

# THE CLERY ACT

## FREEDOM OF INFORMATION AT WHAT COST TO STUDENTS?

*The Clery Act, which requires full disclosure of campus crime statistics, is bringing campus disciplinary issues into the criminal justice system.*

*The result, say the authors, is grave damage to the student-educator relationship as well as to student development. Can we reconcile the desire for consumer protection with the traditional values of higher education?*

BY ELLEN HARSHMAN, STEVEN PURO, AND LORI A. WOLFF

**T**HE JEANNE CLERY Disclosure of Campus Security Policy and Campus Statistics Act (Clery Act) will have an enormous impact on colleges and universities. The essential effect of the Clery Act is to make higher education an adjunct of the criminal justice system. The Clery Act redefines traditional and fundamental aspects of the role of higher education in students' maturation and learning and fosters heightened adversity between student and school. This change dramatically affects student development professionals and faculty members who work with students in extracurricular activities.

# An institution's failure to disclose accurate statistics on crime may lead to a \$25,000 fine.

## CREATION OF THE CLERY ACT

**I**N 1974, legislation was introduced to give students the right to access their educational records, challenge their accuracy, and prevent release of such records to parties outside the school. This law—the Family Educational Rights and Privacy Act of 1974 (FERPA), also known as the Buckley Amendment—was left essentially untouched until 1990, when it was amended to allow higher education institutions to distribute information to current and prospective students regarding campus crime statistics. The 1990 FERPA amendment was actually a small piece of much larger legislation known as the Student Right to Know, Crime Awareness, and Campus Security Act (CSA).

The CSA applies to all public and private higher education institutions on the basis of their participation in federal student aid programs. The impetus behind the act is often traced to the assault and murder of a female student, Jeanne Clery, in her residence hall room at Lehigh University. Her parents are credited with leading the campaign to enact legislation requiring higher education institutions to disseminate statistics every year on crimes committed on campus during the most recent three years. In addition, the CSA requires institutions to provide information regarding their security policies. A related 1990 amendment to FERPA allows institutions to release to victims the results of campus disciplinary proceedings that involve alleged crimes of violence. In 1992, the CSA was amended, focusing on the policies and procedures that institutions were to have in place regarding alleged acts of sexual assault.

Maureen Rada argues in “The Buckley Conspiracy: How Congress Authorized the Cover-Up of Campus Crime and How It Can Be Undone” that the goal behind both FERPA and the CSA, in the eyes of Congress, “has been full disclosure of accurate information” (p. 1815). However, Rada notes a major gap in the 1992 amendments. She reports the opinions of several commentators, who stressed that institutions could easily find ways to avoid reporting crimes by directing them through campus disciplinary hearings rather than reporting them to law enforcement authorities. If incidents were handled as violations of school policy rather than as crimes, they could go unreported under the CSA. Rada also states that even if a school investigated the incident as a crime (perhaps through its own police or security department), the institution could prevent the

release of information about an incident by relying on the law enforcement records exemption under FERPA.

During the late 1990s, there were various attempts by Congress to define institutional responsibilities and close perceived loopholes related to reporting alleged criminal incidents. Suits were filed in federal and state courts, and throughout 1997 and 1998 legislative hearings were held. The hearings ultimately led to an expansive set of amendments to the Higher Education Act, enacted in October 1998. These amendments included renaming the CSA to the Jeanne Clery Disclosure of Campus Security Policy and Campus Statistics Act (Clery Act).

**A**CCORDING TO Security on Campus, Inc., a victims' rights and lobbying organization cofounded by Jeanne Clery's parents, the 1998 amendments would “significantly improve campus safety across the country” (p. 1) by opening information to all campus constituencies, including students, faculty, parents, and board members, and allow such constituents to “make informed decisions about how to avoid and prevent campus crime” (p. 1). Those changes included requirements for all institutions with campus police or security departments to maintain a public crime log in which incidents must be logged within two days of their reporting and include crimes occurring on sidewalks, streets, or other public areas falling adjacent to campuses. An institution's failure to disclose accurate statistics on crime may lead to a \$25,000 fine. Increasing the amount of information provided to the public is a laudable goal, but the 1998 legislative changes to the CSA (hereinafter

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referred to as the Clery Act) affect student–university relations detrimentally and force higher education institutions to recognize the intrusion of the criminal justice system into education.

Although the demographic profile of students is changing, a continuing issue for higher education is the need to facilitate the maturation of the young adult student. This “consumer protection” law, drafted to give potential students and employees information about the safety of a campus and the area immediately around it, radically influences how colleges and universities facilitate student education and development.

Traditionally, the disciplinary process has been viewed as an important component of the educational and maturational experience of some students. The goal behind many campus disciplinary systems has been to nurture a sense of community. Rules are mechanisms for defining the values of the campus community, and sanctions are imposed for violations. Rules and sanctions shape behaviors of members of that community to conform to those values. According to Arthur Chickering and Linda Reisser in *Education and Identity*, through these rules and disciplinary processes, colleges and universities seek to foster a “sense of moral and social accountability” (p. 126). In addition, disciplinary systems seek to create an environment on campus distinguished by “respect, openness, and mutual recognition of both rights and responsibilities” (p. 129).

One element of a student’s developmental experience is interaction with the laws and constraints of the larger society. Although by no means a safe haven from the sanctions imposed by the civil and criminal structures within our legal system, the college or university has been able to address the student’s interaction with some aspects of the legal system within the context of learning.

Consider this situation: Lisa, an eighteen-year-old freshman, has been coming in late at night, obviously drunk. Residents of Lisa’s floor think she drinks while her roommates are at class. Lisa’s grades are beginning to suffer because she is missing classes and not keeping up with her studies. Stacey, a residence hall assistant, has

become friends with Lisa and is concerned about her. She has learned that Lisa, who had straight A’s in high school, is under a tremendous amount of pressure to please her parents by succeeding as a pre-med student.

Stacey recently saw Lisa using fake identification at a bar near campus. Stacey decided she needed to have a serious talk with Lisa about her drinking. When Lisa opened the door to her room in response to Stacey’s knock, Stacey saw a bottle of wine on the floor behind Lisa’s backpack and was pretty sure Lisa had been drinking. The issue here is whether Lisa becomes one of the campus crime statistics or whether she is helped to resolve one of the most common developmental issues college students face: the responsible use of alcohol.

### PRACTICAL EFFECTS OF THE CLERY ACT

HERE ARE examples of the considerations that face Stacey as a result of the Clery Act. First, the act requires that all violations of state and local liquor laws, as well as campus policy related to alcohol, be reported as part of the annual campus statistics. Until the 1998 amendments, incidents were only reported when a student was arrested for such a violation. The regulations now require institutions to report violations in situations where there was either an arrest or a disciplinary referral. Second, the Clery Act authorizes institutions to implement policies that allow parental notification when the student is under twenty-one. Stacey is now required to ensure that documentation is made of the incident for disciplinary referral and consequent Clery Act reporting. The question is whether that process will best serve Lisa, the student whose alcohol use is causing problems in her life. As for parental notification, it is difficult to argue against bringing parents into the situation, when it is realized that parents can often be a major part of the solution. However, the focus of student development is meant to be on the student, his or her behavior, and his or her growth. In a recent *Chronicle of Higher Education* article on the effectiveness of parental notification, Leo Reisberg quotes Richard Mullendore, noted student development professional

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and author of various publications on students' rights, observing that most educators on campus prefer "to deal directly with the student, the student's behavior, and the student's decision-making process. Often with parental notification, the student doesn't learn as much as he would learn if he were fighting the battle himself" (p. 3).

If a matter is taken through the disciplinary process as it has existed on campuses, sanctions such as suspension and expulsion from school are among the possible results. However, unless the offense has been one representing a clear danger to the safety of others, typically the disciplinary process would be centered on allowing the student to remain a part of the campus community while maintaining or rebuilding relationships hurt by the violation of policy, along with appropriate counseling and other assistance to help the student overcome the difficulties that led to the infraction. Under the Clery Act, the school becomes allied with law enforcement, where the emphasis is on the punishment of offenses rather than the student's education. Compliance with the law rather than facilitation of student learning becomes the focus.

Consider the following hypothetical situations. Mary has decided to confide to Stacey, the residence hall assistant, that she has taken items from her roommate and others in her residence hall. Stacey and her supervisors in the student development system are faced with another situation that would fall into one of the Clery Act reporting categories. The Clery Act requires reporting the crimes Mary committed so that the various campus constituencies can be aware of the incidents of burglary that have taken place within the confines of the campus. Reporting the crimes would allow fellow students to get their stolen items back and allow the campus system and the law enforcement system to follow through with proper action against Mary.

In a second hypothetical situation, a male student sexually assaults Jane in her residence hall room, and she goes to Dr. Smith, a faculty member who is the adviser of the university's math club, to talk about what happened. Again, the Clery Act requires reporting the crime (albeit an alleged crime rather than one that was admitted), which would fall within the forcible sexual offense category. Thus campus constituencies would be made aware of the *alleged* instance of such a crime. Such report-

ing would allow both campus and local law enforcement authorities to begin an investigation of the incident and then forward it through any necessary campus or criminal proceedings. In addition, through access the public would have to information about the incident through campus security logs, campus constituencies not only would be aware that an alleged incident had occurred but also, depending on the extent of information released in the logs, might be able to piece together information about the identity of both the alleged victim and perpetrator.

The Clery Act identifies both the residence hall assistant and her supervisors in the first case and the faculty member in the other as campus security authorities, who have reporting responsibilities because of their professional relationships with students. It is true that the goals and outcomes flowing from Clery Act reporting requirements are similar to goals traditionally part of the student development process; obviously, educators have an interest in forwarding truthful and timely information to the public, so that those members of the public, especially those who reside on campus, can take appropriate precautions. Educators also have a vested interest in ensuring that those who break the law receive appropriate sanctions. The difference may be in the way those goals are met. At most campuses other goals are vital to the educational process as well.

In Mary's case, a goal of educators would be to facilitate the process of Mary coming forward with admission of the crime and then guide her further to take responsibility for her actions (which might occur via sanctions established by the campus disciplinary system). In Jane's case, a goal would be to enable Jane, the victim-survivor of the alleged sexual assault, to maintain as much control as possible of the situation. The rationale for that would be to avoid letting the process victimize Jane again and to investigate and take appropriate action against the alleged perpetrator (which would also take place within the campus disciplinary system).

### ARGUMENTS AGAINST THE CLERY ACT

**A**LTHOUGH the Clery Act and the traditional student disciplinary system ultimately have similar goals, the Clery Act's reporting mandates may obliterate

the trust and confidence inherent in the student development relationships and processes facilitated by and between students and those now identified as campus security authorities.

Under both the student development system and the Clery Act mandates, crimes are reported and various campus constituencies are notified. Under the Clery Act requirements, the focus is on the reporting; under the student development process facilitated by campus personnel, the reporting is a by-product of an effort to facilitate student learning. The latter process centers on the student and his or her relationship to the institution and its constituents, whereas the process mandated by the Clery Act focuses on the reporting of the incidents, quite possibly at the expense of students and the educational process.

These examples, as well as the common alcohol-related situation described earlier, are typical of those that find their way to the campus disciplinary system. The Clery Act requirement to report matters simply referred for disciplinary action is most troubling. One concern is that certain incidents must now be reported when they are brought to the attention of a campus security authority or official. The report would be made well in advance of investigations and hearings through the campus judicial process, which might actually result in the exoneration of the accused or the withdrawal of the complaint that gave rise to the report. The sexual assault situation is a good example. The violation associated with a sexual assault is one of the worst imaginable, and anyone would want to take appropriate steps to ensure that those who commit such violations are not able to commit such a crime again. What is taken away in a sexual assault can often never be returned, but what is lost by one who is accused and ultimately exonerated of any crime is also difficult to return.

Another concern is that because institutions wish to appear safe to the general public, there may be temptation to ignore behaviors that might previously—and properly, from an educational perspective—have been directed into the campus judicial system. Stacey may be encouraged by her supervisors to report alcohol abuse only if it is a party situation or if students are participating in overly boisterous or violent behavior that

might break some local or state criminal law or ordinance. Thus, Lisa's behavior may not be acknowledged; the institution may have reason not to report it. In this way, the Clery Act may foster the guiding principle that what is not officially recognized does not have to be reported.

The overall impact of the Clery Act will be fewer referrals to the judicial process. When a referral occurs, students like Lisa, for whom this process could be a crucial aspect of development, are deprived of the opportunity to experience its benefits. A troubled student, or one who knows of a student with a problem, is less likely to bring behavior to the attention of teachers, counselors, advisers, or peers if there is a real possibility that openness will lead to an official report. Further, the students in the school community lose the opportunity to participate in the resolution of a problem in a way that allows them to observe the balance of the best interests of an individual and the best interests of the community.

As a response to the Clery Act's public disclosure emphasis, when the campus judicial process is invoked, it will be much more formal than in the pre-Clery context. As David Hoekema notes in his book *Campus Rules and Moral Community: In Place of In Loco Parentis*, even though it has been established that a disciplinary proceeding requires a more rigorous set of procedural protections than academic assessments, courts have still not required a college or university to adhere to a full-scale judicial model. Under the approach mandated by Clery Act guidelines, campus personnel are truly part of the law enforcement system. This means that faculty and staff members, especially those now labeled as campus security authorities, must develop expertise in some aspects of criminal law and must understand the legal consequences of violations of these laws on campus. Hoekema also points out that "relatively few senior academic administrators besides deans of students, and even fewer faculty members . . . take an active interest in discipline except where particular problems affect them personally" (p. 145). In general, the system necessitated by the Clery Act requires training and levels of administrative responsibility not traditionally part of the job of most professionals in these positions. Consider a campus judicial officer whose responsibilities are often part of an

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entry-level student development position that frequently requires a master's degree. The Clery Act compels institutions to move away from seeking candidates with preparation in student development in favor of individuals with law degrees.

## IMPACT OF THE CLERY ACT

THE CLERY ACT is likely to have a chilling effect on student-faculty interactions outside the classroom. Colleges and universities encourage, and in some cases require, faculty members to be involved with students in out-of-class activities. A faculty member who sponsors a club associated with study in a particular major must, under the guidelines, be a campus security authority. This responsibility is probably a surprise to many faculty members and likely presents a burden most are unwilling to accept. One possible consequence is that a faculty member may continue his or her out-of-classroom activities, choosing to ignore the reporting responsibility. Or the faculty member may discontinue such activities, thus depriving students of important learning and mentoring opportunities.

In summary, the Clery Act undermines essential elements in our educational system by going too far toward consumer protection to the detriment of education. As Hoekema states, "We cannot restore the ethical dimension that has largely vanished from the campus demands by reimposing the paternalistic rules of an earlier generation. . . . Students will insist that their views, their modes of life, and their rights to privacy and self-determination be respected" (p. 164).

Educators should insist on this as well and examine seriously this latest intrusion into time-honored educational processes. It is unlikely that those who drafted and approved the Clery Act considered this kind of major impact on higher education. However, it is now the responsibility of higher education's leaders to reconcile the act's requirements with the best interests of the learning community rather than simply hand over a critical aspect of student development to the legal system. To that end, school officials must view the Clery Act requirements through the lens of education. This means that

policies and procedures drafted for Clery Act compliance must also be tested against standards for advancing the school's educational mission and students' needs. When hiring and training, staff must emphasize the interaction of the act with the student development and educational goals of the school. The campus community must be educated regarding the requirements of the Clery Act. In addition, the processes that are developed must be monitored consistently, with both positive and negative effects reported to federal regulators, to ensure that student rights and sound educational practices are not subordinated to the Clery Act's compliance mandates.

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## ADDITIONAL RESOURCES

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