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## Forewarned is Forearmed: The Crime Awareness and Campus Security Act of 1990 and the Future of Institutional Liability for Student Victimization

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FOREWARNED IS FOREARMED: THE CRIME AWARENESS AND  
CAMPUS SECURITY ACT OF 1990 AND THE FUTURE OF  
INSTITUTIONAL LIABILITY FOR STUDENT VICTIMIZATION

*Sunlight is said to be the best of disinfectants.*<sup>1</sup>

*For I must talk of murders, rapes, and massacres,  
Acts of black night, abominable deeds.*<sup>2</sup>

I. INTRODUCTION

On November 1, 1991, a University of Iowa graduate student shot and killed four persons and himself.<sup>3</sup> In late August 1990, five students were murdered and their bodies mutilated at the University of Florida's Gainesville campus.<sup>4</sup> In 1987, at Clarkson University, Katherine Hawelka was raped and murdered<sup>5</sup> by a

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1. LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY, AND HOW THE BANKERS USE IT* 62 (Nat'l Home Libr. ed., 1933).

2. WILLIAM SHAKESPEARE, *TITUS ANDRONICUS* act v, sc. 1, lines 63-64 (Gustav Cross ed., Penguin Books 1966) (1594).

3. *Student Kills 4, Then Himself at Iowa Campus*, L.A. TIMES, Nov. 2, 1991, at A20. The student was upset because "his dissertation was not nominated for an academic award" *Id.*

4. Denise Kalette, *Campus Crime: USA's Bloody Secret Tranquility is Shattered by Violence*, USA TODAY, Sept. 14, 1990, at 1A. A grand jury was empaneled to hear evidence against the key suspects. Keith Goldschmidt, *Gainesville Killings Going to Grand Jury*, GANNETT NEWS SERVICE, Nov. 3, 1991, available in LEXIS, Nexus Library, Omni File.

5. Elizabeth Greene, *Pressed by Students and Parents, Colleges Step Up Their Efforts to Fight Crime on Campuses*, CHRON. OF HIGHER EDUC., Sept. 28, 1988, at A1. Katherine's death was even more tragic since her parents believed that the rural Clarkson campus in Potsdam, New York, was safer than their daughter's other choice of college, urban Syracuse. The Hawelkas' expectations were not without some basis. Federal Bureau of Investigation statistics for 1987 reveal a total of 130 crimes on the 4277 person Potsdam campus. F.B.I. UNIFORM CRIME REPORTS FOR 1987 114 [hereinafter UCR FOR 1987]; WORLD ALMANAC AND BOOK OF FACTS 1988 245 (Mark S. Hoffman ed., 1988) (student enrollment statistics). By 1990, crime at the Potsdam campus had increased to

local resident.<sup>6</sup> In 1986, at Lehigh University, 19-year old Jeanne Ann Clery was raped, sodomized, tortured, and murdered in her dormitory room by a fellow student.<sup>7</sup>

Campus crime leaves an indelible mark on its victims, their families, and university and college communities.<sup>8</sup> It is estimated that more than 21,000 college students each year are victims of campus crime ranging from robbery and assault to rape and murder,<sup>9</sup> the equivalent of 57 violent acts each day, or one violent act every 25 minutes. Institutions of higher education are no longer "safe, bucolic havens, academic groves where the pursuit of knowledge and the cultivation of fellowship shut out many of the threats and fears of everyday life."<sup>10</sup> Victims, or their families, often contend that a school's failure to warn of possible criminal activity,<sup>11</sup> the failure to protect them from the foreseeable criminal acts of others,<sup>12</sup> and the failure to discipline students who victimize other students,<sup>13</sup> perpetuate campus crime. Most complaints center on a

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156 property crimes, although no violent crimes were reported. F.B.I. UNIFORM CRIME REPORTS FOR 1990 124 [hereinafter UCR FOR 1990].

6. Todd S. Purdum, *The Reality of Crime on Campus*, N.Y. TIMES, April 10, 1988, § 12, at 49. The perpetrator was sentenced to life imprisonment. *Id.*

7. Stacey Colino, *Felony 101*, STUDENT LAWYER, Oct. 1990, at 33. The student was sentenced to death. Denise Kalette, *New Law Ends Parents' Tragic Battle*, USA TODAY, Nov. 12, 1990, at 1D.

8. Kalette, *supra* note 7, at 2D ("As many as 100,000 parents struggled with the aftermath of violence toward their children as a result of campus crime in the past five years."). See also 136 CONG. REC. H3121 (daily ed. June 5, 1990) (remarks of Rep. Williams) ("Articles about increases in crime and racial violence on college campuses have, of course, raised concerns about the safety of students on college campuses.").

9. Carol Jouzaitis, *Law Tries to Uncover Campus Crime*, CHI. TRIB., Dec. 2, 1990, § 2, at 1. See also Jim Castelli, *Campus Crime 101*, N.Y. TIMES, Nov. 4, 1990, § IV, at A34 (Federal Bureau of Investigation statistics for 1989 revealed 2 murders, 241 forcible rapes, 1683 cases of aggravated assault, and 417 cases of arson for the 361 colleges and universities reporting; a 1989 survey revealed that 36% of students reported being victims of crime).

10. Purdum, *supra* note 6, at 49.

11. See *infra* notes 104-07 and accompanying text.

12. See *infra* notes 108-26 and accompanying text.

13. Kristine Maxie was raped by a fellow student at Carleton College in Minnesota. She sued the college for failure to provide a safe environment and adequately discipline her attacker. Judy Keen, *Colleges 'Degrade' Rape Victims*, USA TODAY, June 11, 1991, at 1A. Two other Carleton students alleged that they were raped by the same man, a man who college officials knew had committed similar attacks on other students but did nothing about. Nancy Gibbs, *The Clamor on Campus: Date Rape Is One Crime that Colleges Are Finding Hot to Handle but Impossible to Ignore*, TIME, June 3, 1991, at 54, 55. The college settled with the women before the case could proceed to trial. Maura Lerner, *Carleton Rape Suit Is Settled; Four Women Had Accused College of Negligence*, STAR TRIB., Nov. 1, 1991, at 1B (St. Paul edition).

college's failure or refusal to release campus crime information, thereby frustrating student and parental attempts to gauge the extent of campus crime and take adequate precautions.<sup>14</sup>

Against this backdrop, a number of states enacted mandatory reporting provisions of campus crime information for colleges and universities within their borders.<sup>15</sup> These state-imposed requirements are not uniform and thus make inter-school comparisons difficult.<sup>16</sup> Congress acknowledged the importance of uniformity in increasing college administrators' and students' awareness of campus crime,<sup>17</sup> and enacted the Crime Awareness and Campus Security Act<sup>18</sup> in November 1990. The legislation is designed to "ensure . . . that students and employees at institutions of higher education are aware of crimes committed on campus and are familiar with security policies and procedures."<sup>19</sup> The Act mandates that all colleges and universities whose students receive federal funds compile crime statistics and implement campus security policies beginning September 1, 1991.<sup>20</sup> Beginning September 1, 1992, such schools are required to prepare, publish, and distribute information to current and prospective students and employees detailing these security policies and crime statistics.<sup>21</sup>

This note examines the effect of the federal Crime Awareness

14. See *infra* notes 245-70 and accompanying text.

15. The states which have passed campus crime reporting legislation are California, Connecticut, Delaware, Florida, Louisiana, Massachusetts, New York, Pennsylvania, Tennessee, Virginia, Washington, West Virginia, and Wisconsin. See *infra* note 62.

16. Each state's reporting requirements vary. Compare N.Y. EDUC. LAW § 6450 (McKinney 1985 and Supp. 1992) (mandating only the reporting of campus sexual assault statistics) with 24 PA. CONS. STAT. § 2502-3 (1991) (directing the reporting of campus crime statistics for inclusion in Pennsylvania's Uniform Crime Reports, thus mandating reporting of murder, rape, robbery, assault, burglary, larceny-theft, and motor vehicle theft). The FBI's Uniform Crime Reports also recognize the difficulty in making inter-school comparisons based on reported crime statistics. See UCR FOR 1987, *supra* note 5, at 127 ("[C]aution should be exercised in making any inter-campus comparisons or ranking schools, as university/college crime statistics are affected by a variety of factors.").

17. "[T]here is a clear need — (A) to encourage the development on all campuses of security policies and procedures; (B) for uniformity and consistency in the reporting of crimes on campus . . . ." Crime Awareness and Campus Security Act, Pub. L. No. 101-542, § 202, 104 Stat. 2384 (1990) (codified as amended at 20 U.S.C. § 1092(f) (Supp. II 1992)). See generally *infra* notes 229-74 and accompanying text (detailing the legislative history and development of the Crime Awareness and Campus Security Act).

18. Crime Awareness and Campus Security Act, Pub. L. No. 101-542, §§ 201-205, 104 Stat. 2384 (1990) (codified as amended at 20 U.S.C. § 1092(f) (Supp. II 1992)).

19. 136 CONG. REC. H11,500 (daily ed. Oct. 22, 1990) (statement of Rep. Coleman).

20. 20 U.S.C. § 1092(f)(1).

21. *Id.*

and Campus Security Act of 1990 on college and university liability for student victimization. Part II provides the milieu against which crime reporting legislation is enacted by surveying the history of campus crime. It concludes with an introduction to current state and federal efforts to curb and combat campus crime, including the reporting of campus crime statistics. Part III examines prior attempts of students and their families to hold colleges and universities liable for injuries resulting from campus crime under theories of special relationship, duty to warn, breach of contract, misrepresentation, and negligence. Part IV analyzes state attempts at campus crime legislation and the problems raised by reporting crime statistics, and recommends that states with less stringent reporting requirements adopt the comprehensive methods employed by other states. Part V examines the federal government's response to campus crime through its enactment of the Crime Awareness and Campus Security Act. Finally, Part VI critiques the federal Act and draws upon the state reporting provisions to suggest improvements to its compilation and dissemination requirements. It also considers the effect of crime statistics on determining the foreseeability of campus crime.

This note advocates increased reporting requirements that will bolster student awareness of campus crime. The release of crime statistics and campus security policies may serve as a sword for student-victims or their families to attack institutions which fail to respond adequately to campus crime. But these statistics may also shield colleges and universities from liability for crimes committed against their students.

## II. BACKGROUND

### A. The History of Campus Crime

Campus crime is by no means a new phenomenon. As early as the 1800's, student riots were reported at Harvard, Princeton, Yale, and the University of Virginia.<sup>22</sup> These incidents were reminiscent of the "town versus gown" riots which afflicted European universities in the Middle Ages.<sup>23</sup> Apart from these extreme cases,

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22. Princeton University was plagued by student riots as early as 1807; Harvard University in 1820; the University of Virginia in the early 1820's; and Yale in 1841. MICHAEL C. SMITH, *COPING WITH CRIME ON CAMPUS* 6 (1988) [hereinafter SMITH, *CRIME ON CAMPUS*].

23. *Id.* at 1-2. A riot at Oxford University on Saint Scholastic's Day 1354, for exam-

concrete statistics are unavailable for early campus crimes<sup>24</sup> because colleges and universities generally policed themselves and disciplined their own students rather than referring student-criminals to the judicial system.<sup>25</sup> Thus, colleges and universities maintained the facade that crime did not occur on campus.<sup>26</sup> If crime did occur, it was committed by people from the larger community intruding upon the sanctity of the college or university. Even today, "[p]opular wisdom, and often wishful thinking, has it that campus crimes represent outside incursions into academia, 'as though the violence were from people coming from off campus to rape and pillage'"<sup>27</sup> However, violence endemic to the larger society,<sup>28</sup> and sadly, schools in general,<sup>29</sup> infiltrated the col-

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ple, involved "[t]hree days of battle between the city-dwellers and the scholastics [which] left the university pillaged and many dead, including two chaplains who were flayed alive." *Id.*

24. *Id.* at 17.

25. *Id.* at 5.

26. See Carla Wheeler, *Campus Crime on the Rise*, GANNETT NEWS SERVICE, July 22, 1991, at 1, available in LEXIS, Nexis Library. "With their neatly trimmed lawns, scholarly atmosphere and sense of family, college campuses can lull students into a false sense of security. The fear of being a crime victim ranks right up there with the fear of being hit by a meteorite." *Id.* Even college officials ignore the reality of campus crime: "We're an institution of higher learning. We don't have that many undesirables who come to campus to get an education." *Id.* (quoting Mr. Bob Fletcher, Chief of Campus Police for Crafton Hills College in Yucaipa and San Bernadino Valley College). Interestingly, neither Crafton Hills nor San Bernadino Valley College report crime statistics to the FBI. See UCR FOR 1990, *supra* note 5, at 119-27.

27. Castelli, *supra* note 9, at A34 (quoting Jan Sherrill, Director of the Towson State University (Md.) Center for the Study and Prevention of Campus Violence).

28. See, e.g., JOSEPH JULIAN & WILLIAM KORNBLUM, *SOCIAL PROBLEMS* 180-81 (5th ed. 1986) ("Violence and aggression are woven deeply into the fabric of American history; repeatedly the rewards went to the violent and the strong. For more than two centuries during the westward expansion, for example, Native Americans were systematically exterminated and their lands seized."); CHARLES H. MCCAGHY, *DEVIAANT BEHAVIOR: CRIME, CONFLICT, AND INTEREST GROUPS* 115-17 (2d ed. 1985) ("American history is filled with violence of great variety" ranging from labor violence and organized crime to racial conflicts, the lynch mob and the American government's use of deadly force to control certain groups, whether Native Americans, striking coal miners in Colorado, or students at Kent State University); SMITH, *CRIME ON CAMPUS*, *supra* note 22, at 13 ("The rampant crime that now plagues America is an appalling paradox in a society that boasts of the dignity of the citizen, the freedom of the individual, and the rule of law and order."); Philip Taft & Philip Ross, *American Labor Violence: Its Causes, Character, and Outcome*, in *VIOLENCE IN AMERICA: HISTORICAL AND COMPARATIVE PERSPECTIVES* 187, 187 (Hugh D. Graham & Ted R. Gurr eds., rev. ed. 1979) ("The United States has had the bloodiest and most violent labor history of any industrial nation in the world. There have been few sections and scarcely any industries in which violence has not erupted at some time, and even more serious confrontations have on occasion followed.").

29. Campus crime is not unique to colleges and universities. A study of the San Diego

lege campus, for "[w]ith the wall between academe and the world outside disintegrating, inevitably the problems of the larger culture have begun to intrude upon the academy"<sup>30</sup> The institution of higher education, awakening to the reality of campus crime, now appreciates that it is "no longer a privileged sanctuary"<sup>31</sup>

A study by the Towson State University Center for the Study and Prevention of Campus Violence revealed 285,000 campus crimes,<sup>32</sup> approximately eighty percent of which are committed by students against students.<sup>33</sup> This is especially true in cases of rape,<sup>34</sup> in which seventy-eight percent of campus sexual assaults are committed by students<sup>35</sup> while half of all reported acquaintance rapes are committed by athletes or fraternity members.<sup>36</sup> According to the Federal Bureau of Investigation's Uniform Crime Reports for 1990, the latest date for which statistics

City school system in 1990-1991, for example, revealed that the most serious crimes against persons and property were committed by junior high school and middle school-aged students. David Smollar, *School Crime Rise Is Biggest in Decade*, LOS ANGELES TIMES, Aug. 28, 1991, at 1B. Overall, there were about 8000 crimes during this period, of which 3000 were serious enough to require arrest and referral to the judicial system. *Id.* The study revealed 65 cases of assault with a deadly weapon, 75 cases of assault and battery against school employees, 355 cases of assault and battery against students, 41 cases of aggravated robbery against students, 143 charges of weapons possession, 24 cases of handgun possession, 589 acts of vandalism, 398 thefts, and 40 threats to school officials. *Id.*

30. SMITH, CRIME ON CAMPUS, *supra* note 22, at 8. Smith posits two catalysts for the recent surge in campus violence: the civil rights movement and the Vietnam-era protests of the 1960's and 1970's, which brought, "for the first time, widespread intentional law-breaking and violence to the campuses" *Id.*

31. Andi Rierdon, *Campuses Fighting Back as Crime Increases*, N.Y. TIMES, Oct. 21, 1990, § XII, at 1 (quoting William A. Massett, Executive Director of the University of Connecticut's Public Safety Division).

32. E. Arthur Gray, *Students Need Better Campus Security*, N.Y. TIMES, Sept. 23, 1990, § IV, at 20. These crimes included 31 murders, 600 rapes, 1800 robberies, 13,000 assaults, and 22,000 burglaries. *Id.*

33. Rierdon, *supra* note 31, at 1. Cf. James A. Fox & Daryl A. Hellman, *Location and Other Correlates of Campus Crime*, 13 J. CRIM. JUST. 429, 439 (1985) ("It seems that college campuses may be isolated entities whose crime problems exist as functions of internal attributes rather than as functions of external features of the communities surrounding the campuses.") (emphasis added).

34. A 1985 survey of 7000 students on 32 campuses revealed that 1 in 8 women had been raped, date rape included. In addition, 1 in 12 men admitted to using physical coercion to force, or to try to force, a woman to have sexual intercourse. Purdum, *supra* note 6, at 51.

35. 136 CONG. REC. S16,614 (daily ed. Oct. 24, 1990) (statement of Sen. Gore).

36. A 1990 national survey of 12,000 college and university students conducted by Towson State University revealed that 50% of all reported date and acquaintance rapes are committed by athletes and fraternity members. Constance Johnson, *When Sex Is the Issue*, U.S. NEWS & WORLD REPORT, Oct. 7, 1991, at 34, 34.

are available, 2761 violent crimes<sup>37</sup> and 132,601 property crimes<sup>38</sup> were reported on 402 college and university campuses.<sup>39</sup> Despite this reality, many students are, for the most part, blissfully unaware of the dangers facing them on campus.<sup>40</sup>

Several factors reinforce the fiction that college campuses are entities isolated from problems ravaging the parent society. First, campus crime statistics grossly underestimate the scope of the campus crime problem.<sup>41</sup> As many as two to ten times the number of campus crimes that are reported to authorities remain unreported.<sup>42</sup> Under-reporting is particularly acute in cases of rape and sexual assault.<sup>43</sup> As a result, the actual extent of campus

37. UCR FOR 1990, *supra* note 5, at 119-27. The UCR defines "violent crimes" as murder, forcible rape, robbery, and aggravated assault. *Id.* at 127 n.2.

38. *Id.* at 119-27. The UCR defines "property crimes" as burglary, larceny-theft, and motor vehicle theft. *Id.* at 127 n.3.

39. *Id.* at 119-27. An eight day survey of 100 college and university campuses revealed 690 crimes, including 2 rapes, 61 assaults, 2 robberies, 2 burglaries, 326 thefts, 88 drug and alcohol violations, 197 crimes resulting in property damage, and 12 hate crimes. *Crime Update*, USA TODAY, Dec. 7, 1990, at 7A.

40. See *infra* notes 45-47 and accompanying text.

41. There are 3535 colleges and universities in the United States with a total student enrollment of 13,043,118. CHRON. OF HIGHER EDUC., ALMANAC, Sept. 5, 1990, at 5. This figure includes 2127 four-year institutions with an enrollment of 8,175,008 students, and 1408 two-year institutions with 4,868,110 students. *Id.* Many of the nation's most prestigious colleges and universities do not report crime statistics to the FBI. UCR FOR 1990, *supra* note 5, at 119-27. In fact, only 12 of the nation's top-ranked 50 colleges and universities listed released campus crime statistics to the FBI in 1990. *Id.*

42. SMITH, CRIME ON CAMPUS, *supra* note 22, at 17. A nationwide poll of colleges and universities conducted in 1987 revealed that only 31% of all on-campus sexual assaults and 49% of all on-campus physical assaults were reported to campus police or security. Margaret E. Reford, Comment, *Pennsylvania's College and University Security Information Act: The Effect of Campus Security Legislation on University Liability for Campus Crime*, 94 DICK. L. REV. 179, 181 n.19 (1989) (quoting Towson State University Center for the Study and Prevention of Campus Violence, *Regional Campus Violence Survey: 1985, 1986, 1987 General Reports*).

43. It is estimated that as many as 90% of all rapes go unreported. Keen, *supra* note 13, at 2A; Terry N. Steinberg, *Rape on College Campuses: Reform Through Title IX*, 18 J.C. & U.L. 39, 43 (1991). "Even though the likelihood [of rape] is highest for female college students, the reporting rate is lowest. Only one in ten campus-rape victims reports her rape to the college administration." *Id.* Of those rapes actually reported, only 1 in 100 is prosecuted. Debbie Howlett & Jennifer Campbell, *Public Colleges Must Now Report Crime Statistics*, USA TODAY, Sept. 3 1991, at 3A. Inaction by authorities, "fear of unsympathetic treatment, embarrassment of publicity, fear of assailant reprisal, and apprehension of further victimizing by the court proceedings" make many women reluctant to report being raped. Steve W. Batson, *Minimizing Liability for the College Administrator: Female Student Protection*, in SCHOOL LAW UPDATE 1986 120, 120 (1987). The psychological trauma and stigma associated with rape also makes rape victims reluctant to recount their assaults to the authorities. "Public exposure of rape will subject the victim to the risk of stigmatization on three levels: negative status is conferred because she is



crime is uncertain. Furthermore, a state's definitions of crime may not comport with the definitions employed by the FBI. Even if such figures are reported, they are not included in the UCR crime statistics.<sup>44</sup> Second, many college students are away from home for the first time and are uninformed of the reality and extent of campus crime.<sup>45</sup> College catalogs and recruiting brochures portray campuses as idyllic, tranquil, and aloof from everyday troubles and thus do little to alert students to the possibility of victimization.<sup>46</sup> Finally, administrators and officials are concerned with the damage to their school's reputation (enrollment) and alumni support (donations) that might result from divulging their campus crime problems.<sup>47</sup> Perhaps most tellingly, college and university officials

known as a victim and loser, because an actual act of intercourse with an illegal partner has become common knowledge, and because a most intimate experience can be discussed openly." MCCAGHY, *supra* note 28, at 125.

44. Illinois, for example, repealed its rape law and adopted instead a gender-neutral definition of sexual assault. ILL. ANN. STAT. ch. 38, para. 12-16 (Smith-Hurd Supp. 1991). Thus, rapes occurring on Illinois school campuses, even though reported to the FBI, are not included in the UCR. Cf. UCR FOR 1990, *supra* note 5, at 15 ("Forcible rape, as defined in the Program, is the carnal knowledge of a female forcibly and against her will.").

45. See, e.g., Linnett Myers, *Lessons in Crime; Taking Aim at a Widespread Campus Enemy: Navvete*, CHI. TRIB., Dec. 8, 1988, § 5, at 1. For example, a DePaul University freshman, new to Chicago, considered visiting a place that he had heard about — Cabrini-Green. He did not know that Cabrini-Green is a poverty-stricken, crime-ridden, public housing complex. The campus police officer conducting the orientation replied, "No, no, no, you shouldn't go there. It's not the Water Tower." *Id.*

46. David Davenport, *The Catalog in the Courtroom: From Shield to Sword?*, 12 J.C. & U.L. 201, 202 (1985). Davenport posits that college catalogs are essentially advertisements: "They contained profusions of eulogiums on the goodness of the institutions, their high objectives, the profundity of their professors. There were pictures of attractive young men and women tripping through campus scenes or engaging in lively activity on the gridiron and the tennis courts. Occasionally, a bespectacled youth was shown in reflective contemplation in a corner of the library." *Id.* See also Rierdon, *supra* note 31, at 1 (The images of green lawns and students at play in these brochures "depict a life far removed from everyday reality. But the gulf between the campus and the outside world appears to be narrowing" as recent surveys of the increases in campus crime reveal.); *supra* notes 32-40 and accompanying text (detailing recent studies of campus crime).

47. MICHAEL CLAY SMITH, *CRIME AND CAMPUS POLICE: A HANDBOOK FOR POLICE OFFICES AND ADMINISTRATORS* 4 (1989) (colleges may purposefully understate the occurrence of campus crime so as to avoid negative publicity); SMITH, *CRIME ON CAMPUS*, *supra* note 22, at 88 ("College and university administrators have many reasons to want to avoid adverse publicity about their institutions. Reports of crime on campus discourage potential students and faculty members, and everyone in the business today knows the necessity of 'keeping up the numbers' of enrollees in order to justify budgets and programs."); *Id.* at 131 ("Another dimension to campus sex crime is the adverse publicity that an institution is likely to receive."). See also 136 CONG. REC. S16,614 (daily ed. Oct. 24, 1990) (statement of Sen. Specter) ("there is an indication that when

simply do not perceive campus safety and the presence of campus crime as a priority concern.<sup>48</sup>

### B. School and Legislative Responses to Campus Crime

The reality of campus crime and student naivete,<sup>49</sup> have increased the threat of liability for colleges and universities if they fail to protect their students from victimization.<sup>50</sup> Courts have become more willing to hold colleges and universities liable for their failure to protect a student-victim<sup>51</sup> on the basis of a special rela-

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rapes and other violent crimes occur on campuses, campus security officers may be disinclined to make such information known or available to the public or the campus community"); *Press Conference, Security on Campus, Inc.. The Introduction and Need for the Campus Sexual Assault Victims Bill of Rights*, FEDERAL NEWS SERVICE, May 14, 1991, at 1, 6, available in LEXIS, Nexis Library (in describing the need for a "Bill of Rights" for victims of campus sexual assault, Rep. Ramstad (R-Minn.) recounted cases of rape victims steered away from the criminal justice system by college administrators: "It's obviously the intent of many of these colleges and universities to protect their backsides, to protect their fundraising, to keep their enrollments up"). Despite this, several highly publicized incidents, and the work of grassroots organizations like Security on Campus, have focused national attention on the problem of campus crime.

48. The Vice President of State Relations for Purdue University (Ind), in commenting on the Indiana legislature's proposed campus crime reporting act, stated that he does not "think it's necessary to call attention to those problems which aren't any more of a problem on a campus than they are in any other community. There's certainly not any need for state legislation." James Grass, GANNETT NEWS SERVICE, Feb. 1, 1991, at 1, available in LEXIS, Nexis Library. The consensus of University of Florida students after the five murders, however, is that "[t]hus is not the way college was supposed to be." Kalette, *supra* note 4, at 2A. "A 1989 survey for the Carnegie Foundation for the Advancement of Teaching found that only 20 percent of college presidents said increasing the quality of campus security was 'very important,' the lowest percentage of 20 possible changes in their schools the presidents were asked to rate." Castelli, *supra* note 9, at A34. This attitude is even more pronounced with respect to "date rape," which "does not even merit official mention in the agenda of the First International Conference on Sexual Assault on Campus in Orlando, Fla." in October 1991. Johnson, *supra* note 36, at 34.

49. See *supra* notes 45-47 and accompanying text.

50. According to Frank Carrington, a victims' rights lawyer who tracked lawsuits involving campus crime, there are over 200 appellate cases dealing with the issues of college liability for failure to protect students. Castelli, *supra* note 9, at A34. Carrington estimates that for every appellate case there are 20 trial court cases, with the number of cases having tripled over the last 10 years. About half the suits filed are won by victims or their families. *Id.* Note, too, that it is estimated that many civil claims against colleges and universities go unreported, either because the cases are concluded at the trial level, or because of "1) settlement, 2) immunity doctrines, 3) claimant's inability to meet the requisite burden of proof for negligence, and 4) the availability of the defenses of assumption of the risk and contributory (or comparative) negligence." Nancy R. Hauserman & Paul Lansing, *Rape on Campus: Postsecondary Institutions as Third Party Defendants*, 8 J.C. & U. L. 182, 184 (1982).

51. See, e.g., *Peterson v. San Francisco Community College Dist.*, 685 P.2d 1193 (Cal. 1984) (college liable for failure to protect student from reasonably foreseeable criminal

tionship,<sup>52</sup> negligence,<sup>53</sup> and breach of contract.<sup>54</sup> More cognizant of potential liability, administrators are attempting to increase student awareness of campus crime through seminars<sup>55</sup> and the release of campus crime information.<sup>56</sup> States are also more aware of the need for campus awareness.<sup>57</sup> Particular attention has been paid to the problems of acquaintance and gang rape,<sup>58</sup> since the majority of these crimes are committed by students against other students.<sup>59</sup> Campus crime received national recognition as well

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assault on campus). See generally Anita Raddatz, *Crime on Campus: Institutional Tort Liability for the Criminal Acts of Third Parties*, N.A.C.U.A. (1988) (overview of cases and causes of action detailing college and university liability); Douglas Richmond, *Crime on Campus: When is a University Liable?*, 27 NASPA J. 324 (1990) (survey of cases and causes of action raised against colleges and universities for student victimization).

52. See, e.g., *Duarte v. State*, 151 Cal. Rptr. 727 (Cal. App. 1979), *ordered not officially published*, (university held liable on basis of landlord-tenant relationship for the rape and murder of a student in her dormitory room). See generally Raddatz, *supra* note 51; Richmond, *supra* note 51.

53. See, e.g., *Cutler v. Board of Regents*, 459 So. 2d 413 (Fla. Dist. Ct. App. 1984) (university could be found liable to student raped in dorm room due to college's negligence and breach of contract); *Miller v. State*, 467 N.E.2d 493, 497 (N.Y. 1985) (university's negligence was the proximate cause of student's rape; award of \$400,000 upheld on appeal). See generally Raddatz, *supra* note 51; Richmond, *supra* note 51.

54. See, e.g., *Cutler*, 459 So. 2d 413.

55. See Anthony Flint, *Freshman Orientation Redefined*, BOSTON GLOBE, Sept. 1, 1991, at 32 (seminars on date rape, alcohol and drug abuse, and campus crime are conducted during freshmen orientation to acquaint new students with the realities of college life); CAL. EDUC. CODE § 67390(j) (West Supp. 1992) ("Comprehensive information about acquaintance rape and other kinds of sexual assaults should be provided at all new student orientation programs and at any campus program that students are required to attend."); N.Y. EDUC. LAW § 6450 (1-a)(a) (McKinney 1985 and Supp. 1992) ("[E]ach college shall inform incoming students about sexual assault prevention measures").

56. Grass, *supra* note 48, at 1 (Purdue University, for example, distributes monthly "Crime Line" fliers detailing the incidence of 20 types of campus crime including rape, robbery, theft, burglary, assault, attempted suicide, and drunk driving).

57. See *supra* notes 15-16 and accompanying text, detailing state campus crime reporting requirements.

58. "[A]t the University of Arkansas, where two rape accusations against athletes have been made in the last year, athletes are now required to attend workshops on date rape" to increase awareness of sexual assault and to help men avoid the miscommunication and misunderstanding that can lead to rape. David Leon Moore, *Athletes and Rape: Alarming Link*, USA TODAY, Aug. 27, 1991, at 1C. See also CAL. EDUC. CODE § 67390(k) (West Supp. 1992) ("Colleges should provide *special* sexual assault seminars for all athletic coaches and administrators and members of athletic teams during a student athlete orientation program or prior to the first team meeting.") (emphasis added).

59. Johnson, *supra* note 36, at 34. Athletes are almost 40 percent more likely to be reported for rape than the average campus male. *Id.* "The National Interfraternity Council, representing 62 organizations with 400,000 members, distributes a videotape that tries to show how men and women miscommunicate about sex." *Id.*, *Nation's Colleges Left Unprepared for Campus Rape Epidemic*, PR NEWSWIRE, Aug. 23, 1988 (Rape Treatment

when the United States Congress designated the week beginning September 1, 1991, as National Crime Awareness and Campus Security Week.<sup>60</sup>

As universities and colleges encountered increasing pressure from courts, parents, and students to release campus crime information, states responded by enacting crime reporting laws for schools within their borders. Pennsylvania was the first state to pass such reporting legislation.<sup>61</sup> Altogether, thirteen states<sup>62</sup> have enacted reporting provisions for colleges and universities that range from reporting all campus crime<sup>63</sup> to divulging only campus sexual assault statistics.<sup>64</sup> A lack of uniformity in crime reporting criteria<sup>65</sup> and the dearth of state participation<sup>66</sup> made federal action

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Center at Santa Monica Hospital (Cal.) issued a report on campus rape "as a call to action for every college president in the country to immediately implement programs to prevent campus sexual assaults and to deal effectively with its aftermath."); Gibbs, *supra* note 13 ("college officials have led the effort to raise consciousness about the [rape] problem through rape-awareness weeks, video series, training manuals, and posters"); Rierdon, *supra* note 31 (the Connecticut Consortium for the Prevention of Sexual Assaults on University Campuses "offer[s] educational programs, peer counseling and speakers bureaus"). See also *infra* notes 180-87 (detailing state legislative responses to campus rape and sexual assault).

60. 137 CONG. REC. H6254-04 (daily ed. Aug. 1, 1991).

61. College and University Security Information Act, 24 PA. CONS. STAT. § 2502 (1989). This law was enacted through the lobbying efforts of Constance and Howard Clery after their daughter was murdered at Lehigh University. See Kalette, *Campus Crime*, *supra* note 4 and accompanying text; Reford, *supra* note 42, at 182 (detailing Pennsylvania's College and University Security Information Act).

62. To date, 13 states have enacted some college crime reporting provision. See CAL. EDUC. CODE §§ 67380, 67390-93, 94380 (West Supp. 1992); CAL. PENAL CODE §§ 628 to 628.6 (West 1954 and Supp. 1992); CONN. GEN. STAT. ANN. §§ 10a-55a to 10a-55c (West Supp. 1992); DEL. CODE ANN. tit. 14, §§ 9001 to 9005 (Supp. 1992); FLA. STAT. ch. 240.2683 (Supp. 1992); LA. REV. STAT. ANN. § 17:3351(3) (West Supp. 1992); MASS. GEN. L. ch. 22, § 16 (Supp. 1992); N.Y. EDUC. LAW § 6450 (McKinney 1985 and Supp. 1992); 24 PA. CONS. STAT. § 2501-1 (1991); TENN. CODE ANN. § 49-7-2203 (1990); VA. CODE ANN. § 23-9.1:1 (Michie Supp. 1992); WASH. REV. CODE § 28B.10.569 (Supp. 1992); W. VA. CODE § 18B-1-8a (Supp. 1992); WIS. STAT. ANN. § 36.11(22) (West Supp. 1992).

63. See CAL. EDUC. CODE ANN. §§ 67380, 67390-93, 94380 (West Supp. 1992); CAL. PENAL CODE §§ 628 to 628.6 (West 1954 and Supp. 1992); CONN. GEN. STAT. ANN. §§ 10a-55a to 10a-55c (West Supp. 1992); DEL. CODE ANN. tit. 14, §§ 9001 to 9005 (Supp. 1992); FLA. STAT. ch. 240.2683 (Supp. 1992); LA. REV. STAT. ANN. § 17:3351(3) (West Supp. 1992); MASS. GEN. L. ch. 22, § 16 (Supp. 1992); 24 PA. CONS. STAT. § 2501-1 (1991); TENN. CODE ANN. § 49-7-2203 (1990); VA. CODE ANN. § 23-9.1:1 (Michie Supp. 1992); WASH. REV. CODE § 28B.10.569 (Supp. 1992); W. VA. CODE § 18B-1-8a (Supp. 1992).

64. See N.Y. EDUC. § 6450 (McKinney 1985 and Supp. 1992); WIS. STAT. ANN. § 36.11(22) (West Supp. 1992).

65. See, e.g., *supra* note 44 (detailing the conflict between Illinois' definition of rape

necessary. In response, the federal Crime Awareness and Campus Security Act was passed in November 1990.<sup>67</sup>

The Crime Awareness and Campus Security Act requires all colleges and universities which receive federal funds, or whose students receive federal funds, to report and disseminate campus crime statistics.<sup>68</sup> The purpose of this law is to increase the free flow of information so that prospective students and their families can make informed choices regarding which school to attend, as well as to enable students to take precautions against becoming victims once enrolled.<sup>69</sup> Representative Goodling, sponsor of the Act, explained:

As students arrive on campuses across the United States, many for the first time, they will be caught up in the excitement [sic] of meeting other students, settling into their classes, and the overall enjoyment of college life. They will give little thought to the possible dangers which exist on college campuses today — unless their schools make an effort to provide them with information on crime trends on campus and the security precautions they will need to take to prevent themselves from becoming victims. The reality of the matter is that students are being killed, raped, and assaulted [sic] on college campuses. While we don't want to scare college students, we want to make them aware of the fact that life on a college campus is not that different than life in any city or town in the United States.<sup>70</sup>

Mere release of statistics may be insufficient, however, to warn students of campus crime. Students need information to place these statistics in perspective, as well as information on security procedures and policies. Forewarned of crimes on their campuses, students "will be better able to protect themselves while going to school. With the free flow of [campus crime] information, students and their parents will be able to make intelligent, 'free-market' choices among schools factoring safety into their calcula-

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and the definition employed by the FBI).

66. See *supra* notes 62-64 and accompanying text.

67. 20 U.S.C. § 1092(f) (Supp. 1992).

68. *Id.*

69. *Id.*

70. 137 CONG. REC. H6255 (daily ed. Aug. 1, 1991) (remarks of Rep. Goodling, sponsor of the Crime Awareness and Campus Security Act).

tions .<sup>71</sup>

While the expanding availability of information will heighten student awareness of campus crime, it may also increase college and university liability. The release of crime statistics directly impacts the foreseeability of a criminal incident, which determines whether causation exists between a school's failure to protect its students from victimization and the crime. Furthermore, if the university has taken reasonable security precautions, thus rendering campus crime less foreseeable, it may be shielded from liability.

### III. THEORIES OF INSTITUTIONAL LIABILITY

#### A. The Birth and Death of *In Loco Parentis*

Colleges and universities were once thought to stand *in loco parentis* to students.<sup>72</sup> Under this theory, the courts viewed colleges as educators and care-givers to college students whose parents had entrusted them to the college. The theory was articulated in 1866 in *People v. Wheaton College*,<sup>73</sup> in which the court upheld a college's proscription on membership in secret societies.<sup>74</sup> The legal attitude toward the doctrine of *in loco parentis* as it applied to college students is manifested in *Gott v. Berea College*,<sup>75</sup> in which a school regulation prohibiting attendance at local bars was upheld.<sup>76</sup> The court explained:

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

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71. *Shedding Light on Campus Crime*, CHI. TRIB., July 5, 1991, at 17. See *infra* note 84 and accompanying text (rise of the student-consumer).

72. Literally, "*in loco parentis*" means "[i]n the place of a parent." BLACK'S LAW DICTIONARY 787 (6th ed. 1991).

73. 40 Ill. 186 (1866).

74. *Id.*

75. 161 S.W. 204 (Ky. 1913).

76. *Id.* at 206.

fere, unless the rules and aims are unlawful or against public policy<sup>77</sup>

Under this doctrine, then, "education authorities acted in the stead of parents for, it was supposed, the best interests of the students."<sup>78</sup> The doctrine of *in loco parentis* was firmly entrenched in American jurisprudence through the 1960's and into the early 1970's.<sup>79</sup>

The 1960's witnessed widespread social change, discontent, and the assertion of independence by college and university students. The Twenty-Sixth Amendment,<sup>80</sup> coupled with students' rebellion against parental authority, led to the demise of the *in loco parentis* doctrine.<sup>81</sup> In 1979, the Third Circuit Court of Appeals laid to rest the canon of *in loco parentis* in *Bradshaw v. Rawlings*.<sup>82</sup> The court held that "the modern American college is not an insurer of the safety of its students. Whatever may have been its responsibility in an earlier era, the authoritarian role of today's college administrations has been notably diluted in recent decades."<sup>83</sup> Instead, the doctrine "has been replaced by the concept of student as citizen and consumer, a person who simply is buying a service."<sup>84</sup> Al-

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77. *Id.*

78. SMITH, CRIME ON CAMPUS, *supra* note 22, at 5. Colleges and universities were also held responsible for the physical well-being of their students. See, e.g., *Brigham Young Univ. v. Lillywhite*, 118 F.2d 836, 842-843 (10th Cir. 1941), *cert. denied*, 314 U.S. 638 (1941) (university liable for injuries student sustained while in an unsupervised classroom).

79. Michael Clay Smith, *College Liability Resulting From Campus Crime: Resurrection For In Loco Parentis?*, 59 W. EDUC. L. REP. 1, 1 (1990) [hereinafter Smith, *College Liability*].

80. The Twenty-Sixth Amendment lowered the age of majority from 21 to 18. U. S. CONST. amend. XXVI. See also *Healy v. James*, 408 U.S. 169, 197 (1972) (Douglas, J., concurring) ("Students — who, by reason of the Twenty-sixth Amendment, become eligible to vote when 18 years of age — are adults who are members of the college or university community.").

81. James J. Szablewicz and Annette Gibbs, *Colleges' Increasing Exposure to Liability: The New In Loco Parentis*, 16 J. L. & EDUC. 453, 456 (1987). See also Smith, *College Liability*, *supra* note 79, at 1 ("The venerable old doctrine, which for so long had justified the comprehensive authority of professor and college over student, had fallen weak during the 1960s under a steady decline in parental authority, but the immediate cause of death was an expanded concept of individual liberties, complicated by a lowered age of majority.").

82. 612 F.2d 135 (3d Cir. 1979), *cert. denied*, 446 U.S. 909 (1980).

83. *Id.* at 138.

84. SMITH, CRIME ON CAMPUS, *supra* note 22, at 65. See also LAWRENCE E. GLADIEUX AND THOMAS R. WOLANIN, CONGRESS AND THE COLLEGES 28-29 (1976) (examining the trends which led to recognition of the student-consumer).

though there has been a general refutation of *in loco parentis*, colleges and universities have been found liable to student crime-victims in a recent line of cases, which, as some commentators suggest, may presage a resurrection for *in loco parentis*.<sup>85</sup>

### B. *In Loco Parentis* Revisited

Colleges and universities are confronting increased liability for student victimization, as demonstrated by the multiplying number of lawsuits filed against schools for crime-related injuries.<sup>86</sup> To establish a *prima facie* case of civil liability against a college, a student or her heirs must prove four essential elements: (1) the college had a duty; (2) this duty was breached; and (3) the breach was the proximate cause (4) of an injury to the student.<sup>87</sup> While the theories of recovery vary, each claims a duty on the part of the college and university.<sup>88</sup> These claims generally fall into five categories,<sup>89</sup> only three of which have substantial judicial approbation:

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85. Smith, *College Liability*, *supra* note 79, at 5; Szablewicz and Gibbs, *supra* note 81, at 464-65. Smith explains how contemporary realities of college life herald the rebirth of *in loco parentis*:

In the campus crime liability cases, the courts have acknowledged the dependent status of students in relation to their colleges. The students often have little say in the conditions under which they must live on campus; for the most part they simply must accept the locking systems, roommates, and social codes which they are given by the institutions. In the courts' recognition of the inevitable inability of students to fully take care of themselves, and the corresponding duty upon the institutions to protect them, the same forces are at work which gave rise, centuries ago, to the *in loco parentis* doctrine.

Smith, *College Liability*, *supra* note 79, at 5. See also Perry A. Zirkel and Henry F. Reichner, *Is the In Loco Parentis Doctrine Dead?*, 15 J. LAW & EDUC. 271, 282 (1986) ("[T]he college context is the only one in which the *in loco parentis* theory has undergone a clear rise and complete demise in our courts." The authors contend that the doctrine still exists to some extent in primary and secondary schools.). See *infra* text accompanying notes 95-126 for cases detailing college and university liability for student victimization. But see Theodore C. Stamatakis, Note, *The Doctrine of In Loco Parentis, Tort Liability, and the Student-College Relationship*, 65 IND. L. J. 471, 490 (1990) (asserting that the new line of cases does not demonstrate a return to *in loco parentis* as the doctrine was originally applied, but instead indicates that the courts are fashioning common law remedies as the law evolves and changes).

86. See *supra* note 50 and accompanying text; SMITH, CRIME ON CAMPUS, *supra* note 22, at 81 ("Crime on campus is subjecting institutions of higher learning and those who run them to a broad new field of civil liability for money damages.").

87. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 164-65 (5th ed. 1984) [hereinafter PROSSER AND KEETON].

88. Michael Clay Smith, *Institutional Liability Resulting From Campus Crime: An Analysis of Recovery*, 55 W. EDUC. L. REP. 361 (1989).

89. Smith interprets these categories as: "(1) a duty to be forthcoming about risks; (2) a duty to warn about risks; (3) a duty to provide adequate protection; (4) a duty to



"(1) a duty to be forthcoming about risks; (2) a duty to warn about risks; [and] (3) a duty to provide adequate protection."<sup>90</sup> Foreseeability, one way to demonstrate the existence and breach of a duty,<sup>91</sup> is the criterion against which colleges and universities are judged in determining whether they should be held liable when their students fall victim to campus crime.<sup>92</sup> The release of crime statistics will likely change how the courts or institutions of higher education view the foreseeability of any particular criminal incident or type of incident.

While for the most part courts have declined to impose new duties of care on institutions of higher learning, they have used the fact of foreseeability to impose stricter duties of care within the already present categories. The use of crime statistics will multiply a college's liability for student victimization because neither state campus-crime reporting statutes nor the Crime Awareness and Campus Security Act provide guidance for determining what level of campus crime is foreseeable, leaving courts and juries to determine foreseeability on a case-by-case basis.

### 1. Duty to Be Forthcoming

In general, colleges and universities have a duty to be forthcoming about the nature and extent of on-campus crime. Thirteen

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screen student applicants; and (5) a duty to control student conduct." *Id.*

90. *Id.* To date, no court has held that a college has a duty to protect students from crimes occurring off-campus. The sole decision addressing this issue, and denying recovery, is *Donnell v. California Western School of Law*, 246 Cal. Rptr. 199 (Cal. Ct. App. 1988) (law school owed no duty to student assaulted on property immediately adjacent to the school since the law school neither owned nor exercised control over the public sidewalk). In *Eiseman v. New York*, 511 N.E.2d 1128 (N.Y. 1987), the New York Court of Appeals declined to hold a college liable to murder victims' families for its failure to screen an applicant who was a convicted felon and who had murdered the victims. The paroled felon was attending school as part of a special program for the disadvantaged. *Id.* The court ruled that the college had no heightened duty to screen him, even though the college knew of his felonious history. *Id.* See generally Dena M. Kobasic, et al., Student Case Comment, *Eiseman v. State of New York: The Duty of a College to Protect its Students From Harm Caused by Other Students Admitted Under Special Programs*, 14 J.C. & U.L. 591 (1988) (evaluating the impact and effects of *Eiseman* on college liability for student victimization).

91. See PROSSER AND KEETON, *supra* note 87, § 43, at 280.

92. Foreseeability is "the reasonable anticipation that harm or injury is a likely result from certain acts or omissions." BLACK'S LAW DICTIONARY 649 (6th ed. 1991); see also SMITH, CRIME ON CAMPUS, *supra* note 22, at 86 ("The foreseeability doctrine has become firmly implanted in American college and university law.").

states<sup>93</sup> and the federal government<sup>94</sup> have imposed a statutory duty to be forthcoming. In *Duarte v. State*,<sup>95</sup> the court found a university liable for the rape and murder of a female college student for its failure to disclose knowledge of prior crimes in the area.<sup>96</sup> The mother alleged that she had relied upon representations by the university that it was a safe place.<sup>97</sup> Thus, a college or university may be liable for negligent misrepresentation if it fails to disclose the reality of crime on its campus or in the surrounding area.<sup>98</sup> Since the majority of state crime reporting laws now in effect, as well as the Crime Awareness and Campus Security Act, require campus crime statistics and security procedures to be divulged in a suitable manner,<sup>99</sup> a college may also be found liable for common law fraud or negligent misrepresentation<sup>100</sup> if its catalogs or brochures are fraudulent or misleading.<sup>101</sup> A college which misrepresents the safety of its campus in its catalog may also be liable for breach of contract.<sup>102</sup> Finally, a college or

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93. See *infra* text accompanying notes 127-228.

94. See *infra* text accompanying notes 229-74.

95. 151 Cal. Rptr. 727 (Cal. Ct. App. 1979).

96. *Id.* at 735.

97. *Id.*

98. See RESTATEMENT (SECOND) OF TORTS § 311, 106-09 (1965), which provides:

Negligent Misrepresentation Involving Risk of Physical Harm

(1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results

(a) to the other, or

(b) to such third persons as the actor should expect to be put in peril by the action taken.

(2) Such negligence may consist of failure to exercise reasonable care

(a) in ascertaining the accuracy of the information, or

(b) in the manner in which it is communicated.

99. See *infra* text accompanying notes 158-96, 245-70.

100. See PROSSER AND KEETON, *supra* note 87, § 105, at 728; RESTATEMENT (SECOND) OF TORTS § 525, 55-58 (1965) (a common law action for misrepresentation requires a plaintiff to plead and prove (1) a false statement of material fact; (2) known by the defendant to be false, or uttered with reckless disregard for the truth or falsity of the statement; (3) upon which the plaintiff reasonably relies; (4) resulting in damage to the plaintiff).

101. See Davenport, *supra* note 46, at 204 ("With the increased use of catalogs as tools for recruiting new students, and the increasingly hard sell advertising approach some schools have followed, an action for common law fraud or misrepresentation based upon statements or omissions in the university catalog now becomes more likely.").

102. See *supra* note 98 and accompanying text. At least one case involved a breach of contract action for injuries arising out of campus crime. In *Nieswand v. Cornell University*, 692 F. Supp. 1464 (N.D.N.Y. 1988), parents of a murdered student sued the university, alleging that the university brochures, leaflets, and documents sent to students created

university which withholds crime and security information may also be negligent *per se*, since the violation of a statute that defines reasonable conduct "is negligence in itself."<sup>103</sup>

## 2. Duty to Warn

The duty to warn theory of college liability for student victimization assumes that a "special relationship" exists between the school and the student which creates a legal duty to warn students of potential danger from third parties when such danger is foreseeable. The seminal case in this area is *Peterson v. San Francisco Community College District*.<sup>104</sup> In *Peterson*, a student was the victim of an assault and attempted rape on a stairwell near a college parking lot.<sup>105</sup> The court held that since the college had notice of similar incidents on the *same* stairway and had neither publicized the incidents nor warned students of the impending danger, the university had breached its duty to the plaintiff.<sup>106</sup> To date, no court has held a college or university liable for failure to warn students of crimes occurring off-campus.<sup>107</sup>

## 3. Duty to Provide Adequate Security

The third category, the duty to provide adequate security, encompasses both the landowner-business invitee theory<sup>108</sup> and the

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an implied contract of security. *Id.* at 1469. Specifically, two of the documents stated that doors to residence halls were locked at night. *Id.* at 1470. The killer had gained entrance to a building at a time when it was supposed to be locked. *Id.* at 1465. The court rejected the university's motion for summary judgment and left the case open for more factual development. *Id.* at 1471.

103. RESTATEMENT (SECOND) OF TORTS § 288B(1), 37 (1965). See also Reford, *supra* note 42, at 191-92. "Under the doctrine of negligence per se, an unexcused violation of the Act would constitute negligence in and of itself." *Id.* at 191.

104. 685 P.2d 1193 (Cal. 1984).

105. *Id.* at 1195.

106. *Id.* at 1201-02.

107. See *supra* note 90.

108. According to the RESTATEMENT (SECOND) OF TORTS § 344, 223-24 (1965):

A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

The landowner is under a duty to use reasonable care in inspecting the premises to discover possible dangerous conditions and to warn and protect invitees "from dangers which are foreseeable from the arrangement or use of the property." PROSSER AND KEETON,

landlord-tenant theory<sup>109</sup> of liability. Once a college or university has notice that there is a likelihood of criminal incidents, either through campus reports, possibly including crime statistics, or specific complaints from residents regarding a particular aspect of the campus (an unlit or unpatrolled area of the grounds for example), it may be liable for failure to provide security measures adequately designed to protect students from campus crime.<sup>110</sup> In *Mullins v. Pine Manor College*,<sup>111</sup> for example, the Massachusetts Supreme Court found a college liable for a student rape-victim's injuries for its failure to protect her.<sup>112</sup> Although there were no incidents of violent crime reported on the campus for several years, there was a burglary the year preceding the rape and a man climbed the wall surrounding the campus and entered a commons building the night before the attack.<sup>113</sup> The student was taken from her dormitory room to an unlocked dining hall, and raped. The court believed that the security procedures were inadequately implemented, and were implemented in such a way as to induce reliance by the students.<sup>114</sup> Albeit that colleges no longer stand *in loco parentis* to their students, the court stated that the college was "not enti-

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*supra* note 87, § 61, at 426.

109. Generally, under common law notions of property, landlords are under no duty to provide for tenants once the premises are transferred. PROSSER AND KEETON, *supra* note 87, § 63, at 434. An exception is a landlord's duty to warn tenants of latent defects or dangerous conditions on the premises if a reasonable person would not realize the presence of such conditions. A landlord may be liable for injuries resulting from the failure to disclose. *Id.* § 63, at 436.

110. Note that this duty does not extend to crime occurring *off-campus*. The California Court of Appeals refused to impose on colleges a duty to protect students from crimes occurring off-campus in *Donnell v. California Western School of Law*, 246 Cal. Rptr. 199 (Cal. Ct. App. 1988). The facts in *Donnell* are compelling: there were several reported incidents on the sidewalk where the plaintiff was assaulted, the sidewalk was adjacent to the law school, and the lack of school-provided parking necessitated plaintiff's use of the sidewalk. *Id.* at 199-200. If a court is unwilling to extend a duty in this case, it is unlikely that liability would be extended in other, less factually compelling, cases.

111. 449 N.E.2d 331 (Mass. 1983).

112. *Id.* at 333, 336.

113. *Id.* at 334.

114. *Id.* at 336, 338. Evidence showed that the risk of criminal activity likely to affect an all-women's college situated on the only road and rail lines leading to Boston was foreseen by college administrators, who warned students of this risk. *Id.* at 337. Yet the students were assured that the security guards and physical barriers would keep most criminals away from the college. *Id.* at 336. The guards, however, policed at irregular intervals and were generally unsupervised; the campus gates were often left unlocked; and the surrounding fence was easily scaled. *Id.* at 340. Based on this evidence, the court observed that the college's breach of its voluntarily assumed duty to protect students could be the basis of liability. *Id.* at 335.

tle[d] to abandon any effort to ensure [students'] physical safety" simply because it was no longer responsible for their moral well-being.<sup>115</sup> Since the rape was foreseeable, the college could be held liable for the student's injuries.<sup>116</sup>

In *Miller v. New York*,<sup>117</sup> the university's duty to its resident students was compared with the duty imposed upon a landlord with respect to her tenants.<sup>118</sup> A student at the State University of New York at Stony Brook was raped in a dormitory room.<sup>119</sup> The court found that the university had breached its duty to protect its "tenants" from reasonably foreseeable criminal assaults by failing to lock the outer doors in its residence halls, despite complaints from students of crimes, including rape, occurring in other campus dormitories.<sup>120</sup> Since the assault was foreseeable and the university had failed to provide adequate security, the university was found liable for the student's injuries.<sup>121</sup>

In *Rabel v. Illinois Wesleyan University*,<sup>122</sup> however, the court held that the university's use of security guards and employment of security devices "d[id] not rise to the level of a contractual obligation on the part of the university to provide 'protection'". Thus, in its capacity as a landlord, the university had no duty to protect its tenants from harm caused by intentional or criminal act [sic] of third parties."<sup>123</sup> While Illinois does not recognize the landlord-tenant relationship as one which *per se* creates a special duty, "by contracting with a third party to provide protection or security services, the landlord may voluntarily assume certain duties."<sup>124</sup> Since there was no assumption of special duties by the university in *Rabel*, the university was not liable to a student injured by a fraternity member while in her residence hall. Although liability will not be imposed when criminal acts are unforeseeable,<sup>125</sup> the trend appears to favor imposing a duty on colleges

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115. *Id.* at 335-36.

116. *Id.* at 337.

117. 467 N.E.2d 493 (N.Y. 1984).

118. *Id.* at 494.

119. *Id.*

120. *Id.* at 495.

121. *Id.* at 497. On remand the \$25,000 original award to the plaintiff was increased to \$400,000 because of the horror and aftermath of the rape. *Miller v. New York*, 487 N.Y.S.2d 115, 116 (App. Div. 1985).

122. 514 N.E.2d 552 (Ill. App. 1987).

123. *Id.* at 562.

124. *Id.*

125. See, e.g., *Hall v. Board of Supervisors Southern Univ.*, 405 So. 2d 1125 (La. Ct.

and universities in their landlord capacities when they voluntarily assume certain duties, such as providing security for their tenants.<sup>126</sup>

In each of these three categories — duty to be forthcoming, duty to warn, and duty to provide adequate security — courts use foreseeability as the criterion to measure whether a school's duty to its injured student has been breached. Because the focus of this note is college and university liability, it is important to view how states have dealt with the problem of campus crime and how their campus crime reporting laws have affected the foreseeability of campus crime in regards to litigation.

#### IV STATE ATTEMPTS AT CAMPUS CRIME LEGISLATION

Pennsylvania was the first state to enact legislation requiring colleges and universities to report campus crime statistics to the FBI.<sup>127</sup> Twelve states and the federal government have followed Pennsylvania's lead in enacting their own crime reporting statutes for colleges and universities within their borders.<sup>128</sup> These reporting provisions generally follow a tripartite division of data collection procedures, notice and dissemination requirements, and security

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App. 1981), *cert. denied*, 407 So. 2d 748 (La. 1981) (student shot in common area of residence hall by non-student could not recover from university because this was an isolated, unforeseeable incident). The courts have been hesitant to impose liability on colleges and universities in a landowner-invitee context as well. *See, e.g., Relyea v. Florida*, 385 So. 2d 1378, 1383 (Fla. Dist. Ct. App. 1980) (university not liable for the murders of two female students because it was not proven that the university "had actual or constructive knowledge of prior, similar criminal acts committed upon invitees"); *Brown v. North Carolina Wesleyan College, Inc.*, 309 S.E.2d 701, 703 (N.C. Ct. App. 1983) (college not liable for abduction, rape and murder of student because the criminal act was not foreseeable.); *see also* Irma W. Merrill, *Landlord Liability for Crimes Committed by Third Parties Against Tenants on the Premises*, 38 VAND. L. REV. 431, 454 (1985) (landlords can escape liability for criminal assaults against tenants by third parties if the assault was not foreseeable).

126. *See, e.g., Cutler v. Board of Regents*, 459 So. 2d 413, 414-15 (Fla. Dist. Ct. App. 1984) ("recent Florida decisions have held that a landlord, who recognizes and assumes the duty to protect his tenants from foreseeable criminal conduct, may be liable if he fails to take reasonable precautions to prevent injury to his tenants from this conduct"); *Miller v. New York*, 467 N.E.2d 493 (N.Y. 1984). *See generally* Reford, *supra* note 42, at 193-94.

127. 24 PA. CONS. STAT. § 2502-1 (1991). The crime reporting law was passed after intensive lobbying by Constance and Howard Clery. *See* Reford, *supra* note 42, at 181-82 (detailing the passage and impact of Pennsylvania's College and University Security Information Act).

128. *See* statutes cited *supra* note 63; Crime Awareness and Campus Security Act, 20 U.S.C. § 1092(f) (Supp. 1992).

policies and procedures. Several reporting laws also include provisions in the event of noncompliance by a college or university

#### A. Data Collection Procedures

In 1988, Pennsylvania enacted its College and University Security Information Act.<sup>129</sup> The Pennsylvania law served as the model for subsequent state and federal campus crime reporting laws. The operative provision of the Pennsylvania Act describing data collection mandates that "[e]ach institution of higher education shall report to the Pennsylvania State Police, on an annual basis, crime statistics for publication in Crime in Pennsylvania (Uniform Crime Report) on forms and in the format required by the Pennsylvania State Police."<sup>130</sup> Crime statistics for a three-year period and crime rates based on the number of students per institution, must also be published and distributed to students, employees and, upon request, to all persons applying for admission.<sup>131</sup> With some variation, most states adopted similar reporting provisions as the framework for their crime reporting statutes.<sup>132</sup>

Delaware's College and University Security Information Act,<sup>133</sup> for example, adopts the Pennsylvania reporting requirements, but specifies that "[e]ach institution of higher education shall prepare a report, *on at least a monthly basis*, of the numbers and types of reported criminal offenses occurring on property owned or leased by the institution."<sup>134</sup> Section 9003(b) of the Delaware Act requires that the campus crime rate be expressed in terms of crimes per one hundred students.<sup>135</sup> This format may make crime statistics more understandable to the average college student. A monthly reporting requirement, in addition to the annual reporting of crime statistics, also provides increased notice to a college community about criminal activity occurring on campus. The campus crime reporting provisions of California,<sup>136</sup> Massa-

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129. 24 PA. CONS. STAT. § 2502-3 (1991).

130. *Id.* § 2502-3(a).

131. *Id.* § 2502-3(b).

132. *See, e.g.,* CONN. GEN. STAT. ANN. §§ 10a-55a to 10a-55c (West Supp. 1992).

133. DEL. CODE ANN. tit. 14, §§ 9001 to 9005 (Supp. 1992).

134. *Id.* § 9003(a) (emphasis added).

135. *Id.* § 9003(b).

136. *See* CAL. EDUC. CODE § 67380 (West Supp. 1992) (detailing campus crime reporting duties undertaken by community college districts, the Regents of the University of California, the Board of Directors of the Hastings College of Law, and the Trustees of the California State University); CAL. EDUC. CODE § 94380 (West Supp. 1992) (detailing the campus crime reporting responsibilities of private colleges and universities with a full-

chusetts,<sup>137</sup> Tennessee,<sup>138</sup> and Washington<sup>139</sup> are essentially identical to the Delaware Act.

Two states, however, have narrowly defined reporting provisions that focus exclusively on campus rape and sexual assault. Wisconsin, for example, requires only the reporting of "statistics on sexual assaults and on sexual assaults by acquaintances of the victims that occurred on the campus in the previous year."<sup>140</sup> This campus crime reporting provision requires that "date" rapes be separately reported. The Wisconsin law also provides for the dissemination of national, state and campus crime statistics.<sup>141</sup> New York provides for neither the reporting nor dissemination of either campus crime statistics or campus sexual assault statistics.<sup>142</sup> It does, however, state that the "advisory committee on campus security" shall "review current policies and procedures for reporting sexual assaults."<sup>143</sup> At least one New York State Senator has criticized this law as inadequate.<sup>144</sup>

Several states require minimal reporting of campus crime statistics. Florida, for example, requires only the reporting of campus crime statistics and notice that such information is available.<sup>145</sup> This reporting requirement is less stringent than those imposed by other states. For example, where Delaware requires monthly reports

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time enrollment of 1000 or more students and private vocational institutions).

137. See MASS. GEN. L. ch. 22, § 16 (Supp. 1992). The Massachusetts law is essentially identical to the federal Crime Awareness and Campus Security Act, and becomes "null and void upon the implementation of a federal campus security law." MASS. GEN. L. St. 1990, § 2 (1990). Thus, the Massachusetts law became inoperative September 1, 1992, when the Crime Awareness and Campus Security Act became fully effective.

138. See TENN. CODE ANN. § 49-7-2203 (1990).

139. See WASH. REV. CODE § 28B.10.569 (Supp. 1992).

140. WIS. STAT. ANN. § 36.11(22)(d) (West Supp. 1992).

141. *Id.* § 36.11(22)(b).

142. N.Y. EDUC. LAW § 6450(1-a) (McKinney Supp. 1992).

143. *Id.* §§ 6450(4), 6450(4)(c).

144. New York State Senator E. Arthur Gray has proposed legislation "which would require colleges to inform all applicants and employees of crimes committed on campus." E. Arthur Gray, *Students Need Better Campus Security*, N.Y. TIMES, Sept. 23, 1990, at 20. Various legislation has been introduced in the New York Senate and General Assembly to rectify New York's campus crime reporting deficiencies. See H.R. 2667, 214th Gen. Assem., 2d Reg. Sess. (1991) (would require compilation and disclosure of on-campus crime and off-campus student victimization); H.R. 2869, 214th Gen. Assem., 2d Reg. Sess. (1991) (would require colleges and universities to report on-campus crimes to local police); H.R. 4918, 214th Gen. Assem., 2d Reg. Sess. (1991) (would require compiling and disclosing statistics on campus crimes); S. Res. 5789, 214th Gen. Assem., 2d Reg. Sess. (1991) (would require detailing security personnel and procedures).

145. FLA. STAT. ch. 240.2683(2) (Supp. 1992).



and crime rates expressed in rates per hundred students,<sup>146</sup> Florida merely requires that statistics for the most recent three-year period be reported.<sup>147</sup> Virginia<sup>148</sup> and West Virginia<sup>149</sup> have also imposed relatively minimal campus crime reporting criteria. Virginia only directs an institution of higher education to "make available to any interested party upon request a copy of that portion of the most recent report of the Uniform Crime Reporting Section of the Department of State Police entitled 'Crime in Virginia' pertaining to colleges and universities."<sup>150</sup> Similarly, West Virginia requires that campus crime statistics be collected and distributed as an element of that state's "statewide report card," which is used for intra-state school comparisons, as well as for regional and national school comparisons.<sup>151</sup> The fact that campus crime statistics are included with information ranging from student demographics (e.g., test scores, athletic programs, and graduation rates) to school finances may detract from the gravity of campus crime. And since this law only applies to *public* colleges and universities, private schools are exempt from the law's requirements.<sup>152</sup>

California is unique among states which enacted campus crime reporting laws. First, it is the only state which requires colleges and universities to compile information on all criminal and non-criminal acts and arrests involving hate violence.<sup>153</sup> Second, California requires its public primary and secondary schools to report crime statistics.<sup>154</sup> The California Legislature requires its public school districts to adopt "a comprehensive school safety plan that addresses safety concerns identified through a systematic planning process."<sup>155</sup> Presumably, this includes the compiling and sharing of school crime statistics among the school districts.<sup>156</sup> Studies of

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146. DEL. CODE ANN. tit. 14, § 9003 (Supp. 1992).

147. FLA. STAT. ch. 240.2683(2) (Supp. 1992).

148. VA. CODE ANN. § 23-9.1:1 (Michie Supp. 1992).

149. W. VA. CODE § 18B-1-8a (Supp. 1992).

150. VA. CODE ANN. § 23-9.1:1 (Michie Supp. 1992).

151. W. VA. CODE § 18B-1-8a(a) (Supp. 1992).

152. *Id.* § 18B-1-8a(b). Private colleges and universities in West Virginia enroll approximately 8000 students annually. BARRON'S, PROFILES OF AMERICAN COLLEGES 1228-43 (17th ed. 1990).

153. A. 1094, Cal. Assem., Reg. Sess. (1991). The bill was signed by the Governor on October 5, 1991.

154. CAL. PENAL CODE §§ 628.1 to 628.6 (West 1994 and Supp. 1992).

155. CAL. EDUC. CODE § 35294 (West Supp. 1992). See CAL. EDUC. CODE §§ 32261, 35294.1 (West Supp. 1992) for legislative findings and development of these school safety plans, respectively.

156. See CAL. EDUC. CODE § 35294.1 (West Supp. 1992) ("(a) School safety planning

school crime indicate that crime is not endemic to colleges and universities, and a recent California study revealed that most campus crime is committed by junior high- and middle school-aged children.<sup>157</sup>

#### B. Notice and Information Dissemination Requirements

Crime statistics would fail to alert students and administrators to campus crime if such statistics were not published and distributed, or otherwise made available, to the college or university community. Each of the thirteen states with college and university crime reporting provisions<sup>158</sup> has similar notice and dissemination requirements. Once again, Pennsylvania's College and University Security Information Act is illustrative:

Upon request, the institution shall provide the report to every person who submits an application for admission to either a main or branch campus and to each new employee at the time of employment. In its acknowledgment of receipt of the formal application of admission, the institution shall notify the applicant of the availability of such information. The information shall also be provided on an annual basis to all students and employees.<sup>159</sup>

The Act's dissemination requirement is only triggered by the "request" of the applicant.<sup>160</sup> This is a major weakness of the Act because it places the burden of inquiry on the student, rather than requiring the college or university to supply such information as part of its recruitment literature or application. The California,<sup>161</sup>

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may include, but not be limited to: (1) Assessing the current status of school crime committed on school campuses and at school-related functions.").

157. See *supra* note 29.

158. See *supra* note 62.

159. PA. CONS. STAT. § 2502-3(b) (1991).

160. *Id.*

161. CAL. EDUC. CODE § 67380 (West Supp. 1992) (regulating public postsecondary educational institutions); CAL. EDUC. CODE § 94380 (West Supp. 1992) (regulating private postsecondary educational and vocational institutions). Although the California Legislature "recognizes that all pupils enrolled in [its primary and secondary] public schools have the inalienable right to attend classes on campuses that are safe, secure, and peaceful," its school crime reporting law is addressed only to school districts and county administrators. CAL. PENAL CODE §§ 628.5, 628.2 (West 1954 and Supp. 1992). Furthermore, it is ambiguous whether "community leaders, parents, pupils, teachers, administrators, and other [interested persons]" are privy to the assembled school crime information. CAL. EDUC. CODE § 35294 (West Supp. 1992). Without disseminating this information to the public or allowing for its public access, it appears that the legislative intent to provide "safe, se-

Connecticut,<sup>162</sup> Tennessee,<sup>163</sup> and Washington<sup>164</sup> reporting provisions afford students notice in an identical manner.

Delaware's crime reporting law ensures that colleges inform students about campus crime. Campus crime statistics are considered public record,<sup>165</sup> available to any person upon request.<sup>166</sup> The Act, while not providing for notice to applicants for matriculation and employment that such statistics are available, provides an effective manner of communicating crime information to the college community. It states that "crime statistics and crime rates shall also be published on an annual basis *in a campus newspaper or other suitable way* prescribed by the president for the information of all students and employees."<sup>167</sup> However, this requirement could be further improved by requiring monthly publication as well.

Louisiana, however, makes no provision for providing notice or publication, and merely states that reports detailing campus crime statistics "shall be a public record."<sup>168</sup> A similar notice provision appears in the Florida crime reporting statute.<sup>169</sup> The Virginia reporting law does not even specifically state that crime statistics are public record.<sup>170</sup> It only requires that crime statistics be made available upon request.<sup>171</sup> Without informing current and prospective students and employees of the availability of such information, it is unlikely that they will have the wherewithal to seek out such information for themselves. If the Act's purpose is to reduce the incidence of campus crime by increasing students' awareness, that purpose is circumvented by failing to directly provide students with either campus crime statistics or information as to how they might acquire these statistics. Massachusetts, however, has avoided such problems by requiring that "*each institution shall provide public notice* to its campus or campuses that the institution makes said

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cure, and peaceful" schools will be severely hampered. *Id.* § 32261.

162. CONN. GEN. STAT. ANN. § 10a-55a (West Supp. 1992).

163. TENN. CODE ANN. § 49-7-2203 (1990).

164. WASH. REV. CODE § 28B.10.569 (Supp. 1992).

165. DEL. CODE ANN. tit. 14, § 9003(a) (Supp. 1992).

166. *Id.* § 9003(b).

167. *Id.* (emphasis added).

168. LA. REV. STAT. ANN. § 17:3351(C)(1) (West Supp. 1992).

169. FLA. STAT. ch. 240.2683(2) (Supp. 1992) ("The institution shall give notice that this report is available upon request."). The statute specifies neither to whom notice must be given nor the manner in which such notice is to be supplied.

170. VA. CODE ANN. § 23-9.1:1 (Michie Supp. 1992).

171. *Id.*

report available, upon request, to any applicant, student, or employee of the institution and how such individuals can get a copy of the report from the institution."<sup>172</sup>

One problem in interpreting statistics is discerning exactly what the figures indicate.<sup>173</sup> Thus, campus crime statistics should be reported in an understandable manner. West Virginia, for example, requires that all information, including campus crime statistics, contained in its statewide report cards be written in "brief, concise . . . [and] nontechnical language . . ."<sup>174</sup> Technical or explanatory material deemed important by the institution or governing board is placed in a separate appendix and made available to the public upon request.<sup>175</sup> California provides even greater assurance that its crime statistics will be accurate and understandable. The California statute requires that a crime reporting update be sent annually to each school district, "describ[ing] typical errors in school crime reporting procedures, [and] describ[ing] effective and efficient methods of monitoring and recording, school crime data . . ."<sup>176</sup> Furthermore, California requires that its State Department of Education "use tested validation criteria in a representative sample of school districts and county offices of education to assess the accuracy of school crime data submitted . . . by those agencies."<sup>177</sup> However, these validation procedures are addressed only to primary and secondary schools.<sup>178</sup> Public and private colleges and universities are relatively unrestricted in their data collection and dissemination procedures.<sup>179</sup>

Although New York<sup>180</sup> and Wisconsin<sup>181</sup> limit their report-

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172. MASS. GEN. L. ch. 22, § 16 (Supp. 1991) (emphasis added).

173. See also *infra* notes 311-62 and accompanying text (interpretive problems with federal campus crime statistics).

174. W. VA. CODE § 18B-1-8a(a) (Supp. 1992).

175. *Id.*

176. CAL. PENAL CODE § 628.4 (West Supp. 1992).

177. CAL. PENAL CODE § 628.6 (West Supp. 1992).

178. CAL. EDUC. CODE §§ 32261, 35294, 35294.1 (West Supp. 1992).

179. See CAL. EDUC. CODE § 67380 (West Supp. 1992) ("[T]he appropriate officials at each campus within their respective jurisdictions [shall] compile records of . . . [a]ll occurrences reported to campus police or safety authorities of, and arrests for, crimes which are committed on campus involv[ing] violence theft or destruction of property, illegal drugs, or alcohol intoxication . . . [and shall m]ake the information available on the request of any student or employee of, or applicant for admission to, any campus within their respective jurisdictions."); CAL. EDUC. CODE ANN. § 94380 (West Supp. 1992) (similar criteria applied to private educational and vocational institutions).

180. N.Y. EDUC. LAW § 6450(1-a)(a) (McKinney Supp. 1992).

181. WIS. STAT ANN. § 36.11(1-a) (West 1991).

ing laws to rape and sexual assault, both require that sexual assault information be included in incoming student orientation programs. By providing first-year students information on campus sexual assaults, colleges are more apt to dispel myths surrounding rape and acquaintance rape,<sup>182</sup> gender differences and miscommunication,<sup>183</sup> and naivete surrounding campus crime in general.<sup>184</sup> New York's sexual assault prevention information is comprehensive, detailing what information must be disclosed to students,<sup>185</sup> and the manner in which the disclosure is undertaken.<sup>186</sup> California approaches campus rape and sexual assault from a different perspective by delineating policies and procedures for dealing with the victims.<sup>187</sup> The New York law is a model for

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182. See *supra* notes 55, 58-59.

183. See *supra* notes 58-59.

184. See *supra* note 45.

185. N.Y. EDUC. LAW § 6450(1-a)(a) (McKinney Supp. 1992) provides in pertinent part: Such information shall include, but not be limited to: (1) the applicable laws, ordinances and regulations on sex offenses, (2) the penalties for commission of sex offenses, (3) the procedures in effect at the college for dealing with sex offenses, (4) the availability of counseling and other support services for the victims of sex offenses, (5) the nature of and common circumstances relating to sex offenses on college campuses, and (6) the methods the college employs to advise and to update students about security procedures.

186. N.Y. EDUC. LAW § 6450(1-a)(a) (McKinney Supp. 1992) provides in pertinent part: The trustees or governing board of each college shall inform incoming students about sexual assault prevention measures through programs which may include workshops, seminars, discussion groups, and film presentations, in order to disseminate information about sexual assault, promote discussion, encourage reporting of incidents of sexual assault, and facilitate prevention of such incidents.

187. CAL. EDUC. CODE § 94385 (West Supp. 1992) enumerates detailed policies and protocols for dealing with campus rape and sexual assault victims. Section 94385 provides in part that "[t]he written procedures or protocols adopted shall contain as least the following information:

(1) The college policy regarding sexual assault on campus.

(2) Personnel on campus who should be notified, and procedures for notification, with the consent of the victim.

(3) Legal reporting requirements, and procedures for fulfilling them.

(4) Services available to victims, and personnel responsible for providing these services, such as the person assigned to transport the victim to the hospital, to refer the victim to a counseling center, and to notify the police, with the victim's concurrence.

(5) A description of campus resources available to victims, as well as appropriate off-campus services.

(6) Procedures for ongoing case management, including procedures for keeping the victim informed of the status of any student disciplinary proceedings in connection with the sexual assault, and the results of any disciplinary action or appeal, and helping the victim deal with academic difficulties that

states seeking to enact an effective means of ensuring that students receive information on rape and sexual assault, while the California law provides states with an example of procedures adopting a pro-victim stance.

### C. Security Policies and Procedures

With the exceptions of Florida,<sup>188</sup> Virginia,<sup>189</sup> and West Virginia,<sup>190</sup> each state requires the reporting of campus security policies and procedures in addition to crime statistics. California, New York, and Wisconsin, for example, require comprehensive disclosure of procedures relating to the definition of sexual assault, preventive measures, and policies and procedures for dealing with both the sexual assault victim and the offender.<sup>191</sup> Delaware, Louisiana, Massachusetts, Tennessee, and Washington have adopted security policies and procedures identical or similar to the Pennsylvania College and University Security Information Act.<sup>192</sup>

Pennsylvania requires that information detailing policies and procedures for reporting crime to police and school authorities; institutional response to such reports; policies concerning possession and use of alcohol, weapons, and illegal drugs; and information detailing security considerations and the manner in which security information is conveyed to the campus community be reported.<sup>193</sup> Furthermore, any college or university that maintains student housing facilities is required to include descriptions of the security personnel and their training,<sup>194</sup> as well as "the type and frequency of

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may arise because of the victimization and its impact.

(7) Procedures for guaranteeing confidentiality and appropriately handling requests for information from the press, concerned students, and parents.

(8) Each victim of sexual assault should receive information about the existence of at least the following options: criminal prosecutions, civil prosecutions, the disciplinary process through the college, the availability of mediation, alternative housing assignments, and academic assistance alternatives.

CAL. EDUC. CODE § 94385 (West Supp. 1992).

188. FLA. STAT. ch. 240.2683 (Supp. 1992).

189. VA. CODE ANN. § 23-9.1:1 (Michie Supp. 1992).

190. W. VA. CODE § 18B-1-8a (Supp. 1992).

191. See *supra* notes 187-89 (New York and California); WIS. STAT. ANN. § 36.11(22)(a-d) (West 1992).

192. Compare DEL. CODE ANN. tit. 14, § 9003 (Supp. 1992), LA. REV. STAT. ANN. § 17:3351 (West Supp. 1992), MASS. GEN. L. ch. 22, § 16 (Supp. 1991) (repealed 1991), TENN. CODE ANN. § 49-7-2203 (1990), WASH. REV. CODE § 28B.10.569 (Supp. 1992) with 24 PA. CONST. STAT. ANN. § 2502-03 (Supp. 1991).

193. PA. STAT. ANN. tit. 24 § 2502-3(c)(1-15) (Purdon Supp. 1992).

194. *Id.* § 2502-3(d)(1-9).

programs designed to inform student housing residents about housing security and enforcement procedures."<sup>195</sup> This last point is particularly important since the majority of campus crime occurs in student housing facilities.<sup>196</sup>

#### D. Critique of State Campus Crime Reporting Laws

Although education is traditionally a state function,<sup>197</sup> the above discussion reveals the problems inherent in permitting each state to mandate unique campus crime reporting provisions without federal guidance. Current state reporting requirements vary considerably from state to state. Not only are 37 states without any campus crime reporting provision, but states like Virginia and Florida require little more than a recitation of campus crime statistics found in the Uniform Crime Reports.<sup>198</sup> Furthermore, the statistics

195. *Id.* § 2502-3(d)(7).

196. "The conclusion that dormitories bring higher crime rates should be no surprise [W]hen students live in dormitories they and their possessions are physically present on the campus much more. Not only is the time of exposure to potential crime much greater, but so is the amount of property that might be stolen." SMITH, CRIME ON CAMPUS, *supra* note 22, at 22. Courtship violence is also a growing problem on many campuses. *Id.* at 23. More than half of all incidents of courtship violence occurred in a home, dormitory, or apartment. *Id.* at 24. Interroommate violence is also receiving consideration. "Many believe that for every room in the dormitory in which a woman is assaulted, there are seven or eight rooms on the same dormitory floor in which students are punching each other over whose turn it is to sweep." *Id.* at 23. Resident Assistants have also been victims of violence and retaliatory abuse. *Id.* at 25-27. *See also* CAL. EDUC. CODE § 67390(h)(i) (West 1954 and Supp. 1992) (California recognized the link between campus sexual assaults and fraternities, sororities, and residence halls, by requiring each to undergo rape-awareness training each year). Furthermore, date and gang rape often occur in campus housing. *See, e.g.,* Duarte v. California Western School of Law, 148 Cal. Rptr. 804 (Cal. Ct. App. 1978), *ordered not officially published*, 151 Cal. Rptr. 727 (Cal. Ct. App. 1979) (student raped and murdered in dorm room); Cutler v. Board of Regents, 459 So. 2d 413 (Fla. Dist. Ct. App. 1984) (student raped in dorm room); Miller v. New York, 467 N.E.2d 493 (N.Y. 1984), *on remand*, Miller v. State, 487 N.Y.S.2d 115 (App. Div. 1985) (same); Colino, *supra* note 7, at 33 (rape and murder of Jeanne Ann Clery in her dorm room).

197. *See, e.g.,* Brown v. Board of Educ., 347 U.S. 483, 493 (1954) ("[E]ducation is perhaps the most important function of state and local governments."). *See also* LAWRENCE E. GLADIEUX & THOMAS R. WOLANIN, CONGRESS AND THE COLLEGES 3 (1976) ("In the support and control of public higher education, the states have the primary responsibility. This is the most durable assumption concerning the relationship between the federal government and higher education."); JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT, 275 (2d ed. 1861) ("I have dwelt in strong language on the importance of that portion of the operation of free institutions, which may be called the public education of the citizens. Now, of this operation the local administrative institutions are the chief instrument.").

198. *See supra* notes 148, 151.

do not convey the severity of reported crimes, as "thefts of both automobiles and stamps are included in the same figures reporting the incidence of theft on campus."<sup>199</sup> And since campus crime is under-reported,<sup>200</sup> the statistics will not reveal the actual extent of campus crime. Finally, no state law now in effect requires the reporting of crimes against students victimized off-campus or the crime statistics for the surrounding community

Considerable differences also exist in what states actually report as well as how this information is conveyed to the campus community. The purpose of reporting crime statistics is to increase students' awareness so that they may better protect themselves.<sup>201</sup> Since even experts can differ as to the meaning of statistics,<sup>202</sup> crime statistics need to be conveyed in an understandable manner. States considering enacting campus crime reporting laws, and those states seeking to improve current reporting laws, could emulate West Virginia's mandate that all information be written in "brief, concise . . . [and] nontechnical language."<sup>203</sup> By ensuring that campus crime information will be "nontechnical," the definition employed by the reporting agency will be compatible with the general public's perception of that crime. At the very least, such a requirement recognizes the differences between the legal definition and the public perception. California's requirement that data be validated and that school districts be informed of problems with statistics<sup>204</sup> is another way to overcome public misperception and misinterpretation of crime statistics. In addition, California requires that crime statistics for its primary and secondary schools be reported on a "standard school crime reporting form."<sup>205</sup> This facilitates inter-school comparison. Since the California law is directed

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199. Reford, *supra* note 42, at 196. Reford also cites an example of the Pennsylvania university that reported a scuffle among Boy Scouts attending a convention on campus as an aggravated assault. *Id.*

200. See *supra* notes 42-43, 48 and accompanying text.

201. See *supra* notes 70-71 and accompanying text. See, e.g., CAL. PENAL CODE § 628 (West 1954 and Supp. 1992) ("It is the intent of the Legislature in enacting this section to ensure that schools, school districts, local government, and the Legislature have sufficient data and information about the type and frequency of crime occurring on school campuses to permit development of effective programs and techniques to combat crime on school campuses.").

202. See, e.g., MORRIS H. DEGROOT, ET AL., STATISTICS AND THE LAW xi (1986) (the book "covers a wide variety of applications of statistical concepts in legal settings, many of which have provoked controversy.").

203. W. VA. CODE § 18B-1-8a(a) (Supp. 1992).

204. See *supra* text accompanying note 179.

205. CAL. PENAL CODE § 628.1 (West 1954 and Supp. 1992).



only at school districts, however, it is unclear whether the general public would be privy to such information.

Current state reporting laws do not require that campus crimes be reported to local police. This is a major deficiency of the statutes. If a "date rape" victim chooses a disciplinary hearing before campus administrators rather than reporting the incident to the police, the rape allegations may never be made public. It is difficult to believe that campus disciplinary proceedings have either the capability or the jurisdiction to adjudicate felonies. A college disciplinary proceeding would never handle a murder case, but perceives no difficulty in dispensing "justice" in a campus rape case.<sup>206</sup> Such incidents should be reported to local authorities, since a college administrator who has knowledge of a crime, and who steers a victim away from the judicial system, may be guilty of obstruction of justice<sup>207</sup> or misprision of felony<sup>208</sup>

The only state to question whether college and university officials must report campus crimes to the local police has answered that question in the negative.<sup>209</sup> The Tennessee Attorney General explained that "because of statutory grants to both municipalities and to state colleges and universities, it appears that both have the responsibility to maintain and enforce the laws of the state on college grounds."<sup>210</sup> Given the Attorney General's position, and the fact that the Tennessee crime reporting statute does not mention whether campus security is required to report crimes to the police, college and university police officers "are not required to report the

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206. See, e.g., *supra* note 13.

207. Obstruction of justice is defined as: "A person commits a misdemeanor if he purposely obstructs, impairs or perverts the administration of law or other governmental function by force, violence, physical interference or obstacle, breach of official duty, or any other unlawful act." MODEL PENAL CODE § 242.1 (1962).

208. "Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States," is guilty of the federal crime of misprision of felony. 18 U.S.C. § 4 (West 1969 and Supp. 1990). The elements of the crime of misprision of felony are: (1) a felony was committed, (2) the defendant knew of the felony, (3) the defendant failed to notify the authorities, and (4) the defendant took an affirmative step to conceal the crime. *United States v. Davila*, 698 F.2d 715, 717 (5th Cir. 1982). Misprision of felony requires more than "mere failure to report a felony." *Id.* at 717. See, e.g., *United States v. Gravitt*, 590 F.2d 123, 126 (5th Cir. 1979) (suppression of evidence); *United States v. Hodges*, 566 F.2d 674, 675 (9th Cir. 1977) (untruthful statements); *Lancey v. United States*, 356 F.2d 407 (9th Cir. 1966), *cert. denied*, 385 U.S. 922 (1966) (concealing a criminal).

209. 91 Op. Att'y Gen. 74 (Tenn. Aug. 20, 1991).

210. *Id.*

occurrence of on-campus felonies to local authorities."<sup>211</sup> The Attorney General makes clear, however, that campus officials are subject to the laws regarding obstruction of justice.<sup>212</sup>

Furthermore, most state laws do not even require that the campus be informed of criminal incidents as they occur. Several states, however, require that crime reports be issued at least monthly, as well as annually.<sup>213</sup> Since the primary purpose of crime reporting statutes is to inform the students, it is imperative that such information be disseminated when it will be most effective. This means that the college should release incident reports detailing, at least, the crime committed and the location where the crime occurred. In this way, students will be reminded of the reality and danger of campus crime. This is especially important if the criminal has not yet been apprehended.<sup>214</sup>

Campus crime reporting statutes also vary from state to state in the security policies and procedures that must be reported. For example, Pennsylvania details comprehensive policies which must be disclosed to students;<sup>215</sup> New York and Wisconsin require only the reporting of policies and procedures relating to campus sexual assaults;<sup>216</sup> and Virginia makes no mention of security policies.<sup>217</sup> States should adopt security policies and procedures that impose coverage and protection corresponding to the policies delineated in Pennsylvania's Security Information Act and preventive sexual assault provisions similar to these contained in California's or New York's campus sexual assault laws. Although states may be concerned that stricter campus security laws will damage their schools' recruitment efforts, the presence of such laws actually may be an enrollment incentive as students begin to consider campus safety as a factor in selecting colleges.

Only six of the thirteen state laws contain a contingency in the event of a college's noncompliance. Pennsylvania's College and

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211. *Id.*

212. *Id.*

213. *See, e.g.,* DEL. CODE ANN. tit. 14, § 9003(b) (Supp. 1990); LA. REV. STAT. ANN. § 17:3351(c)(1) (West Supp. 1992); WASH. REV. CODE ANN. § 288.10.569(1) (West Supp. 1992).

214. *See supra* note 13 (discussing allegations by several Carleton College students that the college knew the identity of a student serial-rapist but disclosed neither the student's name nor information that an alleged rapist was on campus).

215. *See supra* notes 193-96 and accompanying text.

216. *See supra* notes 180-81 and accompanying text.

217. VA. CODE ANN. § 23-9.1:1 (Michie Supp. 1992).

University Security Information Act allows the Attorney General to "bring an action in the name of the Commonwealth against the institution to compel compliance."<sup>218</sup> If the institution has willfully violated the act, or has failed to conform promptly with a compliance order, a civil penalty up to \$10,000 may be imposed.<sup>219</sup> Delaware's reporting law contains an analogous provision.<sup>220</sup> In Tennessee, "[a]ny official charged with the responsibility of complying with an institution's obligations under this [act], who fails to do so, is guilty of a Class C misdemeanor"<sup>221</sup> which is punishable by not more than thirty days or a fine not to exceed fifty dollars, or both.<sup>222</sup> Wisconsin imposes a similar requirement for violations of any rule in the statute, although both the fine and length of possible incarceration are greater.<sup>223</sup> New York states that if the administrators of the college "fail[] to file the rules and regulations [required by the Act] such college shall not be eligible to receive any state aid or assistance until such rules and regulations are duly filed."<sup>224</sup> Finally, Louisiana provides that "no person shall be commissioned as a university or college police officer until there has been a determination that the particular public or private college or university naming the police officer is in compliance with the [reporting] provisions."<sup>225</sup> As campus safety becomes a recruiting point for colleges, it is unlikely that an institution would ignore statutory reporting requirements if it were publicized that it lacked a campus security force.

States need to ensure compliance with their campus crime statutes. Following legislation already enacted in several states,<sup>226</sup> a

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218. 24 PA. CONS. STAT. § 2502-5(a) (1991).

219. *Id.* § 2502-5(b).

220. DEL. CODE ANN. tit. 14, § 9005 (Supp. 1992).

221. TENN. CODE ANN. § 49-7-2204 (1990).

222. TENN. CODE ANN. § 40-35-111(e)(3) (1990).

223. WIS. STAT. ANN. § 36.11(1) (West Supp. 1992) ("Any person who violates any rule promulgated under this paragraph may be fined not more than \$500 or imprisoned not more than 90 days or both.").

224. N.Y. EDUC. LAW § 6450(2) (McKinney 1985 and Supp. 1992). New York also has the only state reporting provision that includes specific information on hazing. The statute requires colleges to promulgate rules and regulations "prohibit[ing] reckless or intentional endangerment to health or forced consumption of liquor or drugs for the purpose of initiation into or affiliation with any organization." *Id.* § 6450(1). These rules are deemed part of all campus organizations' by-laws. *Id.* This unique approach ensures that all students have notice of the regulations and the sanctions imposed for violation.

225. LA. REV. STAT. ANN. § 17:1805(F) (West Supp. 1992).

226. See *supra* notes 218-25 and accompanying text.

statute could impose civil and criminal penalties for willful non-compliance. As students more carefully scrutinize their choice of college, and as campus crime becomes a factor in such decisions, schools will be forced to improve their campus safety record, especially if publications such as *Barron's Profiles of American Colleges* and *Fisk's Guide to American Colleges and Universities* publish crime data in their college biographies. The threat of adverse publicity for noncompliance may convince a college or university to abide by the state's campus crime reporting laws.

The threat of fines and withholding financial aid creates even greater incentives for compliance, since it is unlikely that colleges and universities could sustain themselves without state financial assistance. In 1989, for example, states supplied \$54.2 billion of the almost \$97.5 billion, or approximately seventy-three percent, in operating costs, student financial aid, and research and development grants by doctorate-granting universities expended by public and private institutions.<sup>227</sup> By withholding these funds for noncompliance, a state could force a college to comply. The Department of Education's success in compelling compliance with the Family Education Rights and Privacy Act by threatening to withdraw federal funding demonstrates the ultimate power of the purse.<sup>228</sup> It

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227. CHRON. OF HIGHER EDUC., ALMANAC, Sept. 5, 1990, at 3.

228. See *Student Press Law Center v. Alexander*, 778 F. Supp. 1227, 1229 (D.D.C. 1991). "Since 1974, the Secretary [of Education] has found 150 violations through the formal complaint process. In every case, with the extraordinary leverage of withdrawing all federal funding, the DoE has obtained voluntary compliance before rendering a formal ruling." *Id.* The Department also issues "technical assistance" letters "which explain the FERPA [the Family Education Rights and Privacy Act, 20 U.S.C. § 1232g (1990 and Supp. 1991), commonly known as the Buckley Amendment] and its potential application to the agency or institution." *Id.* FERPA conditions receipt of federal funds on preserving the privacy of "education records other than directory information" 20 U.S.C. § 1232g(b)(2) (1990). Education records are "those records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." *Id.* § 1232g(a)(4)(A).

Student Press Law Center challenged the Dept. of Education's designating campus crime reports as "educational records" and thus subject to FERPA. The district court held that the plaintiffs had "a significant likelihood of success on the merits of their claim" that the FERPA provision violated their right to receive information under the First Amendment. *Id.* at 1233. The court granted a preliminary injunction prohibiting the Dept. of Education from withholding or threatening to withhold federal funds, or issuing "technical assistance" letters to the effect thereof, from institutions which release campus crime reports. *Id.* at 1234. See also *Bauer v. Kincaid*, 759 F. Supp. 575, 587-88, 592, 593 (W.D. Mo. 1991) (prohibiting the release of campus crime reports violates the Missouri Sunshine Law, and the First and Fifth Amendments of the United States Constitution). Rep. William Goodling (R-Pa) introduced Congressional legislation to permit colleges and

may also be possible to connect compliance with a state reporting law to accreditation. If the college or university does not report crime statistics and fails to institute basic security policies and procedures, the state could threaten to withhold accreditation. Withholding accreditation could seriously jeopardize an institution's enrollment and recruitment efforts.

Overall, those states adopting campus crime reporting laws provide several alternatives to confronting the problem of campus crime. However, the lack of uniformity among the state provisions, the lack of voluntary state participation, as well as the absence of effective enforcement measures, make clear the need for federal action.

#### V THE FEDERAL GOVERNMENT'S RESPONSE TO CAMPUS CRIME: THE CRIME AWARENESS AND CAMPUS SECURITY ACT OF 1990

Although the problem of campus crime existed even before formulation of the *in loco parentis* doctrine, until recently there have been few attempts to deal comprehensively with the problem. Thirty-seven states have yet to enact campus crime reporting provisions. The thirteen state campus crime laws currently in effect reveal considerable differences in the reporting and dissemination of crime statistics, security policies and procedures, and enforcement procedures for noncompliance.<sup>229</sup> Congress found the states unable to meet the campus crime challenge,<sup>230</sup> explaining that "there is a clear need (A) to encourage the development on all campuses of security policies and procedures; (B) for uniformity and consistency in the reporting of crimes on campus; and (C) to encourage the development of policies and procedures to address

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universities to release campus crime reports. See H.R. 2875, 102d Cong., 1st Sess., 1991 (if passed, the bill would amend 20 U.S.C. § 1232g(a)(4)(B)(ii) to read: "The term 'education records' does not include - records maintained by a law enforcement unit or the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement.").

229. See *supra* notes 127-228 and accompanying text.

230. See, e.g., 136 CONG. REC. S16615 (daily ed. Oct. 24, 1990) (statement of Sen. Gore) ("The State laws and individual institutional initiatives are important steps, but we are a long way from solving the problem [and] not all institutions are willing to provide this [campus crime] information, much less encourage students and employees to obtain it."); 136 CONG. REC. H11,499 (daily ed. Oct. 22, 1990) (statement of Rep. Goodling) ("[W]e cannot force colleges and universities to strengthen their security, nor can we prevent campus crimes through the enactment [sic] of this legislation. We [can,] however, make sure institutions of higher education provide students, prospective students, and faculty the information they need to avoid becoming the victims of campus crimes.").

sexual assaults and racial violence on college campuses."<sup>231</sup> As a result, Congress passed the Crime Awareness and Campus Security Act on November 8, 1990.

The Crime Awareness Act was enacted as part of the Student Right-to-Know and Campus Security Act.<sup>232</sup> Title I of the Act deals with the publication of graduation rates of student-athletes.<sup>233</sup> Title III concerns the calculation of student loan default rates.<sup>234</sup> Title II focuses on campus crime and security. It requires that colleges and universities receiving federal funds collect campus crime statistics and information detailing security policies and procedures beginning September 1, 1991. Beginning September 1, 1992, and for each year thereafter, this information must be published and distributed "to all current students and employees, and to any applicant for enrollment upon request."<sup>235</sup> Heralded as "a consumer protection bill for students"<sup>236</sup> and "the most important piece of education accountability legislation ever approved by the Congress,"<sup>237</sup> the Crime Awareness and Campus Security Act is designed to increase students' awareness of campus crime so that they can better prevent themselves from becoming victims.<sup>238</sup>

The Crime Awareness and Campus Security Act contains operative provisions detailing the disclosure requirements for disciplinary proceeding outcomes to student victims (section 203), campus security policies and campus crime statistics (section 204), and program participation agreements (section 205). While the Act ensures uniformity and consistency in reporting, it has failed to

231. Pub. L. No. 101-542, Title II, § 202, 104 Stat. 2384.

232. Pub. L. No. 101-542, 104 Stat. 2381 (codified as amended in scattered sections of 20 U.S.C.S. (Law. Co-op. Supp. 1991)).

233. Pub. L. No. 101-542, Title I, §§ 101-105, 104 Stat. 2381-2384.

234. 20 U.S.C.S. § 1085 (Law. Co-op. Supp. 1991).

235. 20 U.S.C.S. § 1092(f)(1).

236. 136 CONG. REC. H3123 (daily ed. June 5, 1990) (remarks of Rep. Coleman).

237. 136 CONG. REC. S16,613 (daily ed. Oct. 24, 1990) (remarks of Sen. Kennedy).

238. 136 CONG. REC. H11,499 (daily ed. Oct. 22, 1990) (statement of Rep. Williams) ("colleges and universities will be required to publish crime statistics every year so that students and their families may make informed judgments about campus safety"); *id.* at H11,501 (statement of Rep. Coleman) ("This legislation ensures that students and other members of the campus community can make informed decisions about their own safety."); 136 CONG. REC. S16,614 (daily ed. Oct. 24, 1990) (statement of Sen. Gore) ("Central to fostering a safer environment for young people is the institution's duty to warn students about possible dangers on campus. With proper warning, an individual is more likely to take extra measures to ensure his or her personal safety."); *id.* at S16,614 (statement of Sen. Specter) ("This awareness will help students to be more careful in observing security precautions.").

correct several weaknesses contained in the state reporting laws.

#### A. Disclosure of Disciplinary Proceeding Outcomes to Student Victims

Section 203 of the Crime Awareness and Campus Security Act amends provisions of the General Educational Reform Act, 20 U.S.C. § 1232(6), which designated the results of disciplinary proceedings as educational records.<sup>239</sup> This prevented the disclosure of their outcomes to student crime victims. As amended, this section allows, but does not require, colleges and universities to disclose the results of a disciplinary proceeding to victims of violent crime.<sup>240</sup> Representative Levine explained the importance of this provision:

Victims who have suffered not only the abuses of the crime itself, but have also been excluded from the [campus] trial except to present testimony, are left with no sense of closure to the case. Without knowledge of the outcome of the judicial proceeding, victims can make no decisions concerning their own future. They do not know whether to transfer to a new school or a new residence in order to avoid their attackers or whether they will face the attacker in class each day.<sup>241</sup>

Supplying victims with the results of their assailant's disciplinary proceedings is important in several respects. First, as Representative Levine stated, the victim acquires a sense of closure, as well as knowing what lifestyle changes, if any, she should implement. Second, the probability that student-victims will tell others the outcome of their disciplinary proceeding serves an important checking function on the college's administration and enforcement of its disciplinary rules,<sup>242</sup> similar to the rationale for media coverage

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239. 20 U.S.C. § 1232g(6) (1988 and Supp. 1991), commonly referred to as the Buckley Amendment.

240. Section 203 states: "Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing, to an alleged victim of any crime of violence, the results of any disciplinary proceeding conducted by such institution against the alleged perpetrator of such crime with respect to such crime." 20 U.S.C. § 1232g(6) (1988 and Supp. 1991). "Crimes of violence" are defined as those offenses that have "as an element the use, attempted use, or threatened use of physical force against the person or property of another, or any other offense that is a felony and that, by its nature, involves a substantial risk that physical force [will be used] against the person or property of another." 18 U.S.C. § 16 (1988).

241. 136 CONG. REC. H3122 (daily ed. June 5, 1990) (remarks of Rep. Levine).

242. A university's disciplinary code often contains a provision to the effect that, in ad-

of trials.<sup>243</sup> Thus, the potential negative publicity resulting from lax or inefficient enforcement will encourage colleges to deal seriously with campus criminals. Finally, this information promotes student confidence in the administration of the disciplinary process because "the means used to achieve justice must have the support derived from public acceptance of both the process and its results."<sup>244</sup> If college students believe that the campus judicial process is effective and responsive, they are more likely to use it to resolve disputes and to assert rights they might otherwise ignore.

#### B. Disclosure of Campus Security Policy and Campus Crime Statistics

The second operative provision of the Campus Security Act, section 204, contains six subsections detailing campus security policy and crime statistics information.<sup>245</sup> This section provides for the dissemination of comprehensive information about an institution's security policies, procedures, and practices.

To comply with the first subsection, each institution of higher education must annually report campus crime information, including statistics and security policies,<sup>246</sup> and distribute this information to current students and employees.<sup>247</sup> An institution must describe its procedures for handling emergencies,<sup>248</sup> for maintaining securi-

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dition to school regulations, students are bound by all applicable local, state, and federal laws. *See, e.g.*, CASE WESTERN RESERVE UNIVERSITY STUDENT SERVICES GUIDE FOR 1991-92 108 ("Conduct which is subject to University disciplinary action includes: Violations of civil law on University premises or in connection with University functions including those governing the use of alcohol and drugs.").

243. *See* 1 JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 524 (1978) ("Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account."); *see, e.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (detailing the history of open trials and concluding that public judicial proceedings are necessary as a check on government power, as an educational medium, and for community therapeutic value).

244. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980). *See also* Steinberg, *supra* note 43, at 46. "Negative reactions to a rape complaint by a college administration may intensify the victim's emotional trauma." *Id.* Negative reactions manifest themselves in the failure to investigate a rape complaint, the failure to hold a disciplinary hearing, and the failure to inform the victim of the results of the investigation and/or hearing. *Id.*

245. 20 U.S.C. § 1092(f)(1) (Supp. 1991). Section 204 amends § 485 of General Education Provisions Act (20 U.S.C. § 1092 (1988)) which governs information dissemination activities at institutions of postsecondary education.

246. 20 U.S.C. § 1092(f)(1) (Supp. 1991).

247. *Id.*

248. *Id.* § 1092(f)(1)(A).



ty on campus, in campus residences, and in recognized off-campus student organization housing (e.g., fraternities and sororities).<sup>249</sup> The institution must also describe its procedures for disseminating crime awareness and prevention material,<sup>250</sup> and for dealing with the possession, use, and sale of alcohol and illegal drugs.<sup>251</sup> This information is reported in addition to on-campus crime statistics, which must be reported for "the most recent school year, and the [two] preceding school years for which data are available."<sup>252</sup> UCR crime categories,<sup>253</sup> as well as alcohol, drug abuse, and weapons possession violations,<sup>254</sup> are included in the campus statistics. Moreover, a report compiled pursuant to the Act must be furnished to any applicant for matriculation or employment upon request.<sup>255</sup> The information contained in this section is extensive, though not exhaustive. Rather, the specified policies and procedures, as well as the enumerated categories of reportable crimes, are the minimal standards necessary to comply with the Campus Security Act.<sup>256</sup>

Since each institution is unique in its campus safety requirements, subsection two of the Act prohibits the Secretary of Educa-

249. *Id.* § 1092(f)(1)(B)(G).

250. *Id.* § 1092(f)(1)(D)-(E).

251. *Id.* § 1092(f)(1)(I).

252. *Id.* § 1092(f)(1)(F).

253. *Id.* § 1092(f)(1)(F)(i-vi). The UCR categories include murder, rape, robbery, aggravated assault, burglary, and motor vehicle theft. UCR FOR 1990, *supra* note 5, at 47-48.

254. 20 U.S.C. § 1092(f)(1)(H) (Supp. 1991). Given the correlation between alcohol and drug use and campus crime, these statistics were an important inclusion. *See* Pub. L. No. 101-542, Title II, § 202(2) ("[A]pproximately 95 percent of campus crimes that are violent are alcohol- or drug-related."); 136 CONG. REC. H3123 (daily ed. June 5, 1990) (remarks of Rep. Coleman) ("thus concern [about drug use on college campuses] has been dramatically increased by data indicating a high correlation between drug and alcohol use and violent crimes on campuses"); H.R. REP. No. 518, 101st Cong., 2d Sess. 8 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3363, 3370 ("Because of the high correlation between alcohol and drug abuse violations and the incidence of violent crimes, the Committee encourages institutions to provide students with information regarding such policies on multiple occasions."); Marlys J. Harris, *Best College Buys*, TIME, Oct. 29, 1991, at 10 ("Alcohol abuse is so common on campuses that the American College Health Association has declared it one of the most serious health threats facing students today. According to a study conducted by the Campus Violence Prevention Center, 90% of all student-inflicted assaults, murders and rapes involve alcohol. Usually both offender and victim have been drinking."); Kenneth J. Cooper, *Campus Life Reportedly Deteriorating*, WASH. POST, Apr. 30, 1990, at A12 (In a survey of college presidents, the Carnegie Foundation for the Advancement of Teaching found that "[t]hey most frequently identified substance abuse, primarily alcohol, as their biggest concern. ").

255. 20 U.S.C. § 1092(f)(1) (Supp. 1991).

256. *See infra* notes 290-304 and accompanying text.

tion from requiring colleges and universities to adopt "particular policies, procedures, or practices," relating to campus crime and campus security.<sup>257</sup> The House Committee on Education and Labor explained that "[t]he intent of this legislation is to encourage campuses to develop campus security policies and procedures *which are appropriate to the unique conditions of the campus.*"<sup>258</sup>

The third subsection directs each participating institution to inform the campus community of crimes it deems to be a threat to students and employees.<sup>259</sup> It further requires that such reports be given in a timely manner and in a way that will assist in the prevention of similar incidents.<sup>260</sup> According to the managers of the House Conference Report, colleges and universities are expected "to make every effort to protect the privacy rights of students who are victims of crime" in the release of incident reports.<sup>261</sup> The House managers were particularly concerned that crime victims, especially victims of rape and sexual assault, would be unwilling to report crimes if their identity might be made public.<sup>262</sup>

Subsection four empowers the Secretary to receive a copy of the crime statistics of each participating college and university. It further requires that the Secretary report such statistics to the Committee on Education and Labor of the House of Representatives and the Committee on Labor and Human Resources of the Senate by September 1, 1995.<sup>263</sup> Moreover, the Secretary is directed to identify those campus security policies and procedures which have been particularly effective in reducing campus crime, and to disseminate this information to participating institutions.<sup>264</sup> Notably, this review is undertaken with the assistance of representatives of

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257. 20 U.S.C. § 1092(f)(2) (Supp. 1991).

258. H.R. REP. No. 518, 101st Cong., 2d Sess. 9 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3363, 3371 (emphasis added).

259. 20 U.S.C. § 1092(f)(3) (Supp. 1991).

260. *Id.*

261. H.R. CONF. REP. No. 883, 101st Cong., 2d Sess. 16 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3363, 3382-83.

262. *Id.* at 3382. *See also supra* note 43 concerning the under-reporting of rape and sexual assault and the possible reasons therefor.

263. 20 U.S.C.S. § 1092(f)(4)(A) (Law. Co-op. Supp. 1992). This report is intended to include "annual data on campus crime, trends reflected by changes in this data, specifically regarding patterns of crime, and patterns of reduced campus crime due to specific campus security policies." H.R. CONF. REP. No. 883, 101st Cong., 2d Sess. 17 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3363, 3383.

264. 20 U.S.C.S. § 1092(f)(4)(B) (Law. Co-op. Supp. 1992).

the participating colleges and universities, since college educators and administrators are presumably in the best position to judge the relative effectiveness of their campus reporting procedures and security policies.<sup>265</sup>

Subsection five defines "campus" as institutionally owned or controlled property or buildings that are used by the college or university in pursuit of its educational purposes.<sup>266</sup> The definition also includes buildings that are owned or controlled by a student organization which the institution recognizes.<sup>267</sup> The House Committee on Education and Labor intends that buildings owned or controlled by recognized student organizations "be located within the same reasonably contiguous geographic area as the institution."<sup>268</sup> Thus, the national headquarters of a recognized student organization, unless located near the college or university, is excluded for purposes of the Crime Awareness and Campus Security Act.<sup>269</sup>

Compilation of crime statistics is governed by subsection six. This section mandates that campus crime statistics assembled pursuant to sections 204(f)(1)(F) and 204(f)(1)(H) of the Crime Aware-

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265. *Id.* The importance of consulting with educators on college and university issues cannot be understated. *See, e.g.,* *Pickering v. Board of Educ.*, 391 U.S. 563, 572 (1968) ("Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions"); 136 CONG. REC. S16,613 (daily ed. Oct. 24, 1990) (statement of Sen. Kennedy) ("In drafting this bill, we have tried to pay particular attention to the reporting burden that we will impose on the colleges and universities. We have worked closely with the higher education community to assure that the students have access to the information but in a way that does not overwhelm the institutions that must provide the data."). *See also* CAL. EDUC. CODE ANN. § 35294 (West 1954 and Supp. 1992) (The California Legislature requires all public primary and secondary schools to adopt school safety plans, "in cooperation with local law enforcement agencies, community leaders, parents, pupils, teachers, administrators, and other persons who may be interested in the prevention of campus crime and violence"). *Cf. Vincent Blasi, The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 634 ("Since under the checking value information about the conduct of government is accorded the highest possible valuation, speech critical of public officials by those persons in the best position to know what they are talking about — namely, government employees — would seem to deserve special protection.").

266. 20 U.S.C.S. § 1092(f)(5)(A)(i) (Law. Co-op. Supp. 1992).

267. *Id.* § 1092(f)(5)(A)(ii). Thus, off-campus fraternity and sorority houses are included in the definition of "campus" for purposes of the Crime Awareness and Campus Security Act.

268. H.R. REP. No. 518, 101st Cong., 2d Sess. 9 (1990), *reprinted in* 1990 U.S.C.A.N. 3363, 3371.

269. *Id.* at 3371-72.

ness and Campus Security Act be completed in accordance with the definitions employed by the Uniform Crime Reports and the Hate Crime Statistics Act.<sup>270</sup>

### C. Program Participation Agreement Requirements

The final operative provision of the Act, section 205, makes continued participation in federally funded educational programs contingent upon an institution's compliance with the disclosure requirements of section 485(f) and the establishment of a campus security policy.<sup>271</sup> In the event of noncompliance, the Secretary of Education is authorized to limit, suspend, or terminate an institution's receipt of federal funds.<sup>272</sup> The Secretary is further authorized to impose a civil penalty upon the institution not to exceed \$25,000 for each violation.<sup>273</sup> Title IV of the Act authorizes the Secretary to issue regulations necessary for its implementation.<sup>274</sup>

The Crime Awareness and Campus Security Act is a significant step toward reducing campus crime. It provides for the dissemination of crime statistics to ensure student awareness of campus crime and campus security policies to aid students in taking precautions and responding adequately to emergencies. The Act is not a panacea, however, as it leaves several significant questions unanswered.

## VI. UNANSWERED QUESTIONS AND THE FUTURE OF INSTITUTIONAL LIABILITY FOR STUDENT VICTIMIZATION

As demonstrated above, several factors necessitated federal intervention in the realm of campus crime reporting. The Campus Security Act rectifies the inconsistencies expected when states independently develop and adopt legislation. This section first

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270. 20 U.S.C.S. § 1092(f)(6) (Law. Co-op. Supp. 1992). Thus, for purposes of the Crime Awareness and Campus Security Act, Illinois colleges and universities can only report rapes of women, rather than comporting with the state's gender-neutral definition of rape. *See supra* note 44 and accompanying text. The Hate Crime Statistics Act (Pub. L. No. 101-275, 104 Stat. 140 (1990)) modifies the UCR definitions to include "crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity, including where appropriate the crimes of murder, non-negligent manslaughter; forcible rape; aggravated assault, simple assault, intimidation; arson; and destruction, damage or vandalism of property." *Id.*

271. 20 U.S.C.S. § 1094(d)(12)(A)(B) (Law. Co-op. Supp. 1992).

272. 20 U.S.C. § 1094(c)(1)(D) (1988).

273. 20 U.S.C. § 1094(c)(2)(B) (1988).

274. 20 U.S.C.S. § 1092 (Law. Co-op. Supp. 1992).

analyzes the effect of the Campus Security Act on state reporting laws and then proposes that the Act be amended to impose stricter reporting standards and allow for private enforcement actions. These amendments would heighten student and administrator awareness of campus crime, educate the college community as to security precautions and anti-crime measures, and provide incentive for colleges to develop novel approaches for preventing campus crime.

#### A. What Is the Effect of the Federal Campus Security Act on State Crime Reporting Laws?

The expressed intent of the Crime Awareness and Campus Security Act is "to encourage the development on all campuses of security policies and procedures,"<sup>275</sup> and to foster "uniformity and consistency in the reporting of crimes on campus."<sup>276</sup> As federal law, the Act supplants inconsistent state laws,<sup>277</sup> and thus establishes the default setting for campus security policy and crime statistics disclosure. Colleges and universities must now report and disclose statistics in accordance with the Uniform Crime Reports. Thus, states such as New York and Wisconsin which require only the reporting of campus sexual assault information,<sup>278</sup> must now ensure that their postsecondary educational institutions also divulge statistics on campus murders, robberies, aggravated assaults, burglaries, motor vehicle thefts, and liquor law, drug abuse, and weapons possession violations.<sup>279</sup> States like Pennsylvania and Dela-

275. Pub. L. No. 101-542, Title II, § 202(7)(A), 104 Stat. 2384 (1990).

276. *Id.* § 202(7)(B), 104 Stat. 2384. Representative Goodling, the Act's sponsor, explained: "[T]he advantage of [this legislation] is the crime statistics will be reported in a uniform manner, permitting the students to compare with confidence the statistics they receive from colleges and universities throughout the United States." 136 CONG. REC. H3122 (daily ed. June 5, 1990). See also 136 CONG. REC. S16,614 (daily ed. Oct. 24, 1990) (statement of Sen. Gore) ("There is a strong need for basic uniformity in requirements and standards because the [campus crime] problem still exists. This legislation will bring uniformity to campus crime statistic disclosure requirements at postsecondary institutions throughout the United States.").

277. The Supremacy Clause of Article VI of the United States Constitution provides in part that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; shall be the supreme Law of the Land; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. The United States Supreme Court has stated that "the first and fundamental inquiry in any pre-emption analysis is whether Congress intended to displace state law." *Wardair Canada, Inc., v. Florida Dep't. of Revenue*, 477 U.S. 1, 6 (1986). Given the Congressional findings and legislative history, see *supra* notes 243, 250 and *infra* note 289, it seems clear that Congress intended to preempt conflicting state reporting laws.

278. See *supra* notes 180-81 and accompanying text.

279. See 20 U.S.C.S. § 1092(f)(1)(F) and (H) (Law. Co-op. Supp. 1992).

ware, upon which the Crime Awareness and Campus Security Act is modeled, however, have relatively little to do to bring their campus crime reporting statutes into compliance.<sup>280</sup>

Since each state is now held to a uniform standard, colleges and universities can be less concerned with perceived competitive disadvantages in being required to report campus crimes and can concern themselves with improving their campus safety record. The legislative history suggests that the Crime Awareness and Campus Security Act was designed both to ensure uniformity in reporting by placing all colleges and universities on the same level, and to supplement already existing state laws to the extent that such laws are above the minimum level set by the Act.<sup>281</sup> Since states retain the primary responsibility for education,<sup>282</sup> they are free, of course, to implement more stringent requirements than those demanded by the Crime Awareness and Campus Security Act. Assuming that New York, California, and Wisconsin do not repeal their crime reporting laws, colleges and universities in those states will be governed by additional reporting criteria.

With the rising cost of college tuition, students and their families "are more likely to view their college education as a financial investment requiring a more careful and business-like analysis."<sup>283</sup> This analysis will likely include inquiries into a school's safety record.<sup>284</sup> Thus, stricter reporting laws and specialized crime awareness programs dealing with rape and sexual assault, for example, may attract students. This is especially likely if such information is included in a school's brochures and catalogs, which are

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280. Pennsylvania's College and University Security Information Act is almost identical to the Crime Awareness and Campus Security Act in terms of notice and disclosure requirements for campus crime statistics and security policies and procedures. Compare 24 PA. CONS. STAT. § 2501 (Purdon Supp. 1991) with 20 U.S.C.S. § 1092(f) (Law. Co-op. Supp. 1992).

281. See 136 CONG. REC. S16,614 (daily ed. Oct. 24, 1990) (statement of Sen. Gore) ("[A]long with new State laws, [this law] will encourage institutions to take assertive action to protect their students and employees.").

282. See *supra* note 197.

283. Davenport, *supra* note 46, at 203.

284. See, e.g., 136 CONG. REC. H11,499 (daily ed. Oct. 22, 1990) (remarks of Rep. Williams) ("Choosing which college or university to attend is a difficult decision for millions of students and their parents every year. They deserve as much information as possible, including fundamental facts about the incidence of crime on campus."); 136 CONG. REC. S16,613 (daily ed. Oct. 24, 1990) (remarks of Sen. Kennedy) ("[T]his vitally important legislation will help students and their families make informed decisions about which college to attend.").

indispensable for student recruitment.<sup>285</sup> Furthermore, since the Secretary is empowered to recognize exemplary campus crime policies,<sup>286</sup> colleges and universities have an incentive to develop unique programs. Such experimentation may lead to methods which are especially effective at reducing campus crime or confronting the aftermath. Public recognition of effective procedures is also likely to have a positive effect on an institution's reputation, and hence, may bring an increase in student and employment applications.

Although the Secretary of Education is expressly prohibited from compelling colleges and universities to adopt particular security policies or procedures,<sup>287</sup> the Crime Awareness and Campus Security Act effectively mandates a minimum level of security procedures. The disclosure requirements of section 204(f)(1) state that each institution shall distribute "an annual security report containing *at least* the following information with respect to the campus security policies and campus crime statistics of that institution."<sup>288</sup> Since this information must be disclosed, regardless of whether an institution actually has implemented such policies, colleges and universities are likely to adopt the enumerated policies and procedures, rather than state in their recruitment literature that they do not have these security policies and procedures in place. In the age of the student-consumer<sup>289</sup> the latter would adversely affect enrollment.

#### B. What Do Campus Crime Statistics Actually Indicate?

In 1897 Oliver Wendell Holmes anticipated that "the man of the future [would be] the man of statistics and the master of economics."<sup>290</sup> The enactment of state and federal laws requiring disclosure of campus crime statistics to forewarn students of campus crime illustrates the veracity of Holmes' prediction. Although problems with the usage and scope of statistics are not indigenous to federal crime reporting legislation, the Crime Awareness and Campus Security Act failed to rectify several deficiencies in the state reporting provisions. The issues of off-campus student victim-

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285. Davenport, *supra* note 46, at 203.

286. 20 U.S.C. § 1092(f)(4)(B) (Supp. II 1990).

287. See *supra* notes 257-58 and accompanying text.

288. 20 U.S.C. § 1092(f)(1) (Supp. II 1990) (emphasis added).

289. See *supra* note 84, *infra* note 293 and accompanying text.

290. Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

ization, the necessity for additional criteria by which to evaluate campus crime statistics, and the potential misinterpretation of crime statistics by students, their families, and the college administration have yet to be resolved.

### 1. Off-Campus Crime Statistics

As enacted, the Crime Awareness and Campus Security Act does not require reporting statistics involving off-campus student victimization. The original Senate bill contained a provision which dealt specifically with students who reside in private off-campus housing, but it was not adopted by the House of Representatives.<sup>291</sup> The Act's sponsor, Representative Goodling, explained the rationale for rejecting the Senate proposal:

Considering the fact that our goal is to provide students with information on crimes on their campus, the inclusion of all information on crimes against students would have skewed the data reported to students in such a manner that they would never know if their school's security system was effective in protecting students.<sup>292</sup>

Unfortunately, this constitutes a narrow view of campus safety. Since the Crime Awareness and Campus Security Act is heralded as a "consumer protection [law] for students,"<sup>293</sup> an amendment requiring disclosure of off-campus crime statistics, including both crimes against students and against the general community, would more accurately depict overall student safety. This additional information would then aid students and their families in making an informed choice as to which college to attend and what precautions to take once enrolled.

#### a. Crimes against Students

Although the Act's expressed purpose is to provide students with information concerning on-campus student victimization, it is difficult to imagine that a college can describe realistically its campus safety without reference to *overall student safety*, whether

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291. 136 CONG. REC. S16,614-15 (daily ed. Oct. 24, 1990) (remarks of Sen. Specter).

292. 136 CONG. REC. H11,499-500 (daily ed. Oct. 22, 1990) (remarks of Rep. Goodling). See also H.R. REP. NO. 518, 101st Cong., 2d Sess. 9 (1990), reprinted in 1990 U.S.C.C.A.N. 3363, 3371 ("The Committee does not intend that crimes committed on major, public thoroughfares which are not under the control of the institution or the campus security authorities be included in statistics required to be reported by this Act.").

293. 136 CONG. REC. H3122 (daily ed. June 5, 1990) (remarks of Rep. Coleman).



on-campus or off. Since it is probable that many students will live, or at least venture, off-campus at some point in their college careers,<sup>294</sup> informing students of the crime risks present in the enveloping community is necessary. Statistics which reveal the overall incidence of student victimization will help dispel student ignorance of campus crime<sup>295</sup> and will apprise students of off-campus dangers. Forewarned, they can then take appropriate precautions. Senator Specter explained his support for reporting off-campus student victimization:

A good portion of students at American colleges live off-campus. Many colleges simply cannot guarantee on-campus housing for students beyond their freshman year. In addition, the boundaries between college property and the local community are often blurred. *I believe that what happens to these students reflects on overall safety and ought to be reported.*<sup>296</sup>

Reporting occurrences of off-campus student victimization does not skew campus crime statistics since the true measure of student safety should be a combination of both on- and off-campus figures. Schools need to be responsive to all their students, regardless of where the students live. Informed decision making for both students and applicants is impossible where an institution is required to provide information on campus safety and campus crime while its students live in college housing, but has no such duty to divulge the incidence of students victimized off-campus. If students do not consider whether they will live on- or off-campus, and the commensurate risks associated with each, they may fail to gauge the actual safety of their chosen college or university. A college like Wright State University (Dayton, Ohio), for example, which houses only nine percent of its 16,149 students on-campus, reports a lower crime rate than Miami University (Oxford, Ohio), which houses sixty percent of its 16,028 students on campus.<sup>297</sup> The

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294. In Ohio, for example, 99% of students attending Cleveland State University, 98% of those attending Youngstown State University, 92% of those attending the University of Toledo, and 81% of those attending Ohio State University commute to campus. BARRON'S PROFILES OF AMERICAN COLLEGES, *supra* note 152, at 861, 904, 896, 884.

295. See *supra* notes 27 and 40 (concerning problems associated with student naivete).

296. 136 CONG. REC. S16,615 (daily ed. Oct. 24, 1990) (remarks of Sen. Specter) (emphasis added).

297. BARRON'S PROFILES OF AMERICAN COLLEGES, *supra* note 152, at 877, 902. For 1990, Wright State University (Ohio) reported no violent crimes and 383 property crimes.

crime statistics for Wright State may reflect the fact that ninety-one percent of its students live off-campus and thus are less affected by the pressures of residence hall life.<sup>298</sup> To avoid this result, institutions should be required to compile and disclose figures on off-campus student victimization.

Of course, colleges and universities are neither liable nor responsible for off-campus crimes committed against their students. Nor can schools police the private dwellings or establishments where students live or frequent. However, a college truly concerned with the safety of its student body should make every possible effort to inform its students of the dangers they face. Otherwise, the murders of the five University of Florida students<sup>299</sup> would be neither reported nor disclosed to the student body since the murders occurred in private, off-campus apartments. Colleges can request that students who are victimized off-campus report the incident to campus security for the sole purpose of inclusion in that school's campus crime statistics. The importance of such voluntary reporting can be stressed in the college's catalogs, campus crime programs, and at orientation seminars.<sup>300</sup> Voluntary reporting is especially important if the perpetrator is another student and, hence, subject to the school's disciplinary code.<sup>301</sup> Reporting also en-

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Miami University (Ohio) reported three violent crimes and 466 property crimes. UCR FOR 1990, *supra* note 5, at 124.

298. See Fox and Hellman, *supra* note 33, at 438 ("percentage of students who live on campus in addition to being on campus more are also more likely to report a crime to campus, rather than to local police."); *supra* note 196 (concerning the incidence of crime in student dormitories).

299. See Kalette, *Campus Crime*, *supra* note 4, at 1A.

300. New student orientation would be a particularly effective means of illustrating the college's stance on campus crime and student safety. A well-organized crime awareness program, with follow-up seminars on issues of topical importance (e.g., alcohol and drug abuse, date rape and sexual assault, fraternity and sorority hazing), would impress upon students the seriousness of these concerns and the seriousness of the college's approach to these issues. See, e.g., CAL. EDUC. CODE § 67390(g) (West Supp. 1992) ("It is not sufficient to develop policies, brochures, and other informational materials; once these materials are developed they must be distributed in a way that emphasizes their importance and stimulates the interest of students."). See also *supra* notes 55, 58-59.

301. Courts have allowed colleges and universities considerable freedom in disciplining students for crimes they commit off-campus. See, e.g., *Kusnur v. Leach*, 439 A.2d 223 (Pa. Commw. Ct. 1982) (suspension of student for trespass and improper conduct at a private, off-campus party upheld. The court stated: "Obviously, a college has a vital interest in the character of its students, and may regard off-campus behavior as a reflection of a student's character and fitness to be a member of the student body."); *Krasnow v. Virginia Polytechnic Inst. and State Univ.*, 414 F. Supp. 55 (W.D. Va. 1976) (upheld the constitutionality of a college's sanctions for off-campus drug possession by its students), *aff'd*, 551 F.2d 591 (4th Cir. 1977).

ables the college to provide counseling and other rehabilitative services for the crime victim,<sup>302</sup> which are particularly important in cases of rape and sexual assault.<sup>303</sup>

To prevent skewed data, off-campus crime statistics can be recorded in a separate category labelled, for example, "off-campus student victimization as compiled through voluntary student disclosure." This will give students some idea of the occurrence of off-campus student victimization, while cautioning them that student-divulged, off-campus crime statistics do not reveal the entire story

#### b. Crime Statistics of the Surrounding Community

While voluntary student reporting of off-campus victimization is preferable because it provides information on actual *student* safety, unfortunately, it is unreliable and sporadic. "[S]tudies reveal that in America only about one-half of all felonies are reported to the police in the first place, and the percentage is much lower with misdemeanors."<sup>304</sup> Only one in ten rapes is reported.<sup>305</sup> Colleges should make every effort to compile information from students by suggesting that they report any off-campus victimization. Given the probable reluctance of college students to report being victimized, however, colleges and universities should be required to report the UCR statistics for the surrounding community to provide students with a measuring gauge of overall student safety

Amending the Campus Security Act to require juxtaposing UCR statistics for the surrounding community with campus crime statistics will forewarn students of off-campus dangers. Since many colleges and universities simply cannot house all students in campus residence halls and apartments,<sup>306</sup> community crime statistics

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302. See, e.g., Greene, *supra* note 5, at A31 "Pennsylvania State [University] hired a 'victim advocate, whose primary responsibility will be to assist the victims of campus crime. The advocate will inform victims about their legal rights, how they can recover losses, and what they can expect from the student disciplinary process and the criminal justice system." *Id.*

303. SMITH, CRIME ON CAMPUS, *supra* note 22, at 122 (One campus rape program provided victims with counseling and advocacy. "Counselors helped victims move through the stages of the 'rape trauma syndrome' and assisted with medical and legal processes, adjustments in work and school, and alterations in interpersonal relationships."). See also *supra* note 187 (detailing California's pro-victim procedures and policies for handling campus rape and sexual assault).

304. SMITH, CRIME ON CAMPUS, *supra* note 22, at 1-2.

305. See *supra* note 43 and accompanying text.

306. For example, Ohio State University can house 10,133 of its 50,926 students, or approximately 19%, Ohio University can house 7,500 of its 17,100 students (42%), and

will alert students to the off-campus crime problem. In addition, reporting UCR statistics of the surrounding vicinity will offset disadvantages to urban universities caused by disclosing campus crime statistics.<sup>307</sup> Such institutions may have higher crime rates relative to non-urban schools, but lower crime rates than the surrounding area. Thus, a student could compare the relative safety of an institution with the relative safety of its surrounding environment, as well as compare the relative safety of an urban institution (which might have a lower crime rate than the surrounding area) with that of a non-urban institution.

While colleges and universities may incur additional expense in the compiling of student-initiated reports of off-campus victimization, the costs of reporting UCR statistics is minimal. UCR statistics are compiled by the FBI; thus, an institution will incur little, if any, real cost in reprinting such information. Any burden imposed by disseminating UCR statistics is minor compared with other statutorily-imposed reporting requirements.<sup>308</sup> During the passage of the Campus Security Act, the Congressional Budget Office (CBO) examined the cost impact of the Act. The CBO concluded that "there would be no direct effect on federal, state, or local government costs as a result of [the] enactment of th[e Act]."<sup>309</sup> Furthermore, the experience of Pennsylvania's colleges and universities operating under the College and University Security Information Act emphasizes that any additional expense incurred by reporting crime information is outweighed by increased security and student awareness.<sup>310</sup> Although there is little financial burden in-

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the University of Cincinnati can house 2657 of its 36,408 students, a mere 8%, on campus. BARRON'S PROFILES OF AMERICAN COLLEGES, *supra* note 152, at 884, 887, 892. The University of Florida only houses 9,000 of its 34,000 students. Denise Kalette, *Colleges Confront Liability; Off-Campus Risk Warnings Urged*, USA TODAY, Sept. 14, 1990, at 6A.

307. Reford, *supra* note 42, at 196-97. Legislation has been introduced in both the U.S. Senate and House of Representatives to provide financial assistance for programs at urban colleges and universities designed to address urban campus and community crime. See S. 1904, 102d Cong., 1st Sess. (1991); H.R. 3553, 102d Cong., 1st Sess. (1991).

308. See, e.g., 136 CONG. REC. H11,501 (daily ed. Oct. 22, 1990) (statement of Rep. McMillen) ("There has been some criticism of this bill, claiming that it would be too burdensome to schools to collect this information [I]f Congress can require the airline industry to report on the number of bags lost by a particular carrier, surely we can require a school to report on the number of students who they, in effect, lose before they graduate.").

309. H.R. REP. No. 518, 101st Cong., 2d Sess. 10 (1990), reprinted in 1990 U.S.C.C.A.N. 3363, 3372.

310. 136 CONG. REC. H3122 (daily ed. June 5, 1990) (statement of Rep. Goodling)

curred in reprinting UCR statistics, there are interpretive burdens placed on students and their families to discern the significance of both on- and off-campus crime statistics.

## 2. Misinterpretation and Misuse of Campus Crime Statistics

The use of campus crime statistics, like the use of statistical evidence in discrimination, environmental, and tort litigation,<sup>311</sup> is replete with opportunities for misconstruction, misinterpretation, and misrepresentation. College administrators have little incentive to "improve" the safety of their campus by intentionally distorting campus crime statistics. The potential litigation from discovery of this fact,<sup>312</sup> the resultant liability for student victimization,<sup>313</sup> and the ensuing negative publicity<sup>314</sup> will cause more damage to a college's reputation and recruitment efforts than a candid reporting. An unintended distortion of campus safety may transpire, however, as students and their families misperceive and misinterpret an institution's campus crime statistics.

("Bryce Jordan, the president of Penn State University, has summed up his experience with Pennsylvania's law by stating, 'although the requirements have resulted in additional expense, the process has been workable and reasonable. The major goal of legislation — to inform the university community — has been achieved. It is one step that will help students and staff make informed choices about their own security.'").

311. See DAVID W. BARNES AND JOHN M. CONLEY, *STATISTICAL EVIDENCE IN LITIGATION* §§ 10.0-10.8.3, at 546-595 (1986) ("[C]ourts' discussions of statistical methods are often cryptic and conclusions drawn from statistical evidence are often stated without supporting analysis. Determining whether the techniques used have been correctly chosen and applied almost always requires that we make assumptions about the data or about the specifics of the statistical methods employed in order to reconstruct the analysis.").

312. Since an institution's duty to report and disclose campus crime statistics is statutorily prescribed, failure to comport with the statute constitutes negligence per se. See PROSSER AND KEETON, *supra* note 87, § 36, at 229-30. The Crime Awareness and Campus Security Act and several state acts contain enforcement provisions in the event of an institution's noncompliance. See *supra* notes 218-25 (states), 271-74 (federal) and accompanying text. This note's proposed amendment to the Crime Awareness and Campus Security Act, allowing for private enforcement, further increases the risk of liability for noncompliance. See *infra* notes 368-78 and accompanying text.

313. Colleges have been held liable for student victimization where the institution is aware of increased violence on campus, gives no warning of this fact, and represents its campus as a safe place. See, e.g., *Duarte v. State*, 151 Cal. Rptr. 727, 735 (Cal. App. 1979) (*ordered not officially published*) (action alleging negligent misrepresentation of campus safety against a college allowed to stand because "[t]he representation of the safety of the dormitories was at least an opinion, made by persons in authority with presumed superior knowledge.").

314. See, e.g., *supra* note 47 (detailing college administrators' concerns about negative publicity).

a. The Insufficiency of Raw Numbers

Difficulty interpreting statistics is not endemic to the Campus Security Act. The state crime reporting laws created similar problems.<sup>315</sup> The advent of federal legislation that requires a vast majority of American colleges and universities to report crime statistics, however, will exacerbate the problem it was intended to remedy — the lack of sufficient information with which students may make intelligent “consumer” choices of colleges and safety precautions.<sup>316</sup> Colleges will not be furnishing students with the necessary information if campus crime statistics are easily misunderstood or if the statistics paint an inaccurate or unrealistic portrait of campus crime. Since it is likely that students will use and rely upon these statistics (e.g., in choosing a school and implementing safety procedures and precautions), institutions should be compelled to provide students with a means of gauging their significance.

Campus crime statistics do not reveal the factors contributing to campus crime. A school whose UCR statistics report an increase in the number of rapes, assaults, or thefts, for example, may not be showing an *actual* escalation in the incidence of campus crime. Rather, the rise in reported crimes may be the result of more vigilant enforcement by campus security and administrators, increased disclosure by students, especially in the cases of rape and sexual assault, or a combination of these factors. As more states require their colleges to adopt security policies that encourage student reporting of crimes,<sup>317</sup> it is likely that the number of reported crimes will increase.<sup>318</sup>

Thus, campus crime statistics are a double-edged sword. On the one hand, an increase in the number of reported crimes may depict vigilant enforcement and student reporting; while on the other, a high crime rate may reveal a college lacking effective enforcement, security procedures, and student participation. An institution which reports a low crime rate faces these same problems as well. These problems may adversely affect a school's enrollment and recruit-

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315. See *supra* text accompanying notes 197-200.

316. See *supra* note 284.

317. See, e.g., CAL. EDUC. CODE § 67390(d) (West Supp. 1992) (encouraging reporting of campus sexual assaults); N.Y. EDUC. LAW § 6450(1-a)(a) (McKinney Supp. 1992).

318. “[S]ecurity officers were concerned about the increase in reports of date rape. The increase shows that students are becoming much more conscientious about reporting such incidents, officers said, rather than that more rapes were occurring.” Susan Dodge, *With Campus Crimes Capturing Public Attention, Colleges Re-Evaluate Security Measures and Stiffen Some Penalties*, CHRON. OF HIGHER EDUC., Feb. 6, 1991, at A29-30.

ment efforts, since, without information that places campus crime statistics in perspective, an applicant will see only a raw number that may depict a campus as more crime-ridden than it really is.

To counter this problem, the Campus Security Act should be amended to require that colleges explain what the statistics signify. This requirement could include the caveat that campus crime results from several factors and that the reported crime rate is attributable to actual crime incidents, as well as increased student awareness and reporting. Colleges should be required to include material on student and community demographics which places crime information in perspective. For example, the percentage of full-time students, the number of students on campus, and the number of male students, are significantly correlated with a high rate of campus crime and should be disclosed.<sup>319</sup> The location of a college campus, however, "has no apparent influence on campus crime rates, although it may have some effect on crime mix."<sup>320</sup> Thus, a rural or suburban college may be just as safe, or unsafe, as an urban university, as the Hawelkas discovered.<sup>321</sup> Without some way to differentiate among factors which influence campus crime and factors which do not, college students will be left with speculative rather than informed choices.

#### b. Crime Statistics and Crime Foreseeability

Prior to the 1960's and 1970's, colleges were thought to stand *in loco parentis* to their students.<sup>322</sup> Although the doctrine was laid to rest in 1979, new theories of liability emerged to hold colleges responsible for student victimization.<sup>323</sup> The touchstone of these theories is foreseeability.<sup>324</sup> Current state and federal reporting laws have the potential to shape the foreseeability of campus crime, and, consequently, institutional liability. The doctrine of foreseeability "casts upon the institution the duty of protecting those whom it invites onto its campuses and into its programs from

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319. Fox and Hellman, *supra* note 33, at 438.

320. *Id.* at 439. Fox and Hellman posit that one explanation for this finding is the "risk trade-off notion: rural campus crime rates reflect the large percentage of students who live on campus, while urban campus crime rates reflect adverse urban influences, offset somewhat by the small percentages of resident students." *Id.* at 439-40. Ultimately, however, the authors contend that the risk trade-off hypothesis is not supported. *Id.* at 440.

321. *See supra* note 5.

322. *See supra* text accompanying notes 72-85.

323. *See supra* text accompanying notes 86-126.

324. *See id.*

dangers that the institution could have foreseen, either because of a history of crime or because of the dangerousness of persons involved."<sup>325</sup> Generally, landowners (i.e., colleges and universities) have a duty to use reasonable care in inspecting their premises to discover possible dangerous conditions and to warn and protect invitees (i.e., college students) "from dangers which are foreseeable from the arrangement or use of the property."<sup>326</sup> The *Restatement (Second) of Torts* explains:

A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.<sup>327</sup>

The comment to this section further provides that a possessor's "past experience" with similar events can impose a duty of reasonable care, and hence liability upon breach of this duty if the experience makes it reasonable to anticipate such incidents in the future.<sup>328</sup>

Since the Campus Security Act provides courts, students, parents, and college administrators with little guidance as to what constitutes a foreseeable level of campus crime, the use of campus crime statistics to establish a landowner's "past experience" is likely to raise significant questions on the appropriate role of statistics. In several cases involving student suits against their colleges for failure to warn or to protect them from victimization, courts have grappled with determining what constitutes foreseeable crimi-

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325. SMITH, *CRIME ON CAMPUS*, *supra* note 22, at 86.

326. PROSSER AND KEETON, *supra* note 87, § 61, at 426 (footnote numbers omitted).

327. RESTATEMENT (SECOND) OF TORTS, § 344 (1965).

328. *Id.* at cmt. f. *See, e.g.,* Kline v. 1500 Massachusetts Avenue Apartment Corp., 439 F.2d 477 (D.C. App. 1970) (the seminal case for imposing on landlords a duty to protect their tenants from the foreseeable criminal acts of third persons). The *Kline* court held that imposing such a duty on landlords is not unreasonable where "the landlord has notice of repeated criminal assaults and robberies, has notice that these crimes occurred in the portion of the premises exclusively within his control, has every reason to expect like crimes to happen again, and has the exclusive power to take preventive action." *Id.* at 481.



nal activity Generally, foreseeability has been determined in light of past criminal incidents, or the lack thereof, that occurred on the campus.

In *Brown v. North Carolina Wesleyan College, Inc.*,<sup>329</sup> for example, a college cheerleader was abducted, raped, and murdered after a college basketball game. The court held that "[f]oreseeability of a criminal assault determines a college's duty to safeguard its students from criminal acts of third persons."<sup>330</sup> However, the "scattered" criminal activity prior to the attack<sup>331</sup> "d[id] not show a repeated course of criminal activity which would have imposed a duty upon defendant to keep its campus safe."<sup>332</sup> Similarly, in *Relyea v. State*,<sup>333</sup> the college was not liable for the abduction, rape, and murder of a college student given the dearth of reported incidents of violent crime on campus. The court found the facts insufficient to establish the foreseeability of violent criminal assaults, but noted that such foreseeability, if demonstrated, "may give rise to a duty to protect."<sup>334</sup>

Statistical evidence of the general incidence of criminal assaults, without more, also has been held insufficient to establish liability For example, in *Tanya H. v. Regents of the University of California*,<sup>335</sup> a woman gang-raped in a dormitory room by four

329. 309 S.E.2d 701 (N.C. App. 1983).

330. *Id.* at 703.

331. The criminal activity cited consisted of "a break-in at the college business office approximately 10-12 years prior to the assault on plaintiff's intestate, a break-in and vandalism of some vending machines approximately five years prior to the assault on plaintiff's intestate, and a reported attempted rape in 1978." *Id.*

332. *Id.* The court further held that, even assuming that a single rape was sufficient to provide notice to the defendant, there must also be a corresponding breach of duty of reasonable care. *Id.* Since the college implemented and carried out effective security measures, there was no breach of duty. *Id.* The evidence revealed that the college maintained "a security staff composed of three full-time students, two full-time non-students, and a Director of Security. At least one security officer was on duty each hour of the day. Each officer was equipped with a uniform, a mobile radio, and has access to a recognizable security vehicle. In addition, the campus was regularly patrolled by members of the County Sheriff's Department." *Id.*

333. 385 So. 2d 1378 (Fla. Dist. Ct. App. 1980).

334. *Id.* at 1383. The court stated that "[i]n order to impose a duty upon a landowner to protect an invitee from criminal acts of a third person a plaintiff, must allege and prove that the landowner had actual or constructive knowledge of prior, similar criminal acts committed upon invitees. The landowner is not bound to anticipate criminal activities of third persons where, as here, the wrongdoers were complete strangers to the landowner and to the victims, and where the incident occurred precipitously." *Id.*

335. 278 Cal. Rptr. 918 (Cal. Ct. App. 1991).

football players could not recover against the university since it had no duty to protect her from unforeseeable criminal assaults. The plaintiff had presented statistical evidence illustrating the frequency of date rape on college campuses. The court found, however, that this evidence did not establish a correlation between the assault and the university's alleged breach of duty<sup>336</sup> Moreover, the court refused to take judicial notice of the statistics "since it is impossible . . . to determine their scientific validity or relevance."<sup>337</sup>

Generally, a plaintiff can prevail if she demonstrates that the university had prior notice of criminal assaults on campus and failed to take effective preventive measures. In *Miller v. New York*,<sup>338</sup> the court found that a university's notice of similar attacks, including a complaint by the victim-plaintiff, and its failure to institute even minimal security precautions, constituted a foreseeable probability of criminal assault.<sup>339</sup> Similarly, in *Duarte v. California*,<sup>340</sup> in which the plaintiff "asserted [that] the university knew of past assaults and of the conditions inviting further assaults," the court found that the plaintiff had alleged "the most important factor of liability — foreseeability"<sup>341</sup>

Evidence of prior criminal acts may be unnecessary, however, to establish foreseeability of criminal assault. In *Mullins v. Pine*

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336. The statistics "would seem to show that the problem is so widespread that it cannot properly be related to any particular campus, living situation, or degree of illumination." *Id.* at 922 (plaintiff attempted to establish a breach of duty due to inadequate lighting and the maintenance of co-ed floors). In plaintiff's appellate brief, she alleged that "the information available to respondents at or about the time plaintiff was raped, in mass media, social science research, and professional educators' publications, reveals that by the early to mid 1980's, the danger to young women in plaintiff's position of precisely the injury she alleges — gang rape by male student acquaintances — had been clearly documented in publications of which respondents could not reasonably have been unaware." *Id.* at 923 (Kline, J., concurring). Judge Kline further stated, however, that none of these studies "suggest that the incidence of sexual assault occurring on college and university campuses is any different from that occurring elsewhere in American society or that female college or university students are a particularly vulnerable group because they reside on or near a campus" *Id.* at 924 (Kline, J., concurring).

337. *Id.* at 922, n.1.

338. 467 N.E.2d 493 (N.Y. 1984), *on remand*, 487 N.Y.S.2d 115 (App. Div. 1985).

339. *Id.* at 497. The court found that, despite student complaints of criminal activity and intruders, the university did not lock the dormitory doors at night. *Id.*

340. 151 Cal. Rptr. 727 (Cal. Ct. App. 1979) (*ordered not officially published*).

341. *Id.* at 735. The court also found that the university's knowledge of these prior assaults, coupled with its failure to institute means within its power to prevent future assaults, contributed to the plaintiff becoming a victim. *Id.*

*Manor College*,<sup>342</sup> the court rejected a cramped notion of foreseeability and found the college liable for a student's rape by a non-student, notwithstanding that Pine Manor is in a low-crime area and there were no reports of violent crime on the campus in the years preceding the attack. The court explained that "the standard of foreseeability turns on an examination of all the circumstances."<sup>343</sup> The court stated that "[p]rior criminal acts are simply one factor among others that establish the foreseeability of the act of the third party."<sup>344</sup> The court explained:

The rule requiring evidence of prior criminal acts often leads to arbitrary results and distinctions. It is not clear how serious the prior acts must be to satisfy the rule. It is also not clear how close in time the criminal act must be.<sup>345</sup>

Each of these cases demonstrates several approaches to defining "foreseeability." The question is whether a college's *own* annual campus crime statistics, and interim, *timely* reports,<sup>346</sup> suffice to provide notice of criminal activity on campus so as to rise to a level of duty to warn and protect. Furthermore, if a college inadequately implements its security procedures and policies, a duty may arise. The use of Uniform Crime Report statistics, however, should resolve the problem of being unable to ascertain the veracity of campus crime statistics. Furthermore, the three year range of statistics may provide some basis for demonstrating the foreseeability of crimes on campus. If a plaintiff demonstrates statistical evidence of campus crime, is the victim of a reported crime, and shows that the college's security procedures were ineffective or were inefficiently implemented, she is almost assured recovery, since she will have proven foreseeability and the breach of due care requisite for liability.

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342. 449 N.E.2d 331, 334 (Mass. 1983).

343. *Id.* at 337.

344. *Id.*

345. *Id.* at 337, n.12. Compare *Graham v. M & J Corp.*, 424 A.2d 103, 105 (D.C. 1980) (minor acts of trespass and vandalism sufficient to show foreseeability) with *Gulf Reston, Inc., v. Rogers*, 207 S.E.2d 841, 845 (Va. 1974) (activity of trespassers on the roof of an apartment complex, including dropping water bombs in one incident, did not make it foreseeable that trespassers would spill paint on the decedent causing his heart attack).

346. 20 U.S.C.S § 1092(f)(3) (Law. Co-op. Supp. 1992).

c. Reporting Campus Crime to Law Enforcement Authorities

The Crime Awareness and Campus Security Act failed to remedy another major shortcoming of state campus crime reporting laws since it does not require colleges or universities to report campus crimes to local law enforcement authorities.<sup>347</sup> The diversity of state laws pertaining to the jurisdiction and powers of campus security and local police, as well as the issue of schools which do not retain their own security personnel, make such an amendment impracticable.<sup>348</sup> States occupy the best position to reconcile these difficulties by imposing the mandatory reporting of campus crimes to municipal law enforcement. Thus, they should amend their campus crime laws to require, or at least to facilitate, the reporting of campus crimes to local authorities.

The Crime Awareness and Campus Security Act, however, can be amended to require colleges and universities to inform student-victims of their right to pursue remedies in the criminal and civil justice systems, and, perhaps, to strongly encourage such action in particular cases. California and New York provide an example for cases of rape and sexual assault.<sup>349</sup> Requiring colleges to inform student-victims of their options helps to ensure that administrators do not conceal campus crimes. By reporting crimes to the police, and by encouraging victims to do the same, colleges reduce the possibility that they will be sued by students alleging a cover-up by the administration<sup>350</sup> or prosecuted for obstruction of justice or misprision of felony.<sup>351</sup>

d. Reducing Institutional Liability by Decreasing Foreseeability

Given students' tendency to overemphasize the significance of reported campus crime statistics, affirmative steps should be taken to minimize the risk of student victimization. The most effective

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347. See *supra* text accompanying notes 206-212.

348. See, e.g., *supra* notes 209-212 and accompanying text detailing Tennessee's response to this question.

349. California's campus rape victim law provides that "[e]ach victim of sexual assault should receive information about the existence of at least the following options: criminal prosecutions, civil prosecutions, the disciplinary process through the college, [and] the availability of mediation." CAL. EDUC. CODE § 94385 (West Supp. 1992). New York requires that all incoming students receive information on "(1) the applicable laws, ordinances and regulations on sex offenses, (2) the penalties for commission of sex offenses, [and] (3) the procedures in effect at the college for dealing with sex offenses." N.Y. EDUC. LAW § 6450(1-a)(a) (McKinney Supp. 1992).

350. See *supra* note 47.

351. See *supra* notes 207-08.

way to reduce the foreseeability of criminal incidents is to raise student awareness of campus crime by implementing effective security policies and crime prevention-education programs.

Under the Campus Security Act, the Secretary of Education is authorized to recognize institutions with exemplary security procedures and policies.<sup>352</sup> Such recognition serves two purposes. First, it gives institutions incentive to develop more effective programs by providing them with favorable publicity; second, it furnishes other states, colleges, and universities with paradigms for establishing their own campus crime programs. For example, Pennsylvania's College and University Security Information Act illustrates model security policies and procedures,<sup>353</sup> California exemplifies the paradigm pro-victim sexual assault policy,<sup>354</sup> and New York and Wisconsin demonstrate model rape awareness and prevention programs.<sup>355</sup>

Although the Campus Security Act prohibits the Secretary of Education from imposing security policies and procedures on regulated institutions,<sup>356</sup> states are free to require that their colleges and universities adopt certain protocols.<sup>357</sup> The American Council on Education, for example, suggests that colleges adopt certain minimal security procedures to achieve reasonable campus security; these procedures will simultaneously reduce the foreseeability of criminal activity and institutional liability for student victimization.<sup>358</sup> Thus, state campus crime legislation can require institutions to adopt effective security procedures or implement specialized programs on rape and sexual assault, hazing, and alcohol and drug abuse. Furthermore, a college itself can implement and publicize such anti-crime education programs.

Even if the facts of a specific case establish foreseeability, however, an institution may have implemented sufficient security

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352. See *supra* notes 264-65 and accompanying text.

353. See *supra* notes 193-96 and accompanying text.

354. See *supra* note 187.

355. See *supra* notes 180-86 and 191.

356. See *supra* notes 257-58 and accompanying text.

357. See *supra* notes 275-82 and accompanying text.

358. *Achieving Reasonable Campus Security*, in SELF-REGULATED INITIATIVES: RESOURCE DOCUMENTS FOR COLLEGES AND UNIVERSITIES, reprinted in Raddatz, *supra* note 51, at 9-15. The American Council on Education enumerates general practices that institutions should take to reduce the risk of student victimization: 1) "Instructing Campus Community about Security Procedures;" 2) "Grounds Security and Access;" 3) "Supervision in Student Housing;" 4) "Training Security Officers;" 5) "Campus Law Enforcement." *Id.* at 11-15.

procedures to satisfy its duty of reasonable care. Furthermore, since students and applicants are provided with campus crime statistics and security procedures under the Campus Security Act, a college may assert that a student-victim assumed the risk of on-campus victimization when she decided to attend the institution. Assumption of the risk requires a knowing and voluntary exposure to a dangerous situation.<sup>359</sup> A student who receives a college's campus crime information pursuant to a state crime reporting law or the Campus Security Act is cognizant of the security policies and rate of crime,<sup>360</sup> and is thus voluntarily encountering a known risk. However, since the Campus Security Act is designed and intended to increase student awareness of campus crime,<sup>361</sup> it is unlikely that a court would find that a student assumed the risk of victimization by attending a particular college or university.<sup>362</sup>

C. What if the College or University Fails to Comply with the Campus Security Act?

As enacted, the Campus Security Act invests exclusive enforcement powers in the Secretary of Education. In the event of non-compliance, the Secretary is authorized to limit, to suspend, or to terminate an institution's receipt of federal funds<sup>363</sup> and is further authorized to impose a civil penalty up to \$25,000 for each violation.<sup>364</sup> These same enforcement provisions govern the Family Education Rights and Privacy Act ("FERPA").<sup>365</sup> No institution has ever lost federal funding for violating FERPA's privacy provision<sup>366</sup> by releasing campus crime reports. In fact, two recent decisions held that campus crime reports were not "educational records" and therefore FERPA did not even apply.<sup>367</sup> This

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359. PROSSER AND KEETON, *supra* note 87, § 68, at 487.

360. See Reford, *supra* note 42, at 194.

361. See *supra* notes 236-38 and accompanying text.

362. See Reford, *supra* note 42, at 196.

363. See 20 U.S.C. § 1094(c)(1)(D) (1988).

364. See 20 U.S.C. § 1094(c)(2)(B) (1988).

365. 20 U.S.C. § 1094(c)(1)(A) (1988); *id.* § 1094(c)(2)(A)-(B) (1988).

366. SMITH, CRIME ON CAMPUS, *supra* note 22, at 77. In general, FERPA prohibits the release of "personally identifiable information." 20 U.S.C. § 1232g(b)(1) (1988). Thus, "No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records or personally identifiable information contained therein other than directory information." *Id.*

367. *Bauer v. Kincaid*, 759 F. Supp. 575, 590 (W.D. Mo. 1991) ("criminal investigation reports are specifically excluded from the educational records which FERPA protects"); see also *Student Press Law Center v. Lamar*, 778 F. Supp. 1227, 1228 (D.C. Cir. 1991)

frustrated the Education Department's attempted enforcement of the Act. Although the release of campus crime reports and the withholding of campus crime statistics and security policies raise different issues — one seeks to increase the flow of information to the student-consumer, while the other seeks to impede it — it seems unlikely that an institution which fails to comply with the Crime Awareness and Campus Security Act would have its federal funding terminated or withheld.

The Crime Awareness and Campus Security Act, like FERPA, currently does not provide for private enforcement actions. Amending 20 U.S.C. § 1232g to permit private enforcement, with penalties ranging from injunctions to fines, would ensure expeditious institutional compliance. Similar to other statutorily-conferred, citizen-initiated actions,<sup>368</sup> or under the "private attorney general" doctrine,<sup>369</sup> a prevailing plaintiff should be awarded reasonable

(unless exceptions are present, educational records do not include law enforcement records).

368. More than 100 federal statutes authorize fee awards. For a list of these statutes, see *Marek v. Chesny*, 473 U.S. 1, 44-51 (1985) (Brennan, J., dissenting). See, e.g., 42 U.S.C.S. § 2000e-5(k) (Law Co-op. Supp. 1992) ("In any action or proceeding the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs."); Fair Credit Reporting Act, 15 U.S.C. §§ 1681n, 1681o (1988) ("[I]n the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court" shall be awarded to the consumer if she prevails.).

369. A "private attorney general action" is a private cause of action devised to effectuate a public purpose usually accomplished by the government. By providing private parties incentive, in the form of attorney's fees and costs for example, to sue wrongdoers, it is thought that the misconduct will thereby be eliminated. See, e.g., *Agency Holding Corp. v. Malley-Duff & Associates Inc.*, 483 U.S. 143, 151 (1987) ("Both RICO and the Clayton Act are designed to remedy economic injury by providing for the recovery of treble damages, costs, and attorney's fees. Both statutes bring to bear the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources are deemed inadequate."); *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968) (Plaintiffs acting as private attorneys general vindicate public rights. "If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts."); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 263 (1975) ("[U]nder some, if not most, of the statutes providing for the allowance of reasonable fees, Congress has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation."); *Woodland Hills Residents Ass'n, Inc. v. City Council of Los Angeles*, 593 P.2d 200, 208 (Cal. 1979) ("The [private attorney general] doctrine rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions, and that, without some mechanism authorizing the award of attorney fees, private actions to enforce such important

attorney's fees and costs as well. This would provide students with incentive to initiate suits under the Act to bring their college or university into compliance. In addition, states can amend their campus crime reporting laws or rules of civil procedure to authorize the award of attorney's fees and costs.<sup>370</sup> The success of Neighborhood Watch Communities and other citizen action groups<sup>371</sup> suggests that when people are involved in protecting their own interests, crime reporting increases while the level of

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public policies will as a practical matter frequently be infeasible."); *Watkins v. Labor and Indus. Review Comm'n*, 345 N.W.2d 482, 488 (Wis. 1984) (Court authorized award of attorney's fees under the Wisconsin Fair Employment Act, because "it is evident that the authority to award reasonable attorney's fees to a prevailing complainant is necessary in order to fully enforce and give meaning to the rights created by the Act.");

In *Alyeska*, the Supreme Court overruled the judicially created private attorney general exception, and held that courts can award attorney's fees and costs against the government only when a statute specifically authorizes such an award. 421 U.S. at 263. For a list of federal statutes authorizing such fee awards, see *Marek v. Chesny*, 473 U.S. 1, 44-51 (1985) (Brennan, J., dissenting). A Congressional amendment to the Crime Awareness and Campus Security Act is therefore necessary to allow private enforcement.

370. California's Code of Civil Procedure, for example, provides for a fee award when the following criteria are met: (1) the action "has resulted in the enforcement of an important right affecting the public interest," (2) "a significant benefit has been conferred on the general public or a large class of persons," (3) "the necessity and financial burden of private enforcement are such as to make the award appropriate," and (4) the fees "should not in the interest of justice be paid out of the recovery, if any." CAL. CIV. PRO. CODE § 1021.5 (West 1992). Under this criteria, a student suing to enforce a state campus crime reporting statute is vindicating the public interest (campus safety) by conferring a significant benefit (campus crime information) on a large class of persons (the college community, educating other students about their statutory rights, and putting other schools on notice).

371. See, e.g., Douglas I. Brandon, et al., *Self-Help: Extrajudicial Rights, Privileges and Remedies in Contemporary American Society*, 37 VAND. L. REV. 845, 894 (1984) ("Neighborhood watch programs currently are popular forms of organized citizen participation in law enforcement that originated in colonial America. Members of neighborhood watch programs contribute to crime prevention and law enforcement by serving as the eyes and ears of the police. Since the New York City Police Department first sponsored a neighborhood watch program in the late 1970s, the number of citizen participants has grown from 30,000 to 81,000. Over two million Americans now belong to watch programs in approximately 80,000 communities."); Frank G. Carrington, *Deterrence, Death, and the Victims of Crime: A Common Sense Approach*, 35 VAND. L. REV. 587, 588 (1982) (One of the premises of victim advocacy is "preventing victimization from ever occurring. Thus preventative goal can be effectuated through engag[ing] in activity that encourages and assists the potential victim of crime to help himself in programs such as neighborhood watch."); Jim H. Zemora, *Police, Residents Launch New Effort Aimed at Curbing Crime*, LOS ANGELES TIMES, Nov. 7, 1991, at B3 (community representatives and block captains will "report crimes in their neighborhoods and teach fellow citizens how to prevent crime."); Elizabeth Ross, *'Fed Up' With Crime and Grime, Inner City Dwellers Take Charge*, CHRISTIAN SCIENCE MONITOR, March 12, 1991, at 9 (citing Miami, Florida's, "Coalition for a Drug-Free Community" and Kansas City, Missouri's, "Ad Hoc Group Against Crime" as successful community-wide programs).



criminal activity decreases.<sup>372</sup> Thus, students acting as private attorneys general vindicate the public interest in safe and secure college environments. In addition, private enforcement actions will encourage student vigilance in policing these interests, educate others "about a contemporary issue of public importance,"<sup>373</sup> and induce college compliance with the Act.<sup>374</sup> The threat of potential lawsuits also encourages innovation on the part of college administrators to develop anti-crime measures and programs. This development not only protects the students by informing and educating them, it generally makes campus crime less foreseeable, and, consequently, may shield the college from liability as well.<sup>375</sup>

A school's failure to abide by the statutory requirements of the Campus Security Act may constitute negligence *per se*.<sup>376</sup> Thus, a suit can enjoin the institution from further noncompliance and can impose fines on the institution depending upon the severity of the noncompliance. Refusing to comply with the court order places a school's administration at risk of being held in contempt. In addition, any monetary penalties assessed against the college could be employed to fund campus rape treatment and prevention programs; alcohol, drug, and crime awareness seminars; increased lighting; a

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372. See, e.g., Brandon, *supra* note 371, at 894-95 ("Recent evaluations of the effectiveness of these [neighborhood watch] programs are encouraging. One study strongly suggested that neighborhood watch programs appreciably deter criminal activity. This study found that communities which employed neighborhood watch programs achieved up to an eighty-five percent reduction in crime rates."); Rierdon, *supra* note 31 ("The best deterrent to crime on campus is to build a community that is intolerant of abuse, one that says to students it's not O.K. to get drunk every night, or steal, or assault someone or get mad and pound holes in walls. Only when students, faculty, and administrators make an active effort to create a safe community can we make a difference in the level of crime on campuses."). Cf. SMITH, CRIME ON CAMPUS, *supra* note 22, at 222 ("A recent study by the National Institute of Justice and the Minneapolis Police Department found that 16% of the women who reported domestic violence to the police were assaulted a second time, but 23% of those who did not call police suffered a second assault.").

373. Hill v. National Collegiate Athletic Ass'n, 273 Cal. Rptr. 402, 425 (Cal. Ct. App. 1990) (quoting Press v. Lucky Stores, Inc., 667 P.2d 704, 707 (Cal. 1983)). Hill involved a challenge to the NCAA drug testing of student-athletes. *Id.* at 406. The court found that the participation of Stanford University in the suit benefitted over 600 of its student-athletes and provided notice to thousands of other California student-athletes that NCAA drug testing is unconstitutional. *Id.* at 425.

374. See Smith, *College Liability*, *supra* note 79, at 4-5 ("Lawsuits often serve as quality-control devices in American society. Perhaps the threat of lawsuit liability will drive such a change in campus life."); see, e.g., Brooks v. Cook, 938 F.2d 1048, 1051 (9th Cir. 1991) ("The award of attorneys' fees also acts to stimulate voluntary compliance with the law.").

375. See *supra* notes 356-62 and accompanying text.

376. See *supra* note 312 and accompanying text.

shuttle-bus or campus escort service; and secured doors.

Amending the Crime Awareness and Campus Security Act to allow students to bring suits against noncomplying institutions encourages awareness of and involvement in solving the campus crime problem. More importantly, the threat of litigation compels colleges and universities to institute campus safety procedures and policies, to divulge campus crime statistics, and to seriously confront their campus crime problems.<sup>377</sup>

## VII. CONCLUSION

*"Was I sleeping, while the others suffered? Am I sleeping now?"*<sup>378</sup>

American colleges and universities were rudely awakened by recent incidents of campus violence. Murder, rape, assault, theft, drug and alcohol abuse, common topics on campuses across the Nation, confirm that colleges and universities are no longer safe, idyllic havens, immune to the pressures of the parent society. More than 13 years since the doctrine of *in loco parentis* has been laid to rest, new theories ranging from misrepresentation and duty to warn to special relationship have emerged to hold colleges and universities liable for on-campus student victimization.

State legislatures were the first to establish campus security laws mandating that their colleges and universities provide students with campus crime statistics and campus security policies. These laws were designed to provide students and their families with sufficient information to forewarn them of campus crime. A dearth of participation among states and the lack of consistent and uniform reporting standards, however, frustrated the purpose of these laws. To remedy these problems, and to ensure that students were apprised of campus crime and campus security, the federal government enacted the Crime Awareness and Campus Security Act in 1990.

While the Crime Awareness and Campus Security Act ensures uniform reporting standards, it fails to remedy the problems surrounding off-campus student victimization, reporting of campus crimes to local police authorities, and the release of campus crime reports. The Campus Security Act provides the minimum level of reporting and disclosure, while leaving states free to enact stricter

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377. See Smith, *College Liability*, *supra* note 79.

378. SAMUEL BECKETT, *WAITING FOR GODOT* 58 (1954).

campus crime reporting laws. Like Vladimir and Estragon, students and their families have waited for Godot long enough. Until both the state and federal government wake up and address these issues, students, their families, and the college community, will continue to suffer the nightmare of campus crime.

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