a crime involves a sexual component. A student may approach an RA to discuss the alleged sexual assault of a friend.

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<sup>56</sup> In certain circumstances, the recipient may find the information unclear and may reach out to the mandatory reporter to seek clarification. For example, in determining whether a vandalism incident indicates any inference of a hate crime, the recipient may reach out to the mandatory reporter for clarification.

<sup>57</sup> Although the Handbook makes suggestions on how to appropriately effectuate accurate crime reporting, there is no requirement to utilize these methods or provide the recommended training.



Many well-trained RAs will approach their RD the next day to discuss the issue. Even if RDs are trained on how to define and identify the sex crimes that require mandatory reporting, due to individual social interpretation, they may identify the incident as a sex offense. For example, female student A approaches her RA to discuss an on-going issue with male resident B. While A is friendly with B, she is uncomfortable with his actions: he often incessantly knocks on her door and waits outside her dorm room, he has memorized her class schedule and often shows up outside her classrooms, and he discusses inappropriate relational and sexual topics with her, despite her request to stop. The Clery Act adopts the definition of “stalking” provided in the Violence Against Women Act of 1994: “engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others; or suffer substantial emotional distress,” such as following, undesired harassing, or threatening.<sup>58</sup> In the example above with students A and B, it is likely B is stalking A under this definition.

Hopefully, the RA, understanding this is outside of her realm, plans to discuss this student’s concerns with her supervising RD in the morning. Hopefully, the RD is able to interfere and address B’s behaviors that are making A uncomfortable. Hopefully, the RD recognizes this behavior as stalking and includes the incident in his/her monthly statistics report. However, the information included in crime statistic reports are generally based off of what is being handled judicially, and, for this reason, it is unlikely that this type of incident would be reported under this system.

Additionally, for this stalking violation to appear in a Clery statistics report, RAs and RDs must be properly educated on crimes such as stalking, through a thorough understanding of crime definitions and recognition. Perhaps more importantly, if this incident has not been

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<sup>58</sup> Federal Register, supra n. 13.

properly recognized and reported as a sex crime, student A will most likely not receive the benefits afforded to her under the Clery Act as a victim of sexual violence.

Unintentional miscategorization of crimes is a likely reality, as well. For example, it is unclear whether a multi-faceted crime should appear in a crime statistics report multiple times. If an incident involves an intoxicated student entering the wrong apartment, it is likely this incident will only be recorded as a trespass, although there has also been an alcohol violation as well. If, in this same situation, the perpetrator has entered the room of an ex-girlfriend with the intention to engage sexually, it fully depends on the individual RD's interpretation as to whether this incident constitutes a sexual offense. A department's unintended disparities in reporting can skew a university's crime statistics alone.

The concern of decreased enrollment may additionally influence the accuracy of crime statistic reports.<sup>59</sup> Parents reviewing Clery statistics before sending their children to college are likely to perceive theft or trespass as less severe than sex crimes, giving universities a motive to purposefully mischaracterize or misreport incidents without being entirely dishonest. The reality of non-compliance when compared with the reality of a federal fine sadly makes a university's decision to misrepresent crime statistics a good economic investment. From 2000 to 2014, only 21 universities were fined for non-compliance under the Clery Act.<sup>60</sup> Additionally, although the Clery Act now allows for fines of up to \$35,000 per incident, over 80% of the fines issued were lowered by an average of 25% than the amount originally proposed by the Department of

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<sup>59</sup> A decline in enrollment due to Clery Act crime statistic reports may be actual or perceived. A study conducted of parents of first-year students at a large research institution in the southeast concluded that parents' knowledge and use of university crime statistics is low. Steven Michael Janosik, Parents' Views on the Clery Act and Campus Safety, *Journal of College Student Development*, 45 no. 1: 43-56. Jan-Feb 2004.

<sup>60</sup> Michael Stratford, Clery Fines: Proposed vs. Actual, [insidehighered.com](https://www.insidehighered.com/news/2014/07/17/colleges-often-win-reduction-fines-federal-campus-safety-violations), <https://www.insidehighered.com/news/2014/07/17/colleges-often-win-reduction-fines-federal-campus-safety-violations> (July 17, 2014).

Education.<sup>61</sup> While 8,476 institutions are required to comply with the Clery Act, only 21 have been fined under the law – that is less than a 0.2% chance of being fined.<sup>62</sup>

The Clery Act also requires that crime statistics be readily accessible to the public.<sup>63</sup> The trend of universities is to maintain a webpage that contains the annual statistics submitted for the previous three years. However, the location and format of crime statistics reports may vary depending on the university.<sup>64</sup> Web searching for and analyzing a university's crime statistics takes a great deal of effort and knowledgeable interpretation.

While in theory the Clery Act makes accurate crime statistics publically accessible, both accuracy and accessibility may be compromised in practice. Based on the studies establishing the prevalence of sexual assault on college campuses, sex offense statistics are continually misrepresented in crime statistics reports, due to a combination of intentional miscategorization and inadequate training of CSAs. Universities have a clear incentive to misreport data to establish the image of a safe and secure campus, with only a minimal risk of an insignificant fine if caught. Additionally, crime statistics may be deliberately hidden under layers of webpages, and are difficult to access, interpret, and understand.

#### **IV. Analysis**

For over twenty years, the Clery family, activists, and Congress attempted to develop a reporting system that educates students and families about both crimes on college campuses and how to minimize them. After two decades, the Department of Education published summary crime statistics indicating that only 2,646 sex offenses were reported among 8,476 institutions in

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<sup>61</sup> Id.

<sup>62</sup> Id.; H.R. 2016, 112th Cong. (May 26, 2011).

<sup>63</sup> §1092(j)(5)(B).

<sup>64</sup> For example, two Pittsburgh universities, University of Pittsburgh and Duquesne University, produce stylistically different Crime Statistic Reports, bearing different categories and providing varying information about the Clery Act requirements.

the year 2009.<sup>65</sup> On average, less than one-in-three schools reported the occurrence of a sex offense on Clery geography, although between twenty and twenty-five percent of female students experience some form of sexual assault while attending college.<sup>66</sup>

In May of 2011, Congress amended the Higher Education Act of 1965 with hopes of improving the education and prevention efforts of sexual violence on campuses.<sup>67</sup> In response to a variety of alarming findings, the House of Representatives introduced a bill amending the Higher Education Act, most commonly known as the Campus SaVE Act.<sup>68</sup> Summarizing the need for improvement, Congress reported that less than five percent of rapes or attempted rapes of students at institutions of higher education are reported to campus authorities.<sup>69</sup> While it is certainly true that college students are underreporting sexual assaults, the incongruence in statistics is likely the result of both underreporting by victims and misreporting by CSAs.

An analysis of sex offenses reported during the stages of an audit suggests misreporting by universities is both significant and intentional.<sup>70</sup> After observing sexual assault crime reporting at universities before, during, and after a Clery compliance audit, researchers found university reports of sexual assault increase almost 45% during an audit period, but return to the unbelievably low rates of reporting immediately after the completion of the audit.<sup>71</sup> This information confirms that it is likely that sexual assaults are being reported to CSAs in greater numbers than reflected in crime statistics reports.<sup>72</sup>

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<sup>65</sup> H.R. 2016, 112th Cong.; United States Department of Education, Data on Campus Crime, [www2.ed.gov](http://www2.ed.gov), <http://www2.ed.gov/admins/lead/safety/campus.html> (accessed April 17, 2015).

<sup>66</sup> H.R. 2016, 112th Cong.

<sup>67</sup> Id.

<sup>68</sup> Id.

<sup>69</sup> Id.

<sup>70</sup> To analyze the accuracy of crime statistic reports, the Department of Education performs periodic audits of reporting policies.

<sup>71</sup> Yung, supra n. 40, at 921.

<sup>72</sup> Id.

In October 2013, Congress again amended legislation in an effort to provide funding to institutions of higher education for the implementation of programs and initiatives developed to decrease sexual assaults and domestic violence incidents on college campuses.<sup>73</sup> Through an amendment to the Violence Against Women and Department of Justice Reauthorization Act of 2005, Congress has appropriated \$12,000,000 to strengthen these efforts for each of the fiscal years of 2014 through 2018.<sup>74</sup> Public and private institutions compliant with Clery Act regulations may receive federal funding to: (1) provide personnel, training, technical assistance, data collection, and other equipment; (2) develop, strengthen, and implement campus policies and services (3) implement education programs; (4) enlarge victim services programs; (5) create and disseminate information about victims' options; (6) expand data collection and communication systems; (7) finance campus safety improvements; (8) support coordination among campus administrators, and campus and local law enforcement; (9) develop materials about prevention and intervention; and (10) develop strategies and projects for victims.<sup>75</sup>

To receive funding, universities must establish a need for funding, propose a detailed plan of program implementation and goals, provide proof that they have collaborated with victim service providers in the community, provide the characteristics and demographics of their institution, and assure the federal funds are merely a supplement to a sexual assault initiative already in action.<sup>76</sup> While these conditions are auxiliary to the requirement that a university is compliant with the Clery Act, they do not create a connection between funding and the number of sex offenses recorded in the university's Clery Act crime statistics reports. As a result,

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<sup>73</sup> 42 U.S.C.A. § 14045b (2013).

<sup>74</sup> Id.

<sup>75</sup> Id.

<sup>76</sup> Id.

universities still have very little incentive to honestly comply with the Clery reporting system, as the likelihood of proven non-compliance is miniscule: 0.2%.<sup>77</sup>

In January 2014, President Obama recognized the prominence of sexual assault among college students as a problem in need of executive attention as well, and created the Task Force to Protect Students from Sexual Assault. In April 2014, the Task Force published a report of findings and offered recommendations to: (1) identify the problem through campus climate surveys; (2) prevent sexual assault through community engagement; (3) effectively respond to sexual assaults; and (4) increase transparency and improve enforcement.<sup>78</sup> To more clearly identify and target sexual assault, the Task Force suggests campus climate surveys, as reports to authorities “don’t provide a fair measure of the problem.”<sup>79</sup> Instead of utilizing the information gathered through Clery crime statistics, the Task Force established a new survey system to better gauge the “prevalence of sexual assault on campus, test students’ attitudes and awareness about the issue, and provide schools with an invaluable tool for crafting solutions.”<sup>80</sup> This model indicates Clery crime statistics are not an accurate indicator of sex offenses, and discards their relevance.

Both legislative and executive action evidences governmental efforts to deter sexual assaults on college campuses. However, although there is effort to better collaborate,<sup>81</sup> the governmental branches and departments involved have not established a unified approach. Further, neither the Congressional grants nor the Task Force’s recommendations truly encourage compliance with the Clery Act. While a university must not be found severely noncompliant with the requirements of the Clery Act to receive a grant, the unlikelihood of such a finding

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<sup>77</sup> Stratford, *supra* n. 60.

<sup>78</sup> Task Force Report, *supra* n. 4, at 1-4.

<sup>79</sup> *Id.* at 8.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 5.

renders this component virtually weightless. Similarly, the Task Force abandons reliance on Clery statistics to establish data, and instead utilizes a “new toolkit” for conducting climate surveys on college and university campuses.<sup>82</sup>

## V. Recommendations

Governmental efforts to deter sexual assault on college campuses have been significant, indicating both concern and dedication to the cause. However, the confusing intersections of Title IX, the Clery Act, the Campus SaVE Act, the Family and Educational Rights and Privacy Act, (“FERPA”) as well the enforcement juncture between the Departments of Education and Justice, fragments and limits these substantial efforts. Although the Departments of Education and Justice have agreed to “better coordinate” their enforcement efforts,<sup>83</sup> and the Presidential Task Force created a chart to clarify how Title IX and the Clery Act intersect with students’ rights under FERPA,<sup>84</sup> mere patchwork is not the solution.

To achieve compliance with the Clery Act, “schools have to get credit for being honest,” specifically regarding sex offenses.<sup>85</sup> Conditioning legislative funding on Clery Act compliance is not enough to establish incentive, as the risk of proven non-compliance is less than 1%. However, if a university’s efforts to deter sexual assault are funded in proportion to the prevalence of reported sexual assault on campus, accurate Clery Act reporting is encouraged.

In practice, this proposal would function much like the Congressional grant does now, utilizing the initiatives outlined in the amendment and appropriation.<sup>86</sup> However, instead of awarding an arbitrary amount of federal money, the government would apply a discrete formula

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<sup>82</sup> *Id.*; see also Not Alone, Climate Surveys, notalone.gov, <https://www.notalone.gov/assets/ovw-climate-survey.pdf> (accessed April 17, 2015).

<sup>83</sup> Task Force Report, *supra* n. 4, at 5.

<sup>84</sup> Not Alone, Intersection of Title IX and the Clery Act, notalone.gov, <https://www.notalone.gov/assets/ferpa-clerychart.pdf> (accessed April 18, 2015).

<sup>85</sup> Task Force Report, *supra* n. 4, at 8.

<sup>86</sup> 42 U.S.C.A. § 14045b (2013).

to establish how much funding a university should receive connected directly to need. The first step would be to calculate the percentage of students that are victims of sexual assault through crime statistics reports. For example:

1. University of Pittsburgh – 19 sex offenses reported among 28,769 students = .06%<sup>87</sup>
2. Duquesne University – 2 sex offenses reported among 9,984 students = .02%<sup>88</sup>

Sexual assault occurrence percentages could then be classified into categories linked to an amount of federal funding. While a legislative committee would best be able to create this hierarchy, my suggestion would be that universities reporting less than 0.5% of victims in their student body do not qualify for federal funding, as these universities express very little need, and most likely are not complying with the Clery Act requirements. Universities reporting a sexual assault occurrence percentage of 0.5% to 1% can receive \$10,000 in federal grants towards sexual assault programming. A university reporting 1% to 5% of victimization can receive \$25,000 in federal funding, while a university reporting 5% to 10% can receive \$40,000 in programming funds. Any university reporting above a 10% rate of sexual assault will receive \$50,000 in federal funding to combat sexual assault on their campus. These proportions would remain flexible, and could be readjusted each year to respond to funding capabilities and need.

Campus climate surveys developed by the Presidential Task Force have undeniable value, as they maintain anonymity and are more likely to accurately represent victimization rates of students in higher education. These surveys provide a great resource that the Department of Education could use to better investigate Clery non-compliance. Surveys similar to the ones

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<sup>87</sup> University of Pittsburgh, Fact Book 2013, pitt.edu, <http://www.ir.pitt.edu/factbook/documents/FB2013.pdf> (accessed April 5, 2015); University of Pittsburgh, Chart I—Crimes Reported to the University of Pittsburgh, Pittsburgh Campus, Police/Officials or Local Police, safety.pitt.edu, <http://www.safety.pitt.edu/pdfs/Safety-Pub-CHART-I.pdf> (accessed April 9, 2015).

<sup>88</sup> Duquesne University, Facts and Rankings, duq.edu, <http://www.duq.edu/about/facts-and-rankings> (accessed April 5, 2015); Duquesne University, Clery Act Statistics, duq.edu, [http://www.duq.edu/Documents/public-safety/\\_pdf/Main%20Campus%2011-12-13.pdf](http://www.duq.edu/Documents/public-safety/_pdf/Main%20Campus%2011-12-13.pdf) (accessed April 9, 2015).



designed by the Task Force should continue to collect information regarding the occurrences of sexual assault, but should also measure whether the incident was reported to a CSA and whether action was taken. Disparities between this information and a university's Clery crime statistics report can indicate non-compliance to the Department of Education's investigation team.

Further, the campus climate surveys provide a baseline by placing a "cap" on the amount of need-based funding universities can receive. If a university reports a higher number of sexual assaults than students anonymously self-reported, a strong presumption of Clery non-compliance (through strategic over-reporting) is established, and an audit should be performed. Comparative use of campus climate surveys directly addresses the concerns of university officials falsely reporting offenses to receive increased funding under this proposal. Additionally, this proposal incorporates an inherent check on an unnecessary desire for federal funding, because a university must balance its financial desire for funding with the negative stigma of reporting a high number of sexual assaults.

Additionally, stricter enforcement of Clery regulations through increased and regular audits regulating both under and over reporting will increase funding recovered through fines. Under the current system, audits are generally only initiated when a university is suspected of substantial non-compliance.<sup>89</sup> Implementing a regular audit system within the U.S. Department of Education would better regulate Clery compliance and could generate supplementary funding, while also further incentivizing accurate reporting.

Comprehensive education and programming about sexual assault may help restore societal conceptions regarding this topic, and eventually lessen the number of sex offenses occurring among college students. The Centers for Disease Control and Prevention conducted a

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<sup>89</sup> U.S. Department of Education, Background Information: Clery Act Reviews, [studentaid.gov](https://studentaid.gov), <https://studentaid.ed.gov/es/sites/default/files/fsawg/datacenter/cleryact/CleryDataCenterv3.pdf> (accessed April 4, 2015).

review of prevention strategies of sexual assault and determined that “effective programs are those that are sustained (not brief, one-shot educational programs), comprehensive, and address the root individual, relational and societal causes of sexual assault.”<sup>90</sup> Perhaps the most promising programming strategy is bystander awareness programming, as it reconstructs many misconceptions about peer values on the subject.<sup>91</sup> Educating young adults on intimate topics can help reduce the social stigmatization associated with sex offenses.

## VI. Conclusion

Since Jeanne Clery’s death in 1986, public awareness of campus crime has increased greatly. Due in part to the activism and dedication of the Clery family, the Clery Act uses a three-pronged model to ensure students are aware of dangers on their campus. However, due to societal and structural restraints, sexual assault remains a significant problem on college campuses, a reality not generally reflected in Clery crime statistics reports.

If universities receive funding for sexual assault education and other resources based on need as established by reported Clery statistics, reports are more likely to be accurate. Further, if the government can unify efforts to support universities in need, institutions of higher education can actively reconstruct societal misconceptions of sexual assault, rather than merely collecting useless data on a larger societal problem.

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<sup>90</sup> Task Force Report, *supra* n. 4, at 9.

<sup>91</sup> Id.; Centers for Disease Control and Prevention, Sexual Violence: Prevention Strategies, cdc.gov, <http://www.cdc.gov/violenceprevention/sexualviolence/prevention.html> (accessed April 24, 2015).