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A Legal Analysis of Court Cases and Administrative Investigations Related to Violations of the Clery Act: Getting Good from the Bad and the Ugly

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A LEGAL ANALYSIS OF COURT CASES AND ADMINISTRATIVE INVESTIGATIONS
RELATED TO VIOLATIONS OF THE CLERY ACT: GETTING GOOD FROM THE BAD
AND THE UGLY

by

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DEDICATION

This brain child is dedicated to my mother, Willie Mae Tucker, who is my number one fan. In all that I see and all that I do, the one thing I always want to be is more like you. With this accomplishment, I am hearing you say my favorite scripture from Jeremiah 29:11, which reads, “For I know the plans that I have for you, says the Lord, plans to prosper you and not to harm you, plans to give you a hope and a future.”

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ABSTRACT

College brochures paint pictures of beautiful campuses, diverse student populations, renowned professors, and the best educational programs. What colleges never include in those brochures are the ugly crime statistics. In 2012, higher education institutions reported 41,708 liquor arrests, 20,486 burglaries, 4,837 forcible sex offenses, 951 hate crimes, and 31 murders. The reporting requirement, along with other regulations, has been required of institutions of higher education since 1990 under the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, yet so many colleges and universities are facing lawsuits, investigations, settlements, and fines for failing to comply. This legal study examines such lawsuits and investigations for areas of non-compliance resulting in institutional liability. The findings provide guidance for campus officials and policymakers who have the responsibility of administering campus security at their respective institutions. The study concludes with recommendations to strengthen campus policies and procedures for successful reporting and responding to campus crimes, thereby avoiding liability.

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CHAPTER ONE

OVERVIEW OF THE STUDY

Introduction

Scene: A female student walks to her dorm room upon leaving a party where she has consumed alcohol and is noticeably drunk. Two male students follow her and physically stop her from entering her room. They lead her to another room where one of the male students rapes her. Following that assault, two different male students are allowed to enter and rape the female student. Outside the room, a group of male students congregate to high-five and congratulate the attackers on their conquest¹.

Although the scene just described sounds like the plot for a fictional movie, it is reality on many campuses. How such an incident can be prevented and how campuses should react in similar situations are the relevant questions that are faced by campus administrators. Campus leaders, as well as the institution involved in the specific facts previously illustrated, were sued because they failed to warn students of prior sexual crimes in violation of federal law, and they failed to appropriately respond to the incident in violation of the college's code of conduct. Unfortunately, this situation ended tragically as the student committed suicide at her parents' home after the semester ended.

Historically, crime on campus has been prevalent and is considered the “dirty little secret” of higher education. According to Sloan and Fisher (1995), “there would be

¹ The details of the scene described are summarized from *McGrath v. Dominican College of Blauvelt, New York*, 672 F. Supp. 2d 477 (S.D.N.Y. 2009).

occasional whispers about the tragedy of a campus rape or assault, but no real effort was made to find out how much of it was going on, to understand the mechanisms at work generating it, or to do something about it” (p. 17). The unspoken policy of keeping quiet about campus violence ended due to an incident at Lehigh University in Pennsylvania. On April 5, 1986, nineteen-year-old freshman Jeanne Clery was beaten, raped, sodomized, and murdered in her dorm room by a fellow student. During their investigation, Jeanne Clery’s parents discovered that thirty-eight violent crimes had occurred on campus in the three years prior to Jeanne’s death, and the statistics had been withheld from the public. The Clerys brought suit against the university for failing to provide adequate security and failing to warn students of foreseeable dangers. Additionally, the Clerys began a national, public campaign lobbying for campus security laws (Security on Campus, Inc., n.d.). The first of many congressional regulations in response to the Clerys' efforts was signed into law in 1990 and titled the Student-Right-To Know and Campus Security Act (Hunnicuttt & Kushibab, 1998). It was later renamed the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (hereinafter, “the Clery Act”). The Clery Act requires institutions of higher education to report crime statistics, educate the campus community regarding campus safety, create campus policies and procedures, establish crime prevention programs, and respond to campus violence (*see* 20 U.S.C. § 1092(f)).

Certain members of Congress were hesitant to pass a bill that involved the federal government in higher education practices (*HR 3344: The Crime Awareness*, 1990). Statistics were presented and testimonies were shared that convinced the legislative body that campus crime is indeed a national problem. Many organizations, such as the

American Council on Education, the National Association of Student Personnel Administrators, and the International Association of Law Enforcement Administrators, spoke in support of the bill, acknowledging the need for legislative action. Nevertheless, they expressed concerns that institutions would have difficulty complying with the proposed federal law.

Issues under discussion in legislative hearings dealt with the lack of uniform reporting of campus crimes, clarifying the definition of campus and surrounding areas, methods of distributing the campus crime reports, administrative training, and the costs associated with complying with the bill once passed. A question often repeated was, “how do [institutions] begin to stop students from victimizing each other?” (*HR 3344: The Crime Awareness*, 1990, p. 29). This question was asked because of data illustrating that almost 85 percent of all campus crime and violence was student-to-student crime, and that approximately 60 percent of campus crime was alcohol-related (*HR: 3344: The Crime Awareness*, 1990). The response to that query was that no legislation could guarantee students’ personal safety, though institutions should endeavor to ensure that students are armed with the necessary information to protect themselves (*HR: 3344: The Crime Awareness*, 1990). The passage of the Clery Act may not have dispelled the concerns that were raised back in 1990, but the question that Congress clearly answered in establishing the legislation was whether campus crime should be addressed on the federal level.

The Clery Act was created 24 years ago, and there are still debates among interested parties over this legislation. Old arguments about the legislation that have never been settled are now combined with new points of view about the failures and

successes of the Clery Act. College officials have continually argued that the legislation is a financial burden to institutions, requiring additional paperwork and resources to comply with requirements that are complex and ambiguous (Gregory & Janosik, 2002; Leef, 2014; Lipka, 2009; Woodham, 1999). Researchers dispute whether the Clery Act is merely a symbol with no evidence that it has made any impact on reducing campus crime or educating the public (Fisher, Cullen, and Turner, 2002; Gregory & Janosik, 2013; Nobles, Fox, Khey, & Lizotte, 2013). Groups, such as the Clery Center for Security on Campus, along with parent organizations have advocated for this legislation to ensure that institutions are accurately publishing crime statistics and taking measures to prevent and respond to campus violence (Keels, 2004, McNeal, 2007). Media outlets have reported problems with campus safety, alleging that colleges and universities are not doing enough to deal with campus violence (Gregory & Janosik, 2013; Kerkstra, 2006; Lighty, Clair, & Cohen, 2011).

Despite these debates over its necessity and effectiveness, higher education institutions are required to comply with the Act; therefore, the most important inquiry is whether schools are complying with the legislation and upholding the purpose for which it was established. The number of lawsuits and settlements regarding campus crime, as well as the number of agency investigations, suggest that institutions are not adhering to the requirements of the Clery Act. This study examines instances of non-compliance through review of court cases and the United States Department of Education investigations to determine any problems these governing bodies have found and what policy recommendations for compliance they have conveyed in their rulings.

Purpose of the Study

The purpose of this research is to determine trends of non-compliance and related policy recommendations as demonstrated by the authoritative bodies deciding issues concerning the Clery Act: the federal government and the judiciary. Researchers have conducted studies in an effort to understand why institutional leaders are failing to comply with the federal mandate (e.g., Colaner, 2006, Gregory & Janosik, 2013; Janosik & Gregory, 2003; McNeal, 2007). No research exists, however, that examines instances of non-compliance to determine what information can be gleaned from agency determinations and judicial opinions.

According to Kaplin and Lee, “the law’s presence on campus and its impact on the daily affairs of post-secondary institutions are pervasive and inescapable” (2007, p. 11). Litigation exposes colleges and universities to jury trials, large monetary damages awards, and judicial oversight. Litigation is more prevalent today due to increased parent and student expectations as a result of increased tuition and fees. Faculty, administration, staff, and students are more likely to demand more from institutions because of increased competition among higher education institutions. Technological advances, expanding campuses, and distance learning has increased institutional responsibility to its constituents. According to Kaplin and Lee (2007), “an increasingly adversarial mindset, a decrease in civility, and a diminishing level of trust in societal institutions have made it more acceptable to assert legal claims” (p. 12). Lawsuit defenses are drains on resources even when the institution prevails.

Post-secondary institutions are also subject to governance from Congress, hence the passage of the Clery Act, as well as federal agencies through the creation of federal

legislation. The Clery Act grants the Department of Education responsibility for ensuring that colleges and universities are abiding by the directives within the Act. An investigation of an institution “may be initiated when a complaint is received, a media event raises concerns, the school’s independent audit identifies serious non-compliance, or through a review selection process that may also coincide with state reviews performed by the FBI’s Criminal Justice Information Service (CJIS) Audit Unit” (US Department of Education, 2014). Once an investigation is completed, the agency issues a final determination and imposes sanctions when relevant.

This study seeks guidance from those entities whose recommendations are the most beneficial to administrators who set policies and establish campus security measures.

Research Questions

1. Given the US Department of Education and court findings in their published decisions, what do administrators need to consider when complying with the Clery Act?
 - a. What Clery Act violations have been reported by the US Department of Education in its investigations of higher education institutions since the law was established in 1990?
 - i. Which violations are specific to particular types of campuses?
 - b. What recommendations for compliance have been established by the US Department of Education in its determinations of institutional violations?
 - c. What cases have been published by appellate or trial courts addressing the Clery Act in their analysis of legal claims?

- i. In what ways are the courts consistent or inconsistent in their analysis across jurisdictions?
- d. What recommendations for compliance with the Clery Act are derived from the court cases?
- e. What are the similarities and differences in the recommendations established by the courts and those established by the US Department of Education?

Statement of the Problem

After 24 years, it is unclear why institutions are failing to comply with the Clery Act. Whether the lack of compliance stems from the complexity of the law, the burden of complying with multiple federal regulations, monetary limitations, or simple indifference, this question has not been answered. The federal government instituted the Clery Act in an effort to combat campus violence by ensuring that colleges and universities no longer treat crimes as “dirty little secrets.” This legislation is the most known and pervasive measure in which institutions of higher education must universally address campus crime (Gottlieb, 2008). This study will review the Clery Act and known violations of the Act in order to gain a better understanding of the underlying problem.

Requirements of the Clery Act

The Clery Act mandates that all higher education institutions receiving federal funding must compile campus crime statistics and security policies and submit an annual report of those compilations. The statistics for the following crimes shall be as categorized by the Federal Bureau of Investigation, and the reports must include the totals from the preceding three years:

1. Murder

2. Sex offenses, forcible or non-forcible
3. Robbery
4. Aggravated assault
5. Burglary
6. Motor vehicle theft
7. Manslaughter
8. Arson
9. Arrests or campus disciplinary referrals for liquor law violations, drug related violations, and weapons possession (20 U.S.C. § 1092(f)).
10. Domestic violence
11. Dating violence
12. Stalking

Colleges and universities must also report if any of the above offenses; larceny or theft; simple assault; intimidation; destruction, damage, or vandalism of property; or other crimes involving bodily injury to any person are committed as a hate crime (a crime in which the victim is selected because of the actual or perceived race, gender, religion, sexual orientation, ethnicity, or disability) (20 U.S.C. § 1092(f)).

The first report was due on September 1, 1992, and should be submitted on that day annually. The annual security report shall be made available to “all students, faculty and staff by October 1, and to any applicants for employment or admission who request such information” (20 U.S.C. § 1092(f)). Colleges and universities shall "include descriptions of a variety of institutional policies relating to the reporting of crimes and

other emergencies on campus, security of and access to campus facilities, campus law enforcement authority, and crime prevention programs" (Sloan & Fisher, 2011, p. 74).

Amendments to the Clery Act

Advocates have lobbied Congress for additional rule changes, and the following amendments have been passed since 1990:

1991: Crime statistics reporting requirement was changed from school year to calendar year.

1992: Campus police and security records about crimes involving student perpetrators are not shielded as confidential student educational records protected under the Federal Educational Right to Privacy Act (FERPA).

1992: The Campus Sexual Assault Victims' Bill of Rights was added mandating institutions to implement policies that guaranteed certain basic rights for all sexual assault survivors. Colleges and universities must report statistics delineating forcible sex offenses such as rape from non-forcible sex offenses such as incest.

1998: FERPA does not prohibit the disclosure of disciplinary actions against a student accused of a crime.

1998: Congress renamed the legislation the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act of 1998. Institutions should include geographic areas where crimes occurred on campus, in certain non-campus buildings, and in public places. Campus security must maintain a daily crime log and provide it upon request.

2000: The Campus Sex Crimes Prevention Act was added requiring colleges and universities to collect and disclose information on the number of convicted sex offenders enrolled, employed, or volunteering at institutions.

2008: Institutions must include statements of emergency responses and evacuation procedures. Institutions will not retaliate, intimidate, threaten, coerce, or otherwise discriminate against any individual with respect to implementing the Act (whistleblowing protection) (Sloan & Fisher, 2011, p. 75-76).

2012: Fines for Clery Act violations increased from \$27,500 to \$35,000.

2013: Campus Sexual Violence Act (SaVE Act) was enacted under the Violence Against Women Reauthorization Act. The SaVE Act amended the Clery Act to include gender identity and national origin in the description of hate crimes. Institutions must include domestic violence, dating violence, and stalking in the annual crime statistics. Additionally, institutions must report sexual crimes that law enforcement or campus officials have determined to be unfounded. Victims' names should not be included in timely warnings. Policies and procedures for sexual violence must be enhanced (American Council on Education, 2014).

The Clery Act's primary function is to gather information from all federally funded public and private institutions regarding crimes committed on their campuses, adjacent territories, and college off-campus facilities (Gottlieb, 2008). These requirements provide potential students with crime data so they can make an informed decision when determining which college to attend (Janosik & Gehring, 2003). Furthermore, these measures place the campus community on notice about potential risks so they can make "active choices about their personal behavior" (Janosik & Gehring, 2003, p. 81). The act

imposes a duty on colleges and universities to report crimes and force the sharing of this information to the campus community and general public (Janosik & Gregory, 2003).

Priorities and Confusion Relating to the Act

One writer remarked that the days have long gone “when security budgets and safety concerns were low priority items for college and university administrators, parents, and students” (Dahlem, 1996, p. 3). As campus child sex abuse scandals, mass shootings, and stabbing sprees are broadcast across the country, administrators are forced to address security issues on their own campuses. Administrators “must endeavor to lessen crime risks and the perception of them in order to protect institutional image, enhance student recruitment, and avoid costly lawsuits stemming from an alleged failure to protect students and employees from criminal miscreants” (Smith, 1996, p.11). More people are declaring that the public has a right to know what goes on at colleges and demanding that campus officials be forthright about violent incidents (Nicoletti, Spencer-Thomas, & Bollinger, 2001; Sloan & Fisher, 2011).

Crime prevention advocates, parents, and the media claim that colleges and universities are blatantly failing to report crimes to protect the image of the institution (Kerkstra, 2006; Lighty, Clair, & Cohen, 2011; Nicoletti et al., 2001). Campus administrators, on the other hand, “state they are doing their best to comply with the laws and deeply resent the accusations that they are being intentionally misleading” (Nicoletti et al., p. 19). They also argue that the “laws are confusing, constantly under revision, and so detail-oriented they become meaningless” (p. 19). Administrators concede the failure to disclose crimes that are reported to offices other than campus security (Nicoletti et al., 2001). Campus leaders also admit that they may not report crimes in the surrounding

areas as required by the Act because they believe those areas to be “off campus” (Nicoletti et al., 2001). Furthermore, there is evidence that institutions have “different definitions for crimes such as sexual assault and different time frames to calculate the date (e.g., academic year or calendar year)” (p. 19). Much controversy exists on who should report, where that information goes, and how to define and tabulate the information (Nicoletti et al., 2001). All of this leads to incorrect records and inaccurate reporting which are violations of the Clery Act. Information gathered from instances of non-compliance will guide campus leaders in dealing with those complex issues that have generated fines, court settlements, and negative public images.

This research seeks to investigate findings from the US Department of Education and courts because they both play a significant role in the regulation of the Clery Act. Colleges and universities need to understand the rulings that these entities have published regarding compliance with the Act. In the past, the courts and the US Department of Education have differed in examining matters regarding higher education. For example, when deciding the issue of sexual harassment under Title IX of the Education Amendments of 1972², the US Supreme Court “refused to accord any deference to the decisions of the administrative agency authorized to implement the statute” (Kaplin & Lee, 2007, p. 436). In contrast to its precedent in other situations, the Supreme Court found that the US Department of Education’s guidelines were too strict and rejected the application of the agency’s guidelines in favor of the Supreme Court’s own interpretation of the statute (Kaplin & Lee, 2007). Although four justices vehemently dissented from the majority ruling in that particular case, the Supreme Court and the US Department of

² Title IX declares that “no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under an education program or activity receiving federal financial assistance” (20 U.S.C. § 1681(a)).

Education have not reached the same conclusion with regard to Title IX (Kaplin & Lee, 2007).

Despite the fact that the governing entities cannot reach common ground regarding the mandates of Title IX, institution leaders are expected to comply with that legislation as well as the Clery Act. Both statutes require institutions to take action regarding sexual violence and campus crime, yet neither provides direction on how to comply with both statutes simultaneously. Whether the failure to comply is a result of too much legislation and very little instruction has yet to be determined. This research will examine instances of non-compliance as published by both the courts and the US Department of Education for better understanding of the problem in an effort to assist administrators in addressing compliance issues.

Significance of the Study

Researchers have “crafted new discussions of the factors underlying institutional non-compliance with Clery Act guidelines” (McNeal, 2005, p. 2). The roles administrators have played have been analyzed along with their perceptions of barriers to institutional compliance (Janosik and Gregory, 2003; Colaner, 2006; Janosik & Gregory, 2009). There have been repeated arguments that the Clery Act is ineffective, overly complex, and a financial burden to colleges and universities (Fisher, Hartman, Cullen, & Turner, 2002). All can agree, however, that efforts must be made to address campus violence, and this regulation has generated national dialogue (Carter, 2011).

This study demonstrates to administrators the negative consequences threatening colleges and universities since the passage of the Clery Act. In 2007, the US Department of Education fined Eastern Michigan University \$350,000 for Clery Act violations.

Three years later, Virginia Tech paid eleven million dollars to settle suits after the tragedy on its campus (Carter, 2011). As of 2013, 28 individuals filed suit against Penn State regarding the sex scandal that will be investigated by the US Department of Education for possible violations (Associated Press, 2013). These are just a few examples of the fines, lawsuits, and monetary awards that have negatively affected institutions of higher education. This does not include the negative publicity that could cause decreases in enrollment, as well as decreases in alumni donations. This study, by highlighting experiences with Clery Act violations, seeks to provide guidance to prevent administrators from making costly mistakes.

The examination of rulings from court cases and the US Department of Education investigations will clarify the expectations those entities have for institutional compliance. As a result, the data collected will assist campus policy makers in creating effective policies and security measures in an effort to limit liability. The data will enhance the field of research regarding campus crime because it will give administrators insight regarding specific instances of non-compliance and a greater understanding of what compliance measures are expected from the two governing bodies based on the legal claims and the violations cited. This study will assist university administrators in avoiding fines or judgments, and more significantly, the loss of federal funding. Finally, this research will aid administrators in establishing measures that will promote campus safety, thereby providing a safe learning environment for campus communities.

Limitations of the Study

This study only addressed Clery Act violations that have been discussed in published court cases and agency investigations. Such institutional violations are often

reported by media outlets and some never gain public notice or review. This is a limitation because this issue has garnered a great deal of attention in recent years with many accusations of institutions not complying with the law.

Additionally, the study only examined court cases where the Clery Act is specifically mentioned in the court's analysis. Cases initiated as a result of campus violence that did not mention the Act were not considered. Lawsuits may have been filed using the Act's mandates as a basis for legal claims; however, if the law was not mentioned by the court or parties in the lawsuit, the case was not included. The small number of cases is not indicative of the number of lawsuits filed or those settled as these cases were selected because of the published decisions.

CHAPTER TWO

LITERATURE REVIEW

Overview of Crime on Campus

Before the death of Jeanne Clery and the resulting crime awareness campaign, campus violence was not broadcast to the public for fear of blemishing the established reputations of the “ivory towers.” Despite the lack of publicity surrounding it, crime on campus is as historical as the institutionalization of higher education. College histories lend numerous examples of violence on campus ranging from campus murders, gentleman duels to settle disputes of honor, and student unrest over academics and discipline in the 1800s. During following century, crime on campus included student riots centered on social phenomena such as the Vietnam War, the Civil Rights Movement, and violence against women.

By the late 1900s, crime on campus was no longer viewed as an extension of the earlier social movements. Lobbyist groups garnered media attention as they petitioned for federal regulation regarding crime on campus. Specifically, violence against women and domestic violence gained a lot of public attention with the death of Jeanne Clery at Lehigh University, along with the other accounts of campus rape and sexual violence that made the news. The focus shifted from holding students responsible for their actions on campus to examining what role institutions have in preventing campus crime.

Campus Crime in the Modern Era: Mass Murders, Hazing, and Sexual Scandals

There was a mass transformation of electronic and print media highlighting social problems leading into the 21st century (Sloan & Fisher, 2011). Now publicized, “perceptions about violence, vice, and victimization on college campuses changed, as did the lack of an organized, large-scale response to the problem of campus crime” (p. 24). The public outcry pushed elected officials, government agencies, and academic researchers to focus their attention on the issue as well (Sloan & Fisher, 2011). Unlike earlier times, the public and government officials began holding institutions responsible for failing to prevent or react to campus crimes.

For example, on April 16, 2007, Sung Hui Cho, a senior at Virginia Polytechnic Institute and State University (“Virginia Tech”), shot two people in a dorm room approximately two hours before he opened fire in an instructional building where classes were in session (Virginia Tech Panel Report, 2007). As a result of the campus shootings, Cho killed 32 of his fellow students and faculty members and wounded 17 others before killing himself with a fatal shot to the head (Virginia Tech Panel Report, 2007). Because the shootings received nationwide attention, the governor of Virginia ordered a panel to analyze the incident to determine whether the shootings could have been prevented, whether the emergency response was handled effectively, and whether adequate services were provided to those collaterally affected by the incident (p. 1). The panel found that Virginia Tech was extremely negligent in its prevention of this incident and its emergency responses (Virginia Tech Panel Report, 2007).

Death has also occurred frequently on college campuses as the result of hazing. On November 19, 2012, following a football game, Robert Champion was beaten during

a hazing ritual on a bus by fellow band members. Champion, a member of the elite band at Florida A&M University, better known as the Marching 100, was punched repeatedly while walking up and down the aisle of the bus in a tradition known as “Crossing Bus C” (Brown, 2012). He was pronounced dead at the hospital after suffering blunt force trauma that caused hemorrhaging and left deep bruises on his chest, arms, shoulders and back (Brown, 2012). Following the heavily publicized death, the band was suspended, the band director fired, and the board accepted the president’s resignation (Brown, 2012). Twelve members of the band face manslaughter charges, while others have been charged with felony hazing or misdemeanors (Hightower, 2013). Champion’s family sued the Florida A&M University for failing to stop the long standing tradition of hazing, which had been frequently reported at the institution (Hightower, 2013).

Colleges and universities are not only liable for crimes caused by student-to-student crimes, but also any crimes that occur on campus that the institution fails to respond to as required by the Act. This is evidenced by the Pennsylvania State University child sex abuse scandal that gained an abundance of media attention. Retired defensive football coach Gerald A. Sandusky molested boys who were associated with The Second Mile, a charity dedicated to providing support and positive human interaction to children with absent or dysfunctional families (Pennsylvania Grand Jury Indictment, 2011). Sandusky was convicted on 45 charges of child sex abuse and sentenced to 30 to 60 years in state prison (Isikoff, 2012). The University has been berated for its part in the scandal because victims were sexually assaulted on campus, and administrators failed to take action (Isikoff, 2012). A number of University officials were fired and face felony charges for covering up the crimes and committing perjury during the trial (Isikoff,

2012). Twenty-eight individuals filed suit or began settlement negotiations with the University (Associated Press, 2013). Other penalties include an unprecedented sanction from the NCAA which fined the school 60 million dollars, vacated all victories since 1998, imposed a five-year probation and a four-year ban from bowl games, and decreased athletic financial aid by 40 scholarships (Prisbell, 2012). Finally, the US Department of Education instituted an investigation into the scandal that could result in even more fines, if not the loss of all federal funding (Prisbell, 2012).

Although crime on campus is not a new phenomenon as evidenced throughout history, it has become a matter of critical, social importance over the last twenty years. For this reason, federal legislation was implemented to deal with this issue.

Context: Pre-Clery Act Research

Very little data on campus crime could be found prior to the passage of the Clery Act in 1990. The Uniform Crime Report issued by the Federal Bureau of Investigation was the only official database for campus crime statistics (Cockey, Sherrill, & Cave, 1989). The database could not be used to examine the reality of crime on campus as only 10 to 15 percent of colleges and universities reported their statistics, because reporting to the FBI was a voluntary measure (Cockey, Sherrill, & Cave, 1989). Researchers, conducting studies in the social sciences, gathered statistics on female college students who were victimized by sexual violence and male college students who admitted to being sexual victimizers (*see* Koss, Gidycz, & Wisniewski, 1987; Rapaport & Burkhart, 1984). Those studies, however, were not limited to sexual assaults taking place on college campuses.

Social scientists examined the concept of sexual violence on campus as it relates to residence life. They found that “acquaintance or date rape is one of the most violent actions taking place in residence halls” (Rickgarn, 1989). This phenomenon, termed “courtship violence,” was first studied by James M. Makepeace in 1981. The results he gathered after surveying students at a medium-size university in the Midwest indicated that one in every five students had personally experienced courtship violence, and a majority of the students knew other students who had been victims. Bogal-Allbritten and Allbritten (1985) found similar results in their study years later. Of the 510 students surveyed, 61 percent knew of students who had been victims of courtship violence, and 19 percent had been victimized themselves. Students shared their experiences, ranging from threat of physical harm to slapping, punching, choking, striking with objects, or assaulting with weapons. Sixty-two percent of the victims ended the relationship, 27 percent continued to date the assaulter, and 11 percent were no longer in the relationship, but not because of the violence. The responses also indicated that alcohol played a large role in courtship violence.

Research on campus violence and residence life also included violence toward resident advisors. In his article expounding on violence in residence halls, Rickgarn (1989) commented that incidents between students and resident advisors were “more likely to be discussed and lamented at staff meetings than to be presented to a judicial board” (p. 31). From the research at that time, Rickgarn concluded that most resident advisors chose to first confront the abuser face to face and then ignore the incident or seek advice from supervisors or fellow resident advisors. Complaints were rarely handled through formal grievance procedures (Rickgarn, 1989). In 1986, Durant,

Marston, and Eisenhandler surveyed 5,902 resident advisors and 1,847 resident advisor supervisors from 284 colleges and universities. Eighteen percent reported personal property damage, 12 percent were attacked with a weapon or object, and 1 percent experienced physical sexual abuse from student residents. Again, alcohol and drugs were involved in the majority of these incidents.

As more national studies emerged from researchers regarding the social theories arising from crime on campus, college and university administrators began discussions about the growing phenomenon of campus violence. It became apparent to administrators that students knew more about campus violence than administrators and that some departments on campus (Residence Life) were more aware of the issue than others (Campus Police) (Cockey, Sherrill, & Cave, 1989).

One of the first studies to determine administrator's awareness of campus crime was conducted over a two-year time period in 1986 and 1987. Cockey, Sherrill, and Cave (1989) surveyed student affairs officers, policy/security leaders, and residence life department heads to determine how much crime campuses were experiencing over a two-year period. They distributed surveys nationwide to 1,100 colleges and universities affiliated with the National Association of Student Personnel Administrators (NASPA). The only crimes specifically addressed were sexual assault, physical assault, and vandalism. In 1986, sexual violence averaged four assaults and two rapes, while physical assaults averaged 10 incidents per institution. Vandalism was reported as the most prevalent crime. The results indicated that the numbers were higher than the previous years at most institutions. In 1987, the results were again tallied and the numbers

indicated a slight decrease in the amount of crimes, but the figures were not gathered from the same sample as the previous year.

This research revealed that crime on campus was indeed a problem in higher education, yet not necessarily one that administrators believed to be unmanageable (Cockey, Sherrill, & Cave, 1989). Respondents recognized that reporting campus crime was the relevant issue that needed to be addressed on the national and state levels as well as on individual campuses (Cockey, Sherrill, & Cave, 1989). Administrators acknowledged the struggle between reporting because of “the bad publicity that violent incidents create and the need to provide an accurate picture of campus conditions” (p. 26). The increasing number of lawsuits made it abundantly clear that “a uniform method of reporting, record keeping, and analyzing violence and crime on college campuses” was critical so that administrators could “design and implement prevention plans, safety and security designs, and consciousness-raising activities” to deal with the problem (Cockey, Sherrill, & Cave, 1989, p. 26).

Recent Context: Post-Clery Act Research

There has been a plethora of research regarding crime on campus following the passage of the Clery Act. Most studies examined the prevalence of crime on campus, perceptions of the Clery Act, or the effectiveness of the Clery Act. There are proponents for and advocates against the current legislation; however, all parties agree, there is a need for federal regulation.

The Need for Federal Regulation

The Department of Education publishes crime statistics from each institution and publishes an aggregated data set for all institutions for each calendar year (*see* Appendix

C, data from years 2010-2012). The numbers in the crime statistics, along with research on the prevalence of crime on campus, indicates that there is a need for federal regulation.

Sexual violence. A number of studies have been conducted to examine the prevalence and prevention of different types of crime on campus. Sufficient evidence indicates that sexual violence is a persistent crime on campus and presents the biggest challenge to campus safety (Gottlieb, 2008). This is largely because college campuses host large concentrations of young women, and females have been the most recognized gender to be victimized by sexual predators (Fisher, Cullen, & Turner, 2000). The problem is further aggravated where binge drinking or heavy alcohol consumption is prevalent on college campuses (Spearman, 2006).

There is evidence that “alcohol and other drug use is associated with a high percentage of sexual assaults committed by men against women as well as other traumatic sexual experiences among college students” (Spearman, 2006, p. 38; *see also*, Campbell-Ruggaard & Ryswyk, 2001, p. 292 (postulating that “when both the victim and the assailant have used alcohol or other drugs, the likelihood of sexual assault taking place increases exponentially”). The law recognizes that sexual intercourse with a person who is too intoxicated to consent is felony rape. Understandably, “issues of blame and alcohol use are closely intertwined when discussing campus rape” (Campbell-Ruggaard & Ryswyk, 2001, p. 292).

Fisher, Cullen, & Turner found that for every 1,000 female students, there will be approximately 35 incidents of sexual violence per year (2000)³. Despite this alarming number of sexual assaults as evidenced by student responses, administrators believe that violence is a small problem or not a problem at all (Gottlieb, 2008). In her quantitative study, Gottlieb surveyed student affairs leaders to determine their perceptions of effective sexual violence prevention programs and perceptions of violence as a problem. The national survey yielded 12,390 responses revealing that institution leaders are satisfied with the status quo in the area of [sexual] violence prevention on their campus” (Gottlieb, 2008, p. 136). The Clery Act mandates that colleges and universities establish programs and policies to prevent sexual violence, but if administrators “do not possess enough knowledge about the problem of violent victimization of college students and do not perceive this problem as serious,” little effort is made to comply with federal mandates.

In *Sexual Assault on the College Campus* (1997), Schwartz and Dekeseredy asserted that the lack of clear-cut policy and the lack of enforcement give students the message that sexual assault is tolerated on campuses. The authors explained that when sexual crimes are committed by non-students or someone outside the campus community, the response by campus leaders is immediate and well publicized. If the criminals are themselves tuition-paying students or campus community members, administrators’ attempts to resolve matters rarely result in harsh punishments or involve law enforcement. Through their analysis of the research on the topic, Schwartz and Dekeseredy found that “many faculty and staff maintain attitudes that promote acquaintance and date rape” (p. 7).

³ These researchers worked with the Department of Justice to survey a national sample of college women to assess the prevalence of sexual violence on campus. The total sample consisted of 4,446 random women attending two- or four-year institutions with a minimum of 1,000 students during the fall of 1996.

Many believed the notion that rape “occurs only in the seamy underbelly of society, in which an anonymous male attacks an unsuspecting victim, restrains her, and literally forces her (with extreme physical strength and/or a weapon) to submit to his sexual demands” (Campbell-Ruggaard & Ryswyk, 2001, p. 283). College students failing to understand their partners’ desired sexual limits are thought to have made mistakes in not recognizing that sexual contact was indeed unwanted (Campbell-Ruggaard & Ryswyk, 2001). This unwanted sexual contact does not compare to the sexual assaults that are committed in dark alleys, so victims are often dissuaded from reporting sexual assaults because they are not considered true rape victims (Campbell-Ruggaard & Ryswyk, 2001).

In examining sexual assault on college campuses, Koestner agreed that school administrators’ perspectives regarding sexual assault have not aided in the fight against sexual violence (2000). She was told by one campus administrator that he removed the sexual assault policy (in violation of the law) because the handbook was growing thicker and the incidence of sexual assault had not decreased (Koestner, 2000). Another administrator explained that the solution to sexual violence was to put a chair in every dorm room because people do not have sex on chairs (Koestner, 2000). Yet another administrator stood firm on his belief that sexual violence does not exist on his campus because sex does not take place at Catholic institutions (Koestner, 2000). Such perspectives and personal beliefs subject the institution to liability because the lack of acknowledgement and response to sexual crimes do not prevent them from occurring.

Stalking. Stalking is a crime that has only recently received recognition. It is typically defined as repeated and persistent unwanted communications and contacts that

create fear in the target (Morgan, 2010). Stalking is a serious crime that escalates over time with the potential of ending violently. A person exhibiting the following behaviors toward an individual would be considered a stalker: “abusive/excessive telephone calls, letters, or e-mails to the person’s home/work; trespassing, following or threatening the target or the target’s friends/relatives; obsessively observing the target from a distance; driving by the person’s home, school, or work; and vandalizing the person’s property” (p. 1).

Research on campus stalking has generally focused on students stalking other students. In their study, Fisher, Cullen, and Turner (2002) used the four factors of lifestyle routine activity theory to explain why college campuses are the perfect setting for stalking. The four factors include: “placing individuals in close physical proximity to motivated offenders; frequently placing individuals in risky or deviant situations that expose them to crime” (e.g., college parties and nightlife); “exposing individuals as attractive targets to the offenders; and, lacking capable guardianship to deter the offender” (i.e., the ability to prevent the behavior) (p. 266). The sample consisted of 4,446 random female students attending two or four-year colleges with enrollment greater than 1,000 students. The students were interviewed via telephone in the spring semester of 1997 and asked whether they had been victimized since they began the 1996-97 school term. Out of the sample, 581 students (13.1 %) had been stalked during the school year (Fisher, Cullen, & Turner, 2002). Of the 581 students, 13 percent experienced two incidents, and three percent experienced three or more incidents of stalking⁴. Some students reported that they were subjected to physical harm including, a knife or stab wound (1.5%); broken bones or teeth knocked out (1%); knocked unconscious (1.5%);

⁴ An incident refers to one stalker so two incidents would be two different stalkers.

and bruises, black eyes, cuts, scratches, swelling, or chipped teeth (14.8%). Finally, in 69 incidents (10.3%), students stated the stalker had attempted to or succeeded in raping them. In most of the incidents, the stalker was known to the victim as an ex-boyfriend, classmate, acquaintance, or co-worker.

In contrast, Morgan (2010) examined the problem of faculty being stalked by students. In a two-part study, 1,000 faculty members in a large Midwestern university composed of eight campuses were surveyed during the first phase. Thirty-three percent of the faculty members were classified as victims. Of those being stalked, 54 percent were female. Part two of the study consisted of interviews with 52 faculty members who acknowledged being stalked. Those faculty members reported 87 incidents of stalking. Morgan classified the stalkers as the domestic violence stalker (prior social contact), the erotomaniac/delusional stalker (fixation with no prior out-of-class social contact), and the nuisance stalker (repeated harassment over a grade or course requirement with no intent of forming a relationship) (2010).

Under the classifications, 14 percent of the incidents involved domestic violence stalkers, 43 percent involved erotomaniac/delusional stalkers, and 44 percent involved cases where the stalkers were nuisances (Morgan, 2010). Most of the faculty members were subjected to unwanted messages and being followed around campus. Over half reported being verbally or physically threatened, whereas 46 percent indicated that the student had threatened to commit suicide. Approximately 33 percent stated that the student exhibited sexually coercive behavior from kissing, caressing, and proposing sexual liaisons. This research demonstrates that “administrators, as well as faculty, need

to understand the reality of student stalking and the potential negative impacts such stalking can have” (p. 14).

Murder. The shootings at Virginia Tech and Northern Illinois Universities increased public awareness of crime in higher education. Whereas sexual violence had been at the forefront of campus crimes, mass murders committed by individuals became a new phenomenon. In their study, Fox and Savage (2009) looked at the murder statistics as reported by the Department of Education for the years preceding both shooting incidents. From 2001-2005, 76 homicides were reported. Of those murders, a gun was used in 52 percent of the occurrences. A knife (12%), some other weapon (14%), or no weapon (22%) was used in the remainder of the incidents. The perpetrator was almost always male (91%) and the victim was usually male (61%). The perpetrator was usually a student (58%), but a few were faculty members (9%), staff (9%), child of a campus community member (5%), or others (19%). The victim was found to be a student (36%), former student (5%), outsider (32%), or undetermined individual (27%). The relationship between the victim and perpetrator was determined to be a friend (28%), partner (13%), acquaintance (7%), stranger (28%) and undetermined (25%) in the reported homicides (p. 1468). When compared to other campus crime statistics, murders rank low, yet “the potential consequences can be devastating and long-lasting” (p. 1466).

Hate crimes. Research indicates that “same-sex male rape is often employed as a gay bashing tool when the perpetrator knows or suspects the victim to be homosexual” and the perpetrator is attempting to “straighten the victim out” (Campbell-Ruggaard & Ryswyk, 2001, p. 293-94). Because the push for sexual assault awareness has generally been geared toward women, campus policies, organizations, and rape crisis programs

have largely ignored same sex violence (Campbell-Ruggaard & Ryswyk, 2001). In general, males are less likely to report sexual crimes because of social consequences such as discrimination and humiliation, especially if the victim does not identify as being homosexual (Campbell-Ruggaard & Ryswyk, 2001).

The US Department of Justice addressed hate crimes on campus in its 2000 publication. The agency acknowledged the increase in “women, blacks, Latinos, Asians, the disabled, international students, as well as gays and lesbians on campuses around the country,” and the conflicts that arise from having a diverse student body (p. 2). Some students commit hate crimes to “make themselves feel more secure by demeaning or attacking, either verbally or physically, those classmates they believe to be inferior by virtue of that group’s background, race, or creed” (p. 2). The Department of Justice classified hate crimes as three types: reactive, impulsive, and premeditated hate episodes.

Reactive hate episodes have a triggering event which the perpetrators use to justify acts of hate (US Department of Justice, 2000). Perpetrators feel the need to protect themselves, friends, and overall environment from the victim, whom they perceive as a threat. Triggering events could be a minority student moving into a dorm where minorities are not present, a student dating outside of his or her race, a minority professor attempting to introduce diverse cultures in the classroom, or the celebration of Gay Pride Week. The perpetrator’s reaction is a signal to the individual victim, as well as the victim’s associative group, that they do not belong on campus. The signals begin as minor incidents such as spray painted graffiti and slurs over the telephone before escalating to physical harm if the signal is ignored (US Department of Justice, 2000).

Impulsive hate episodes are usually committed by a group of individuals looking for excitement (US Department of Justice, 2000). Unlike reactive hate episodes, there is nothing that triggers impulsive responses. Victims are not perceived as threats; instead, perpetrators seek out victims in places where minority groups congregate. The Department of Justice cited as an example, “several sorority members at a university located in the mid-west dressed in Indian costumes and parodied ‘Indian hollers’ outside the Native American Center on campus” (p. 6). The agency also noted that the use of alcohol or drugs encourages perpetrators, and once in that impaired state, any minority group will suffice as targets (US Department of Justice, 2000).

The final category, premeditated hate episodes, are committed by extremists who “wage war against any and all members of a particular group,” believing they have a higher calling to carry out a mission (p. 6). They usually associate with organized groups that promote discriminatory beliefs. Perpetrators often act alone, and their mission is most often suicidal. In 1989, Marc LePine executed 14 female students before killing himself after he was rejected from the University of Montreal’s School of Engineering. He blamed women for his circumstances. Such students are usually dismissed immediately as fanatical until an incident occurs and, in hindsight, others realize there were indications of mental instability (US Department of Justice, 2000).

The Department of Justice emphasized the importance of timely investigations of hate crime complaints and the necessity of “appropriate disciplinary actions without undue delay” (p. 18). Furthermore, the agency is a resource for campus administrators who are dealing with discrimination tensions on campus.

Effectiveness of the Clery Act

Student awareness. University administrators have argued that the Clery Act has had no effect other than to burden administrators with additional and costly duties. Researchers, who have determined that the Clery Act has no influence on student behavior, have corroborated the notion that Clery Act regulations are superficial in their attempt to combat the violence problem on college campuses (Hartle, 2001). Janosik (2001) tested this theory to determine the depth of student awareness regarding the Clery Act. Students at three schools were surveyed regarding their awareness, and the results indicated that student knowledge of the Act or the information produced in the annual reports was low. Nevertheless, Janosik discovered that students were reading the material provided by their respective institutions regarding crime on campus, safety measures, and university policies and procedures. Students were also changing the way they protected their persons and property as a result of the information provided to them.

Two years after that initial study, Janosik and Gehring (2003) sought to reinforce those earlier findings by conducting a national study analyzing the impact of the Clery Act on student decisions regarding campus safety. Thirty students were randomly chosen from each of the sites, which consisted of 3 two-year private institutions, 30 two-year public institutions, 137 four-year private institutions, and 135 four-year public institutions⁵. The study sought the answers to the following questions: (1) Are students aware of the Clery Act; (2) Are students using the information mandated by the act in making decisions about college; (3) Are students using other forms of crime information, programs and services to inform themselves about campus crime; (4) Does having access

⁵Administrators who were voting delegates of NASPA volunteered to administer the survey at their institutions and picked the thirty students by stratified random sample. The females and males chosen were reflective of the proportion of each gender on campus.

to other information change the way students protect themselves, their property, or move about campus; and (5) Does having other information increase the likelihood that students will report crimes?

The results of the 2003 study mirrored the earlier findings but gave additional insight into student reliance on institutional compliance with the Clery Act. Students were still largely unaware of the Clery Act, and few recalled receiving a copy of the annual report from their college or university. Out of the 24 percent of students who read the report, only eight percent were influenced by what they read when choosing which college to attend; however, 60 percent of the students surveyed indicated that they read other materials (flyers, brochures, crime-related reports, news articles) produced by their institution, and 27 percent acknowledged attending crime prevention and awareness programs, which are both mandates of the Clery Act. Janosik and Gehring (2003) discovered that “women and victims were more likely than their counterparts to change: (a) the way they protect their personal property; (b) the way they protect themselves from harm; and (c) how they move around campus” (p. 89). Additionally, the information the students received from their institutions increased their confidence in reporting crime to campus officials because of their increased confidence that campus safety was important to campus officials.

Campus law enforcement practices. The influence of the Clery Act on law enforcement practices has been surveyed in a study. In 2003, Janosik and Gregory discovered that the Clery Act has made a difference to law enforcement administrators. A total of 371 members of the International Association of Campus Law Enforcement Administrators responded to the query. The findings of the study indicated that the Clery

Act could be credited for improving the quality of campus crime reporting procedures, law enforcement policies and procedures, and the quality of campus safety programs available to students. The researchers also found that the number of safety programs had increased on some campuses because of the federal act.

From the study, Janosik and Gregory (2003) found that crime on campus had remained constant since the passage of the Clery Act, and the majority of the administrators firmly believed that crimes were not being hidden by institutional leaders in their reporting. Interestingly, some administrators (22%) stated that they do not “properly instruct students, parents, and employees on how to find web-based crime statistics, and 12 percent responded that they withhold crime reports when requested even though there is no reason to withhold the information” (p. 185). Both of those responses indicate a violation of the Clery Act that could result in possible fines or other penalties.

Student affairs administrators. Kevin T. Colaner conducted a study in 2006 to determine how well student affairs professionals understood the Clery Act. The questions that guided the study asked: (1) To what degree are student affairs administrators aware of the Clery Act legislation; (2) How did these student affairs administrators acquire their knowledge of the Clery Act; and (3) How accurate is student affairs administrators’ knowledge of the Clery Act? Over 14,000 administrators⁶ were surveyed and 1,347 responded. More than half were female (801) and 41 percent of the administrators had five or less years of experience. Only four percent had more than 30 years of experience as a student affairs administrator.

⁶ Administrators were members of the Association of College Personnel Association, the American College Personnel Association, and the National Association of Student Personnel Administration.

Approximately 17 percent of the administrators were completely unaware of the Clery Act, and only four percent were extremely familiar with the Act. Despite the fact that the female administrators believed that campus violence was a problem, unlike their male counterparts, the females were less likely to be in a position of authority to implement policy changes at their institutions, as the more senior level administrators were male. Colaner found that the females were less knowledgeable about the Clery Act than male administrators. This study presented evidence that campus leaders were still unaware of the most important legislation regarding campus safety and those who knew of it were not knowledgeable about the Act.

Three years after Colaner's study, Janosik and Gregory also surveyed senior student affairs officers focusing on their awareness of the Clery Act and their perceptions of their institution's crime prevention strategies (2009). The 33 item questionnaire was sent to 1,065 e-mail addresses provided from NASPA, and 327 individuals completed the survey. Specifically, the questions that guided the research were: (1) Are administrators aware of the act, (2) How were students using the information in the annual reports, (3) What strategies were staff using to inform students about crime issues, and (4) What administrative practices were in place to deal with the Clery Act (2009). Fifty-seven percent of the responses came from administrators working at private institutions, and 88 percent came from those working at four-year institutions.

Similar to the results from Colaner's study, Janosik and Gregory (2009) found that most administrators (98%) were knowledgeable about the Act. Eighty-five percent believed that students received the crime information in the admissions packet, and 10 percent thought students used this information to choose colleges. Ninety-three percent

responded that students received the complete annual report while only 15 percent believed that students read the report. The results indicated that a “small percentage of respondents thought the information contained in the annual reports influenced campus crime prevention behavior such as how students protected their personal property (20%), how students protected themselves (22%), and how students moved around their campuses (18%)” (p. 214). Like the student responses in the previous study by Janosik and Gehring (2003), high percentages of administrators believed students responded to other measures to increase campus safety, such as flyers, posters, news articles, and campus safety programs⁷.

Regarding college practices, 99 percent believed that college administrators were truthful about campus crimes. While only five percent thought the Act caused a reduction in campus crime, 65 percent responded that the Clery Act had improved crime reporting. Finally, 24 percent thought the Act had improved relationships between student affairs administrators and campus police. Janosik and Gregory concluded that although the Clery Act does not reduce campus crimes, it increases the accuracy of crime reporting, influences student awareness through other crime prevention methods, and improves relationships between departments regarding campus crime (2009).

The argument that the Clery Act is ineffective in its purpose places too much emphasis on the current debate on what should be covered by the Clery Act. For example, which categories of criminal activities should be listed and which geographical areas surrounding a school should be counted as university property are both curable issues that overlook the legislative purpose of the act (Janosik & Gehring, 2003). The

⁷ Seventy-three percent thought students responded well to flyers and other print material while 84 percent believed students responded well to campus safety programs.

purpose of the Act is to reduce crime, improve campus safety and crime prevention services and programs, and to educate the campus community and the general public regarding crime on campus (Janosik & Gehring 2003). Consequently, “whether one agrees with the necessity or effectiveness of this legislation, or whether it has positively impacted campus safety or not, everyone can agree that the Clery Act has increased awareness of crime on American college campuses” (Gregory & Janosik, 2002, p. 57). For that reason alone, Congress is not likely to repeal this legislation; therefore, administrators should focus on complying with the federal act.

Compliance with the Clery Act

The lack of compliance with the Clery Act results in negative legal and financial consequences for colleges and universities. The failure to comply stems from a number of variables, including: (a) ambiguity in the Act; (b) institutional resistance; (c) inaccurate reporting; (d) lack of internal and external support; (e) lack of funding; and (f) lack of training (McNeal, 2007). In her multi-campus study of 420 campus security personnel, McNeal specified these variables as impediments to Clery Act compliance (2007).

Earlier research established a foundation for McNeal’s research findings. Campbell-Ruggaard and Ryswyk (2001) believed the strict guidelines in what crimes to report are shadowed by the ambiguity in the manner of reporting those crimes. Their research indicated that the “ambiguity in reporting left many victims of crimes wondering if their colleges and universities are paying proper attention to safety, or even ‘counting’ their crimes among the official statistics” (p. 283). For example, Campbell-Ruggaard and Ryswyk (2001) looked at the statistics in Ohio as reported in 1997 and found that

Ohio University in Athens listed 11 forcible sex offenses from data collected from campus police. Ohio University also listed 19 forcible sex offenses that were reported to officials other than campus police. In comparison, “the University of Cincinnati, an urban Ohio campus situated near a known ‘high crime’ area, reported only two forcible sex offenses, including reports made to the university’s medical center” (p. 285).

Campbell-Ruggaard and Ryswyk questioned this disparity in numbers when a rural school reports 15 times as many as an urban school in a well known high crime district. The researchers reviewed statistics released in 1998 and found that the majority of colleges and universities reported no forcible sex offenses, which contradicted every research study relating to the occurrence of rape on college campuses. Campbell-Ruggaard and Ryswyk (2001) determined that the problem stems from institutions using different methods of reporting because the Clery Act has not provided guidance or direction in the manner in which campus leaders comply with the Act.

Two-year colleges. The Clery Act regulations apply to all colleges and universities that receive federal funding, which includes two-year colleges. Researchers have argued that it is more taxing for two-year colleges to comply with certain requirements of the Act than four-year institutions (Callaway, Gehring, & Douthett, 2000). As stated in the Code of Federal Regulations, which expounds upon the Clery Act, colleges and universities must give a summary of the annual security report to all persons requesting information on admission or employment. Callaway, Gehring, & Douthett (2000) noted the manifest difference in enrollment patterns of students at two-year colleges versus four-year colleges. Providing a summary of the security report to the overwhelming number of students who contact two-year institutions, each term to

request admissions information is a “very expensive and time-consuming task” and Callaway, Gehring, and Douthett conducted a study to determine whether two-year colleges were complying with the notice requirements (2000).

The sample for the study came from the commercial listing of 1,473 community colleges so named in the Higher Education Directory. The sample consisted of 143 public and private institutions that were accredited, degree granting organizations meeting the traditional Department of Education eligibility requirements⁸. The researchers sent a postcard requesting admissions information from the institutions and asked that the material be sent via mail. A total of 117 institutions responded but only 26 provided any information regarding the campus security report. Furthermore, only eight colleges were considered to be in full compliance with the notice requirement. Callaway, Gehring, and Douthett (2000) reflected that either institutions were unaware of the notice requirement in the Clery Act or institutions were unwilling to comply with the expensive and cumbersome unfunded mandate. The latter scenario seems “unlikely given the significant amount of student financial aid received by two-year college students and the effect the loss of aid would have on these institutions” (Callaway, Gehring, & Douthett, 2000, p. 190).

Four-year colleges. In 2001, Kerr found that 122 higher education institutions in the Midwest had failed to comply with the Clery Act. The population consisted of four-year public, private non-profit, and private proprietary universities. Surveys were administered to campus security officials asking whether their respective institutions were complying with the Clery Act. Kerr discovered that colleges and universities were not adhering to the Clery Act despite the administrators’ perceptions that their colleges

⁸ Private institutions include church related colleges, independent colleges, and proprietary colleges.

and universities were in compliance. Kerr recommended that a unified reporting format be added to the Clery Act to ensure that all colleges and universities receive the same guidance for reporting. Kerr also acknowledged the need to restructure the Clery Act so that no requirements would be left open for interpretation by campus leaders.

Campuses have never been free from crime and violence, although the nature and extent of the violence has evolved over time. With the evolution of campus crime, campus administrators have faced challenges in responding to the problem. Federal legislation was enacted as needed to address this issue for the benefit of the public and campus communities. Colleges and universities are subject to governance from external sources, which include the federal government and the courts. The US Department of Education has stated that it “is committed to ensuring that postsecondary institutions are in full compliance with the Clery Act, and enforcement of the Act is a priority of the Department” (Campus Security, 2012). Colleges and universities are subject to steep consequences for failing to comply with the Clery Act. As previously mentioned, financial losses from lawsuits and negative publicity can be detrimental to the financial stability of an institution, and the statutory consequences for failing to comply could cause the demise of a college or university that could not continue in its educational mission without the support of federal dollars. Under the Clery Act, if an institution has substantially misrepresented the number, location, or nature of the crimes reported, the Secretary of Education shall impose a civil penalty not to exceed \$35,00 for each infraction (20 U.S.C. § 1092(f)).⁹ The Secretary may also suspend or terminate a college or university from participating in federal student financial aid for failure to comply with

⁹ The fine increased from \$27,500 in 2012.

the Clery Act (20 U.S.C. § 1092(f)). Most institutions would not survive without the support of the federal government.

Similarly, lawsuits force colleges and universities to expend fiscal resources in defense of legal claims (Sloan & Fisher, 2011). Money is not only spent paying jury awards, out of court settlements and legal fees, but also from “negative publicity which could have detrimental effects on an institution's image and reputation” (p. 129). As a result, “colleges and universities would literally learn they had ‘millions of reasons’ to take their security policies and operations more seriously and change their behavior accordingly” (Sloan & Fisher, 2011, p. 129). Administrators should be proactive in complying with the Clery Act because the legal consequences that arise from fixing problems are more costly than preventative measures.

CHAPTER THREE

METHODOLOGY

Research Design

This study was conducted using a legal research design. Although legal research has been the eminent design method within the legal community, it is “not considered one of the traditional forms of conducting research within the education arena and is not included in the cluster of research and design courses offered to graduate students in education” (Sughrue & Driscoll, 2012, p. 2). Legal research is neither qualitative nor quantitative and can encompass both methods during data collection and analysis. The more in-depth and comprehensive the study, the greater likelihood that qualitative, quantitative, and even historical methodologies would be used to supplement traditional legal research (Sughrue & Driscoll, 2012). As a design method, legal research is the “process of identifying the law that governs an activity and finding materials that explain or analyze that law” (Cohen & Olson, 2000, p. 2). In this study, court cases and agency investigations will be explored to determine how they have explained or analyzed the Clery Act which is the governing law.

Justification of Legal Research in Education

The discussion of converging law and education has centered on the laws affecting secondary and primary schools, but these discussions are also extremely relevant in the realm of higher education law (Redfield, 2003a; Heubert, 1997). Redfield defines a new class of educators and lawyers who are “attuned to the contextual reality of

the other's discipline" (p. 2). This new class of administrators educated in the legalese of higher education will "act preventively to avoid or minimize legal entanglements and proactively to influence both litigation strategy and government policy" (p. 2). Working with this new pedigree of campus leaders will be a new breed of lawyers, educated with a deeper understanding of institutional practices and important educational policies (Redfield, 2003a). This convergence of education and law is a collaboration to conquer the legion of legal issues confronting higher education, including lawsuits and legislation.

Legal research in education is crucial to understanding the complexity of legal issues affecting the organization, governance, and leadership of higher education. Specifically, such research is important to expose "potential legal vulnerabilities that result from misguided or outdated educational policies and practices" and to educate administrators about the "trends in judicial reasoning and in applied legal principles that determine the legality and reasonableness of law, policy, and practice" (Sughrue & Driscoll, 2012, p. 2). Mark Yudof was a former lawyer who joined the ranks of higher education administration and during his presidency at the University of Minnesota, he postulated:

Too little attention has ...been devoted...to the nature of the relationships between attorneys and clients...Much... of today's law-and-education research is misdirected in its approach to the interaction of law with education institutions...[R]esearchers...fail to capture the richness of the legal environment in which school professionals operate...[M]any lawyer-researchers ignore the wisdom of other disciplines except in the most superficial adversary ways...Furthermore, lawyer-researchers tend to treat

complex organizations and individuals the same, ignoring the complex nature of organizational behavior in schools (1979, pp. 11-12).

A collaboration of law and education would create a balance between competing legal and educational interests (Heubert, 1997).

Interprofessional collaboration is defined as the linkage of “experts from the same or different backgrounds that build on each other’s strengths, backgrounds, and experiences and together develop an integrative approach to resolve a...problem [of research, education, or practice]” (Heubert, 1997, p. 562). Some faculty and practitioners resist interdisciplinary work expressing concerns that collaborations would diminish their claim of expertise and the autonomy of their profession (Heubert, 1997). For improvement in education policy and a better understanding of higher education law, interdisciplinary research is both advantageous and a matter of good practice.

Education practice and policies have improved from collaboration between lawyers and educators. For example, first amendment cases and laws have been analyzed to assist administrators in understanding what constitutes free speech in the classroom and on campus (*see* Fischer, Schimmel & Stellman, 2003; Wright, 2008; Redfield, 2003b). With the increase in suicides related to bullying and cyber-bullying due to changes in technology, guidance is necessary to understand how the law applies to this problem with regard to institutional liability (*see* Gibbs, 2011; Furniss, 2000). Furthermore, the world of academia has forever been plagued with questions regarding academic freedom. Researchers are constantly seeking direction to define academic freedom, to determine what protection it provides, and to distinguish who or what is the recipient of that protection (*see* Kaplin & Lee, 2007; Byrne, 1989; Barendt, 2010). The

law has always influenced and defined issues in education. The Clery Act presents another opportunity for partnerships between lawyers and educators to better resolve compliance problems.

Conducting Legal Research

Legal literature is accessible both in print and electronically. Legal databases are comprised of publications in chronological order as they were issued. Some data, such as the US Constitution and judicial cases, has been in force for over 200 years (Cohen & Olson, 2000). Laws and cases remain effective until repealed by the legislature or overruled by judicial opinions. Sources of law are divided in primary and secondary sources. For the purpose of this study only primary sources will be utilized.

Primary Sources

Laws and judicial opinions are primary sources. Primary sources are “the official pronouncements of the governmental lawmakers: the court cases, statutes, and regulations that form the basis of the legal doctrine” (Cohen & Olson, 2000, p. 7). The Clery Act was enacted by Congress, codified and put in subject-matter order in the codes of the United States. Federal statutes take precedence over case law and are second in authority only to the United States Constitution. Congress directed the US Department of Education to implement the statutory provisions of the Clery Act. Therefore, the US Department of Education has broad powers to adopt rules and issue orders. Properly adopted rules and regulations have the same force as the statute and are published in the Code of Federal Regulations.

Case Law refers to the “opinions of courts while administrative agency rulings are called decisions, opinion, or orders” (Redfield, 2002, pp. 10-11). Case law can be

decided under common law in the absence of a statute or decided under a statutory provision such as the Clery Act. Case law rests on precedent, which means the case decided today will govern the case determined tomorrow that is brought under the same legal principle. The doctrine, called “*stare decisis* (to stand by things decided), requires courts to follow their own precedent” (p. 11). Under this doctrine the law remains constant and predictable and will only be changed when the court rejects an earlier decision or by a legislative enactment.

There exists a hierarchy within the structure of the United States judicial system. Matters are tried either in the federal court system or individual states. The federal system consists of trial courts, appellate courts, and the United States Supreme Court. Federal trial courts, divided into ninety-four districts across the country and its territories, generally decide issues of fact¹⁰ and such verdicts are binding on the parties involved and cannot be appealed; therefore, the cases have no precedential effect and usually do not result in written judicial opinions (Cohen & Olson, 2000). Appellate courts, divided into thirteen districts across the country and its territories (Figure 4.1), decide issues of law¹¹ appealed from the lower trial court (Cohen & Olson, 2000). An appellate court decision is more likely to be published in a federal reporter as it holds precedential value to the lower courts within its jurisdiction. The United State Supreme Court is the supreme court of the land and is generally the court of last resort, except in special cases where it is the court of original jurisdiction (Cohen & Olson, 2000). The role of the Supreme

¹⁰ An example of an issue of fact decided by a judge or jury is whether an institution is liable after it failed to protect students by putting safety locks on the doors in residence halls.

¹¹ An example of an issue of law is whether the lower court properly interpreted the statutory provisions of the Clery Act when determining an issue of fact. Appellate courts are usually comprised of “a panel of three or more judges who typically confer and vote on issues after considering written briefs and oral arguments for each side” (Cohen & Olson, 2000, pp. 45-46).

Court¹² is “not to resolve every individual dispute, but rather to establish rules, review legislative and administrative acts, and resolve differences among appellate courts” (p. 2). All Supreme Court cases are published in the US reporter because its rulings have precedential effect over all federal and state courts.

Generally, the state court system follows the same hierarchy as the federal court system with trial courts, appellate courts, and a court of last resort (Supreme Court) within each state. State courts are established by individual state constitutions, and the appellate structure for each state is organized according to the state’s constitution. Similar to the federal courts, only the state appellate court cases are usually published in state reporters.

Administrative cases maintain the same level of authority as case law but have no precedent value as each case is handled individually according to the facts of that particular situation. Occasionally, a party will initiate an administrative hearing and generally, it involves an agency acting to enforce its standards against a regulated party (Redfield, 2002). To enforce the Clery Act, the US Department of Education conducts investigations and issues a determination which cannot be appealed. If sanctions are imposed, an institution can request a hearing. The Administrative Proceedings Act governs administrative hearings.

Data Collection

Court Cases

Conducting legal research has improved with the advances in technology. Researchers do not have to spend hours poring over indexes in the library to find relevant

¹² The Supreme Court has discretion over the cases it will hear and the issues of law it will consider. The Supreme Court is comprised of nine members “who typically confer and vote on issues after considering written briefs and oral arguments for each side” (Cohen & Olson, 2000).

cases and statutory provisions. Electronic databases have combined resources into one “central location” that can be accessed using a computer with internet access and subscriptions to the two major commercial database systems, LexisNexis and WestlawNext (Cohen & Olson, 2000). Most educational institutions provide subscriptions for the campus community to one or both databases.

WestlawNext was used to collect the cases for this study. The database contains a comprehensive collection of case law, court documents, statutory provisions and other information while allowing researchers to determine their own criteria in conducting legal research (Cohen & Olson, 2000). After signing in to the database, the first screen that appears contains the blank search field with options to choose the jurisdiction (federal or state) and type of material (cases, statutes, or regulations). Using the jurisdiction shortcut next to the search field and search button, the dropdown arrow was depressed. Both state and federal options were selected by checking the boxes next to those options and clicking save. In the window where the type of materials was located, the word “cases” was chosen, as the data to be used are judicial opinions. Choosing “cases” opened up a new window, indicating that all federal and state courts would be searched using the applicable terms or phrases.

The search for this study was very narrow as only cases where the courts mentioned the Clery Act were used. The search terms that were entered in the specified field were “Clery Act,” including the quotation marks. The search produced nineteen cases of which five were eliminated. The first case that was eliminated, *Havlik v. Johnson and Wales University*, 490 F. Supp. 2d 250 (D.R.I. 2007), is a federal district court case that had been appealed to the appellate court. The appellate court case, which

was used in the data, was a review of the lower court's decision. The second case to be excluded, *Earvin v. City University of New York*, 03 CV 9521 BSJ DCF, 2008 WL 5740359 (S.D.N.Y. 2008), was not about the Clery Act, but was filed because a person was applying for a job at the University and the duties included campus security measures. Similarly, *Furka v. University of Pittsburgh of Commonwealth System of Higher Education*, CIV. 2:06-CV-875, 2008 WL 219316 (W.D. Pa. 2008), was also an employment case where the job duties included Clery Act reporting and there was no discussion of the law. *Paige v. Jackson State University*, 3:09CV50-WHB-LRA, 2009 WL 230709 (S.D. Miss. 2009), was eliminated from the data as it was filed by a *pro se* individual who listed the Clery Act, but did not make any claims in the complaint against any party; therefore, the court lacked jurisdiction over the subject matter (or the lack thereof) and the matter was dismissed. The final case to be excluded, *Caledonian-Record Publishing Company v. Vermont State Colleges*, 175 Vt. 438, 833 A.2d 1273 (2003), was a lawsuit filed by a newspaper seeking disciplinary records from the institution under the Freedom of Information Act. The court instructed the institution to follow the mandates of the Clery Act and dismissed the case with no further discussion of the Act.

The federal district trial court issued two decisions in *Doe v. University of the South*, 687 F. Supp. 2d 744 (E.D. Tenn. 2009), which were combined as one for purposes of this study, thereby reducing the number of cases to thirteen. Those thirteen cases were then printed and briefed for data analysis.

Agency Investigations

The US Department of Education investigations were collected by inputting the search phrase "Department of Education Clery Act violations" (excluding the quotation

marks) in the google search engine. The first option to appear as a result of the search read, Clery Act Reports – Federal Student Aid – US Department of Education. That choice was selected, which led to the agency’s data center containing all of the investigation reports. The data center contains investigations dating back to 1997, and the reports are searchable by year or by institution.

There are currently 63 investigations reported by the US Department of Education from 1997-2014. Five investigations were consolidated, resulting in 58 reports. In 2003, the three University of California reports were reduced to one as the Department of investigation conducted its investigation against the institution and its branch locations and issued the same report for all three branches. Similarly in 2009, the community college branch locations were issued as four separate reports although only one investigation was conducted, and the reports were identical. The 58 investigations were reviewed electronically and briefed for data analysis.

Briefing

Legal research involves a procedure called briefing a case and for this study, an agency report. A case brief is an analytical summary of a court opinion or agency decision that assists the researcher in understanding the case (Redfield, 2002). The process of briefing a case consists of identifying the essential components within the case and summarizing those components in an organized manner. Briefs enable researchers to quickly access relevant information without rereading the entire case. The information presented in Chapters Four and Five are the essential components of each case and investigation.

Population

Thirteen cases were analyzed for relevant information regarding the Clery Act and detailed in Chapter Four. These cases are all those that have been published which mention the Act in the court's analysis. The search for this study was intended to be narrow, but this small number of cases does not represent all lawsuits filed due to campus violence. Furthermore, these cases are not all that have been filed where a violation of the Act was used as a basis for the lawsuit. However, the thirteen cases detailed in the study represent the total number of cases that have specifically mentioned the Clery Act in published decisions.

The agency investigations represent the total of all those issued by the Department of Education. Of the 58 that were analyzed, 55 were determined to have violated the Clery Act. Chapter Five details the 55 investigations.

Data Analysis

Once all the data was compiled and briefed, the court cases were presented by the jurisdiction deciding the matter (*see* Figure 3.1). In legal analysis, the jurisdiction is crucial in understanding the type of court and the implications flowing from the court's decision. It was also important to organize the data in this manner to answer the research question regarding the consistency of court cases across jurisdictions. Although this set of data could have been presented differently, such as chronologically, the best organizational method was utilized. Within each jurisdiction, the cases were presented chronologically by the date of the decision and then alphabetically when more than one case was issued in the same year. For discussions in Chapter Six, the court cases were grouped as followed:

1. Organized by date of the decision.
2. Organized by party to the case.
3. Organized by type of institution.
4. Organized by type of allegation.

Unlike the court cases, the agency investigations were presented chronologically, but also alphabetically when more than one investigation was reported in a given year.

For discussions in Chapter Six, the agency reports were grouped as followed:

1. Organized by date of the report and the amount of the fine.
2. Organized by date of the decision.
3. Organized by type of institution.
4. Organized by type of violation.

Both the case law and investigation data were then analyzed for themes, similarities and differences, and recommendations.

The Thirteen Federal Judicial Circuits

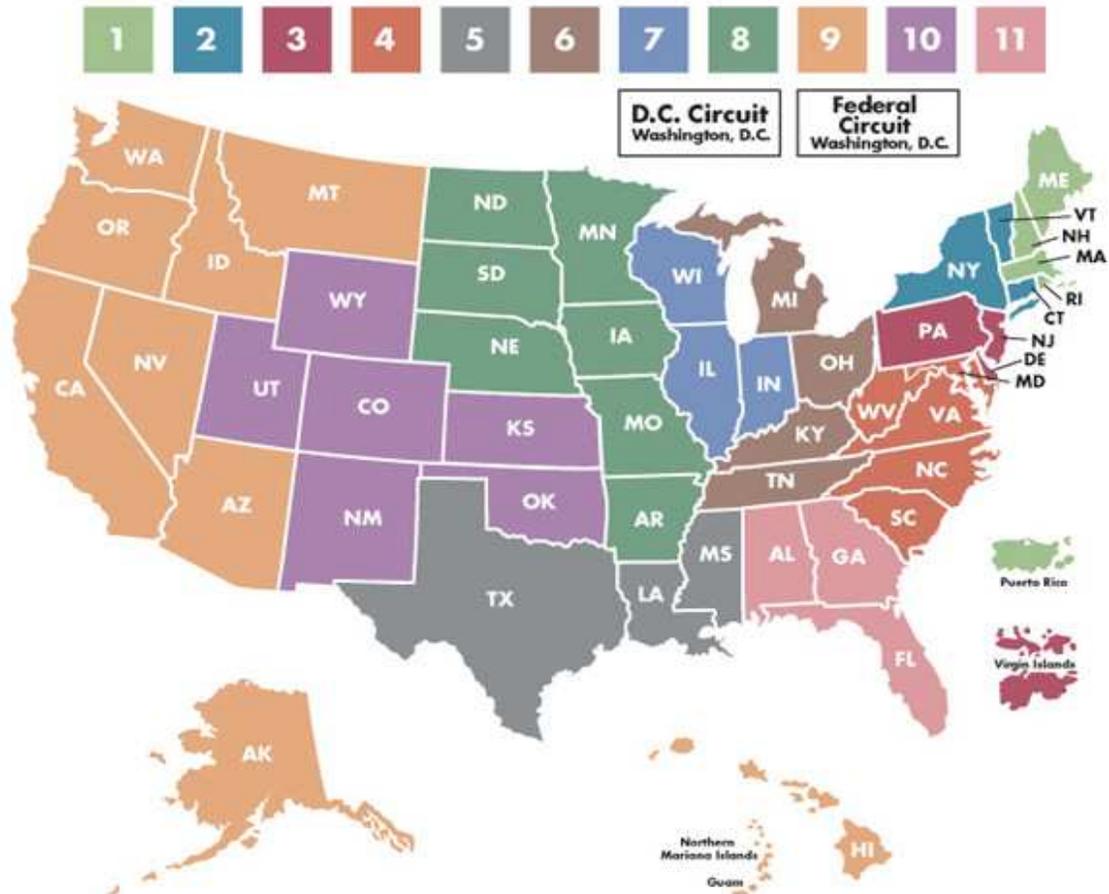


Figure 3.1 Thirteen Federal Judicial Circuits

CHAPTER FOUR

FINDINGS

Court Cases

This chapter details the findings of the published court cases and answers the question: What cases addressing the Clery Act have been published by courts determining the liability of higher education institutions? Thirteen court cases have been issued and are detailed below. The cases are listed according to the jurisdiction in which the cases were decided and divided into three categories by the type of court deciding the issues of law: federal courts of appeals, federal district courts, and state courts.

Federal Court of Appeals

The highest court represented in this study is the United States Court of Appeals, the federal appellate court. As explained in Chapter Three, these courts determine whether a lower federal court rendered a correct determination in answering a question of law. These courts set precedent for the jurisdiction in which the case was decided. Two courts from differing jurisdictions have issued opinions regarding the Clery Act. Table 4.1 illustrates those cases.

Table 4.1 United States Court of Appeals Cases

Federal Court of Appeals		
Jurisdiction	Case	Date
First Circuit	Havlik v. Johnson and Wales University	2007
Seventh Circuit	Lees v. Carthage College	2013

First Circuit

Havlik v. Johnson and Wales University, 509 F.3d 25 (1st Cir. 2007), was the first case in which a federal appellate court considered the notification requirements mandated by the Clery Act. On September 17, 2004, Christopher Havlik, enrolled at the University as a junior, engaged in a physical altercation with a fellow student. Havlik punched the other student, causing the student to fall and hit his head on the sidewalk. As a result, the student suffered a concussion and a fractured skull. The local police responded to the incident and charged Havlik criminally.

The incident, once reported to the campus safety and security office, triggered an investigation by University officials who determined that the altercation occurred because of fraternity animosities. The investigation concluded that Havlik was the aggressor who reputedly brandished a knife at the time of the incident. The University's attorney issued an alert notifying the campus community of the reported crime. The alert indicated that an altercation occurred between two fraternity students where injury resulted and a knife was brandished. The report noted that Havlik was allegedly the responsible party.

The student conduct board found Havlik guilty of assaulting another student and acting lawlessly but found him not guilty of possessing a knife. The conduct board recommended dismissal from the University. When Havlik appealed the decision, the Vice President of Student Affairs accused him of lying and called his fraternity thugs. Later, when the appeals officer asked the Vice President of Student Affairs whether he knew of any reason the decision of the conduct board should be overturned, the Vice President responded in the negative. The appeals officer affirmed the recommendation for dismissal. After Havlik was cleared of his criminal charges, he filed suit against the

University alleging defamation of character due to the crime alert and breach of contract due to an unfair appeals process.

Defamation. The court analyzed the defamation claim first by scrutinizing it under the lenses of the Clery Act. Defamation is a false statement about an individual, negligently published to a third party, without a qualified privilege which causes harm to the individual. The court noted that even if the statement had been false, the University operated under a qualified privilege to issue the crime alert because of the Clery Act.¹³

The court rejected Havlik’s argument that the off-campus altercation was not covered by the Act. It upheld the intent of the Act which requires institutions to report crimes occurring on public property, defined as non-owned property, near the institution and adjacent to a facility owned or controlled by the institution. The University’s attorney issued the alert because it occurred in an area near the campus that students were known to frequent. The court determined that campus safety is the first priority, and if doubt exists as to whether a crime should be reported because of the location of the crime, the “need to assure safety and security for campus communities counsels that doubts should be resolved in favor of notification” (*Havlik*, 509 F.3d at 32).

Similarly, the court found that the University’s attorney did not act with ill will or malice in issuing the crime alert, and therefore was protected by privilege. Under Rhode Island law, an individual is covered by privilege when that individual acts in good faith with a reasonable belief that there exists a legal, moral, or social duty to disclose information or that disclosure is necessary to protect self or others. An individual loses the cover of privilege when the primary motive is ill will or spite, and as the plaintiff,

¹³ The Act requires every institution to make timely reports to the campus community regarding crimes considered to be threatening to other students and employees.

Havlik had to present facts to show where the actions of the University's attorney indicated malice.

Havlik contended that the crime alert accused him of brandishing a knife for which he was cleared. Havlik also asserted that he was identified in the crime alert when approximately five other crime alerts were issued regarding students and names were not mentioned. The court determined that neither factor defeated the privilege in that the University's attorney was not aware of the outcome of the hearing when the alert was issued, and the identity of the students in the other crime alerts were not known, therefore names could not have been mentioned. On at least one other occasion where the student was known, the student's identity was disclosed in the alert. Consequently, the court found that the crime alert was consistent with both the campus incident report and the local police report; the crime alert was issued to prevent similar incidents by notifying the campus community of the potential danger; and the evidence did not indicate that the University's attorney knew Havlik or harbored any ill will towards him.

Breach of contract. Havlik's breach of contract claim arose from the terms set forth in the student handbook, which establishes the University's responsibilities toward students. Specifically, Havlik pointed to the appeals process within the handbook that states a student can appeal a decision from the conduct board and the appeals officer must review the decision of the conduct board and issue a ruling. Havlik alleged the University breached its duty of good faith and fair dealing when the appeals officer consulted with the Vice President of Student Affairs who had accused Havlik of lying and called his fraternity members thugs. Havlik argued the appeals officer was improperly influenced by the Vice President and the information within the crime alert.

In reviewing the language within the handbook, the court determined that it failed to specify what information the appeals officer could consider when reviewing a matter being appealed. Therefore, a consultation with the Vice President of Student Affairs would not have been unreasonable and evidence was not submitted which indicated the Vice President repeated the remarks made to Havlik to the appeals officer. The court also noted that had the appeals officer read the crime report, it was not contradictory to the materials given to the hearing officer for review. Ultimately, the court determined that no evidence existed to show the appeals officer “ignored promised protections, improperly consulted certain proof, acted arbitrarily in carrying out the procedures in the handbook, or made her decision in bad faith” (*Havlik*, 509 F.3d at 36). The court affirmed the decision of the lower court, which had granted summary judgment in favor of the University.

Seventh Circuit

Six years later, the United States Court of Appeals for the Seventh Circuit decided a matter pertaining to the Clery Act. In *Lees v. Carthage College*, 714 F.3d 516 (7th Cir. 2013), Katherine Lees was sexually assaulted in her dorm room by two men wearing college paraphernalia. Shortly after midnight on September 21, 2008, the two men entered Lees' room and attempted to talk to her. She indicated that she was deaf and the two men laughed and walked away. They returned a few minutes later and assaulted her. When the second man attempted to rape Lees, she punched him in the face and both men fled the dorm room. The men were never identified for prosecution. Ultimately, Lees withdrew from the College.

Negligence. Lees sued the College alleging it was negligent in providing a reasonable standard of care with regard to campus security measures. Specifically, she alleged numerous security deficiencies at the College and residence hall, she presented the history of sexual assaults on campus, and she contended that the College did not adhere to the recommended practices in the field of campus security. To prove these allegations, Lees sought to introduce the expert testimony of a premises security expert. The University moved to exclude the testimony of the expert, and the district court ruled in favor of the University. Without that testimony, Lees lacked the relevant evidence to prove negligence and therefore appealed the decision of the district court to the appellate court.

Negligence is the doctrine that a duty existed, a breach of that duty occurred, the breach caused injury, and loss or damage is suffered because of the injury. Courts have long held that if the specifics of the duty of care involve specialized knowledge, expert testimony must be provided to establish the standard of care. The district court did not exclude the testimony because the expert was not qualified, but rather because it determined that the expert failed to follow a reliable methodology in reaching his conclusions regarding whether the College breached its duty owed to Lees.

In reaching his conclusions, the expert reviewed witness statements (e.g. the testimony of the College's former director of security); visited and inspected the security conditions of the dorm; reviewed the various security protocols at the dorm and College; reviewed Clery Act mandated crime statistics and police reports involving sexual assaults on campus; compared the College's practice to the industry standards as published by the International Association of Campus Law Enforcement Administrators; and surveyed the

professional literature on campus sexual assaults and campus security practices. Based on his professional experience, the expert concluded that the College fell short of the standard practice because it did not have a prop alarm on the basement door which would alert security if the door was being propped open for any period of time; dorm lobbies were not staffed between the hours of midnight and 2 a.m.; visitors were not escorted to dorm rooms by the students they were visiting; the building lacked security cameras in critical locations; and students were encouraged to keep their dorm rooms open to socialize. The expert also determined that the number of sexual assaults on campus between 2003 and 2007, five of which occurred in 2007, was an indication of the lack of security measures on campus, which fell below the standard of care.

The College argued that the International Association of Campus Law Enforcement Administrators guidelines were mere recommendations that did not represent industry standards; instead, the expert should have compared the institution to similar institutions using community standards for best practices. The College also reasoned that the expert failed to distinguish between acquaintance rape and stranger rape in the campus statistics when making his conclusions.

The court found that while the guidelines standing alone did not establish a standard of care, the relevant question was whether consulting the guidelines is a methodologically sound practice on which to base an expert opinion. To establish a standard of care for campus security, the court determined the methodology to be sound. Furthermore, it explained community standards could be used as a part of reliable methodology, although such analysis was not necessary. Additionally, the court concluded that while the statistical history of campus sexual assaults was important to

establish reasonable security measures, failing to distinguish between acquaintance rape and stranger rape did not reflect the application of reliable principles and data to the facts of the case. Regarding the expert’s opinion on the lack of monitoring in the lobby, the open-door socializing policy, and the absence of security cameras, the court found insufficient experiential data analysis about the use of such practices in college residence halls. Finally, the court noted that the admissibility of the expert testimony “turns on whether its substance speaks to the standard of care that Carthage was required to meet” (*Lees*, 714 F.3d at 527). Evaluated under that premise, at least some aspects of the testimony were admissible as to particular security measures Carthage failed to provide, and the matter should be presented to a jury for a determination.

Federal District Courts

The second category of cases fell under the federal district courts which are the trial courts in the federal judicial system. Usually, civil trials end with a jury decision and a public record of that decision; however, when an issue of law is decided prior to, during, or after a trial, the decision of the court may be published. Nine cases regarding the Clery Act were published at the federal district level. Table 4.2 illustrates those cases.

Table 4.2 United States District Court Cases

Federal District Court		
Jurisdiction	Case	Date
Second Circuit	McGrath v. Dominican College of Blauvelt	2009
Third Circuit	Lewen v. Edinboro University of Pennsylvania	2011
Third Circuit	James v. Duquesne University	2013
Third Circuit	Frazer v. Temple University	2014
Sixth Circuit	Doe v. University of the South	2011
Sixth Circuit	Moore v. Murray State University	2013
Ninth Circuit	Bruin v. Mills College	2007
Ninth Circuit	King v. San Francisco Community College	2010
Eleventh Circuit	Allocco v. University of Miami	2002

Second Circuit

McGrath v. Dominican College of Blauvelt, 672 F. Supp. 2d 477 (S.D.N.Y. 2009), was filed in the district court of New York. In April of 2006, a female student was sexually assaulted in her dorm room. The College failed to investigate the sexual assault; instead, it held a non-mandatory student meeting, which lasted less than five minutes, to discuss student safety. The College sent the victim to a detective with the local police department who was also employed as an instructor with the College. The detective did not conduct a criminal investigation and the matter went away.

One month after that incident, Wright was raped by three men (two were students) after leaving a party where students were openly consuming alcohol. Being noticeably drunk, Wright was at the door of her room when two male students took her to another room where she was raped. A crowd had gathered outside of the room during the assaults to encourage the rapes and “high five” the assailants. One of the assailants left the room holding up a white sign to the surveillance cameras which read, “I WANT TO HAVE SEX” and purportedly contained Wright’s signature.

Wright woke up in her room the following morning sore and bleeding. Her friends took her to the hospital where she was fully examined, including the use of a rape kit. The examination confirmed substantial injuries and the nurse indicated that in her 15 years of practice, she had rarely seen a victim with more physical trauma. Wright immediately reported the sexual assault to campus officials who sent her to the same detective with the local police department, who was also a College employee. Despite her many requests, the College took no other steps to accommodate Wright other than suggesting she seek counseling from the school’s therapist. University officials told

Wright the College would do nothing until the criminal investigation was concluded. The criminal investigation never began as the detective refused to look into the matter. When Wright's mother met with College officials, she was told the complaint would be difficult to prove and was encouraged not to pursue a complaint. Wright did not return back to campus for the fall semester. She committed suicide in December of that same year. Wright's mother, McGrath, filed a lawsuit on her behalf alleging deliberate indifference under Title IX, Section 1983 claims, fraud, intentional infliction of emotional distress, negligence, and wrongful death against the College and its officials in their individual capacities. The defendants moved to dismiss the complaint as to some causes of action, and the court denied the motion.

Deliberate indifference under Title IX. Title IX states that no person shall, “on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal financial assistance” (20 U.S.C. § 1681(a)). A cause of action under Title IX can arise from student-on-student harassment if it can be proven that the institution is a recipient of Title IX funding; the institution had actual knowledge of the discrimination or harassment; the institution acted with deliberate indifference; and the discrimination is so severe, pervasive, and objectionably offensive that it interferes with the victim's access to an educational opportunity or benefit.

The court denied the motion to dismiss this count as the complaint sufficiently alleged that the College was deliberately indifferent to the report of the assault after it was duly notified. The court noted that the College's failure to act in deference to the police “investigation” that never occurred could prove to be actionable. The court also

considered that the College refused to make accommodations for Wright as requested, considering two of her assailants were also students. Under Title IX, institutions are obligated to conduct an investigation and make a determination independent of a criminal investigation.

Section 1983 claim. This claim is made when a person acting under the authority of any statute, ordinance, regulation, custom, or usage of a state has violated a federal right of another. The complaint alleged that the College officials acted under the authority of the state when they collaborated with the local police detective, also an employee, to conceal reports of sexual assault. Specifically, the College officials “engaged in a pattern of conduct designed to effectively dispose of sexual harassment claims that were potentially embarrassing to the school” (*McGrath*, 672 F. Supp. at 491). The court determined the complaint to be sufficient, as Wright had a federal right to a non-discriminatory police investigation.

Fraud. According to New York law, fraud occurs when a person has superior knowledge that is not readily available to another, and the person knows that the other is acting on the basis of mistaken knowledge. The complaint alleged that the institution defrauded Wright into enrolling under false information. Specifically, the failure to report crimes under the Clery Act prevented students from making informed decisions when applying for admission and deciding to enroll. The institution “intended to misrepresent the safety of the school’s campus in order to induce students to enroll there and Wright justifiably relied on this misrepresentation of campus safety...and was injured as a result” (*McGrath*, 672 F. Supp. at 491). The court held that fraud was sufficiently alleged in the complaint.

Intentional infliction of emotional distress. Finally, the court looked at the claim of intentional infliction of emotional distress, which is made when the extreme or outrageous conduct of an individual with the intent to cause, or without regard of causing, severe emotional distress to another in fact causes severe emotional distress. The court analyzed the complaint to determine whether it sufficiently alleged the intent factor as well as the outrageous conduct. It determined that the insensitivity of the University officials to Wright's report that she had been raped was enough to cause her severe emotional distress, which meets the element of intent. Furthermore, the court stated "whether the reliance upon a police investigation conducted by an officer who was an employee of the College was outrageous conduct exceeding human decency must be considered a jury issue under these circumstances" and as such, the allegations in the complaint overcame a Motion to Dismiss (*McGrath*, 672 F. Supp. at 493).

Third Circuit

Three cases came out of the Third Circuit. All were student cases filed in the District Court of Pennsylvania. The opinion in the first case, *Lewen v. Edinboro University of Pennsylvania*, 2011 WL 4527348 (W.D. Pa. Sept. 28, 2011), was the result of a Motion to Dismiss the complaint, which the court granted. After graduating from Edinboro University in the spring, Lewen enrolled in a graduate program in August of 2007 and moved into the dorm. She brought her .22 caliber revolver with her and kept it in the dorm room. On the first day of class, Lewen sought advice from a classmate about where the revolver could be stored. The following day, an officer came to her dorm room to collect the gun, indicating he had been told she needed assistance storing it. The

officer collected the gun and told Lewen she could retrieve it at the end of the school year.

Later that evening, Lewen was escorted to the police station and informed that she had committed a criminal act by possessing an unregistered handgun on campus. She was told to sign an agreement voluntarily withdrawing from the University to avoid prosecution and disciplinary action. The officers would not listen to her pleas that she had done nothing wrong, so Lewen signed the agreement. As part of the withdrawal agreement, she was banned from campus permanently. Lewen filed a lawsuit *pro se* against the University alleging 32 causes of action. Although courts are lenient toward *pro se* litigants because they proceed without legal counsel, the complaint failed to allege any cause of action that could be tried. Nevertheless, the court analyzed the Clery Act cause of action in its opinion.

The Clery Act. Lewen contended that the University violated the Clery Act because it failed to have her arrested for having the handgun on campus. Furthermore, it failed to report the crime as mandated by the Clery Act in its annual crime report. She argued that the University had an obligation under the Clery Act to prosecute and then report her crime. The court rejected the argument because the Clery Act does not create a private right of action. Specifically, the Act states that it does not “create a cause of action against any institution of higher education or any employee of such an institution for any civil liability; or establish any standard of care” (20 U.S.C. § 1092(f)(14)(A)(i)). Consequently, this cause of action was dismissed in favor of the University, along with 31 others.

The second case in the Third Circuit also arises from an incident involving firearms. In *James v. Duquesne University*, 936 F. Supp. 2d 618 (W.D. Pa. 2013), James and his teammates were shot leaving a school dance held by a student group on campus the night of September 16, 2006. In accordance with past practices regarding the annual dance, the student group invited University students, their guests, and students from neighboring higher education institutions and their guests. The University assigned two police officers to provide security in accordance with its policy. One female student (Female A) brought her boyfriend and his two friends, who were not enrolled at the University, into the party with the full knowledge that they were carrying weapons. The party ended without incident, and everyone departed from the student union.

While walking to their dorm, James and his teammates encountered a young lady (Female B) who began to “flirt” with one of them. This interaction was noticed by Female A’s boyfriend and friends, who were carrying weapons. Female A’s guests called Female B over to them and confronted the basketball students in a threatening manner. Although words were exchanged, the students attempted to walk away, as they did not want to get in trouble and risk their basketball careers. The two friends pulled out their guns and started shooting at the students in the back as they walked away. Five of the basketball players were shot, but no fatalities occurred. The two gunmen were arrested, plead guilty to aggravated assault and attempted homicide, and sentenced to multiple years in prison. Female A plead guilty to recklessly endangering another person because she knowingly brought guests onto campus carrying weapons, and Female B plead guilty to rioting with the intent to commit a felony.

Negligence. James was shot twice in his left foot, which caused him significant injuries and scarring from surgery. He was unable to play basketball the following season. He sued the University, alleging it was negligent the night of the incident and, as a result, he was harmed¹⁴. As previously explained, negligence is proven by establishing a duty owed and a breach of that duty which is the proximate cause of a resulting harm or injury. James claimed that the University owed a duty to provide reasonable security on campus because of previous incidents of violence as evidenced in the crime reports. He also claimed that because the University was aware that guests would be on campus due to the party, it had a higher level of responsibility to provide adequate security. Finally, he argued that had the University provided security measures upon entrance to the party, the weapons would have been confiscated, and the shootings would not have occurred.

In contrast, the University maintained that it owed no duty to protect James from spontaneous criminal shootings by third parties even if it was obligated to provide campus security, as it was not foreseeable that such criminal behavior would occur. Additionally, the University contended that there is no causal link between the duty owed to James, if any, and the injury as it was not a proximate cause of that injury. The court ruled in the University's favor, noting that an invitation to guests to visit the campus does not give rise to an expectation that they will commit felonies while on campus. Specifically, the court stated there was no "reasonable expectation that the type of harm in question had an increased likelihood of occurring on the defendant's property such that the failure to prevent or protect against it can be said to be a form of negligence" (*James*, 936 F. Supp. 2d at 641).

¹⁴ Four of the students who were shot sued the University. One filed in state court and the others before the district court. Discovery for all four cases were consolidated and coordinated.

Furthermore, the court held that the University was not expected to provide additional security than it normally did for events on campus. For the University to breach a duty owed, it would have to be proven that it did not provide the adequate security when compared to similar student-sponsored events on campus. There was no evidence presented that security should have included checkpoints at the entrance of the dance in the likelihood that individuals would be armed with weapons, or included more officers to escort students from the dance. Consequently, the court declined to “impose liability based not on the failure to act with due care with regard to the program of security that had been provided, but on expectations of more or better benefits than can reasonably be expected from the program as offered” (*James*, 936 F. Supp. 2d at 645).

Finally, the court reviewed the statistics from the Clery Act report, which indicated that between 2003 and 2005 there were four aggravated assaults, two involving a handgun. One of the incidents occurred on campus where an individual shot at a cab driver for blocking the entrance to the dorm with his vehicle. The second was reported because a group of underage teenagers stole a car from a campus store and, when arrested, one teenager had a handgun in his possession. The court found that the statistics did not demonstrate constructive or actual notice to the University that the type of harm that happened to James would occur under the circumstances. Without actual or constructive notice, the court declined to impose a duty on the University to protect students from all potential danger, which would effectively make them insurers of student safety, an impossibility in the unfortunate realities of society. The court acknowledged James’ suffering as a result of the incident and emphasized the importance of campus security as a priority for institutions of higher education; however, the consequences of

holding the University responsible to provide absolute protections to its students, “would divert tremendous resources from [the University’s] mission and in turn would impede its ability to advance a campus experience that includes broad exposure to cultural and social diversity” (*James*, 936 F. Supp. 2d at 646-647).

The third case arising out of the Third Circuit, *Frazer v. Temple University*, CIV.A. 13-2675, 2014 WL 2547076 (E.D. Pa. June 5, 2014), was decided on June 5, 2014. The court granted the University’s Motion to Dismiss the complaint based on the causes of actions alleged. Frazer filed the case alleging the University was responsible for the actions that occurred on its campus. Frazer, a full-time student on an athletic scholarship, dated a football player for approximately six months before ending the relationship. On the night of January 17, 2011, the football player entered the lobby of her dorm noticeably drunk and was allowed entrance despite the University’s policy of registering guests. The football player found Frazer in a room socializing with friends. Frazer refused to speak to him and went to a room across the hall. The football player forced his way into the room and began yelling at Frazer until she ran down the hall to her own suite. The football player kicked her door open and began threatening Frazer, yelling, “If I can’t have you no one can have you” (*Frazer*, 2014 WL 2547076, at 2).

Frazer pleaded with the football player not to harm her as he threatened to kill her. Other students intervened, restrained the football player, and called the campus police. Before they arrived, he was able to get away. The football player punched through a window in the dorm hall leaving a trail of blood behind him. He called and texted Frazer while hiding from the police. On instruction from the police, Frazer answered the phone and coaxed the football player into disclosing his location. He was taken into custody

and called Frazer several times while at the police station. Frazer left campus and returned eight days later on January 24.

A disciplinary hearing was scheduled for February 18, and the football player was allowed to remain on campus pending the hearing. He continued to harass Frazer by following her and sitting outside her dorm room. On one occasion, the football player stood beside her while she conversed with another student, and they ignored him. Frazer informed the officials of the behavior, but no action was taken to correct it. The football player was found guilty at his disciplinary hearing and suspended for the remainder of the semester. Frazer continued to participate on the volleyball team for another year until she was removed from the team and her scholarship was revoked. Frazer filed a grievance and regained 50 percent of her scholarship, but was not permitted back on the team. She later filed suit against the University alleging a violation of due process and equal protection, illegal seizure under Section 1983, and a hostile educational environment and retaliation claim under Title IX.

Section 1983 claim. As mentioned previously, a claim under Section 1983 must allege that a person was denied a right, secured by law, by an individual acting under a specific authority of law. Frazer argued that her Fourteenth Amendment right to not be deprived of life, liberty, or property without due process was violated when the University failed to protect her from a fellow student. The court rejected this argument in that the constitutional right does not extend to protecting individuals from the acts of others; instead, its purpose is to protect individuals from the government. Two exceptions exist which could extend the protection to include the acts of others.

The first exception, the special relationship exception, exists when the state creates a relationship with an individual and is therefore responsible for the safety of that individual. Specifically, “such a duty arises only where the state actor takes a person into custody without consent, and by virtue of this custody, limits the individual’s freedom to act” (*Frazer*, 2014 WL 2547076, at 6). Under those circumstances, the individual is not able to defend himself from the actions of another. This exception would not apply to a student enrolled at an institution of higher learning because the student has freely elected to receive an education from the institution.

The second exception, the state-created danger exception, exists when a state entity creates a danger or renders an individual more vulnerable to danger than had the entity not acted at all, when a relationship exists between the state entity and the individual who is a foreseeable victim to the harm caused, and when the entity acts with a high degree of culpability that shocks the conscience. The court noted that mere negligence in failing to act does not rise to the level of creating a danger. Repeatedly, the court has “rejected state-created danger claims involving student-on-student school violence, even where school officials were alleged to have known of the dangerous conditions within the school that ultimately resulted in injury...on the grounds that the school did not affirmatively act to create the danger” (*Frazer*, 2014 WL 2547076, at 7). Frazer alleged that the University knew of the football player’s propensity for danger because he had threatened to kill his roommate and fellow teammate prior to the incident with her. Although the University failed to act, the court found that without an overt act, the facts did not substantiate a state-created danger exception.

Fourth Amendment claim under Section 1983. Frazer alleged that the University violated her rights by subjecting her to an illegal seizure. The Fourth Amendment protects individuals from unlawful restraint by physical force or show of authority; however, the protection applies to restraint by the government and not private individuals. The court found that Frazer failed to allege facts to support an intentional seizure by the University or any of its agents.

Equal protection under Section 1983. This cause of action is demonstrated when an individual who is a member of a protected class (e.g. race, religion, sex, age, disability) is treated differently than those not in the protected class under the same circumstances. Frazer argued that she was treated differently as a member of a protected class, but she did not point to a particular class or the discriminatory conduct. Although she holds the University responsible for the football player's actions, Frazer did not allege that his actions were targeted at women or were sexual in nature. The court determined that the University did not treat Frazer any differently than the football player's roommate, who was also threatened. Furthermore, the University disciplined the football player with a suspension for his conduct towards Frazer.

Title IX hostile environment claim. As previously explained, Title IX mandates that no person shall be excluded from any education program or activity receiving federal funds on the basis of sex. Furthermore, to recover for student to student harassment, it must be alleged that the University acted with deliberate indifference to known acts of sexual harassment. The court noted that the only previous incident that provided notice of the football player's violence was the incident with the roommate. This incident was not sexual in nature, meeting the requirement of Title IX. Furthermore, the court

reviewed the allegation that following the incident with Frazer, the football player was allowed to remain on campus pending his hearing and, during that time, he harassed Frazer. The court determined those actions were those of a jilted boyfriend not amounting to sexual harassment that is sufficiently severe, pervasive, and objectionably offensive, and the University was not deliberately indifferent as it held a disciplinary hearing and suspended the football player.

Title IX retaliation claim. Frazer alleged this cause of action because she was removed from the volleyball team and her athletic scholarship was revoked. Frazer connected these actions to her complaint against one of the University's football players. The key factor in proving retaliation is timing. There must be a showing of an "unusually suggestive temporal proximity between the protected activity (the complaint) and the retaliatory action or there must be a pattern of antagonism coupled with timing to establish a causal link" (*Frazer*, 2014 WL 2547076, at 12). The court determined that there were 15 months between the incident in 2011 and the revocation of the scholarship in 2012; therefore, the timing element required for a showing of retaliation was not met. As a result, all the federal claims were dismissed with prejudice.

Sixth Circuit

Two cases arose out of the Sixth Circuit, both of which were filed by students. The first case, *Doe v. University of the South*, 687 F. Supp. 2d 744 (E.D. Tenn. 2009), alleged numerous counts of statutory, contractual, and tort violations after the University found Doe guilty of sexually assaulting a female student. A female student filed a formal charge against Doe on August 30, 2008. After the University officials discussed the matter, an investigation began without Doe's knowledge. Witnesses were interviewed,

and sufficient evidence was collected for the judicial hearing that was scheduled for September 18, 2008. The dean of students met with Doe the day before the hearing and notified Doe of the charges against him. Doe was told the names of the individuals who provided statements, was given a list of witnesses, and was told the time and place of the disciplinary hearing scheduled for the next day. Doe was also informed that he needed to provide a written statement despite the fact that an investigator had already gathered all the relevant information.

The following morning, Doe submitted a written statement and was questioned for the first time by the investigator just before the judicial hearing. The panel of judges consisted of the dean of students, who also acted as the prosecutor, and three other members of the Faculty Committee. The hearing lasted approximately six hours, and after deliberation, the committee found that Doe was guilty of sexually assaulting the female student in violation of the University's sexual assault policy and procedures. For punishment, Doe had the option of a one semester suspension with the sexual assault on his permanent record or withdrawal from the University for two semesters. In choosing either option, Doe would have to seek readmission from the University's admissions committee.

Doe was informed of his right to appeal but was cautioned against appealing because he might receive a harsher punishment. Furthermore, Doe was told the female student might pursue criminal charges if he appealed. Finally, Doe was given the deadline in which to vacate campus and instructed to destroy all written materials related to the charge and the hearing. Doe did as instructed, and he appealed the ruling by letter dated September 26, 2009. He contended that he did not have sufficient notice of the

hearing and the charge was not properly investigated in light of the fact that he was not interviewed until the morning of the hearing shortly before the hearing commenced. On October 3, 2008, the vice chancellor denied the appeal by letter and affirmed the committee's rulings and actions. Doe withdrew from the University with the possibility of returning in the fall of 2009. He did not seek readmission and filed a lawsuit against the University.

Title IX. Doe argued that the University's student disciplinary process is contrary to Title IX. The Department of Education has mandated that institutions "receiving Title IX funds adopt and publish grievance procedures providing for the prompt and equitable resolution of student complaints alleging any action [e.g. rape] which would be prohibited by Title IX" (*Doe*, 687 F. Supp. 2d at 755). Furthermore, institutions must adopt procedures that are fair and equitable, providing due process to all parties involved. The court ruled that the misconduct alleged by Doe is not a violation of Title IX, but rather a violation of the Department of Education regulations, which do not confer a private right of action. The Department of Education was the proper jurisdiction to determine whether a violation had occurred. The court dismissed the cause of action in favor of the University.

Declaratory judgment under the Clery Act. The Declaratory Judgment Act allows any court in the United States to declare the rights of a petitioner and require action as a result of the court's judgment. The court considered five factors when determining whether the lower court properly exercised its discretion in denying Doe's petition:

- 1) Whether the declaratory action would settle the controversy;

- 2) Whether the declaratory action would serve a useful purpose in clarifying the legal relations in issue;
 - 3) Whether the declaratory remedy is being used merely for the purpose of “procedural fencing” or “to provide an arena for res judicata;”
 - 4) Whether the use of a declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction; and
 - 5) Whether there is an alternative remedy which is better or more effective.
- (*Doe*, 687 F. Supp. 2d at 759).

Under the facts in this case, the court eliminated the third and fourth factors as irrelevant and found that the first, second, and fifth factors prevented the court from declaring a judgment.

Doe alleged that the University violated the Clery Act, which mandates the adoption of policies and procedures for campus disciplinary action in cases of sexual assault. The Clery Act specifies that institutions adopt procedures for on-campus disciplinary action in cases of alleged sexual assault, which shall include a clear statement that (1) the accuser and the accused are entitled to the same opportunities to have others present during a campus disciplinary proceeding; and (2) both the accuser and the accused shall be informed of the outcome of any campus disciplinary proceeding brought alleging a sexual assault (20 U.S.C. § 1092(f)(3)(1990)). Doe did not allege that he was not equally informed of the outcome of the hearing, but rather that the timing and scheduling of the hearing did not provide him the same opportunity to have witnesses present.

Regarding the first two test factors, the court ruled that if it issued a declaratory judgment, the matter between the parties would not be settled. Doe also filed contract, quasi-contract, and tort claims against the University, which would remain unresolved despite a declaratory ruling. Furthermore, such a ruling would not clarify the remaining causes of action for the court as they are unrelated to the Clery Act allegations.

In considering the fifth factor in the test, the court determined that the regulatory provisions established by the United States Department of Education were the proper venue for deciding Clery Act violations. The court referenced the potential fines and loss of student financial assistance the University faced within the guidelines established by the federal agency. For these reasons, the court also dismissed this claim in favor of the University.

The second case filed in the Sixth Circuit was decided in 2013 by the District Court of Kentucky. In *Moore v. Murray State University*, 5:12-CV-00178, 2013 WL 960320 (W.D. Ky. 2013), the court granted the University's Motion to Dismiss on the federal issues and remanded the state claims to the state court. The facts indicated that Moore was a full-time student enrolled at the University and a member of the women's track and field team. On October 28, 2011, Moore sent an e-mail to the head track and field coach reporting that she had been sexually assaulted six weeks earlier in her dorm room by a male student. Moore asked the coach for information about University resources that would help her deal with the assault. The coach responded three days later encouraging Moore to go to the Women's Center on campus. The coach offered to make an appointment for Moore and to accompany her, and Moore agreed. After a number of e-mail correspondences, an appointment was set, although the coach did not accompany

Moore because she was out of town with the team for a competition. Moore kept the appointment and self-reported the sexual assault to campus police on December 16, 2011. The coach never reported the sexual assault and never followed up with Moore or inquired about her well-being. Moore filed suit alleging two federal causes of action: failure to comply with the Clery Act and failure to comply with Title IX. The court did not make a determination regarding the state allegations, leaving those to be tried in state court.

The Clery Act. Moore alleged that the University violated the Clery Act when it failed to report her sexual assault. Like other courts, the Sixth Circuit determined that no private right of action existed; therefore, the cause of action was dismissed.

Title IX. The court analyzed the cause of action based on the elements that had to be proven. The University was a Title IX recipient of federal funds. The sexual harassment alleged here, rape, is the type that is severe, pervasive, and objectionably offensive that it could reasonably deprive an individual of educational benefits and opportunities. Nevertheless, the court found that the University was not on notice of the sexual harassment before the assault took place and was not deliberately indifferent to it after it was reported. The court noted that “if a funding recipient does not engage in harassment directly, it may not be held liable for damages unless its deliberate indifference subjects its student to harassment” (Moore, 2013 WL 960320, at 4). Specifically, “the deliberate indifference must, at a minimum, cause students to undergo harassment or make them vulnerable to it” (Moore, 2013 WL 960320, at 4). As result, this cause of action was also dismissed.

Ninth Circuit

Two opinions came out of the Ninth Circuit covering Clery Act issues. The first, *Bruin v. Mills College*, C06-05209 WHA, 2007 WL 419783 (N.D. Cal. 2007), was filed by an employee alleging that her termination was related to the Clery Act. Bruin was employed by the college in a variety of positions from 1998 to 2006. Bruin was an outspoken advocate for race, gender, and disability-based discrimination, and she alleges that her advocacy of these campus issues led to her termination. She alleged that in April of 2005, her criticism of the College's ineffectual and weak sexual harassment policy and procedures, and violations of health and safety standards caused her superiors to treat her with hostility. Bruin was threatened with termination, denied the full benefit allowed for maternity leave, denied housing benefits, placed on probation, and demoted to a lower-level position. Bruin argued that her flawless record did not support the treatment she was subjected to by the College, which caused her extreme emotional distress. She did not return from maternity leave and instead, resigned from the College because she felt her superiors had constructively discharged her.

Wrongful discharge underlying public policy against the College. This claim is based on California's public policy forbidding unlawful discrimination and retaliation. Specifically, "the Supreme Court of California established the common-law tort of wrongful discharge in violation of public policy" (*Bruin*, 2007 WL 419783, at 4). Bruin contended that the College retaliated against her for vocalizing its Clery Act violations. The College responded that the allegations were vague in that they did not explain how the College failed to comply with the Act. Because the allegations were not specific, the College claimed it was without notice of how it violated public policy. The College

agreed to allow Bruin to amend the complaint to add detailed information regarding the Clery Act violations. The court granted the College's Motion to Dismiss the claim with leave to amend the complaint to give specific Clery Act violations.

Wrongful discharge underlying public policy against officials of the College.

Bruin also applied the same allegation above against certain officials in their individual capacities. The officials argued that only the employer (College) can be found liable for wrongful constructive discharge and demotion. The court ruled that only the employer and not individuals could be liable for the cause of action. It stated that "a tortious wrongful discharge claim is inherently based on an employer-employee relationship and a basic duty imposed by law upon all employers" (Bruin, 2007 WL 419783, at 8). The individuals were not the employers of Bruin and could not be sued as such. The court granted the Motion to Dismiss this cause of action against the officials without leave to amend the complaint.

The second case, also filed in the District Court of California, is a decision from a lawsuit filed against a community college. In *King v. San Francisco Community College District*, C10-01979, 2010 WL 3930982 (N.D. Cal. 2010), King was a student enrolled at the College from 2006 until he was suspended in 2009. King alleged in the complaint that he made reports to the College for more than two years that he was being stalked, threatened, sexually harassed, and terrorized. King stated that he made numerous complaints to the College's administration and police department, but nothing was done in response. The perpetrator was allowed to remain on campus without an investigation taking place. King alleged that instead of taking action against the perpetrator, the college came after him, the victim. He was arrested and suspended from classes and

therefore, unable to complete his degree. King believed the actions were motivated by unlawful discrimination, specifically racial profiling and gender-based discrimination when responding to victims of crimes. King filed the lawsuit *pro se* against the College, alleging numerous claims.

The Clery Act. The court determined that the College's failure to comply with the Clery Act was relevant evidence, but not a cause of action to be tried in court. The College's Motion to Dismiss was granted without leave to amend.

Title IX. King argued that the failure of the College to respond to his reports of harassment was willful and amounted to deliberate indifference under Title IX. Furthermore, the College retaliated against him for his reports of harassment, which amounts to gender discrimination by the College. Specifically, the College failed to protect him from the sexual harassment of a person on campus under its control and also discriminated against him on the basis of sex, both violations of Title IX. Although a valid allegation, the court found that the format of the complaint did not comply with court rules. The court granted the College's Motion for a More Definite Statement, giving King leave to fix the deficiencies in the complaint. The remainder of the claims were also handled in a similar manner or dismissed because the College could not be sued due to sovereign immunity.

Eleventh Circuit

Only one case citing the Clery Act arose out of the Eleventh Circuit. *Allocco v. The University of Miami*, 221 F. Supp. 2d 1317 (S.D. Fla. 2002)¹⁵ was an employment case filed in the District Court of Florida. Former university public safety officers filed a

¹⁵ The full title of the case is *Allocco, Fernandez, Garcia-Montes, Quevedo, Silva, Montalvo, and Allen v. City of Coral Gables and the University of Miami*. The title is shortened for brevity in citation.

lawsuit against the University and the City of Coral Gables because they did not get the same benefits and salary as full-time city officers. Two officers, Allocco and Fernandez, alleged they were terminated for whistleblowing in violation of a Florida statute. Specifically, they claimed they were fired for exposing the University's violations of the Clery Act.

Whistleblowing. The officers asserted that University officials handled criminal matters administratively without properly reporting incidents to law enforcement. They stated that crimes were categorized as lower level crimes (e.g. burglary as theft) or not reported at all, and crime reports sometimes "disappeared." Finally, they claimed that crimes which occurred on campus were not reported as campus crimes if the victim contacted the authorities off-campus. For example, a female student overdosed in the dormitory and the authorities were not contacted until she was off-campus, presumably at the hospital, and the University did not include the incident in the crime report. According to the officer, all of these instances amounted to underreporting by the University.

Florida state law prohibits "agencies from taking retaliatory action against individuals who disclose information to an appropriate agency alleging improper use of governmental office, gross waste of funds, or any other abuse or gross neglect of duty on the part of an agency, public officer, or employee" (*Allocco*, 221 F. Supp. 2d at 1366). The law mandates that all state administrative remedies (complaint or grievance procedures) be utilized before an individual institutes a civil lawsuit. The court determined that the officers had not exhausted all state administrative remedies regarding the whistleblower claims. The court also determined that the officers were time-barred

from alleging the whistleblower cause of action. The time period for filing is 180 days after the prohibited action (e.g. termination). Both officers filed the lawsuit more than 180 days after being terminated by the University.

Despite the procedural deterrents, the court analyzed the claim under the relevant statute. To establish a claim under the law, the officers had to show evidence that they engaged in a protected activity, suffered an adverse employment action, and the adverse action was related to the protected activity. Allocco, who was terminated on January 20, 1999, did not make his complaints to the University about the Clery Act violations until nine days after he was terminated. It was alleged that Fernandez made his complaints to the University in 1997, and he was not terminated until 1999. Therefore, the court ruled that the adverse action was not related to the protected activity. The court dismissed the whistleblower claim against the University and its officials.

State Courts

The third category referenced in the study is state appellate cases. Similar to the federal appellate court cases, these also set precedent, but only for the state in which the matter was decided. Two cases, from different jurisdictions, fell within this category. Table 4.3 illustrates those cases.

Table 4.3 State Cases

State Court		
Jurisdiction	Case	Date
Sixth Circuit	Kleisch v. Cleveland State University	2006
Eighth Circuit	Jones v. University of Iowa	2013

Sixth Circuit: Ohio

On appeal from a bench trial, the Ohio Court of Appeals issued an opinion in *Kleisch v. Cleveland State University*, No. 50AP-289, 2006 WL 701047 (Ohio Ct. App.

2006), affirming the decision of the lower court. The lower court determined that the University was not negligent for the incident that occurred on the morning of August 3, 2001. Kleisch was raped by a stranger while studying in a lecture hall at the University an hour before the exam was to be given in that lecture hall. Kleisch later sued the University for breaching the duty to protect her, which caused her harm.

Negligence. The court analyzed the negligence cause of action under the theory of premises liability. In Ohio, premises liability defines the status of the person who enters upon the land of another and specifies the duty owed that person. For example, a trespasser who enters the property of another without authorization is owed no duty. Comparatively, an invitee, who enters the property of the owner by implied or expressed invitation for the benefit of the owner, is owed a duty of reasonable care and protection through the maintenance of a safe environment. In that Kleisch paid tuition to the University to attend classes, the court considered her an invitee and determined the University was responsible for providing a safe environment.

The court noted that “a business has a duty to warn or protect its business invitee from criminal acts of third persons only where the business knows or should know in the exercise of ordinary care that such acts present a danger to its business invitee” (*Kleisch*, 2006 WL 701047, at 4). The court determined that the relevant question was whether the criminal act of the third party was foreseeable to the business. Kleisch argued it was foreseeable because of insufficient security measures such as unlocked doors and an undermanned campus police department. Kleisch also argued that the underreporting of campus crimes which is a violation of the Clery Act, gave students a false sense of security. The University countered with an expert who opined that the University

“complied with requirements under the Clery Act and that it had acceptable standards and best practices in place at the time of [Kleisch’s] rape” (*Kleisch*, 2006 WL 701047, at 7).

The court considered the expert’s testimony, noting that crime is not always preventable. Furthermore, “part of the solution is to be aware of these situations when they come...to have police involved...and to disseminate the information to students and staff so that people are aware that this has occurred, and these are the things that one should watch out for” (*Kleisch*, 2006 WL 701047, at 7). The court noted that the one rape that occurred on campus in the four or five years prior to the 2001 incident was in a restroom in an adjacent building. It concluded that a rape at the University approximately two years before was insufficient to give the University notice that Kleisch would be raped in a classroom, typically an open environment, while she studied at 9:00 a.m. in the morning for a final examination. As a result, the University was not liable for breaching its duty to Kleisch, and the court affirmed the decision of the trial court in favor of the University.

Eighth Circuit: Iowa

The second case in a state court was decided by the Supreme Court of Iowa on September 11, 2013. In *Jones v. University of Iowa*, 836 N.W.2d 127 (S. Ct. 2013), Jones filed a lawsuit alleging numerous allegations stemming from his termination from the University. Jones served as Dean of Students and Vice President of Student Services for the University after having been employed in that department for approximately 27 years. The University hired a law firm to investigate its handling of a sexual assault that occurred in 2007. The law firm reported that Jones had mishandled the matter, and the University terminated him from employment.

On the morning of October 15, 2007, Jones was notified by the athletic department that a female athlete was assaulted by two football players the day before. Jones did nothing in response to the information he received. The athletic department conducted an informal investigation and again spoke to Jones on October 18 and 19. It reported that the football players had been suspended, and Jones expressed concern about punishing the football players twice. The athletic department explained that the suspension was for athletic reasons not having anything to do with the assault. Jones decided his office would not handle the complaint and told a colleague in his office, “Well, let’s see if we get a complaint. When we get a complaint, then we can do something. Otherwise, all these rumors, we can’t do very much with them” (*Jones*, 836 N.W.2d 127 at 135).

The athletic department sent the report from the informal investigation to a number of University officials. Jones reviewed the report, and because it did not contain a formal complaint, he filed it away. The Office of Equal Opportunity and Diversity commenced a formal investigation after receiving the information. During this time, the victim was continually harassed by the football team and other athletes. Because the University officials were not responsive, the victim filed a complaint with campus police and the county prosecutor, who filed criminal charges. Through the prosecutor, the victim learned that there were actually two football players involved instead of the one she had reported. The second had allegedly assaulted her while she was unconscious. While the University had been investigating both, the victim only knew of one. The victim also realized that the second football player lived down the hall from her.

On November 15, the victim and her mother met with Jones, the director of public safety, and a rape victim advocate. She requested to be released from the housing contract, which was granted, and she notified the officials of the identity of students who continually harassed her because of the assault. Jones sent a letter to the students notifying them of the anti-retaliation policy, but did not tell them that allegations were made and did not conduct an investigation. Jones did not make additional contact with the victim or take further action. The victim's parents sent two letters to University officials criticizing their handling of the incident, the first in November and the second the following May. Jones received both letters and filed them away.

The Board of Regents learned of the letters in July and hired outside counsel to audit the University's response to the sexual assault. The law firm was given specific instructions, including interviewing all those involved in the incident, consulting sexual victim advocates experts, appraising University policies for compliance with federal laws, specifically the Clery Act, and appraising University policies for compliance with Iowa statutes. The law firm reported that Jones had lied to the victim's family, had failed to remove the perpetrators from the victim's dormitory, had mishandled the victim's allegations of continued harassment, and refused to communicate with the victim and her family. The report further stated that Jones "failed in his responsibilities to the [victim] and to the University in this case. [Jones] had the authority to intervene at numerous points in the process and to achieve the results necessary to protect the [victim]" (*Jones*, 836 N.W.2d 127 at 138). Jones was terminated following the release of the report and responded via letter to the Board of Regents that he disagreed with his termination and the investigative report. Jones filed suit against the University, the Board of Regents, the

president, and the law firm. The trial court granted summary judgment in favor of the University and all other defendants, and Jones appealed the matter.

False light invasion of privacy and defamation claims. The court dismissed the claims against the University because it could not be sued for such claims under the Iowa Tort Claims Act. Specifically, the statute prohibited lawsuits against the state for assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, and interference with contract rights. Defamation is either libel in the written form or slander in the spoken form, and in Iowa, a state entity could not be sued for either. The court found that the false light invasion of privacy claim stemmed from the defamation claim. Therefore, it was also dismissed.

These claims were also filed against the president in her individual capacity. The court determined that the president could only be sued under these claims if she was acting outside the scope of her employment. An employee is acting within the scope of employment if the “act is necessary to accomplish the purpose of the employment and is intended for such purpose. The question, therefore, is whether the employee’s conduct is so unlike that authorized that it is substantially different” (*Jones*, 836 N.W.2d 127 at 143). Jones argued that the president blamed him for mishandling the sexual assault incident to shield herself from blame. Jones claimed that assigning blame was not her job as president and as such, she was not acting within the scope of her employment. The court disagreed with Jones, noting that terminating him because of how he handled the sexual assault incident was well within the scope of the president’s employment.

Wrongful discharge in violation of public policy. Jones alleged that the he was terminated for following the University’s sexual assault policy, which is a violation of

public policy. The court acknowledged the cause of action as valid when employment is terminated to “undermine a clearly defined and well-recognized public policy of the state” (*Jones*, 836 N.W.2d 127 at 144). Although Jones was an at-will employee, which meant his employment could be ended at any time by either party for any reason or for no reason, the public policy violation is an exception to an at-will termination. However, the court found no evidence in the record for which a jury could conclude that Jones was terminated for following University policies. The report from the law firm indicated that while Jones had “not violated the letter of the University sexual assault policy...his conduct was fundamentally inconsistent with its substance and intent” (*Jones*, 836 N.W.2d 127 at 144). The court found that “Jones’ termination was based on a reportedly inadequate utilization of the policy to secure the rights and safety of the alleged victim” (*Jones*, 836 N.W.2d 127 at 145).

Due process under Section 1983. Jones claimed that the president violated due process by not allowing him the opportunity to clear his name. Due process is “implicated where the employer levels accusations that are so damaging as to make it difficult or impossible for the employee to escape the stigma of those charges” (*Jones*, 836 N.W.2d 127 at 146). The court noted that the reasons given for Jones’ termination did not rise to the level of stigma needed to implicate due process. Due process is usually implicated by accusations of dishonesty, immorality, criminality, racism, and other such damaging allegations. The court found that the president’s statement that she had lost faith in Jones’s ability to perform his job and that he had failed a student were mere statements of incompetence.

Employment discrimination under Section 1983. Jones maintained that he was terminated based on his race and gender, which is a violation of the Equal Protection Clause of the Fourteenth Amendment. The court analyzed the evidence and determined that the president had a legitimate, nondiscriminatory reason to terminate Jones. Thereafter, the burden shifted to Jones to show that the reason given by the president was pre-textual in an effort to cover up discrimination. Jones asserted that the law firm indicated in its report that he was very defensive and belligerent, angry, argumentative, and not very cooperative with regard to their internal audit. Jones stated such comments are reflective of stereotypes about African American men, and the comments were the basis for the termination. The court rejected the argument, noting that adverse employment actions based on race and gender stereotypes do constitute discrimination, but the president's termination of Jones was based on the legitimate, nondiscriminatory reasons found in the report. Furthermore, the University's general counsel, a Caucasian male, was also terminated based on the law firm's report, so Jones is unable to show how he was treated differently than similarly situated employees. Thus, the court affirmed the trial court's decision to grant summary judgment in favor of the University.

The cases illustrated in the findings have either analyzed the Clery Act as a separate cause of action or discussed the mandates within the Clery Act as the basis for a claim. The study is limited in its scope as these cases represent only a small number of those filed against institutions as a result of crime on campus. The thirteen cases represent a small sample due to the narrow scope of the study.

CHAPTER FIVE

FINDINGS

Department of Education Investigations

This chapter details the findings of the agency investigations and answers the question: What Clery Act violations have been reported by the US Department of Education in its investigations of higher education institutions? Fifty-eight agency investigations have been reported by the Department of Education (DOE) since 1997, although only 55 were determined to have violated the Act.¹⁶ All investigations published by August of 2014 were analyzed in the study. The agency investigations have been presented in chronological order by publication year and alphabetical order within each yearly subsection.

Agency Investigations: 1997

In 1997, the DOE first issued reports of Clery Act investigations, seven years after the Act was established. Four institutions were found to be non-compliant. Table 5.1 illustrates the institutions.

Table 5.1 Agency Investigations: 1997

1997
Institution
Clemson University
Miami University of Ohio
Minnesota State University Moorhead
Virginia Tech

¹⁶ All reports can be found at: <https://studentaid.ed.gov/about/data-center/school/clery-act>.

Clemson University, South Carolina

The University was found to have violated the mandates set forth in the Clery Act as follows:

1. Forcible and non-forcible rapes were not properly reported.
2. Qualifying incidents were not reported as hate crimes.
3. The report did not include the preceding three years as required.
4. Crimes were not reported consistently.¹⁷
5. Statistics in the report did not reflect University records.
6. Drug/alcohol policies were not included in the report.
7. Procedures for issuing warnings to the campus community were not established.
8. An adequate sexual assault policy had not been developed.
9. Reports were not submitted for each branch location where students were located.
10. Statistics were not gathered from campus sources other than the campus security office. (U.S. Department of Education, Clemson University Clery Act Report, 1997)

The University submitted a response addressing each of these findings and provided proof of the corrective measures it had taken to comply with the Clery Act. The DOE closed the investigation.

¹⁷ In 1995 the University reported one rape for the 1994 calendar year, and in 1996, the University reported two rapes for the 1994 calendar year.

Miami University of Ohio, Ohio

The DOE conducted an investigation and determined the University was not in compliance with the Clery Act. The investigation reported the following violations:

1. Crime incidents from all sources were not reported.
2. Crime statistics were not reported correctly when compared to University records.
3. Crimes occurring at “other” university properties were not included (e.g. fraternity houses).
4. Crimes were reported inconsistently in subsequent yearly reports.
5. Crime statistics from branch locations were misreported.
6. Written procedures for sexual assault disciplinary proceedings did not specify that both parties would be notified of the outcome. (U.S. Department of Education, Miami University of Ohio Clery Act Report, 1997)

The University responded that it was not required to report statistics from the counseling center due to patient confidentiality. The DOE refuted this response, as the center provided statistics in compliance with other federal regulations, and because the center would be providing numbers, not personal information that would violate a patient’s privacy rights. The University agreed to report those statistics and correct all other issues listed by the DOE. The matter was closed.

Minnesota State University Moorhead,¹⁸ Minnesota

The DOE received complaints alleging the institution was not complying with the Clery Act and opened an investigation. It found the following problems:

1. Crime statistics were estimated by the local police department.

¹⁸ Formerly Moorhead State University

2. All properties were not included in the annual report.
3. Crime statistics were not gathered from all sources.
4. Crimes were not defined and categorized consistently with the FBI Uniform Crime Reporting Program.
5. Hate crimes were not reported.
6. Crimes were not reported per calendar year.
7. Data was inconsistent in subsequent reports.
8. Timely warning procedure and policies were not established.
9. The annual report was not issued to students and employees or disclosed to prospective students and employees.
10. Policies and statements were omitted from or incomplete in the annual report.
11. Policies did not accurately represent the actual practices. (U.S. Department of Education, Minnesota State University Moorhead Clery Act Report, 1997)

The University responded but did not satisfactorily address the findings from the investigation. The DOE stated in its final report that “the institution has not fully complied with the requirements of the initial program review report. We believe that the institution has not demonstrated a serious commitment to its obligations under the [Clery Act] and has discounted the seriousness of the issues raised by this office” (U.S. Department of Education, Minnesota State University Moorhead Clery Act Report, 1997). The matter was referred to the appropriate office to impose a fine, yet no further action was taken.

Virginia Polytechnic Institute and State University, Virginia

Security On Campus, Inc., the non-profit organization started by the Clerys, filed a complaint with the DOE alleging the Campus Security Report was not in compliance with the law. Specifically, the complaint stated that a female student was sexually assaulted three times in one night in September of 1994. When Security on Campus, Inc. reviewed the statistics, two incidents were reported, and campus security confirmed the two incidents reported were not related to that particular female student. Her matter was handled by an internal disciplinary committee and never reported to campus police. Consequently, Security on Campus, Inc. alleged the University was failing to report campus crimes.

The DOE conducted an investigation and determined that crime statistics were not reported by calendar year, crime statistics were not accurately disclosed, and policies and statements were omitted or incomplete (U.S. Department of Education, Virginia Polytechnic Institute and State University Clery Act Report, 1997). The University was required to take corrective action and hired an independent firm to review those actions and certify to the DOE that the corrective measures comply with the law. The DOE closed the investigation.

Agency Investigations: 1998

During the following year, the DOE investigated only one institution for Clery Act violations. Table 5.2 shows the institution.

Table 5.2 Agency Investigations: 1998

1998
Institution
University of Pennsylvania

University of Pennsylvania, Pennsylvania

The Philadelphia Inquirer published an article entitled “How Safe is Penn? Depends on Whose Talley.” The article disclosed a discrepancy in the University’s reporting for the 1995 calendar year. The article noted the University Police database had 181 robberies for that year, yet the University reported only 18. This information was relayed to the DOE, and an investigation ensued. The DOE determined that the University’s police department patrolled a wide area other than the campus. The additional robberies did not occur on University property as defined by the Act, and the 17 reported robberies (not 18 as reported in the article) were accurate. However, the investigation revealed other issues, such as the following:

1. Hate crimes were not included in the report.
2. Reports were not accurate regarding forcible sexual assaults and liquor law violations.
3. Statistics for branch campuses were not reported separately, and the statistics from one branch location were not included.
4. Prospective students were not notified of the Campus Security Report.
5. The annual report was not provided to current students. (U.S. Department of Education, University of Pennsylvania Clery Act Report, 1998)

The University submitted reports correcting those issues, and the investigation was closed.

Agency Investigations: 2000

Two years later, the DOE published two reports regarding Clery Act violations. Table 5.3 displays the institutions.

Table 5.3 Agency Investigations: 2000

2000
Institution
Ashford University
West Virginia Wesleyan College

Ashford University,¹⁹ Iowa

The DOE received a complaint from a parent that the University was not reporting crime statistics accurately and opened an investigation. The DOE discovered the following violations:

1. All crimes statistics were not reported for calendar years 1994 – 1999 with some years showing no crimes were committed at the University.
2. Incident reports and disciplinary records could not be produced due to poor record keeping.
3. Crimes were not reported per calendar year.
4. The only crimes reported were those investigated by the local police department if it determined a crime occurred.
5. Hate crimes were not reported.
6. The annual report was not made available to prospective students and employees.
7. Policies and procedures were not disclosed in the annual reports. (U.S.

Department of Education, Ashford University Clery Act Report, 2000)

The University failed to correct all the deficiencies listed above, and the matter was referred to the proper office for sanctions. The DOE issued a fine of \$25,000, which the

¹⁹ Formerly Mount St. Clare College

University appealed. Ultimately, a settlement was reached and the University paid \$15,000 in fines for violating the requirements of the Clery Act.²⁰

West Virginia Wesleyan College, West Virginia

The DOE received a complaint from C.R.U.S.A.D.E Security, a private security firm hired by an undisclosed client to look into the College's security measures, alleging violations of state and federal law. Regarding the Clery Act, the complaint stated that “[the College] has falsified their campus criminal statistics” (U.S. Department of Education, West Virginia Wesleyan College Clery Act Report, 2000). The DOE began investigating the College for Clery Act violations and found the following instances of non-compliance:

1. Policies and procedures were either omitted from or incomplete in the annual report.
2. Hate crimes were not included.
3. Crimes were miscoded and not included in the annual reports.
4. Statistics were not collected from all sources.
5. Prospective students were not made aware of the annual report. (U.S. Department of Education, West Virginia Wesleyan College Clery Act Report, 2000)

The DOE determined that the violations were unintentional, and after the College corrected the problems, the matter was closed.

Agency Investigations: 2001

In 2001, the DOE published two reports regarding Clery Act violations. Table 5.4 illustrates the institutions.

²⁰ Ashford University was the first institution fined by the DOE.

Table 5.4 Agency Investigations: 2001

2001
Institution
College of New Jersey
Ramapo College of New Jersey

College of New Jersey, New Jersey

Upon receipt of a complaint alleging the College failed to report three incidents of sexual assault that occurred in the 1996 – 1997 academic school year, the DOE began looking into matters at the College. It found the following areas of non-compliance:

1. Three forcible sexual offenses were missing from the reports (one for calendar year 1996 and two from calendar year 1997).
2. Inconsistent crime classifications (e.g. burglary and theft) in investigative reports led to inaccurate reporting.
3. Crime statistics did not coincide with the College’s records.
4. Programs offered to inform students and employees of crime awareness were not included.
5. The timely warning policy was not included in the report. (U.S. Department of Education, College of New Jersey Clery Act Report, 2001)

The College responded, submitting evidence that corrective measures had been implemented. While the DOE noted the College’s efforts to address the problems, it referred the findings to the appropriate office for sanctions. No further action was taken against the College.

Ramapo College of New Jersey, New Jersey

The DOE investigated the College for failing to report all crimes for the 1997 – 1999 calendar years. The College acknowledged the missing incidents and indicated it

had implemented corrective measures to ensure such violations would not occur again. The DOE referred the matter for sanctions, although no further action was taken (U.S. Department of Education, Ramapo College of New Jersey Clery Act Report, 2001).

Agency Investigations: 2002

In 2002, the DOE published two reports regarding Clery Act violations. Table 5.5 shows the institutions.

Table 5.5 Agency Investigations: 2002

2002
Institution
Mount Saint Mary College
Saint Mary's College, Indiana

Mount Saint Mary College, New York

The DOE received a complaint alleging the College was not reporting sexual crimes in its annual reports and not issuing timely warnings after sexual crimes occurred. Specifically, it was alleged that the college had not issued timely warnings after the first incident, and the perpetrator had subsequently raped two other individuals. The DOE reviewed documents relevant to the 1997 – 1999 time period and interviewed college officials and local police department officials. The DOE determined the College had violated the Clery Act in the following areas:

1. Forcible sex offense in 1998 and 1999 were incorrectly reported.
2. Liquor-law violations were not all reported.
3. The number of judicial referrals for liquor law violations was underreported at 41 when the actual number was 117.
4. The number of judicial referrals for drug-abuse was underreported at 4 when the actual number was 18.

5. Timely warnings were not issued after two forcible sexual assaults were reported, and the emergency response plan was not activated.
6. The crime log was not maintained from October, 1998 through December, 1998 and in general, the crime log did not include all the required elements.
7. The crime reports were covering academic years instead of calendar years as required, and as a result, periods of time were not reported. (U.S. Department of Education, Mount Saint Mary College Clery Act Report, 2002)

The College responded that it did not include the forcible sexual assaults because it originally considered the incidents to be consensual and not sexual assaults as alleged; it was unaware that arrests had to be reported; it was counting the number of incidents involving drugs and alcohol instead of the number of people involved; and it did not issue timely warnings to protect the rights of the alleged perpetrator during the investigation. The DOE explained that because the incidents were reported as sexual assaults, they should have been coded as forcible sexual offenses; the College should be counting the number of people involved in a drug or alcohol incident; and timely warnings must be issued to protect the campus community from potential threats. The College implemented policies and procedures to address each violation. The DOE found that the College had taken appropriate corrective measures, but still referred the College to the appropriate administrative office for the assessment of fines. The College was not issued any sanctions.

Saint Mary's College, Indiana

Security on Campus, Inc. filed a complaint against the institution stating that it was not accurately reporting statistics and was not disclosing policy statements. The DOE opened an investigation against the College and found the following issues:

1. Statistics were not accurately disclosed.
2. All required categories of crimes were not included.²¹
3. Geographical breakdown of crimes statistics were not reported (e.g. on-campus, off-campus, etc.).
4. Policies were not included in the annual reports.
5. Daily crime logs did not include all incidents. (U.S. Department of Education, Saint Mary's College Clery Act Report, 2002)

The DOE determined the College had not substantively misrepresented information. It also noted that the College had made significant efforts, prior to the DOE's involvement, to comply with federal mandates regarding campus crimes. The DOE stated, "Generally, we found that the College's current overall interest and efforts in the area of campus safety were impressive" (U.S. Department of Education, Saint Mary's College Clery Act Report, 2002). The investigation of the College was closed.

Agency Investigations: 2003

Two investigations were conducted in 2002 regarding Clery Act violations.²²

Table 5.6 illustrates the institutions.

²¹ In 2000, amendments to the Clery Act added additional crime categories to be disclosed.

²² The DOE published the investigation of the University of California as three separate incidents for each of its branch locations, but issued one final determination for all three of the investigations. For the purposes of this study, the University of California and its branch locations are counted as one investigation.

Table 5.6 Agency Investigations: 2003

2003
Institution
California State University
University of California

California State University, California

The DOE received a complaint from Security on Campus, Inc. and Women Escaping a Violent Environment (WEAVE) alleging the following violations by the University:

1. The “secretive systems” of internal campus judicial systems deprive students and parents of information about misconduct (crimes).
2. Sexual assaults are underreported based on the gap between the number of sexual assaults reported to campus women’s centers and the number appearing in official university crime statistics.
3. The University did not keep statistics from disciplinary proceedings.
4. The annual report did not contain required sexual assault policies;
5. The annual report did not contain any statement about the monitoring of alcohol violations of student organizations off-campus.
6. The University failed to comply with requirements to distribute the report to all students.
7. The only crime statistics included in the report were those that had been reported to campus police and the student affairs department.

8. A victim of assault was not involved with or informed of the resolution of the disciplinary process. (U.S. Department of Education, California State University Clery Act Report, 2003)²³

The University responded to the allegations in the complaint, and the DOE determined that the responses satisfactorily addressed all the allegations. Consequently, the matter was closed.

University of California, California

Security on Campus, Inc. filed a complaint with the DOE alleging a number of allegations against the University and its branch locations. The DOE conducted an investigation and raised concerns about the University's responses to certain allegations. Specifically, it discussed the following statements from the University:

1. Law enforcement professionals had to verify that all elements of a crime could be proven before it could be reported.
2. Crimes reported to counselors did not have to be included because counselors were not considered authoritative figures with significant responsibility for student and campus activities.
3. Crimes could only be reported if the victim's identity could be disclosed.
4. Crimes reported to "other" sources (e.g. the campus's Gender Equity Center) did not have to be reported.
5. Utilizing the FBI's definition of rape, forcible sexual assaults against men were classified as aggravated assault.²⁴ (U.S. Department of Education, University of California Clery Act Report, 2003)

²³ The published reports from this investigation are different from others in that the DOE did not issue findings regarding the alleged violations.

The Department of Education determined that the problems with reporting were due to erroneous standards that the University had applied regarding the Clery Act.

1. Regarding the first erroneous standard, the DOE explained that the law does not require any law enforcement official to review or make determinations of crimes. Additionally, whether the elements can be proven is irrelevant as any incident made known to University officials should be included in the annual report.
2. The regulation does not specify titles or positions because any employee that is given information relating to a crime is responsible for reporting it.
3. The law does not require the disclosure of identifying information, only statistics. Therefore, incidents disclosed to counselors must be included in the annual report.
4. Reports from any source must be included in the statistics and not only those reviewed by law enforcement. The primary objective of the Clery Act is to provide information for the benefit of those who attend and work at institutions; if all crimes are not reported, it provides no benefit to those as intended.
5. The definition in the FBI's Uniform Crime Reporting Handbook for sexual offenses was not used for purposes of the Clery Act because of its gender limitations. The Clery Act mandates that the National Incident-Based Reporting System definition of sexual offenses should be used which would

²⁴ This allegation arose from an incident in which a male victim reported that he had been beaten with a fence post or metal rod, chained to a fence, and forced to commit oral copulation on his assailant, after which a plastic bag was duct-taped over his head. The matter was reported as an aggravated assault simply because of gender (U.S. Department of Education, University of California Clery Act Report, 2003).

have categorized the sex crime as a forcible sodomy. However, the DOE explained that when an incident takes place that results in multiple crimes, only one can be reported.²⁵ Although the University was utilizing the wrong sexual definition, reporting the crime as an aggravated assault was not a violation because the incident included multiple crimes. (U.S. Department of Education, University of California Clery Act Report, 2003)

The University provided evidence that it had corrected any errors in reporting, and the DOE closed the investigation.

Agency Investigations: 2004

Again the following year, two investigations were conducted regarding Clery Act violations. Table 5.7 lists the institutions.

Table 5.7 Agency Investigations: 2004

2004
Institution
Georgetown University
Salem International University

Georgetown University, Washington D.C.

Security on Campus, Inc. filed a complaint on behalf of a female student who was sexually assaulted on campus. The student notified the university, and an internal investigation as well as a disciplinary hearing, ensued. When the female student inquired as to the outcome of the hearing, she was made to sign a non-disclosure agreement or she would be denied access to the findings. The student stated in the complaint that she had to know “the outcome not only for [her] peace of mind but also to make decisions about

²⁵ Multiple crimes should not be confused with multiple people. If two people are assaulted, the report would list two assaults. If one person is kidnapped, assaulted, and sexually abused, only one of the crimes should be listed.

where [she] would feel safest attending school” (U.S. Department of Education, Georgetown University Clery Act Report, 2004). The complaint was filed to determine whether the University was permitted to deny victims the outcome of disciplinary hearings.

The DOE proceeded to investigate the matter and determined the following:

1. The University could not require an alleged sexual assault victim to execute a non-disclosure agreement as a pre-condition to accessing judicial proceeding outcomes and sanction information under the Clery Act.
2. The Family Education Rights and Privacy Act (FERPA) exceptions referenced in the University’s response do not apply in such cases. FERPA permits, yet does not require certain re-disclosure of judicial proceedings outcomes and sanctions to alleged victims of a crime of violence or non-forcible sex offenses.
3. The Clery Act **does** require access to outcomes and sanctions information without condition. Specifically, the statute states, “both the accuser and the accused must be informed of the outcome of any institutional disciplinary proceeding brought alleging a sex offense.” Compliance with the Clery Act does not constitute a violation of FERPA provisions. (U.S. Department of Education, Georgetown University Clery Act Report, 2004)

The University was required to change its policies and submit the modifications to the DOE within 30 days of the decision. Although the DOE determined a violation had occurred, it did not seek sanctions against the University as this was an issue that needed to be clarified for all institutions.

Salem International University, West Virginia

The chief of police for the local police department submitted a complaint that University officials were impeding the police department's enforcement on campus. The complaint alleged that campus officials had destroyed evidence, obstructed investigations, and hindered access to the campus, employees, and students. The complaint specified an incident that occurred in August of 1998 when three students from China, participating in a summer youth camp, disappeared from campus with their possessions remaining in the dorm rooms.²⁶ The University never reported the incident to any law enforcement agency, choosing instead to conduct an internal investigation. An informal search of the grounds was conducted, and the "University concluded that the youths' disappearance was probably pre-arranged, that they were safe, and most likely living with family members in the United States" (U.S. Department of Education, Salem International University Clery Act Report, 2004).

Through its own sources, the FBI learned of the incident in October of 1998 and conducted an investigation, but the youths' disappearance was never solved. The complaint noted that the "University is still unable to provide any substantive evidence that these youths did not meet with foul play" (U.S. Department of Education, Salem International University Clery Act Report, 2004). The DOE opened an investigation explaining that it was unlikely that the incident would have resulted in any mandatory reporting under the Clery Act, but it raised concerns about the University's response to such incidents (U.S. Department of Education, Salem International University Clery Act Report, 2004).

²⁶ Three other students, participating in the program, were picked up at John F. Kennedy airport and were also never seen again.

The investigation revealed the following Clery Act violations:

1. The University did not have the administrative capability to comply with the Act. For example, the annual budget for the Office of Campus Security was insufficient to meet the security needs of the institution. Specifically, the annual budget for fiscal year 2000 was \$2,075. Total enrollment for fiscal year was approximately 625 students, which amounted to less than \$4.00 per student. Of the three staff members, only one received an annual salary above \$20,000, resulting in high turnover and low morale. Staff was required to handle other duties, such as installing telephones and internet cables, working on the campus cooling system, and watering the lawn.
2. Incidents were not reported or underreported. The University reported zero forcible sex offenses since the reporting requirement began, yet over two calendar years, five sexual assaults occurred and were reported to University officials. Additionally, over three calendar years, 40 burglaries were not reported. Alcohol, drug, and weapons violations were underreported by 39 incidents.
3. Crimes were miscoded and not included in the annual report.
4. Crime statistics were not collected from all sources. This was due in part to the disintegrated relationship between the University and the local police department. The campus community was given a directive stating that they were not to give out information regarding any student, staff, or faculty member at the University. The directive applied to everyone, including the

Salem police department. If any information were released, it could result in the termination of the person who released the information.

5. Timely warnings were not issued.
6. The annual report was not distributed to current students and employees, and prospective students and employees were not notified of its availability.
7. Policies and procedures were not included in the annual report. (U.S. Department of Education, Salem International University Clery Act Report, 2004)

The University was required to address each violation and implement corrective measures. The DOE closed the investigation. The matter was referred for sanctions and a fine of \$250,000 was imposed. The University paid \$200,000 in fines.

Agency Investigations: 2005

In 2005, three institutions were investigated for possible Clery Act violations, yet only two institutions were determined to have violated the provisions of the Act.²⁷ Table 5.8 illustrates the institutions.

Table 5.8 Agency Investigations: 2005

2005
Institution
Miami University of Ohio
Northern Illinois University

Miami University of Ohio, Ohio

Security on Campus, Inc. filed a complaint with the DOE on behalf of a former student. As the victim in a sexual assault on campus, the student was not properly informed of the outcome of the disciplinary hearing. The DOE initiated an investigation

²⁷ Saint Mary's College of California was the third institution investigated in 2005.

regarding this specific issue and found six violations. Specifically, in the preceding five years, nine sexual assaults had occurred on campus and resulted in disciplinary hearings. The DOE found that the University had only provided victims written notice regarding the outcome of the disciplinary proceedings in three of those cases. Out of the six remaining matters, the University provided information regarding the outcome verbally to the victims in three cases, no notification to victims in two cases, and verbally gave the wrong information to the victim in one case.

After the DOE notified the University of these violations, it provided written notice of the outcomes to the victims in the six matters. By that time, the written notice “was anywhere from six months to five years after the disciplinary hearings” (U.S. Department of Education, Miami University of Ohio Clery Act Report, 2005). The DOE noted that in the 1997 investigation of the University, the DOE cited the University because its “written procedures for sexual assault disciplinary proceedings did not specify that both parties would be notified of the outcome” (U.S. Department of Education, Miami University of Ohio Clery Act Report, 1997). At that time, the University changed its policy to provide for written notification to both parties; yet, in six incidents, the policy had not been followed. The DOE referred the matter for further sanctions and the University was fined \$27,500.

Northern Illinois University, Illinois

The DOE opened an investigation after receiving a complaint from Security on Campus, Inc. alleging that the University (1) failed to accurately report arrests and referrals for campus disciplinary action for liquor law violations, and (2) failed to properly maintain daily crime logs (U.S. Department of Education, Miami Northern

Illinois University Clery Act Report, 2005). Regarding the first issue, the complaint alleged that the University was not reporting individuals given citations for violating the local city ordinance. Additionally, the University was not reporting those individuals who were cited by the University for liquor violations and given “green cards.”²⁸ With regard to the daily logs, the complaint alleged that the University was not making entries into the log within the two business day allotment of time following an incident.

The DOE’s investigation was limited to the issues within the complaint, and it found that the University was only reporting incidents for state law violations, although the Clery Act covers laws and ordinances. Therefore, the University should have been reporting individuals cited by city police under the local ordinance. However, the DOE determined that the “green card” participants did not have to be reported, as the citation was not a disciplinary action. If an individual failed to complete the course and was referred for disciplinary action, that individual should be included in the statistics. Finally, the DOE reviewed the University’s response to the maintenance of the daily log and found that the University is required to keep the electronic version updated as well as the hard copy. The University’s problem with its electronic version was a result of technical software issues that were being corrected. The DOE closed the case after informing the University that its auditor must address all corrective measures in its next non-federal audit.

Agency Investigations: 2006

In 2006, the DOE investigated two institutions for Clery Act violations. Table 5.9 illustrates the institutions.

²⁸ The University used green cards as an opportunity to educate individuals about alcohol abuse. An individual had to complete an on-line course and submit the certificate of completion to campus police. If the on-line course was not completed, the individual would be arrested or referred for disciplinary action.

Table 5.9 Agency Investigations: 2006

2006
Institution
LaSalle University
Ohio State University

LaSalle University, Philadelphia

The DOE conducted an investigation of the University regarding its compliance with the Clery Act. The DOE found the following areas of non-compliance:

1. Incidents were omitted or miscoded, and crime statistics were inaccurate for calendar years 2001 and 2002 (26 additional serious crimes, including sex offenses and aggravated assaults, were not reported in 2001; 9 in 2002).
2. Liquor and drug disciplinary referrals were improperly reported (1 liquor law violation was reported in 2002 when the actual number was 87).
3. Timely warnings were not issued to the campus community following two sexual assault incidents.
4. Daily crime logs were not maintained.
5. Required policies and procedures were not included in the annual report. (U.S.

Department of Education, LaSalle University Clery Act Report, 2006)

The DOE clarified a misconception regarding whether an institution can refrain from issuing timely warnings. The University was under the impression that suspending the alleged perpetrators eliminated the need for crime alerts. The DOE explained that the purpose of timely warnings are to “alert the campus community of potential threats, and thereby, [enable] the community to protect themselves and assist in preventing similar crimes...Suspending students would not achieve this requirement, as the potential of a serious threat continued” (U.S. Department of Education, LaSalle University Clery Act

Report, 2006). The DOE considered the University's response regarding corrective actions to all the violations and determined that it was taking the appropriate steps to comply with the Act. The matter was referred for sanctions and a fine of \$110,000 was imposed. The matter was resolved with a fine of \$87,500.

Ohio State University, Ohio

The University was investigated for possible Clery Act violations. The DOE found the following issues:

1. Inaccurate statistical information in the annual crime report for calendar years 2001 – 2003 were not supported by documentation.
2. Incidents reported to authorities other than the police were improperly documented and reported.
3. The daily crime log did not contain all required data.
4. The annual report was not distributed to students and staff by October 1 in 2002 and 2003. (U.S. Department of Education, Ohio State University Clery Act Report, 2006)

The DOE closed the matter after the University submitted evidence of its corrective measures.

Agency Investigations: 2007

Only one institution was investigated in 2007 by the DOE for Clery Act violations. Table 5.10 shows the institution.

Table 5.10 Agency Investigations: 2007

2007
Institution
Eastern Michigan University

Eastern Michigan University, Michigan

After a female student was found dead in her dorm room on December 15, 2006, the University issued a written statement to the campus community the following day, indicating there was no reason for alarm, as it was not a case involving foul play. On February 23, 2007, a suspect was arrested and charged with the rape and murder of the female student. University officials knew it was a criminal incident from the day it occurred, as campus police actively participated in the homicide investigation with local law enforcement agencies, and identified the suspect. Security on Campus, Inc. filed a complaint with the DOE alleging multiple violations of the Clery Act. The DOE opened an investigation and found the following infractions:

1. A timely warning was not issued following the student's suspicious death when the initial incident reports indicated foul play leading to a homicide investigation, and the suspect was a registered student who remained on campus.
2. There was a lack of administrative capability regarding institutional training, oversight, and supervision in ensuring compliance.
3. The policy and procedures for timely warnings were not included in the annual report.
4. Crime statistics were not properly disclosed in calendar years 2003 – 2005.
5. Statistics were not gathered from all sources for the annual report.
6. Policies and procedures were not included in the annual report.
7. The daily crime log was not maintained. (U.S. Department of Education, Eastern Michigan University Clery Act Report, 2006)

The University did not dispute any of the findings from the DOE investigation as it had hired a law firm to conduct an independent investigation, which produced the same findings.²⁹ The University took corrective measures addressing each of the issues listed. The DOE referred the matter for sanctions and a fine of \$357,500 was imposed. The fine was later reduced to \$350,000.

Agency Investigations: 2008

In 2008, the DOE investigated two institutions for Clery Act violations. Table 5.11 shows the institutions.

Table 5.11 Agency Investigations: 2008

2008
Institution
Paul Smith’s College of Arts and Sciences
University of Virginia

Paul Smith’s College of Arts and Sciences, New York

The Department of Education received a complaint from Senator Christopher Dodd’s office alleging the College might be in violation of the Clery Act surrounding the death of two people (one was a student) on a snowmobile after a student-organized party. The DOE reviewed reports and disciplinary records, and interviewed College officials and local agency officials. The DOE determined that the College had violated the Clery Act and cited the following problems:

1. There was a lack of administrative capability regarding institutional training, oversight, and supervision in ensuring compliance.

²⁹ As a result of the independent investigation, the President, Vice President for Student Affairs, and the Director of Public Safety were terminated from employment with the University.

2. Crime statistics were not properly disclosed (11 crimes were not reported in 2004 and 20 were not reported in 2005).
3. The College had not defined its campus in accordance with the definition in the federal regulations, and failed to report crimes for non-contiguous locations.
4. Procedures were not established for collecting data from all sources.
5. The annual report was not distributed to all current students and employees, and all prospective students and employees were not notified of the annual report.
6. A daily crime log was not maintained.
7. Policy requirements such as drug and alcohol policies as well as sexual assault education, prevention, and adjudication policies were omitted from the annual report.
8. Hate crimes were not included.
9. Crime statistics were not reported on a calendar year basis. (U.S. Department of Education, Paul Smith's College of Arts and Sciences Clery Act Report, 2008)

The College's response adequately addressed the issues including corrective actions that were taken to comply with the Act. The DOE referred the matter for sanctions and a fine of \$260,000 was imposed. The College ultimately paid \$195,000 in fines.

University of Virginia, Virginia

Security on Campus, Inc. filed a complaint on behalf of two sexual assault victims, alleging the University would not provide the two victims notice of the outcome

of the relevant disciplinary hearings. University officials warned the students that if they discussed the findings, sanctions could be imposed against them. They were instructed that any breach of confidentiality could be a violation of the honor code, resulting in suspension or expulsion. The DOE investigated the matter and determined that the University “cannot require an accuser to agree to abide by its non-disclosure policy, in writing or otherwise, as a pre-condition to accessing judicial proceedings outcomes and sanction information under the Clery Act. The Clery Act does require access to outcomes and sanctions information without condition” (U.S. Department of Education, University of Virginia Clery Act Report, 2008). The University was required to conduct a comprehensive review of its policies and procedures, specifically addressing how it would inform the parties to a sexual assault disciplinary hearing of the outcome. The University had to submit a copy of the revised policies, explaining the revisions, and submit a copy of the most recent annual report. This information had to be supplied to the DOE within thirty days. Due to the confusion regarding the Clery Act and FERPA provisions, the DOE did not refer the matter for sanctions.

Agency Investigations: 2009

In 2009, the number of institutions investigated for Clery Act violations increased.³⁰ Table 5.12 illustrates the institutions.

³⁰ The DOE published the investigation of Alamo Colleges as four separate incidents for each of its branch locations, but issued one final determination for all four of the investigations. For the purposes of this study, Alamo Colleges and its branch locations are counted as one investigation.

Table 5.12 Agency Investigations: 2009

2009
Institution
Alamo Colleges
Schreiner University
Tarleton State University
West Virginia University

Alamo Colleges, Texas

The DOE learned about a fatal shooting at a branch location of Alamo Colleges. As the information for the branch locations are included in one annual report issued by Alamo Colleges, the DOE began an investigation. The following violations were reported:

1. Policies for the branch locations were inadequate in the annual report.
2. Crime statistics, specifically all crime categories, were not accurately reported.
3. Crime statistics were not listed according to geographic location. (U.S.

Department of Education, Alamo Colleges Clery Act Report, 2009)

The College corrected the errors in its reporting and the DOE closed the investigation.

Schreiner University, Texas

On January 22, 2005, a fifteen year-old female was drugged and raped at an apartment complex on campus. The rape was reported to local police on May 22, 2005, and later to campus officials in August. The incident was not included in the statistics for that year. Security on Campus, Inc. filed a complaint with the DOE. An investigation ensued, and the DOE determined the following instances of non-compliance:

1. Crime statistics were not accurately reported.

2. Crime statistics, specifically all crime categories, were not accurately reported.
3. Required policies and statements were not included in the annual report. (U.S. Department of Education, Schreiner University Clery Act Report, 2009)

The University took corrective measures regarding violations 2 and 3. Regarding the first violation, the University stated that the rape incident was not included in the statistics because the victim and her family did not file a report with the University, although the local police department informed the University of the incident in August. The DOE explained that “an institution may only exclude incidents which have been officially unfounded (i.e. a determination is made by a law enforcement authority that an incident did not occur)” (U.S. Department of Education, Schreiner University Clery Act Report, 2009). The University corrected its statistics regarding the rape. The DOE referred the matter for sanctions and a fine of \$55,000 was imposed. The University paid \$42,000 in fines.

Tarleton State University, Texas

The University’s campus newspaper reported that the institution was underreporting forcible sex offenses and burglaries. Security on Campus, Inc. sent the information to the DOE for review. The DOE investigated the allegations and found the University had not reported 4 burglaries, 6 drug law violation arrests, and 2 drug law violation referrals. Prior to the DOE’s investigation, the University had revised its reports for calendar years 2003 – 2005. The revision included 35 excluded burglaries, 22 excluded alcohol and liquor law violations, 3 excluded forcible sex offenses, and 1 robbery. The DOE referred the matter for sanctions and a fine of \$137,000 was imposed.

The University appealed the fine to the Administrative Law Court and the judge reduced the fine to \$27,500. The Secretary of Education reviewed the decision after the DOE appealed. The Secretary overruled the judge's ruling and stated "there is no fact in the record supporting the [Administrative Law Judge's] conclusion that [the University's] failure to 'disclose 40 crimes, including three sexual assaults and 22 arrests in one year'...was due to a misunderstanding of Clery Act requirements or that a mitigation of the fine is warranted" (U.S. Department of Education, Tarleton State University Clery Act Report, 2009). The Secretary of Education upheld the issuance of the maximum penalty for each violation (i.e. \$27,500 multiplied by the number of violations) instead of grouping them all together under the maximum penalty (i.e. \$27,500). Otherwise, "[a] single fine for issuing a crime report missing multiple crimes is tantamount to sending the message to postsecondary institutions throughout the nation that regardless of whether your crime report omits one crime or 101 crimes, the maximum fine is the same" (U.S. Department of Education, Tarleton State University Clery Act Report, 2009). However, the Secretary of Education determined that the DOE could not adequately explain a portion of the fine, and remanded the matter back to the agency for recalculation. Ultimately, the University paid \$110,000 in fines.

West Virginia University, West Virginia

Security on Campus, Inc. submitted a complaint alleging that the University was improperly classifying crimes in violation of the Clery Act. The complaint stated that "according to two current and one former University Police officers, reports that should properly be classified as burglaries, and thus be reportable under the Act, were being classified instead as petite larceny or theft, which is not reportable in annual statistics"

(U.S. Department of Education, West Virginia University Clery Act Report, 2009). The DOE began an investigation and reviewed records for calendar years 2001 – 2002. It determined that the University had failed to properly disclose crime statistics (44 incidents were not reported in 2001 and 100 incidents were not reported in 2002). The University acknowledged its failure to accurately report crimes and agreed to follow the directives of the DOE to correct the issues in its collection, coding, and reporting for the annual report. The investigation was closed.

Agency Investigations: 2010

In 2010, the DOE investigated seven institutions for violating the Clery Act.

Table 5.13 displays the institutions.

Table 5.13 Agency Investigations: 2010

2010
Institution
Florida State University
Liberty University
Notre Dame College of Ohio
Oregon State University
Slippery Rock University
Virginia Tech
Wesley College, Delaware

Florida State University, Florida

The DOE, in conjunction with the Federal Bureau of Investigations (FBI) Criminal Justice Information Service Audit Unit, selected the University from a sample of institutions with sworn police departments to investigate its compliance with the Clery Act. The DOE found the following issues:

1. A policy for preparing the annual report was not developed or implemented.
2. Crimes statistics were not properly coded.

3. Crimes statistics were not categorized by geographical location.
4. The daily crime logs did not include dispositions of reported incidents.
5. Policies and procedures were not followed regarding drug and liquor law arrests and disciplinary referrals. (U.S. Department of Education, Florida State University Clery Act Report, 2010)

The University responded, correcting each violation, and the investigation was closed.

Liberty University, Virginia

Security on Campus, Inc. filed a complaint on behalf of students at the University alleging a number of violations, including the University's response to a sexual assault, the most serious incident. The DOE opened an investigation and found the following Clery Act violations:

1. Crime statistics were not properly categorized.
2. Timely warnings were not issued following aggravated assaults and forcible sex offenses.
3. Incidents were not recorded in the daily crime log.
4. Policies and statements were not included in the annual report.
5. Annual reports were not distributed to the campus community by October 1.

(U.S. Department of Education, Liberty University Clery Act Report, 2010)

The University was required to examine its campus security program addressing each of the violations and report back to the DOE submitting evidence of compliance. The matter was referred for sanctions and a fine of \$165,000 was imposed. The University paid \$120,000 and the investigation was closed.

Notre Dame College of Ohio, Ohio

Security on Campus, Inc. filed a complaint with the DOE, alleging that the College failed to issue timely warnings after a student perpetrator committed two sexual assaults during the fall semester. The complaint noted that four additional sexual assaults, committed by the same perpetrator, were reported at later dates and could have been prevented, had timely warnings been issued. The DOE investigated the matter and determined that the University failed to issue timely warnings. Evidence indicated that in October of 2005, two female students alerted a University official that they had been sexually assaulted in their dorm room. Neither student wished to take legal or campus disciplinary actions. The University official reported the incidents to campus security at the end of November, but did not identify the assailant or the victims. Both students contacted campus security in December and identified the assailant. Campus security issued timely warnings after receiving complaints from the students (U.S. Department of Education, Notre Dame College of Ohio Clery Act Report, 2010).

The University responded that a timely warning was not required for either incident because the University official made the determination that the incidents did not represent a threat to students and employees. The DOE found that there was no policy or procedures in place for the University official to make that determination. Furthermore, when campus security received the same reports in December, it considered the reports of a serious nature, requiring timely warnings. The University was required to establish policies and procedure for issuing timely warnings.

Additionally, the DOE determined that the crime statistics were inaccurately reported. The College corrected the errors in its annual report, and the matter was closed.

The DOE referred the matter for further sanctions and a fine of \$165,000 was imposed. Ultimately, the University paid \$89,000 in fines.

Oregon State University, Oregon

The DOE conducted an investigation to review the University's campus security. The DOE found that the University had failed to accurately report its statistics. The University had provided incorrect information to both the agency and the campus community. The crimes statistics were reported as follows:

1. Forcible sex offenses: 7 to the campus community, 3 to the agency, and 8 actual incidents.
2. Aggravated assaults: 3 to the campus community, 1 to the agency, and 4 actual incidents.
3. Robbery: 0 to the campus community and the agency with 1 actual incident.
4. Burglary: 46 to the campus community, 30 to the agency, and 59 actual incidents.
5. Motor vehicle thefts: 5 to the campus community, 2 to the agency, and 9 actual incidents.
6. Liquor law arrests: 386 to the campus community, 0 to the agency, and 543 actual incidents.
7. Weapons law arrests: 2 to the campus community, 0 to the agency, and 10 actual incidents.
8. Drug law arrests: 93 to the campus community, 0 to the agency, and 93 actual incidents. (U.S. Department of Education, Oregon State University Clery Act Report, 2011)

The University corrected its statistics and the DOE closed the matter. It was referred for sanctions and a fine of \$280,000 was imposed. The University paid \$220,500 in fines.

Slippery Rock University, Pennsylvania

The DOE selected the University from a sample of institutions with sworn police departments to investigate its compliance with the Clery Act. The DOE found the following infractions:

1. Crimes statistics were not properly classified (two burglaries were misclassified);
2. Crimes statistics were not categorized according to geographic location;
3. The annual report was not distributed to the campus community by October 1; and
4. The daily crime log was not maintained. (U.S. Department of Education, Slippery Rock University Clery Act Report, 2010)

The University submitted evidence of its corrective measures and the DOE closed the matter.

Virginia Tech, Virginia

As a consequence of the mass shooting at Virginia Tech on April 16, 2007, in which thirty-two individuals were murdered and two were seriously injured, the DOE conducted an investigation to determine whether the University had violated the Clery Act by failing to issue a timely warning to the campus community. The DOE determined that the University failed to issue a timely warning. Specifically, the “warnings that were issued by the University were not prepared or disseminated in a manner to give clear and timely notice of the threat to the health and safety of campus community members” (U.S.

Department of Education, Virginia Tech Clery Act Report, 2010). Furthermore, the University did not follow its policy for issuing warnings.

On the morning of April 16, two students were shot in a campus dorm at 7:15 a.m. Police arrived at the scene at 7:24 a.m. and notified University officials at 7:57 a.m. The University's Policy Group met at 8:25 a.m. to discuss the matter and issued a warning at 9:26 a.m. Regarding the allegation that the warning was not timely, the University stated that the warning at 9:26 a.m. was sufficient and met the requirements of the Clery Act as there was no evidence of an ongoing threat. The DOE found that an ongoing threat did exist as University officials were told "one victim was dead, one was critically injured, no witnesses saw the incident, no weapon was found at the scene, bloody footprints were leading away from the bodies, and no suspect was in custody or had even been questioned" (U.S. Department of Education, Virginia Tech Clery Act Report, 2010). The DOE had always instructed institutions that the "determination of whether a warning is timely is determined by the nature of the crime, the continuing danger to the campus community, and the possible risk of compromising law enforcement efforts among other circumstances surrounding the event in question" (U.S. Department of Education, Virginia Tech Clery Act Report, 2010). The DOE noted that the "shooting in [the campus dorm] is precisely the type of event for which the timely warning requirement was intended" (U.S. Department of Education, Virginia Tech Clery Act Report, 2010).

The DOE also found that the warning issued at 9:26 a.m. lacked specific information to alert the campus community. The message indicated that a shooting had occurred and to be cautious, yet the warning did not state that two potential murders had

taken place. The DOE noted that University officials “made decisions about the actions they needed to or didn’t need to take to protect themselves and their families,” as phone calls were made advising family members of the situation (U.S. Department of Education, Virginia Tech Clery Act Report, 2010). Furthermore, one University official locked his office, a number of buildings were locked down, and the trash pickup was cancelled prior to the warning being issued. The DOE noted that had the warning been issued timely, “other members of the campus community may have had enough time to take similar actions to protect themselves” (U.S. Department of Education, Virginia Tech Clery Act Report, 2010). The DOE emphasized that waiting more than two hours to notify the campus community of a shooting with one person dead and another critically injured, was simply not timely.

In addition to not issuing a timely warning, the DOE determined that the University did not follow its policy submitted in the annual report. The policy in the annual report indicated that campus police would draft and issue timely warnings, yet the internal policy that was followed required the Policy Group to meet, discuss, and determine whether an alert was necessary. A representative from campus police was not in the Policy Group, so the practice followed did not coincide with the information submitted in the annual report. The DOE closed the investigation and referred the matter for sanctions. A fine of \$55,000 was imposed. The University appealed the decision in light of the fact that an institution had not previously been fined for inconsistent policies. The Secretary of Education ruled in favor of the University because the violation was not in failing to issue a warning, but for failing to issue a warning in a timely manner due to inconsistent policies and practices. The University was required to pay \$5,000 in fines.

Wesley College, Delaware

Security on Campus, Inc. filed a complaint on behalf of a group of students because the College failed to issue a timely warning following a sexual assault. The DOE conducted an investigation into the allegations surrounding the incident. On the morning of February 12, 2006, a female student was sexually assaulted in her dorm room by a student acquaintance. She reported it to campus security and victim's services that same day, and the local police department was contacted. The following day, the assailant contacted the student via text message and substantively confessed to the crime during the exchange. The assailant was arrested on February 15th and dismissed from the College on February 20th. The campus community was alerted to the matter by the local newspaper after the student was arrested. The student remained on campus for three days and the College failed to evaluate whether an alert was necessary. The DOE determined that a timely warning should have been issued on February 12th. The agency noted that the incident "posed a clear and ongoing threat to the health and safety of the campus community" (U.S. Department of Education, Wesley College Clery Act Report, 2010). The DOE cited the following violations:

1. Timely warnings were not issued in accordance with federal regulations.
2. Daily crime logs were not maintained.
3. Policy statements and procedures were not included in annual reports. (U.S.

Department of Education, Wesley College Clery Act Report, 2010)

The DOE required the College to submit a status report within sixty days delineating its corrective actions. The matter was referred for sanctions and a fine of \$60,000 was imposed. The College paid \$45,000 in fines.

Agency Investigations: 2011

In 2011, the DOE investigated more institutions for Clery Act violations than any other year. Seventeen institutions were investigated, although only fifteen institutions were determined to be in violation of the Act.³¹ Table 5.14 illustrates the institutions.

Table 5.14 Agency Investigations: 2011

2011
Institution
College of New Jersey
Louisiana State University
Lincoln University
Oklahoma State University
South Dakota State University
University of Arkansas
University of Michigan
University of North Dakota
University of Northern Iowa
University of Texas, Arlington
University of Utah
University of Vermont
University of Wisconsin, Green Bay
Washington State University
Yale University

College of New Jersey, New Jersey

The DOE selected the College from a sample of institutions with sworn police departments to investigate its compliance with the Clery Act. The DOE determined that the institution failed to properly disclose hate crimes, arrests, and disciplinary statistics in the annual report and in its online statistics database (U.S. Department of Education, College of New Jersey Clery Act Report, 2011). The College corrected the inaccurate statistics and the matter was closed.

³¹ Franklin Pierce University and Wake Forest University were the two institutions for which no violation was found in 2011.

Louisiana State University, Louisiana

The DOE selected the University from a sample of institutions with sworn police departments to investigate its compliance with the Clery Act. The DOE found that the University had submitted inaccurate crime reports to the agency. The University's annual reports were accurate, but the information it submitted to the DOE for calendar years 2006 – 2008 contained incorrect numbers (U.S. Department of Education, Louisiana State University Clery Act Report, 2011). The University stated that the discrepancy occurred because of procedural errors. Following the investigation, the errors were corrected. The DOE closed the matter.

Lincoln University, Missouri

The DOE conducted an investigation to review the University's campus security. The DOE found the following infractions:

1. Record keeping was insufficient and crime statistics could not be substantiated.
2. Crimes were miscoded in the daily crime log.
3. Annual reports were not distributed in 2006 and 2007.
4. Daily crime logs were not kept until 2008.
5. Victims of sexual assaults were not provided written notice of the outcome of disciplinary hearings.
6. Possible sanctions for sex offenses were not included in the sexual assault policies.
7. Sexual assault policies were procedurally insufficient.

8. Crimes statistics were not accurately disclosed regarding geographical locations.
9. Crimes statistics were not collected from all sources.
10. Hate crimes were not included. (U.S. Department of Education, Lincoln University Clery Act Report, 2011)

The University submitted evidence that it had corrected or established measures to correct each infraction. The DOE closed the investigation and referred the matter for sanctions. A fine of \$275,000 was imposed.

Oklahoma State University, Oklahoma

The DOE selected the University from a sample of institutions with sworn police departments to investigate its compliance with the Clery Act. The DOE determined that the University did not include policies and procedures in its annual report and was not properly classifying crimes (U.S. Department of Education, Oklahoma State University Clery Act Report, 2011). The University submitted information correcting the errors and the DOE closed the investigation.

South Dakota State University, South Dakota

The DOE selected the University from a sample of institutions with sworn police departments to investigate its compliance with the Clery Act. The DOE determined the University had violated the Clery Act in the following areas:

1. Crime statistics were not properly classified and disclosed (one aggravated assault, one motor vehicle theft, and five burglaries were improperly classified).

2. Crime statistics were not properly reported (underreported and over reported in all categories).
3. Crime statistics were not reported for non-campus buildings and property (e.g. fraternity housing).
4. Crime statistics were not collected from all sources.
5. A daily crime log was not maintained.
6. Policy statements and procedures were not included in the annual report. (U.S. Department of Education, South Dakota State University Clery Act Report, 2011)

The University was required to address each violation and implement corrective measures. The DOE closed the investigation.

University of Arkansas, Arkansas

The DOE selected the University from a sample of institutions with sworn police departments to investigate its compliance with the Clery Act. The DOE found that the University had not properly maintained its daily crime log. (U.S. Department of Education, University of Arkansas Clery Act Report, 2011). The University implemented measures to ensure compliance with the Act and the investigation was closed.

University of Michigan, Michigan

The DOE selected the University from a sample of institutions with sworn police departments to investigate its compliance with the Clery Act. The DOE determined that the University failed to properly disclose crime statistics (underreporting and over reporting crimes) and failed to report all crimes occurring in non-campus buildings or

property (e.g. fraternity housing) (U.S. Department of Education, University of Michigan Clery Act Report, 2011). The University corrected the errors in its reports and corrected its procedures for collecting statistics from all locations as required by the Clery Act.

The DOE closed the matter.

University of North Dakota, North Dakota

The DOE selected the University from a sample of institutions with sworn police departments to investigate its compliance with the Clery Act. The DOE found that crime statistics were not properly classified and disclosed, crimes for non-campus buildings and properties were not reported (18 properties were not included), and policy and procedures were not included in the report (U.S. Department of Education, University of North Dakota Clery Act Report, 2011). The University instituted corrective measures to address the violations and the investigation was closed. The DOE reported the matter for sanctions and a fine of \$115,000 was imposed.

University of Northern Iowa, Iowa

The DOE selected the University from a sample of institutions with sworn police departments to investigate its compliance with the Clery Act. The DOE found the following violations:

1. Crime statistics were inaccurately reported to the DOE, but not in the report issued to the campus community (40 liquor law violations were reported when the actual number was 407).
2. Current students and employees were not notified that the annual report was available.
3. Timely warning policies were insufficient.

4. Sexual assault policies were insufficient. (U.S. Department of Education, University of Northern Iowa Clery Act Report, 2011)

The University submitted information addressing each of the issues raised by the DOE. The matter was closed and referred for sanctions. A fine of \$110,000 was imposed.

University of Texas at Arlington, Texas

The DOE selected the University from a sample of institutions with sworn police departments to investigate its compliance with the Clery Act. The DOE determined that the University failed to properly classify, compile and disclose crime statistics. Specifically, the University classified a forcible fondling as an assault, an aggravated assault as an assault of a family member, and two motor vehicle thefts as the unauthorized use of a motor vehicle. The improper classifications resulted in the exclusion of these incidents from the statistics. The University also underreported arrests for liquor law violations, drug law violations, and weapons law violations (U.S. Department of Education, University of Texas, Arlington Act Report, 2011). The University was required to reclassify crimes and correct its statistics, and the DOE closed the investigation with a referral for sanctions. A fine of \$82,000 was imposed and the University paid \$49,000 in fines.

University of Utah, Utah

The DOE selected the University from a sample of institutions with sworn police departments to investigate its compliance with the Clery Act. The DOE found the following problems:

1. Policies and procedures were not included in the annual report.
2. Crimes were improperly classified (two burglaries were reported as thefts).

3. Crimes statistics were improperly reported (some were underreported and some were over reported).
4. Crimes statistics did not include non-campus buildings or property (e.g. fraternity housing).
5. Proper notice of the annual report was not given to current students and employees, or prospective students and employees. (U.S. Department of Education, University of Utah Clery Act Report, 2011)

The University addressed each violation in its response and submitted information indicating its corrective measures. The DOE closed the investigation.

University of Vermont, Vermont

The DOE selected the University from a sample of institutions with sworn police departments to investigate its compliance with the Clery Act. The DOE found the following issues:

1. Crime statistics were not accurately reported (20 sexual assaults were misclassified).
2. Daily crime logs were not maintained.
3. Timely warning policies were inadequate.
4. Sexual assault policies were inadequate.
5. The e-mailed notice to the campus community of the availability of the annual report did not include its location. (U.S. Department of Education, University of Vermont Clery Act Report, 2011)

The University stated that it failed to report the 20 anonymous sexual assaults to the DOE (they were included in the annual report given to the campus community) because it did

not believe anonymous complaints were required. The DOE explained that an institution may include a caveat in the crime report, noting the sex offenses that were reported anonymously. However, all sex offenses must be reported. The University took measures to correct each violation. The DOE closed the investigation and referred the matter for sanctions. A fine of \$65,000 was imposed and the University paid \$55,000 in fines.

University of Wisconsin at Green Bay, Wisconsin

The DOE selected the University from a sample of institutions with sworn police departments to investigate its compliance with the Clery Act. The DOE determined that crime statistics were improperly classified and disclosed. Specifically, there were three incidents that were classified incorrectly, one instance of underreporting, and multiple discrepancies in its arrest and disciplinary referral statistics (U.S. Department of Education, University of Wisconsin at Green Bay Clery Act Report, 2011). The University corrected those issues and the DOE closed the investigation.

Washington State University, Washington

The DOE selected the University from a sample of institutions with sworn police departments to investigate its compliance with the Clery Act. The DOE found that sexual crimes statistics were not properly classified and disclosed, and policies and procedures were not included in the annual report (U.S. Department of Education, Washington State University Clery Act Report, 2011). The DOE detailed two incidents of sexual assaults that were incorrectly handled. The first was correctly coded as a domestic dispute when campus police arrived at the scene of the incident. The victim later submitted a written statement regarding the incident that indicated her husband had given her sleeping pills,

and one of his friends had raped her. The DOE determined that campus police failed to properly recode the matter after the new information was received.

The second incident was properly coded as a sexual assault taking place in a campus dorm. The records manager removed the crime from the statistics after deciding that the incident was unfounded. The DOE determined that the records manager had no authority to make that determination, as “only sworn or commissioned law enforcement personnel may “unfound” a crime” (U.S. Department of Education, Washington State University Clery Act Report, 2011). The University corrected its statistics and included all required policies and procedures in its annual report. The DOE closed the matter and referred it for sanctions. A fine of \$82,500 was imposed.

Yale University, Connecticut

The DOE reviewed an article published in the Yale Alumni Magazine, which indicated that the University was not in compliance with the Clery Act. The DOE required the University to respond to three areas of violations mentioned in the article. Based on the University’s response, the DOE conducted an on-site, comprehensive review of the University’s campus security. The DOE found the following violations of the Clery Act:

1. Crime statistics were not properly compiled and disclosed (four sexual assaults were not reported).
2. Timely warnings were not issued following serious crimes.
3. The campus areas were not defined and branch locations were not included in the annual report.

4. Policy statements and procedures were not included in the annual report. (U.S. Department of Education, Yale University Clery Act Report, 2011)

The University responded that corrective measures were in place to address the violations. The DOE closed the investigation and referred the matter for further sanctions. A fine of \$165,000 was imposed and the University ultimately paid \$155,000 for violating the Clery Act.

Agency Investigations: 2012

The following year, the number of investigations significantly decreased to three.

Table 5.15 shows the institutions.

Table 5.15 Agency Investigations: 2012

2012
Institution
Delaware State University
Dominican College of Blauvelt
University of Delaware

Delaware State University

The DOE conducted an investigation to review the University’s campus security. The DOE found that the University lacked the administrative capability to comply with the Clery Act. Furthermore, the University failed to accurately report crime statistics, as its records did not substantiate the statistics (U.S. Department of Education, Delaware State University Clery Act Report, 2012). For two years, the DOE sought information from the University, but due to inadequate record keeping, untrained staff, and insufficient policies and procedures, the University could not produce the necessary documents. As a result, statistics could not be substantiated. Although the University had implemented a new system to comply with the Clery Act, the DOE determined that

its “response [was] inadequate as it [failed] to provide details of the institution’s policies and procedures for documenting, reporting, and maintaining information (U.S. Department of Education, Delaware State University Clery Act Report, 2012). The investigation was closed and the matter was referred for sanctions. A fine of \$55,000 was imposed.

Dominican College of Blauvelt, New York

The DOE became aware of possible Clery Act violations after a lawsuit was filed by the estate of a former student against the College.³² The DOE required the College to send information to determine whether an investigation was warranted. Based on those submissions, the DOE conducted an on-site, comprehensive review of the College’s campus security. The DOE found the following violations of the Clery Act:

1. Crime statistics were not properly classified and disclosed (2 burglaries, 1 weapons violations, and 3 drug violations were not reported).
2. Crime statistics were not reported for non-campus property (e.g. a nearby hotel that was used to house students), and the campus was not defined.
3. Crimes statistics were not collected from all sources.
4. The annual report was not distributed to current students and employees, and prospective students and employees were not notified of its availability.
5. Policies and procedures were not included in the annual report.
6. The daily crime log was not maintained. (U.S. Department of Education, Dominican College of Blauvelt Clery Act Report, 2012)

³² *McGrath v. Dominican College of Blauvelt*, 672 F. Supp. 2d 477 (S.D.N.Y. 2009).

The College implemented measures to correct each violation cited by the DOE. The matter was closed and referred for sanctions. A fine of \$262,500 was imposed and the College ultimately paid \$200,000.

University of Delaware, Delaware

The DOE selected the University from a sample of institutions with sworn police departments to investigate its compliance with the Clery Act. The DOE found that the annual report was not prepared and distributed as a comprehensive document. The University had issued numerous documents to students and employees because it was unaware it had to be issued as a comprehensive report. After ensuring that the University would be complying with the Act, the DOE closed the investigation.

Agency Investigations: 2014

Four investigations published in 2014 were included as data for the study. Table 5.16 illustrates the institutions.

Table 5.16 Agency Investigations: 2014

2014
Institution
Mid-Atlantic Christian University
Midlands Technical College
Sterling College, Kansas
University of Nebraska, Kearney

Mid-Atlantic Christian University

The DOE opened an investigation after a shooting occurred on campus, in which a student was killed. The initial review examined the University's timely warning policy and procedures. At 1:00 p.m. on October 2, 2010, the local police department responded to a shooting on campus. The shooter, another University student, was arrested at the scene. The University was locked down at 1:18 p.m. and e-mails were sent to the campus

community about the incident at 5:38 p.m. The DOE found no violation because the shooter was arrested, and no longer a threat to the campus community.

Upon further review of campus security, the DOE determined that the University had violated the Clery Act, and cited the following problems:

1. The annual security report was not distributed by October 1.
2. Policies and procedures were not included in the annual report.
3. The daily crime log was not maintained. (U.S. Department of Education, Mid-Atlantic Christian University Clery Act Report, 2014)

The University responded that it was not aware that a daily crime log was required because it did not have a police or security department, as specified in the Clery Act. The DOE clarified that the university had a security officer, and the employment of contract security officers would trigger the need for a daily crime log. The University implemented corrective measures and the investigation was closed.

Midlands Technical College

The DOE selected the College from a sample of institutions with sworn police departments to investigate its compliance with the Clery Act. The DOE found that the College failed to develop crime policies and failed to properly classify crimes (two burglaries and one theft of motor vehicle parts) (U.S. Department of Education, Midlands Technical College Clery Act Report, 2014). The College corrected the issues raised by the DOE and the investigation was closed.

Sterling College, Kansas

The DOE received two complaints regarding the College. Security on Campus, Inc. alleged that the College did not include the sexual assault policy in its annual report,

and it did not have the required sexual assault programs. A former student also submitted allegations referring to the lack of sexual assault policies and programs. The DOE opened an investigation and determined the following problems with the College's campus security:

1. An annual report had never been prepared or published to students and employees.
2. Policies and procedures were not developed.
3. The daily crime log was not maintained. (U.S. Department of Education, Sterling College Clery Act Report, 2014)

The College did not employ a security department, so believed it did not have to maintain a daily crime log. The DOE determined that it was a requirement. The College implemented corrective measures to address each violation and the investigation was closed.

University of Nebraska, Kearney

The DOE selected the University from a sample of institutions with sworn police departments to investigate its compliance with the Clery Act. The DOE found the following areas of non-compliance:

1. Crime statistics were inaccurately reported.
2. Crime statistics were not gathered regarding non-campus buildings and properties (e.g. off-campus instructional locations).
3. Prospective students and employees were not notified of the annual report. (U.S. Department of Education, University of Nebraska, Kearney Clery Act Report, 2014)

The University addressed each violation with remedial measures and the investigation was closed. The matter was referred for sanctions and a fine of \$65,000 was imposed.

The investigations illustrated in the findings represent all that have been published by the DOE from 1990 to 2014 for Clery Act violations. Three investigations were omitted because the DOE issued a determination that no violations had been found. Accordingly, these investigations, along with the cases, were analyzed for significant findings, recommendations, and to answer the remaining research questions. The results are presented in the next chapter.

CHAPTER SIX

DISCUSSIONS

This chapter presents the significant findings from the data and answers the research questions. Policy recommendations gleaned from the data will be detailed to assist administrators in complying with the Clery Act. The chapter will conclude with suggestions for future studies to enhance this body of research.

Revisiting the Research Questions

The overarching question is how can the information gathered from the data, guide administrators in their compliance measures. As this chapter unfolds with significant findings and recommendations, administrators will have sufficient information to defend against lawsuits and investigations. In this litigious era, lawsuits and agency investigations are unavoidable; however, the data have indicated that institutions and officials are successfully overcoming allegations of wrongdoing. As explained later in the chapter, the courts ruled in favor of the institution and officials in the majority of the cases. Furthermore, only 55 of the 58 published agency investigations were included in the study because the Department of Education did not find any violations in three cases. This chapter will inform administrators of what they need to know when complying with the act, in light of the US Department of Education and court findings.

What Clery Act violations have been reported by the US Department of Education in its investigations of higher education institutions since the law was established in 1990?

This question was answered in Chapter Five by the 55 reports of violations, the details of each investigation, and the determinations made by the agency. The significant findings related to the type of violations will be explained later in this chapter.

Which violations are specific to particular types of campuses?

The data did not indicate that violations were specific to a particular institution or campus. Had the name of the institution not been given, it would have been difficult to determine whether the case or investigation governed a private or public institution or a 2- or 4-year college. The mention of a housing component was also not determinative, considering some 2-year institutions now have campus housing. The Clery Act and its mandates are applicable to all campuses and violations are not specific to particular types of campuses.

What recommendations for compliance have been established by the US Department of Education in its determinations of institutional violations?

The purpose of this study was to assist administrators in avoiding liability for failing to comply with the requirements of the Clery Act. The data indicated that the problem is not the complexity of the Act, but in failing to know what the Act requires. In almost every investigation, once officials knew they were not in compliance, they corrected the errors. Therefore, the problem is not with the Act itself, but in the administration of the Act on campuses. To combat the possibility of confusion, the Department of Education has issued a publication titled, The Handbook for Campus

Safety and Security Reporting (2011), which details the requirements of the Clery Act and using examples, explains how institutions should comply with the Act.³³ The handbook has been updated with each amendment, and as such, the Department of Education should release an updated handbook to incorporate the changes that will go into effect beginning 2015. Every administrator responsible for campus security should use this handbook as a reference. Following the guidelines set forth in the handbook will ensure that campus security measures are in compliance with the Clery Act, if the institution is investigated by the Department of Education.

Complying with multiple laws. The data did indicate confusion, but not with the Clery Act alone. The confusion arose with administrators attempting to comply with the Clery Act and provisions of FERPA. However, the Department of Education explained that the two federal laws are not in conflict, and complying with the Clery Act does not violate FERPA. Furthermore, the 1992 amendment to the Clery Act states that campus police and security records about crimes involving student perpetrators, are not shielded as confidential student educational records protected under FERPA. Once again, it is important for administrators to know the provisions of the Clery Act.

Awareness of third party groups. Administrators may not be familiar with the mandates of the Act, but third party organizations such as Security on Campus, Inc.³⁴ make it a priority to know what is required by the act, and report violations to the Department of Education. Out of the 22 complaints which initiated agency investigations, 15 were filed by Security on Campus, Inc. The organization, started by the Clerys after the murder of their daughter, is a non-profit organization that promotes

³³ The handbook can be found at <https://www2.ed.gov/admins/lead/safety/handbook.pdf>.

³⁴ The organization is now called the Clery Center for Security On Campus.

safety on college campuses. Security on Campus, Inc. advocates for campus violence legislation (the Clery Act is a result of such a campaign) and advocates on behalf of victims, when institutions fail to comply with the Act. Administrators need to be aware that such groups exist and are reporting their actions, or the lack thereof, to the Department of Education.

Fines. Finally, the data indicated that the amount of money an institution has does not determine the level of compliance. As seen in the Salem International University investigation, the institution did not provide sufficient resources to properly comply with the Clery Act. This did not deter the Department of Education from imposing a fine of \$200,000 and requiring the institution to implement corrective measures. It is better for administrators to spend the resources to comply with the Act, rather than paying fines in addition to spending the resources on compliance measures. Although administrators may elect to take their chances on receiving fines rather than comply with the Clery Act, the Department of Education can impose a fine of \$35,000 per infraction, up to the total loss of federal funding. The \$35,000 fine is likely to increase given the attention campus violence, especially violence against women, has been given by the media and now legislators. A bipartisan group of senators has introduced legislation that will increase the fine to \$150,000 per infraction, to ensure that campus violence is a priority for campus administrators (Stratford, 2014).

What cases have been published by appellate or trial courts addressing the Clery Act in their analysis of legal claims?

This question was answered in Chapter Four by the 13 cases, the details of each case, and the analysis of the courts. The significant findings related to the cases will be explained later in this chapter.

In what ways are the courts consistent or inconsistent in their analysis across jurisdictions?

This question was important because jurisdictions across the country rarely reach the same conclusions, or use similar reasoning in their opinions. Interestingly, the data showed consistency across jurisdictions when looking at institutional liability regarding crime on campus. Here, the courts have used similar analyses and reached analogous conclusions in both student and employee cases.

Employees. The employee cases fell into two categories. One category consists of lawsuits filed by former employees, alleging retaliation for whistleblowing or wrongful discharge underlying public policy. These two cases have indicated that it is unlawful for an institution to retaliate against or discharge an employee for disclosing Clery Act violations. In one case, there was no evidence of retaliation, and in the other the employee was given the opportunity to specify the violations in an amended complaint. However, the analysis was the same for both courts. Reports that institutions are not complying with the Clery Act is a matter of public importance and public policy, and employees have an avenue of recourse through the courts if they are mistreated for voicing concerns about an institution's actions, or lack thereof.

The second category consists of lawsuits filed by employees for being terminated when the institution finds wrongdoing (e.g. failing to properly respond to a complaint of sexual violence). The *Jones v. University of Iowa* case showed that when employees fail to properly carry out their duties and are terminated by the institution following proper procedures and practices, employees are not likely to prevail in court. When employees are discharged for failing to secure the rights and safety of students, an institution has a valid reason for terminating their employment.

Student victims. Seven cases were filed by students (one a deceased student's estate) who were victimized by campus violence (*see* Table 6.2). Where allegations of negligence arose, and evidence existed that the institution failed to provide reasonable measures of security in light of previous crimes or according to industry standards, the court ruled in favor of the student (one case). Comparatively, when the claims attempted to place a higher responsibility on institutions to completely safeguard campuses from third parties where no prior knowledge of the particular crime existed, courts ruled in favor of the institution (two cases). This indicates that colleges and universities will be held liable for failing to protect students when it is foreseeable that crimes will occur, or for failing to have reasonable measures of security in place according to industry standards (e.g. locks on entrances of dorms).

Furthermore, where allegations arose under Title IX and other claims, and evidence existed that the institution knew of a sexual crime and failed to respond reasonably, the student prevailed (two cases). If the institution acted in some manner to address the situation after being notified of the criminal conduct, even if the response did not completely eliminate the criminal behavior, courts ruled in favor of the institution

(two cases). Adequately responding to reports of crimes is necessary for institutions to prevail in court. Institutions cannot ensure that crimes will not occur on campus, but students should expect that reasonable measures will be taken to address or to prevent them.

Student perpetrators. The five claims made by student perpetrators against institutions were all dismissed in favor of the institutions.³⁵ The defamation claim warrants discussion, as it was filed because the institution issued an alert to the campus community naming the student perpetrator. The court referenced the need to protect the campus community and deferred to the institution's practices relating to the issuance of crime alerts. All the courts emphasized the need for campus security, and as such, institutions would not likely be penalized for erring on the side of caution, and issuing crime alerts with the perpetrator's name. Other claims were dismissed because they were not valid causes of action (e.g. Clery Act claims).

For claims such as breach of contract, it is important that student perpetrators be treated fairly according to the terms in the student handbook, or an institution's policies and procedures. Although it is unpalatable for student perpetrators to prevail in any circumstance, institutions must abide by the terms set forth in their agreements with students (e.g. student handbook). Courts tend to defer to the institution when the college or university can show that to some degree, it upheld the terms of the agreement.

Deference to the US Department of Education. As explained in Chapter One, the courts and the Department of Education have differed in their rulings regarding higher education. Courts have not always shown deference to the agency (Kaplin & Lee,

³⁵ These are only the causes of action that required judicial review on appeal or a decision by the trial court. There may have been additional claims filed in these cases that were not mentioned in the published decisions which is a limitation for the study.

2007). Contrary to this precedent, at least one court declined to rule on claims regarding violence on campus, ruling that the Department of Education was the proper jurisdiction to determine whether violations had occurred. Specifically, in *Doe v. University of the South*, 687 F. Supp. 2d at 755, the court noted that certain provisions established by the Department of Education should be addressed by the agency.

What recommendations for compliance with the Clery Act are derived from the court cases?

The court cases produced information that is relevant to administrators regarding institutional liability as a result of crime on campus. Recommendations arising from the court cases have been reduced to four categories: administration, reporting and record keeping, policies and programs, and timely warnings. The courts provide general, broad information that can be used as guidelines to avoid liability.

Administration. Court analysis on administrative matters centered on the responses of university officials to campus crimes. Where officials reacted with blatant disregard to students' well-being, despite the processes put in place to protect them, courts ruled in favor of the party filing the lawsuit. Failing to follow policies and procedures (e.g. conduct investigations), neglecting to accommodate student victims, and concealing crimes, are examples of deliberate indifference by campus administrators.

Reporting and record keeping. A number of court rulings in favor of institutions resulted from those institutions actually reporting crime statistics. Courts used the statistics to determine whether certain crimes were foreseeable, and whether a duty existed to protect students from specific crimes. Colleges and universities should endeavor to properly disclose campus crimes.

Policies and programs. Institutions set policies governing procedures and programs, and issue handbooks to inform students of their responsibilities while at the same time, assuring students that the institution will uphold its obligations.

Administrators avoid liability when reasonable efforts are made to abide by the terms contained in those documents. Ignoring promised protections and arbitrarily making decisions that differ from the written protocols are invitations for lawsuits.

Timely warnings. The Clery Act establishes a legal duty to disclose information when that disclosure is necessary for the safety of others. Failing to provide the necessary disclosures opens the door to liability, such as negligence, when harm arises that could have been prevented had the disclosures been made. If administrators issue warnings in good faith that later turn out to be false or unnecessary, they will most likely be protected under a qualified privilege. Courts have stated that campus safety is a priority and where doubt exists, it should be resolved in favor of notification.

What are the similarities and differences in the recommendations established by the courts and those established by the US Department of Education?

The similarities in the recommendations can be found in the administrative aspects of campus compliance. Both entities have provided information to assist administrators in avoiding liability through actions that comply with the Clery Act. Again, lawsuits and investigations are unavoidable, but utilizing this information will assist in the defense of the institution and campus officials. There were no differences in the analysis of the governing entities that would cause discord in how these entities analyze the Clery Act.

Significant Findings: Cases

The cases outlined in the findings represent the lawsuits filed which specifically address the Clery Act. Timing of the cases, prevailing parties, types of institutions, and types of claims are themes that emerged from the data. These themes will be discussed for relevance to institutional liability.

Timeline of Cases

The thirteen cases are displayed in Table 6.1 according to the year of publication. Interestingly, the first published opinion was issued in 2002, twelve years after the enactment of the Clery Act. The next case arose four years later in 2006 with at least one case being filed every year following, except for years 2008 and 2012. The number of cases published in 2013 is the most significant finding in this category. It is unclear what caused the increase in lawsuits. An assumption can be made that media efforts publicizing the Clery Act and its mandates for institutions of higher education can be credited for the high numbers.

Table 6.1 Cases by Date

Cases by Date	
Year	Case
2002	Allocco v. University of Miami
2006	Kleisch v. Cleveland State University
2007	Bruin v. Mills College
2007	Havlik v. Johnson and Wales University
2009	McGrath v. Dominican College of Blauvelt
2010	King v. San Francisco Community College
2011	Doe v. University of the South
2011	Lewen v. Edinboro University of Pennsylvania
2013	James v. Duquesne University
2013	Jones v. University of Iowa
2013	Lees v. Carthage College
2013	Moore v. Murray State University
2014	Frazer v. Temple University

Prevailing Party

Table 6.2 illustrates the individuals filing the case and the prevailing party based on the court's decision. Out of the thirteen matters, the institution was the prevailing party in nine cases. The reason for this was discussed previously in the section on jurisdictional consistency. It is also important to note the three lawsuits filed by employees. Those cases are crucial because they are warnings to institutions that employees are not silent about internal practices and policies that do not comply with the Clery Act.

Table 6.2 Party to the Case

Type of Party		
Party	Case	Prevailing Party
Employee	Allocco v. University of Miami	Institution
Employee	Bruin v. Mills College	Both
Student (perpetrator)	Doe v. University of the South	Institution
Student (victim)	Frazer v. Temple University	Institution
Student (perpetrator)	Havlik v. Johnson and Wales University	Institution
Student (victim)	James v. Duquesne University	Institution
Employee	Jones v. University of Iowa	Institution
Student (victim)	King v. San Francisco Community College	Both
Student (victim)	Kleisch v. Cleveland State University	Institution
Student (victim)	Lees v. Carthage College	Student
Student (perpetrator)	Lewen v. Edinboro University of Pennsylvania	Institution
Student's Estate (victim)	McGrath v. Dominican College of Blauvelt	Student's Estate
Student (victim)	Moore v. Murray State University	Institution

Type of Institution

Seven of the thirteen colleges and universities were private non-profit institutions. The nature of private non-profit institutions does not give rise to much outside influence and governance, so it is important that there is an avenue of recourse through the courts for those who have been harmed by the actions or inactions of private institutions. Of the

six public institutions, one was a community college. Interestingly, this community college does not have a housing component, so it worth speculating whether the “commuter campus” life contributed to the alleged dismissal of the student’s claims of sexual harassment. This “commuter campus” life is probably why there is only one lawsuit involving a community college. Table 6.3 illustrates the type of institutions represented in the data.

Table 6.3 Type of Institution: Court Cases

Type of Institution	
Private, Non-Profit	Public
Allocco v. University of Miami	Frazer v. Temple University
Bruin v. Mills College	Jones v. University of Iowa
Doe v. University of the South	King v. San Francisco Community College
Havlik v. Johnson and Wales University	Kleisch v. Cleveland State University
James v. Duquesne University	Lewen v. Edinboro University of Penn.
Lees v. Carthage College	Moore v. Murray State University
McGrath v. Dominican College of Blauvelt	

Allegations in the Lawsuits

Nineteen different causes of action were brought against colleges and universities.³⁶ In three of the cases, individuals attempted to sue under the Clery Act, but the courts determined this was not a valid claim. Also in three cases, individuals sued alleging negligence and deliberate indifference under Title IX, utilizing the Clery Act’s mandates. These allegations are to be expected, and officials will have to ensure that their actions and responses to crime do not give rise to liability under these theories. The employee lawsuits alleging defamation and wrongful discharge were unexpected results, as it could not be predicted that employees would bring allegations against institutions for

³⁶ These are only the causes of action that required judicial review on appeal or a decision by the trial court. There may have been additional claims filed in these cases that were not mentioned in the published decisions which is a limitation for the study.

violating the Clery Act. Those claims were alleged in two cases. The other claims that require recognition are the Section 1983 cause of action with no federal law violation³⁷ and the petition for declaratory judgment under the Clery Act³⁸. The first is not a valid cause of action and the second is not likely to be successful in court. Table 6.4 shows the claims and the number of times they were filed in the cases.

Table 6.4 Type of Allegation

Type of Allegation	
Cause of action	Number of Cases
The Clery Act	3
Deliberate Indifference, Title IX	3
Negligence	3
Defamation	2
Wrongful Discharge Underlying Public Policy	2
Breach of Contract	1
Declaratory Judgment under the Clery Act	1
DOE Regulations, Title IX	1
Due Process, Section 1983	1
Employment Discrimination, Section 1983	1
Equal Protection, Section 1983	1
Fourteenth Amendment, Section 1983	1
Fourth Amendment, Section 1983	1
Fraud	1
Hostile Environment, Title IX	1
Intentional Infliction of Emotion Distress	1
Retaliation, Title IX	1
Section 1983	1
Whistleblowing	1

The themes that arose from the case law data are relevant to institutional liability. They are indicators of the parties filing actions against institutions, the types of claims being filed, and the likelihood that those claims will prevail. Some of the themes arising from the case law data were also gleaned from the agency investigations.

³⁷ A Section 1983 claim must allege a federal law that was violated.

³⁸ Courts are not likely to declare a violation of the Clery Act as it is probable that this will be deferred to the Department of Education.

Significant Findings: Agency Investigations

The agency investigations enumerated in the findings are all that have been published by the Department of Education since the Clery Act was established. The amount of fines, timeline of the investigations, sources of the investigations, types of institutions, and types of violations are themes that emerged from the data. The themes necessitate discussion due to their inference to institutional liability.

Amount of Fines

The most interesting theme to arise from the agency data is the inconsistency in the fines assessed to institutions. As is evident in Table 6.5, the Department of Education issued its first sanction in 2000. Notwithstanding the serious nature of violations committed by institutions investigated prior to 2000, one can assume this was a grace period. Once the Department of Education began issuing fines, they were not assessed consistently. For example, the investigation of West Virginia University revealed that the institution failed to report 44 incidents one year and 100 incidents the following year, yet the Department issued no sanctions. Conversely, Oregon State University was fined \$220,500 for failing to accurately report statistics.

Furthermore, the Department of Education did not issue fines in 2008 to the University of Virginia for threatening victims of sexual violence with honor code violations if they disclosed the outcome of disciplinary hearings (*see* details from the report on page 118). The Department indicated that the confusion over FERPA and Clery Act provisions was the reason the matter was not referred for sanctions, although that issue was explained thoroughly in its 2004 Georgetown University report (*see* report

details on pages 106-107). Four years later, sanctions assessed against the University of Virginia were most likely warranted, but the matter was not referred for sanctions.

Finally, as reported in 2014 (twenty-four years after the Clery Act was enacted), Sterling College had never prepared or published an annual report, did not have policies and procedures in place, and did not maintain a daily crime log. The institution was not fined. Consequently, there is a lack of consistency in the sanctions issued as some institutions were fined, whereas others were not for the same category of violations or serious violations that warranted penalty.

Regarding the settlement amounts, the basis for the settlement amounts paid versus the amount originally fined were not explained except in the three instances where the fine was appealed (Ashford University, Tarleton State University, and Virginia Tech). An assumption can be made that these were negotiated settlements that the institutions were able to work out with the Department of Education.

Table 6.5 Agency Fines

Sanctions			
Year	Institution	Original Fine	Amount Paid
2000	Ashford University	\$25,000	\$15,000
2004	Salem International University	\$250,000	\$200,000
2005	Miami University of Ohio	\$27,500	\$27,500
2006	LaSalle University	\$110,000	\$87,500
2007	Eastern Michigan University	\$357,500	\$350,000
2008	Paul Smith's College of Arts and Sciences	\$260,000	\$195,000
2009	Schreiner University	\$55,000	\$42,000
2009	Tarleton State University	\$137,000	\$110,000
2010	Liberty University	\$165,000	\$120,000
2010	Notre Dame College of Ohio	\$165,000	\$89,000
2010	Oregon State University	\$280,000	\$220,500
2010	Virginia Tech	\$55,000	\$5,000
2010	Wesley College, Delaware	\$60,000	\$45,000
2011	Lincoln University	\$275,000	\$275,000
2011	University of North Dakota	\$115,000	\$115,000
2011	University of Northern Iowa	\$110,000	\$110,000
2011	University of Texas, Arlington	\$82,000	\$49,000
2011	University of Vermont	\$65,000	\$55,000
2011	Washington State University	\$82,500	\$82,500
2011	Yale University	\$165,000	\$155,000
2012	Delaware State University	\$55,000	\$55,000
2012	Dominican College of Blauvelt	\$262,500	\$200,000
2014	University of Nebraska, Kearney	\$65,000	\$65,000

Sources of the Investigation

The Department of Education can open an investigation on an institution for any reason. As stated on its website, it is common for an investigation to begin after a “complaint is received, a media event raises concerns, the school’s independent audit identifies serious non-compliance, or through a review selection process that may also coincide with state reviews performed by the FBI’s Criminal Justice Information Service (CJIS) Audit Unit” (US Department of Education, 2014). The data show that the sources of the investigations were complaints, random sample selections, agency initiated, or media information. The receipt of a complaint was the most prevalent source.

Complaints were made by third parties such as Security on Campus, Inc., parents, and students, both former and current. Newspaper articles and broadcasts of campus crimes also contributed to the number of investigations. Random institutions were chosen because of their police departments in 18 of the 55 cases. Finally, the agency initiated investigations were categorized as such, because the published information did not reveal a particular source. Table 6.6 shows the number of investigations by each source.

Table 6.6 Sources of the Investigation

Investigation Source	
Source	Number of Occurrences
Complaint	22
Random Selection Sample	18
Agency Initiated	8
Media	7

Timeline of Agency Investigations

Table 6.7 illustrates the investigations by publication year. The first investigations were published in 1997, five years before the courts issued a decision pertaining to the Clery Act. Prior to 2010, the Department of Education issued a few reports every year, except in 1999. The number increased marginally to seven in 2010 and significantly in 2011. These increases can be explained by the magnitude of crimes in the preceding years, and the time it took to complete the investigations. For example, the shooting at Virginia Tech took place in 2007, but the report was not issued until 2010. The number of investigations normalized in 2012, and none were published in 2013.

Table 6.7 Timeline of Investigations

Agency Investigation By Year	
Year	Institution
1997	Clemson University
1997	Miami University of Ohio
1997	Minnesota State University Moorhead
1997	Virginia Tech
1998	University of Pennsylvania
2000	Ashford University
2000	West Virginia Wesleyan College
2001	College of New Jersey
2001	Ramapo College of New Jersey
2002	Mount Saint Mary College
2002	Saint Mary's College, Indiana
2003	California State University
2003	University of California
2004	Georgetown University
2004	Salem International University
2005	Miami University of Ohio
2005	Northern Illinois University
2005	Saint Mary's College of California*
2006	LaSalle University
2006	Ohio State University
2007	Eastern Michigan University
2008	Paul Smith's College of Arts and Sciences
2008	University of Virginia
2009	Alamo Colleges
2009	Schreiner University
2009	Tarleton State University
2009	West Virginia University
2010	Florida State University
2010	Liberty University
2010	Notre Dame College of Ohio
2010	Oregon State University
2010	Slippery Rock University
2010	Virginia Tech
2010	Wesley College, Delaware
2011	College of New Jersey
2011	Franklin Pierce University*
2011	Louisiana State University
2011	Lincoln University
2011	Oklahoma State University
2011	South Dakota State University

2011	Washington State University
2011	University of Arkansas
2011	University of Michigan
2011	University of North Dakota
2011	University of Northern Iowa
2011	University of Texas, Arlington
2011	University of Utah
2011	University of Vermont
2011	University of Wisconsin, Green Bay
2011	Wake Forest University*
2011	Yale University
2012	Delaware State University
2012	Dominican College of Blauvelt
2012	University of Delaware
2014	Mid-Atlantic Christian University
2014	Midlands Technical College
2014	Sterling College, Kansas
2014	University of Nebraska, Kearney

*The investigation determined there was no violation of the Clery Act.

Type of Institution

The institutions were categorized as public four-year institutions, public two-year institutions (community colleges), private non-profit institutions, and private for-profit institutions (*see* Table 6.9). In contrast to the case law data, the majority of the colleges and universities investigated were public institutions. Fifty-five were four-year institutions and two were community colleges. Similar to the case law data, the two community colleges are non-residential. Nineteen private non-profit colleges and universities were investigated and one for-profit institution. It is interesting to note that the for-profit was the first institution to be fined for Clery Act violations.

Type of Violation

The investigations were analyzed to determine the type of violations commonly reported. The categories listed in Table 6.8 emerged from the agency data. Although an investigation may have included numerous violations that fall within a specific category,

the violations were counted as one. There was nothing unusual in the categories or the number of violations per category.

Table 6.8 Type of Violation

Type of Violation	
Violation	Number
Inaccurate reporting and classification of statistics	46
Policies and programs excluded from the annual report	22
Annual report not disclosed	19
Daily crime logs not maintained	18
Policies and programs inadequate or not developed	13
Crime statistics not gathered from all sources	12
Locations excluded from the annual report and campus undefined	10
Timely warnings not issued	10
Crimes not reported for the calendar year	5
Victims not informed of disciplinary proceeding	5
No administration for campus security	4
Poor recordkeeping	4

The themes that arose from the agency data are relevant to institutional liability. They are indicators of the progression of investigations and the sources, the number and amount of fines, the inconsistency of those fines, and the types of violations that reappear in the investigations. Most importantly, it is clear from the data that the Department of Education has and will investigate any institution that receives federal funding.

Future Research

Research in this area has largely centered on the number and category of crimes occurring in higher education, administrative awareness of violence in higher education, and the effectiveness of the Clery Act with regard to institutional compliance. This study filled the gap in the research by looking at those institutions that have been sued or investigated for non-compliance to determine common violations, and provide recommendations for administrators in their campus security efforts.

Future research regarding the courts should include a study looking at all the cases that have been filed against institutions as a repercussion of campus violence. A limitation of this study was that only cases discussing the Clery Act in their decisions were analyzed. The study did not include those cases that were filed using violations of the Clery Act as a basis, without actually mentioning the Act. It would be interesting to know the exact number of cases, the causes of action, and the number of times the institution prevails.

Regarding agency investigations, further research should be done examining campus security measures among those institutions that were investigated, to see what efforts are now in place to comply with the Clery Act. The efforts of these institutions could be used as an example for other colleges and universities similarly situated. Additionally, sexual violence appeared repeatedly in the data which also falls under Title IX of the Education Amendments of 1972. As with the Clery Act, the Department of Education also conducts investigations for Title IX violations. A similar study should be done to see what violations have been reported concerning sexual crimes, as applied to Title IX.

Summary and Conclusion

In Chapter Six, significant findings that emerged from the case law and agency data were explained, and the research questions were answered. The chapter concluded with recommendations for complying with the Clery Act, and future directions for research in this body of knowledge that will benefit higher education administrators.

Crime on campus is a prevalent and alarming problem that is as old as the establishment of higher education. As time has progressed, campus violence has

increased significantly and the magnitude of student-on-student violence is unprecedented (e.g. mass murders and mass stabbings). Actions by university administrators to address crime on campus have been insufficient at best, and deliberately indifferent in some cases (e.g. ignoring reports of child abuse on campus). Legislation, such as the Clery Act, is necessary to ensure that lackluster administrative efforts to prevent, respond, and report crimes in higher education will not be tolerated.

The Clery Act was established twenty-four years ago and institutions are still failing to comply with the law. The argument has been made that the Act is unreasonably complicated and efforts to comply are a drain on an institution's resources (Nicoletti et al., 2001; Fisher et al., 2002; Janosik & Gregory, 2009). However, the cases and investigations have produced data indicating that campus security is not a priority for colleges and universities. Security measures such as establishing a campus security office, training staff, providing programs for victims, and producing an annual report seem minimal in light of the prevailing problem. Although it is impossible to eradicate campus violence, preventative and responsive measures are all that is required by law.

With the courts determining issues regarding higher education practices, administrators must understand which areas are ripe for litigation. The court cases analyzed in the study revealed that institutions are not liable when reasonable safety measures are implemented to ensure campus safety. Liability attaches when institutions fail to adequately respond to reports of crimes and fail to comply with the relevant laws. Higher education institutions are subject to the governance of the US Department of Education because of their dependence on federal funding. The agency investigations revealed the specific violations of the Clery Act that can only be addressed through

administrative oversight, accurate reporting and record keeping, adequate policies and programs, and timely warnings to the campus community of potential threats.

Table 6.9 Type of Institution

Type of Institution: Agency Investigations			
Public, four-year	Public, two-year	Private, non-profit	Private, for-profit
California State University	Alamo Colleges	Dominican College of Blauvelt	Ashford University
Clemson University	Midlands Technical College	Franklin Pierce University*	
College of New Jersey (2)		Georgetown University	
Delaware State University		LaSalle University	
Eastern Michigan University		Liberty University	
Florida State University		Mid-Atlantic Christian University	
Lincoln University		Mount Saint Mary College	
Louisiana State University		Notre Dame College of Ohio	
Miami University of Ohio (2)		Paul Smith's College	
Minnesota State University Moorhead		Saint Mary's College of California*	
Northern Illinois University		Saint Mary's College, Indiana	
Ohio State University		Salem International University	
Oklahoma State University		Schreiner University	
Oregon State University		Sterling College, Kansas	
Ramapo College of New Jersey		University of Pennsylvania	
Slippery Rock University		Wake Forest University*	
South Dakota State University		Wesley College, Delaware	

Tarleton State University		West Virginia Wesleyan College	
University of Arkansas		Yale University	
University of California			
University of Delaware			
University of Michigan			
University of Nebraska, Kearney			
University of North Dakota			
University of Northern Iowa			
University of Texas, Arlington			
University of Utah			
University of Vermont			
University of Virginia			
University of Wisconsin, Green Bay			
Virginia Tech (2)			
Washington State University			
West Virginia University			

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Moore v. Murray State University, 5:12-CV-00178, 2013 WL 960320 (W.D. Ky. 2013).

Paige v. Jackson State University, 3:09CV50-WHB-LRA, 2009 WL 230709 (S.D. Miss.
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Sweezy v. New Hampshire, 354 U.S. 234 (1957).

APPENDIX A

Clery Act Crime Definitions from the Uniform Crime Reporting Handbook³⁹

Aggravated assault - An unlawful attack by one person upon another for the purpose of inflicting severe or aggravated bodily injury. This type of assault usually is accompanied by the use of a weapon or by means likely to produce death or great bodily harm. (It is not necessary that injury result from an aggravated assault when a gun, knife, or other weapon is used which could and probably would result in serious personal injury if the crime were successfully completed.)

Arson - Any willful or malicious burning or attempt to burn, with or without intent to defraud, a dwelling house, public building, motor vehicle or aircraft, personal property of another, etc.

Burglary - The unlawful entry of a structure to commit a felony or a theft. For reporting purposes this definition includes: unlawful entry with intent to commit a larceny or felony; breaking and entering with intent to commit a larceny; housebreaking; safecracking; and all attempts to commit any of the aforementioned.

Criminal homicide (Manslaughter by negligence) - The killing of another person through gross negligence.

Criminal homicide (Murder and non-negligent manslaughter) - The willful (non-negligent) killing of one human being by another.

Dating violence - Violence by a person who has been in a romantic or intimate relationship with the victim. Whether there was such a relationship will be gauged by its length, type, and frequency of interaction.

Destruction/Damage/Vandalism of property - To willfully or maliciously destroy, damage, deface, or otherwise injure real or personal property without the consent of the owner or the person having custody or control of it.

Domestic violence - Asserted violent misdemeanor and felony offenses committed by the victim's current or former spouse, current or former cohabitant, person similarly situated under domestic or family violence law, or anyone else protected under domestic or family violence law.

³⁹ Code of Federal Regulations at http://www.ecfr.gov/cgi-bin/text-idx?SID=7b52cd807178d105389c037e5d3b82e1&node=ap34.3.668_149.a&rgn=div9

Drug abuse violations - The violation of laws prohibiting the production, distribution, and/or use of certain controlled substances and the equipment or devices utilized in their preparation and/or use. The unlawful cultivation, manufacture, distribution, sale, purchase, use, possession, transportation, or importation of any controlled drug or narcotic substance. Arrests for violations of state and local laws, specifically those relating to the unlawful possession, sale, use, growing, manufacturing, and making of narcotic drugs.

Intimidation - To unlawfully place another person in reasonable fear of bodily harm through the use of threatening words and/or other conduct, but without displaying a weapon or subjecting the victim to actual physical attack.

Larceny/Theft (Except motor vehicle theft) - The unlawful taking, carrying, leading, or riding away of property from the possession or constructive possession of another. Attempted larcenies are included. Embezzlement, confidence games, forgery, worthless checks, etc., are excluded.

Liquor law violations - The violation of state or local laws or ordinances prohibiting the manufacture, sale, purchase, transportation, possession, or use of alcoholic beverages, not including driving under the influence and drunkenness.

Motor vehicle theft - The theft or attempted theft of a motor vehicle. (Classify as motor vehicle theft all cases where automobiles are taken by persons not having lawful access even though the vehicles are later abandoned—including joyriding.)

Robbery - The taking or attempting to take anything of value from the care, custody, or control of a person or persons by force or threat of force or violence and/or by putting the victim in fear.

Simple assault - An unlawful physical attack by one person upon another where neither the offender displays a weapon, nor the victim suffers obvious severe or aggravated bodily injury involving apparent broken bones, loss of teeth, possible internal injury, severe laceration, or loss of consciousness.

Stalking - A course of conduct directed at a specific person that would cause a reasonable person to fear for her, his, or the safety of others, or to suffer substantial emotional distress.

Weapons: Carrying, possessing, etc. - The violation of laws or ordinances prohibiting the manufacture, sale, purchase, transportation, possession, concealment, or use of firearms, cutting instruments, explosives, incendiary devices, or other deadly weapons.

Sex Offenses Definitions from the Uniform Crime Reporting Handbook

Sex Offenses – Forcible

Forcible fondling - The touching of the private body parts of another person for the purpose of sexual gratification, 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 youth or because of his/her temporary or permanent mental incapacity.

Forcible rape - The violation of laws or ordinances prohibiting the manufacture, sale, purchase, transportation, possession, concealment, or use of firearms, cutting instruments, explosives, incendiary devices, or other deadly weapons.

Forcible sex offenses - Any sexual act directed against another person, 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.

Forcible sodomy - Oral or anal sexual intercourse with another person, forcibly and/or against that person's will; or not forcibly against the person's will where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental or physical incapacity.

Sexual assault with an object - The use of an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, 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 youth or because of his/her temporary or permanent mental or physical incapacity.

Sex Offenses – Non-forcible

Incest – Non-forcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

Non-forcible sex offenses - Unlawful, non-forcible sexual intercourse.

Statutory rape – Non-forcible sexual intercourse with a person who is under the statutory age of consent.⁴⁰

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APPENDIX B

Definitions

Actual notice - Actual awareness or direct notification of a specific fact or proceeding. Actual notice occurs when an individual is directly told about something (<http://www.nolo.com/dictionary/actual-notice-term.html>).

Affirmed - In the practice of appellate courts, to affirm a judgment, decree, or order, is to declare that it is valid and right, and must stand as rendered below (<http://thelawdictionary.org/affirm/>).

Cause of action - A specific legal claim for which a plaintiff seeks compensation. Each cause of action is divided into discrete elements, all of which must be proved to present a winning case (<http://www.nolo.com/dictionary/cause-of-action-term.html>).

Constructive notice - The legal fiction that a person or entity should have known, as a reasonable person would have, even if they have no actual knowledge of it (http://en.wikipedia.org/wiki/Constructive_notice).

Dismissed with prejudice - A dismissal with prejudice is dismissal of a case on merits after adjudication. The plaintiff is barred from bringing an action on the same claim. Dismissal with prejudice is a final judgment and the case becomes res judicata on the claims that were or could have been brought in it (<http://definitions.uslegal.com/d/dismissed-with-prejudice/>).

Letter of the law - The strict and exact force of the language used in a statute, as distinguished from the spirit, general purpose, and policy of the statute (<http://legal-dictionary.thefreedictionary.com/letter+of+the+law>).

Motion to Dismiss - Application by a defendant in a lawsuit or criminal prosecution asking the judge to rule that the plaintiff (the party who filed the lawsuit) or the prosecution has not and cannot prove its case. Attorneys most often make this motion after the plaintiff or prosecutor has presented all the evidence they have, but they can make it at the end of the evidence presentation but before judgment or upon evidence being presented that proves to the judge that the defendant cannot lose (<http://dictionary.law.com/Default.aspx?selected=1289>).

Non-disclosure agreement - A legal contract between at least two parties that outlines confidential material, knowledge, or information that the parties wish to share with one another for certain purposes, but wish to restrict access to or by third parties. It is a contract through which the parties agree not to disclose information covered by the agreement (http://en.wikipedia.org/wiki/Non-disclosure_agreement).

Private right of action - The privilege of instituting a lawsuit arising from a particular transaction or state of facts, such as a suit that is based on a contract or a tort, a civil wrong (<http://legal-dictionary.thefreedictionary.com/right+of+action>).

Pro se - A party to a lawsuit who represents himself (acting in propria persona) is appearing in the case "pro se" (<http://dictionary.law.com/Default.aspx?selected=1654>).

Proximate cause - A proximate cause is one that is legally sufficient to result in liability. It is an act or omission that is considered in law to result in a consequence, so that liability can be imposed on the actor. It is the cause that directly produces an event (<http://definitions.uslegal.com/p/proximate-cause/>).

Remand - An appeals court may remand a case to the trial court for further action if it reverses the judgment of the lower court (<http://legal-dictionary.thefreedictionary.com/remand>).

Res judicata - A Latin term meaning "a thing decided". It is a common law doctrine meant to prevent re-litigation of cases between the same parties regarding the same issues and preserve the binding nature of the court's decision. Once a final judgment has been reached in a lawsuit, subsequent judges who are presented with a suit that is identical to or substantially the same as the earlier one will apply the doctrine of res judicata to uphold the effect of the first judgment. Res judicata does not prevent appeals to a higher court (<http://definitions.uslegal.com/r/res-judicata/>).

Sovereign immunity - A legal principal making governmental bodies and employees immune from being sued in their own courts without governmental consent. The legislature can, and often does, carve out areas where this immunity will be waived (<http://www.nolo.com/dictionary/sovereign-immunity-term.html>).

Spirit of the law - Refers to ideas that the creators of a particular law wanted to have effect. It is the intent and purpose of the lawmaker, or framer of the Constitution, as determined by a consideration of the whole context thereof (<http://definitions.uslegal.com/s/spirit-of-the-law/>).

Summary judgment - A court order ruling that no factual issues remain to be tried and therefore a cause of action or all causes of action in a complaint can be decided upon certain facts without trial. A summary judgment is based upon a motion by one of the parties contending that all necessary factual issues are settled or so one-sided they need not be tried. If it is unclear whether there is a triable issue of fact in any cause of action, then summary judgment must be denied as to that cause of action. The theory behind the summary judgment process is to eliminate the need to try settled factual issues and to decide without trial one or more causes of action in the complaint (<http://dictionary.law.com/Default.aspx?selected=2063>).

APPENDIX C
Campus Crime Statistics

Table C.1 Campus Crime Statistics: 2010-2012

Crime	2010	Hate Crimes (2010)	2011	Hate Crimes (2011)	2012	Hate Crimes (2012)
Murder	33	0	33	0	31	0
Negligent Manslaughter	5	0	2	0	2	0
Forcible Sex Offenses	3613	7	4219	10	4837	9
Non-forcible Sex Offenses	69	0	68	0	74	0
Robbery	4468	21	4269	10	4396	13
Aggravated Assault	4586	38	4560	29	4664	28
Burglary	23912	12	21971	12	20486	10
Motor Vehicle Theft	6121	7	6168	2	5701	5
Arson	833	0	713	2	797	0
Bodily Injury	0	101	0	102	0	110
Larceny	0	24	0	23	0	47
Intimidation	0	339	0	343	0	327
Vandalism	0	624	0	400	0	402
Illegal Weapon Possession Arrests	1926	0	1910	0	1902	0
Drug Arrests	26754	0	29788	0	30717	0
Liquor Law Violations Arrests	45302	0	46388	0	41708	0

<http://ope.ed.gov/security/GetDownloadFile.aspx>