The Buckley Conspiracy: How Congress Authorized the Cover-Up of Campus Crime and How It Can Be Undone

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Crime on college campuses is a growing and pervasive problem for many institutions of higher education. In light of this alarming trend, many universities have organized student disciplinary boards in an effort to deal with student offenders within the university community, and without police involvement. These student disciplinary boards have begun to adjudicate complex criminal issues, ranging from theft to assault and rape, and are almost always carried out in secret. The result of this practice is that student offenders suffer only the most nominal of punishments, and other students on campus remain unaware that a crime has even taken place. One crucial piece of federal legislation, the Family Educational Rights and Privacy Act (FERPA), has allowed universities to shield this disciplinary information from the public by requiring universities to keep a student's educational records confidential. Many schools have thus interpreted disciplinary records as "educational records" in an effort to avoid potentially losing millions of dollars in federal aid. The author argues, here, that FERPA must be amended in such a way as to give universities a clear indication that disciplinary records are not "educational records" and, furthermore, that universities must be forced to affirmatively disclose information relating to crime on their campuses in an effort to protect their students.

I. INTRODUCTION

In February 1995, a first-year Miami University student[1] and some friends from her dorm set out for one of the many parties that were in progress that weekend in Oxford, Ohio. The party was hosted by one of the University's varsity wrestlers and was held in a house rented by students. The house was located not even a mile from the University campus.

After spending several hours at the party, the student fell asleep in one of the upstairs bedrooms. She reported having fallen asleep on her stomach, next to one

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* This Note is dedicated to my family, Ric, Debbie, and Kara, for their many years of tireless love and support, and to Patrick, for everything. Thanks to all of you for never letting me forget there was a light at the end of this tunnel. I would also like to extend my special thanks to Bill Mandel, without whose friendship and feedback, none of this would have been possible.

[1] The victim chose to identify herself only as "Erin R." *See* Nina Bernstein, *College Campuses Hold Court in Shadows of Mixed Loyalties*, N.Y. TIMES, May 5, 1996, at B1 (discussing the problems involved with secret campus disciplinary boards and detailing the rape of the Miami University student).

of her friends from her dorm.[2] Not long after, the student was awakened by the party's host, a 190 pound wrestler, who was pinning her down and penetrating her from behind.[3] She screamed and struggled but was unable to ward off the attacker. The friend, lying next to the student, witnessed the entire scene.[4]

Soon after the alleged incident took place, the student reported the assault to the Oxford Police. According to representatives from that agency, the police encouraged her to press charges; according to the student, however, the prosecutor assigned to the case was hostile and did all he could to discourage her from going forward.[5] Susan Vaughn, the University's Judicial Affairs Coordinator, later intervened and suggested the student and her attacker attempt mediation, as the problem was merely a "misunderstanding."[6] The student reluctantly agreed to a disciplinary board hearing, in hopes that her attacker would at least have to answer to the University for his actions. Though she already had a written apology from him,[7] she hoped for some greater vindication.

The disciplinary hearing lasted four hours, and the disciplinary board, composed of two professors and two students, took only twenty minutes to deliberate. The result: Aaron Grossman, the attacker, was guilty of violating a provision of the Miami University Student Code of Conduct, "Physical or Psychological Abuse of Others." For his actions, Grossman was placed on "student conduct probation," a label that carried with it no suspension. Because the hearing was handled through the University's own disciplinary board and thus kept secret, Grossman was shielded from public backlash. The female student continued to run into her attacker at various places around campus. And Miami University, for the period from January to June 1995, reported not a single rape in its annual campus crime report.[8]

The above incident highlights the essence of an all too common problem at

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[2] *See id.*

[3] *See id.*

[4] *See id.*

[5] According to Erin, the prosecutor suggested that no jury would take seriously a woman who had willingly gone to a party, drank alcohol all night, and then fell asleep at the host's house. *See id.*

[6] *See id.*

[7] Among other things, the apology implored, "Although I hurt you very seriously, I pray to you that you won't destroy my life." *Id.*

[8] The rape of Erin R. was rationalized as an "off-campus" rape, and thereby not required by law to be reported. In fact, twenty-one other rapes that occurred in the same time period also went unreported. This latter group of rapes was ignored as having been reported to off-campus counselors, hospital personnel, and others who were under no legal duty to report the crimes to the University. *See id.*

many of the nation's colleges and universities—the secret disciplinary board. Organized to deal with standard college infractions, such as academic dishonesty and underage drinking, these boards today adjudicate complex criminal issues ranging from theft, to assault and rape. Because these matters are disposed of largely in secret, educational institutions—like Miami University—are able to avoid disclosure of these crimes, thereby enhancing the school's image and avoiding the potential loss of millions of dollars in federal aid.[9] Indeed, these institutions often claim to be *prevented* from releasing this information, even when they are willing to do so, because of one crucial piece of legislation—the Family Educational Rights and Privacy Act ("Act," "Buckley," or "FERPA").[10]

Buckley, enacted in 1974, was intended to protect the privacy rights of students by limiting third-party access to their educational records.[11] At its most basic level, Buckley permits access to student educational records by parents, students, and necessary school administrators and teachers, while denying access to most third parties.[12] Buckley's only enforcement mechanism lies in the conditioning of federal funding to educational institutions on their compliance with Buckley's procedures; schools that violate its terms stand to lose millions of dollars in federal aid.[13]

Though Buckley itself has been substantively amended four times since its enactment in 1974,[14] much confusion persists among institutions of higher

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[9] *See infra* Part III.C.

[10] 20 U.S.C. § 1232g (1994 & Supp. 1998) (named for its sponsor, James Buckley).

[11] *See id.* § 1232g(b)(1) ("No funds shall be made available . . . to any educational agency or institution which has a policy or practice of permitting the release of education records . . . of students without the written consent of their parents to any individual, agency, or organization . . . .").

[12] *See id.* § 1232g(a)(1)(A), (b)(1) (denying funds to educational institutions that release students' educational records).

[13] Miami University, for example, stood to lose forty-million dollars in federal funding for the release of confidential student information. *See School Paper, School Await Records Decision*, DAYTON DAILY NEWS, Mar. 31, 1997, at B4 (detailing the events surrounding the lawsuit filed by *The Miami Student* against Miami University).

[14] In 1979, Buckley was amended to allow for disclosure of records without parental consent to educational authorities conducting audits and program evaluations. *See* Education Laws of 1979, Pub. L. No. 96-46, § 4(c), 93 Stat. 338, 342 (codified as amended at 20 U.S.C. § 1232g(b)(5) (1994)). In 1990, Buckley was amended to coordinate its provisions with those of the Campus Security Act (CSA), which requires disclosure of crime statistics on college campuses. *See* Student Right-to-Know and Campus Security Act of 1990, Pub. L. No. 101-542, § 204, 104 Stat. 2381, 2385–87 (codified as amended at 20 U.S.C. § 1092 (1994)). In 1992, Buckley's language was amended to exclude campus law enforcement records from the definition of "educational records." *See* Higher Education Amendments of 1992, Pub. L. No. 102-325, § 1555(a), 106 Stat. 448, 840 (codified as amended at 20 U.S.C. § 1232g(a)(4)(B)(ii) (1994)). Note, however, that law enforcement records and disciplinary records are not the

education over the exact meaning of Buckley's use of the term "educational records." While it is clear from the language of Buckley that campus law enforcement agencies' records on students are *not* "educational records" within the meaning of the Act,[15] the same cannot be said of records that are kept by university disciplinary boards.[16] The result has been that many schools opportunistically classify disciplinary records as confidential educational records that are protected by Buckley. Thereby the universities are insulated from public scrutiny about the events and outcomes surrounding major campus crimes.

This Note details the opportunistic use of Buckley by institutions of higher education and offers a critical analysis of Buckley's major weakness—the ambiguity surrounding the term "educational records." Part II explains the mandates of Buckley and highlights the interpretation of Buckley by both

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same. Additionally, in 1994, Buckley was amended to provide greater parental access to records, while easing Buckley's burden on schools. *See* Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (codified as amended at 20 U.S.C. § 1232g(b)(1)(J), (b)(1)(E), (b)(4)(B), and (h) (1994)). To trace the amendments to Buckley since its enactment, see Lynn M. Daggett, *Bucking Up Buckley I: Making the Federal Student Records Statute Work*, 46 CATH. U. L. REV. 617, 620–22 (1997).

[15] *See* 20 U.S.C. § 1232g(a)(4)(B)(ii) ("The term 'education records' does not include . . . records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement."). Note the peculiar and arbitrary distinction the exception for law enforcement records draws. Had Aaron Grossman had the misfortune of answering to the Miami *campus* police force, the records surrounding the incident would have been available to the public at large. However, because the campus police did not have jurisdiction over Aaron's "off-campus" residence (and thus were not involved in the case's disposition), and because Miami chose to resolve the matter on its own, Aaron was able to enjoy the benefits of Miami's secret disciplinary system. Such a result hardly seems principled, particularly when a university can influence the disposition of a case that originated off-campus (as in the Miami example, in which the local police actually had jurisdiction to begin with). A university's decision as to how to dispose of the matter thus seems to matter more than whether the particular offense occurred on- or off-campus.

Indeed, even allowing college students the benefit of disciplinary boards is problematic. One can imagine a case where an eighteen year old college student is sent before a disciplinary board for rape, while his eighteen year old counterpart merely *living* in a college town, but not attending the college, is prosecuted for the same crime to the fullest extent of the law. That Congress has provided for such an arbitrary system hardly seems just.

[16] Note, however, that an effective *exclusio unis* argument could be made in support of the notion that disciplinary records are educational records. That is, by enumerating the several types of records that are clearly *not* educational records, Congress intended for all other types of records to be considered "educational" for purposes of Buckley. On the other hand, one might argue that because Congress specifically exempted law enforcement records from the definition of educational records, it intended for information about crimes generally to be beyond the reach of Buckley.

universities and courts. Part III lays out the crux of the problem inherent in Buckley—the idea that Congress has passed legislation that makes it more beneficial for colleges and universities to bury information by way of Buckley than disclose in accordance with the Campus Security Act. Part IV analyzes recent legislation proposed in the U.S. House of Representatives. To close Buckley's major loophole, this legislation would ensure that students attending our nation's colleges and universities receive full information regarding campus crime. Part V both critiques this legislation and proposes recommendations for dealing with the problem. Finally, Part VI concludes by explaining that Congress, in order to compel full disclosure by school officials, must remove the existing incentives for concealing disciplinary information.

II. BUCKLEY'S "MANDATE"

A. *Buckley's Plain Language and the Meaning of "Educational Records"*

Enacted in 1974, Buckley had two goals as its purpose:[17] (1) to provide to parents and students a right of access to a student's records[18] and an opportunity to challenge the accuracy of those records,[19] and (2) to prevent other unauthorized third parties from gaining access to private student files.[20] Buckley was originally introduced as a Senate floor amendment to the General Education Provisions Act by Senator James Buckley.[21] Rather than affirmatively require the release of information to parents and students, Buckley instead mandates only that federal funding be withheld from those institutions that deny parents access to their children's records.[22] Rather than affirmatively require that institutions deny access to student records to third parties, Buckley instead

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[17] *See* Ralph D. Mawdsley, *Litigation Involving FERPA*, 110 West's Ed. Law Rep. 897, 897 (1996) (providing a basic overview of Buckley and highlighting several court cases from across the country involving Buckley).

[18] *See* 20 U.S.C. § 1232g(a)(1)(A), (B) (1994 & Supp. 1998).

[19] *See id.* § 1232g(a)(2).

[20] *See* Daggett, *supra* note 14, at 620 (explaining the goals of lawmakers in passing Buckley).

[21] *See* 20 U.S.C. §§ 1221-1235.

[22] *See id.* § 1232g(a)(1)(A), which states:

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying . . . the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children.

Id.

mandates that federal funding will be withdrawn if such records are released.[23]

Because Buckley was introduced as a floor amendment to pending legislation, there was very little deliberation on the matter before the Act's passage.[24] Only a scant amount of floor debate actually took place, and there were no hearings held or committee reports written on the topic. Further, the Act contains no preface or statement of purpose.[25] The only definitive remarks surrounding the Act's passage came from Senator Buckley himself, who stated only that the statute was intended to address "the growing evidence of abuse of student records across the nation."[26] Thus, the hurried setting in which the Act was promulgated helps to explain why so many problems have arisen in regard to Buckley's provisions.[27]

What is the Buckley mandate, then, with respect to educational institutions?[28] For purposes of this Note, the mandate has two components: (1) it

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[23] *See supra* note 11.

[24] *See* Daggett, *supra* note 14, at 620 (discussing the scant amount of legislative history that exists on Buckley). *See generally* T. Page Johnson, *Managing Student Records: The Courts and the Family Educational Rights and Privacy Act of 1974*, 79 West's Edu. Law Rep. 1 (1993) (summarizing the legislative background of Buckley).

[25] *See* Daggett, *supra* note 14, at 622.

[26] 121 CONG. REC. 13,990 (1975). These remarks were not made in Congress, but in an address to the Legislative Conference of the National Congress of Parents and Teachers on March 12, 1975. Desperate judges, guided by no substantive legislative history, have often turned to this address for guidance when attempting to interpret Buckley. *See* Johnson, *supra* note 24, at 3 (detailing the absence of legislative history in regards to Buckley).

[27] *See* Johnson, *supra* note 24, at 2:

> There is scant legislative history to explain FERPA's purposes or guide judicial interpretation of its meaning. Congress offered no opportunity to those affected by the Act to be heard on the merits of FERPA prior to its enactment. FERPA was not subjected to the usual process of legislative committee study and review, and there were no public hearings to receive testimony from interested institutions and individuals.

Id.

[28] As has already been explained, Buckley, in reality, affirmatively compels an institution to do nothing in particular. Rather, Buckley provides that federal funding will be withheld from institutions that fail to comply with certain record access requirements. *See, e.g.*, Student Bar Ass'n v. Byrd, 239 S.E.2d 415, 419 (N.C. 1977) (noting that Buckley is not a law that prohibits the disclosure of student records, but instead imposes a funding precondition for nondisclosure); *see also* Bauer v. Kincaid, 759 F. Supp. 575, 589 (W.D. Mo. 1991) ("FERPA is not a law which prohibits disclosure of educational records. It is a provision which imposes a penalty for the disclosure of educational records."). The author asks what Buckley "directs" universities to do only for simplicity's sake. It may be said, however, that by threatening the withdrawal of millions of dollars in federal aid, Congress *has* effectively directed institutions to do something—keep student records confidential.

withdraws federal funding from any educational agency or institution[29] that denies parents the right to inspect and review the educational records of their children;[30] and (2) it withdraws federal funding from any educational agency or institution that has a "policy or practice" of permitting the release of student[31] education records or personally identifiable information contained within such records without the written consent of parents.[32] This Note focuses on the dissemination (or lack thereof) of educational reports by colleges and universities. However, particular attention must also be paid to the provision that withdraws funding for the release of student records.

1. *Exceptions to Buckley's Ban on Releasing Student's Educational Records*

While as a general rule colleges and universities may not release educational records, or other personally identifiable information, to third parties, Buckley

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[29] By its own terms, Buckley affects nearly all educational institutions within the United States. The statute defines "educational agency or institution" as "any public or private agency or institution which is the recipient of funds under an applicable program." 20 U.S.C. § 1232g(a)(3) (1994). The Act similarly covers both federal and state agencies. *See* 20 U.S.C. § 1232g(a)(1)(B). Note, however, that "applicable federal program" refers to funds disseminated by the U.S. Department of Education (DOE), not funds distributed by other departments. *See* 34 C.F.R. § 99.1 (1997) (listing applicable federal programs). Merely enrolling students who receive federal student aid is enough to satisfy this low standard. *See* Daggett, *supra* note 14, at 623 n.44 ("[R]eceipt of federally-funded or federally-guaranteed financial aid makes a university subject to Buckley."). Thus, nearly all colleges and universities fall under the ambit of Buckley.

[30] *See* 20 U.S.C. § 1232g(a)(1)(A).

[31] Those "students" affected by Buckley include "any person with respect to whom an educational agency or institution maintains educational records or personally identifiable information." 20 U.S.C. § 1232g(a)(6). An exception is made for those who have not actually attended the particular institution (for example, those who have been *accepted* to an institution, but are not yet in attendance). *See* 20 U.S.C. § 1232g. Alternatively, those who have attended an institution, but have either graduated from or otherwise left that institution, may or may not be covered. One case has indicated that policy reasons may favor the release of otherwise protected information. *See* Klein Indep. Sch. Dist. v. Mattox, 830 F.2d 576, 581 (5th Cir. 1987). In *Klein*, a teacher sought to prevent disclosure of old transcripts contained within her personnel file. *See id.* at 578. Holding that the personnel file, including the transcripts, could be opened, the Fifth Circuit Court of Appeals reasoned that the public's interest in access to a teacher's records outweighs the individual teacher's privacy interest in her transcript. *See id.* Admittedly, the result may be different if the individual at issue was a recent graduate of an institution or if there were not strong policy reasons in favor of disclosure. Generally speaking, those currently attending a college or university receive the greatest protection.

[32] *See* 20 U.S.C. § 1232g(b)(1).

contains several noteworthy exceptions.[33] First, release of such information may be made to other school officials, including teachers, who have a legitimate educational interest in the material.[34] Second, such information may be released to state and local officials or authorities, as long as a state statute authorizes such a release.[35] Third, educational records generally may be released with the written consent of the student's parents.[36] While all are important, none of these exceptions does much to facilitate the release of information contained in disciplinary board reports.

2. *The Meaning of "Educational Record"*

What is perhaps more important than the enumerated exceptions is the definition articulated for the term "educational records."[37] Buckley's provisions

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[33] Although the focus here is on only three exceptions which are germane to this Note, Buckley actually provides for several others. *See* 20 U.S.C. § 1232g(b)(1)(B) (release may be made to officials of other school systems in which the student seeks to enroll); 20 U.S.C. § 1232g(b)(1)(C) (release may be made to the Comptroller General of the United States, the Secretary of Education, or state educational authorities); 20 U.S.C. § 1232g(b)(1)(D) (release may be made in connection with a student's application for financial aid); 20 U.S.C. § 1232g(b)(1)(F) (release may be made to organizations conducting studies for educational institutions); and 20 U.S.C. § 1232g(b)(1)(I) (release may be made in connection with an emergency).

[34] A determination of whether an official has such a legitimate interest must be made by the agency or institution. *See* 20 U.S.C. § 1232g(b)(1)(A).

[35] *See* 20 U.S.C. § 1232g(b)(1)(E) (information may be released to "State and local officials or authorities to whom such information is specifically allowed to be reported or disclosed pursuant to State statute . . . .").

[36] *See* 20 U.S.C. § 1232g(b)(1) ("No funds shall be made available . . . to any educational agency or institution which has a policy or practice of permitting the release of education records . . . without the written consent of their parents . . . ."). Also, note that limited information may be released in order to list a student in the school's directory. *See* 20 U.S.C. § 1232g(a)(5)(A). This information may include the student's name, address, telephone number, date and place of birth, major field of study, participation in school activities and sports, dates of attendance, degrees and awards received, weight and height of athletic team members, and the most recent previous institution attended by the student. *See* 20 U.S.C. § 1232g(a)(5)(A). In most cases, however, in order for this information to be lawfully published, the school must have designated such information as directory material before the publication. *See, e.g.*, Krauss v. Nassau Community College, 469 N.Y.S.2d 553, 555 (N.Y. Sup. Ct. 1983) (holding that Buckley prohibits the release of enrolled students' names and addresses when such information has not been designated by the school as directory information).

[37] Indeed, much litigation and continued confusion surrounds the precise meaning of this term. *See, e.g.*, Tarka v. Cunningham, 917 F.2d 890, 891 (5th Cir. 1990) (whether physics professor's grading process could be scrutinized by a student as part of his "educational

contain the following definition of "educational records": "those records, files, documents, and other materials which contain information directly related to a student."[38] The term does *not* include records of instructional, supervisory, and administrative personnel that are in the sole possession of those personnel,[39] records maintained by a law enforcement unit of the educational agency or institution,[40] or records on students made and maintained by physicians, psychiatrists, psychologists, or other recognized professionals in connection with the treatment of that student.[41] The definition is thus intentionally broad. The definition includes most information that is *personally identifiable information*, such as social security numbers,[42] the student's name, parents' or other family members' names, lists of personal characteristics, or other similar information.[43]

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record"); Klein Indep. Sch. Dist. v. Mattox, 830 F.2d 576, 580 (5th Cir. 1987) (whether teacher's college transcript was an education record within meaning of Buckley); Flannery v. Board of Trustees of Illinois Community College, No. 96C50184, 1996 WL 663918, at *4 (N.D. Ill. Nov. 4, 1996) (whether disclosure of nursing student's grade on a paper to other students was disclosure of education record); *see also* John A. Scanlan, *Playing the Drug Testing Game: College Athletes, Regulatory Institutions, and the Structures of Constitutional Argument*, 62 IND. L.J. 863, 956–58 (1986–1987) (discussing the application of Buckley to student athlete drug testing); Mary H.B. Gelfman & Nadine C. Schwab, *School Health Services and Educational Records: Conflicts in the Law*, 64 West's Ed. Law Rep. 319 (1991) (discussing the problems that Buckley poses with regard to student health records). The case of *The Miami Student v. Miami University* will be discussed *infra* Part II.B.2.

[38] 20 U.S.C. § 1232g(a)(4)(A) (1994).

[39] *See* 20 U.S.C. § 1232g(a)(4)(B) ("The term 'education records' does not include . . . records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute.").

[40] *See* 20 U.S.C. § 1232g(a)(4)(B)(ii) ("[The term 'education record' does not include] records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement."). Note, however, that this exemption does *not* address the issue of disciplinary boards; it applies only to campus law enforcement units.

[41] *See* 20 U.S.C. § 1232g(a)(4)(B)(iv) ("[The term 'education record' does not include] records on a student . . . made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity . . . .").

[42] *See generally* Krebs v. Rutgers, 797 F. Supp. 1246, 1259 (D.N.J. 1992) (holding that students could enjoin school from distributing class rosters that list students by name and social security number); Alexander C. Papandreou, Krebs v. Rutgers*: The Potential for Disclosure of Highly Confidential Personal Information Renders Questionable the Use of Social Security Numbers as Student Identification Numbers*, 20 J.C. & U.L. 79, 92–95 (1993) (discussing the difficulties surrounding the use of students' social security numbers as school identification numbers in light of the district court's ruling in *Krebs*).

[43] *See* 34 C.F.R. § 99.3 (1997) (detailing the categories of personally identifiable

The current problem concerning university disciplinary records exists for two reasons: (1) absent from Buckley's treatment of educational records is any clear statement regarding in which category disciplinary records kept by a university fall, and (2) a separate provision in Buckley specifically authorizes university officials to incorporate disciplinary records into the educational records of students.[44] These two facts have allowed universities to opportunistically shield damaging disciplinary records from public and student scrutiny. Congress, by drafting this piece of legislation the way it did, has effectively put its imprimatur on the cover-up of campus crime.

B. *Buckley as Interpreted by the Courts*

Buckley has spawned much litigation in both state and federal courts on a diverse range of issues.[45] These issues have included parental access,[46] student access,[47] the proper remedies for those who have been damaged by the release of information,[48] and the constitutionality of Buckley in general.[49] Relatively little

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information).

[44] *See* 20 U.S.C. § 1232g(h) (1994 & Supp. 1998) ("Nothing in this section shall prohibit an educational agency or institution from including appropriate information in the education record of any student concerning disciplinary action taken against such student for conduct which posed a significant risk to the safety or well-being . . . of other students.").

[45] For a thorough discussion of litigation involving Buckley, see Mawdsley, *supra* note 17; Johnson, *supra* note 24.

[46] *See* Fay v. South Colonie Cent. Sch. Dist., 802 F.2d 21 (2d Cir. 1986). In *Fay*, a father with joint legal custody of his children, pursuant to a divorce agreement, sued the school district due to the school superintendent's failure to provide him with information contained in his children's educational records. *See id.* at 24. The court found that, under applicable New York law, joint custodial parents must have equal access to the educational records of their children. *See id.* at 34.

In *Webster Grove School District v. Pulitzer Publishing Co.*, parents of a disabled child filed suit to prevent access by a newspaper to a disciplinary report prepared about their child for allegedly threatening other students with a handgun. *See* Webster Grove Sch. Dist. v. Pulitzer Publ'g Co., 898 F.2d 1371, 1373 (8th Cir. 1990). The newspaper claimed its First Amendment rights prevented the school system from sealing the disciplinary report. *See id.* at 1374. Holding that Buckley prevented disclosure of the child's file, the Eighth Circuit Court of Appeals reasoned that the newspaper's interest in access to the files was outweighed by the student's privacy interest. *See id.* at 1377.

[47] For example, in *Tarka v. Cunningham*, an undergraduate student invoked Buckley to challenge a grade he received in a physics course. *See* Tarka v. Cunningham, 917 F.2d 890, 891 (5th Cir. 1990). Holding that the student had no right to access his teacher's grade book and other materials, the court noted that Buckley does not create a "statutory vehicle" for challenging professors' grading processes. *See id.* at 892.

[48] *See, e.g.*, Francois v. University of the Dist. of Columbia, 788 F. Supp. 31, 32 (D.C. Cir. 1992) (holding that Buckley provides for no private cause of action); Norris v. Board of

litigation, however, has focused on the proper treatment to be afforded disciplinary records under the Act. Two cases, however, do merit attention as being uniquely focused on this particular issue. The first case is *Red & Black Publishing Co., Inc. v. Board of Regents*.[50] The second case is *The Miami Student v. Miami University*.[51]

1. Red & Black Publishing Co., Inc. v. Board of Regents

The Red & Black, the University of Georgia's student newspaper, filed suit in state court against the Board of Regents in an effort to compel the University to disclose records and proceedings of the Student Judiciary.[52] The University created the Student Judiciary to deal with the discipline of students and student organizations and charged it with hearing and adjudicating alleged violations of University rules.[53] In this case, the student court was responsible for the adjudication of offenses perpetrated by some of the school's fraternities and sororities.[54]

Educ. of Greenwood Community Sch. Corp., 797 F. Supp. 1452, 1452 (S.D. Ind. 1992) (holding that a § 1983 cause of action is inapplicable in cases where a student or his parents have released otherwise confidential information to other people in the school system); Maynard v. Greater Hoyt Sch. Dist., 876 F. Supp. 1104, 1107 (D.S.D. 1995) (holding that § 1983 is an appropriate remedy when a student has been damaged by the unlawful release of confidential student information).

Courts have consistently denied the existence of a private cause of action under Buckley—meaning that only the Secretary of Education can sanction a school for noncompliance. *See, e.g.*, Odom v. Columbia Univ., 906 F. Supp. 188, 195 (S.D.N.Y. 1995) (holding that a student does not have a private cause of action under Buckley); Allen v. Board of Governors of State Colleges and Univs., No. 93C380, 1993 WL 388938, at *2 (N.D. Ill. 1993) (holding that Buckley does not provide for a private cause of action).

[49] *See, e.g.*, Bauer v. Kincaid, 759 F. Supp. 575, 594 (W.D. Mo. 1991) (holding that if Buckley was applied in such a way as to prevent disclosure of privately-commissioned reports regarding campus crime, Buckley would violate the First Amendment rights of students). Indeed, the tension between Buckley and freedom of information acts across the fifty states provides another significant area of conflict. *See generally* Daggett, *supra* note 14, at 650–51. Most states that have freedom of information acts provide that applicable information must be disclosed unless otherwise provided by federal law—hence the conflict with Buckley. *See, e.g.*, Ohio Public Records Act, OHIO REV. CODE ANN. § 149.43 (Anderson 1994) (excluding from the definition of public records those records "the release of which is prohibited by state or federal law").

[50] 427 S.E.2d 257 (Ga. 1993).

[51] 680 N.E.2d 956 (Ohio 1997).

[52] *See Red & Black*, 427 S.E.2d at 259.

[53] *See id.*

[54] *See id.* at 260.

After unsuccessfully petitioning the University for access to the records of the Student Judiciary, *The Red & Black* brought suit under Georgia's Open Records Act.[55] The University, however, maintained that the records requested by the newspaper were protected by Buckley and thus could not be accessed under the Open Records Act.[56] The trial court granted the newspaper's request for access to the records of the Student Judiciary, and the University appealed.[57]

Affirming the trial court's decision in favor of *The Red & Black*, the Georgia Supreme Court explained, "we do not believe the documents sought are 'education records' within the meaning of the Buckley Amendments."[58] According to the court, "the records are not of the type... the Buckley Amendment... is intended to protect, *e.g.*, those relating to individual student academic performance, financial aid, or scholastic probation."[59] Furthermore, the court noted, the records at issue were maintained in the Office of Judicial Programs, and not at the Registrar's office where bona fide educational records were held.[60] The University was thus forced to comply with the Open Records Act and release the requested information to *The Red & Black*.

2. The Miami Student v. Miami University

In July of 1996, *The Miami Student*, Miami University's student-run newspaper, filed suit in state court in an effort to force Miami University to release student disciplinary records compiled over a three-year period.[61] *The Miami Student* intended to compile these records in order to build a database to track campus crime and punishments handed down to student offenders over a three-year period.[62]

In the spring of 1995, the editor of *The Miami Student* made her first request, which was flatly refused by the University, for the Disciplinary Board information.[63] Her successor made a second request pursuant to the Ohio Public Records Act[64] the following year, and was given only the most insignificant

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[55] GA. CODE ANN. § 50-18-70(a) (1998).

[56] *See Red & Black*, 427 S.E.2d at 261.

[57] *See id.* at 259.

[58] *Id.* at 261.

[59] *Id.*

[60] *See id.*

[61] *See* DAYTON DAILY NEWS, *supra* note 13, at B4.

[62] *See Miami U. to Appeal Student-Records Case*, THE PLAIN DEALER, Sept. 7, 1997, at B9 (detailing the decision handed down against Miami University by the Ohio Supreme Court).

[63] *See* The Miami Student v. Miami Univ., 680 N.E.2d 956, 957 (Ohio 1997).

[64] OHIO REV. CODE ANN. § 149.43 (Anderson 1994) ("All public records shall

information surrounding campus crime and the University's Disciplinary Board practices.[65] According to Miami University officials, Buckley prevented the school from adequately supplying the requested information.[66] It was the University's contention that the files maintained by its Disciplinary Board were educational records within the meaning of Buckley and, therefore, were not available for inspection.[67]

The Ohio Supreme Court, however, disagreed with the University's position and granted *The Miami Student*'s writ of mandamus to compel disclosure of the requested information.[68] According to the court, a university's disciplinary board records are not "educational records" within the meaning of Buckley because they "do not contain educationally related information, such as grades or other academic data, and are unrelated to academic performance, financial aid, or scholastic performance."[69] Furthermore, the court reasoned, without full access to such vital information, student safety is compromised.[70] The court ordered University officials to disclose the requested information and delete only personally identifiable information such as social security numbers, the student's identification number, and the specific time and date upon which the incident occurred.[71] The location of the incident, the age and sex of the parties involved, the nature of the offense, and the punishment handed down by the Board all were to be included.[72]

Still unhappy with the verdict, and fearful of losing forty-million dollars in federal aid for complying with the order,[73] Miami University petitioned for certiorari in the United States Supreme Court. The petition, however, was denied, letting stand the Ohio Supreme Court's decision compelling disclosure.[74]

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be... made available for inspection... [i]n order to facilitate broader access to public records....").

[65] The University deleted not only names, ages, and genders of those involved in campus crimes and disciplinary board actions, but also the location of the crimes, the times at which they occurred, the date on which they occurred, and the disposition of the matter within the Disciplinary Board. *See The Miami Student*, 680 N.E.2d at 957.

[66] *See id.*

[67] *See id.* at 958.

[68] *See id.* at 960.

[69] *Id.* at 959.

[70] *See id.*

[71] In the court's opinion, this could lead to the identity of the student. *See id.*

[72] *See id.* at 959–60.

[73] *See* DAYTON DAILY NEWS, *supra* note 13, at B4.

[74] *See* Miami Univ. v. Miami Student, 118 S. Ct. 616 (1997).

3. *Analysis of Courts' Treatment of Buckley*

What is perhaps most startling about the courts' opinions in the above cases is not that the courts compelled disclosure; rather, it is the *reasoning* the courts used to do so. Like the Georgia Supreme Court, the Ohio Supreme Court in the *Miami* case relied upon a determination that the records at issue did not contain "educationally related information."[75] Thus these two courts have effectively read into Buckley a requirement that educational records consist of information related to academic performance, financial aid, or scholastic performance. Yet conspicuously absent from the language of Buckley is any such interpretation of "educational records."[76] Indeed, Buckley has been understood by many to encompass a broad range of information on students in its definition of "educational records."[77]

It is clear where the Ohio Supreme Court found support for its position that disciplinary board records are not educational records—it discussed *The Red & Black* extensively.[78] How the Georgia Supreme Court conjured up such an interpretation is less clear.[79] It is evident that both courts appeal to a policy rationale—the protection of students and opening of governmental functions to public scrutiny[80]—while courageously flaunting the plain language of Buckley. How the United States Supreme Court views such a drastic departure from the

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[75] *The Miami Student*, 680 N.E.2d at 959.

[76] Again, Buckley defines "educational records" only as those records that "contain information directly related to a student" that are "maintained by an educational agency or institution." 20 U.S.C. § 1232g(a)(4)(A) (1994).

[77] *See, e.g.*, Daggett, *supra* note 14, at 624–28 (explaining the breadth of the definition for "educational records"); Mawdsley, *supra* note 17 (detailing the treatment of Buckley in general, and educational records in particular, in various court cases).

[78] *See The Miami Student*, 680 N.E.2d at 958.

[79] In 1996, Assistant Secretary of Education David Longanecker wrote a "Dear Colleague" letter to advise schools that Buckley was not intended to cover statistical information. *See* Letter from United States Department of Education, Office of Postsecondary Education, to Colleges and Universities Generally (May 1996) <http://www.campussafety.org/CSA/colleague.html>. The effect of this letter, according to recent studies, has been negligible. *See* General Accounting Office, *Campus Crime: Difficulties Meeting Federal Reporting Requirements* (Mar. 11, 1997) <http://www.campussafety.org/ STUDIES/gao.html>.

[80] The Ohio Supreme Court explained, "For potential students, and their parents, it is imperative that they are made aware of all campus crime statistics and other types of misconduct in order to make an intelligent decision of which university to attend." *The Miami Student*, 680 N.E.2d at 959. The Georgia Supreme Court explained, "We are mindful that openness in sensitive proceedings is sometimes unpleasant, difficult, and occasionally harmful. Nevertheless, the policy of this state is that the public's business must be open, not only to protect against potential abuse, but also to maintain the public's confidence in its officials." Red & Black Publ'g Co. v. Board of Regents, 427 S.E.2d 257, 263 (Ga. 1993).

language of Buckley is not entirely certain: in December 1997, the Court declined to decide the issue when it refused to hear Miami University's case.[81]

Just one month after the Supreme Court denied certiorari, however, in a surprising turn of events,[82] the United States Department of Education (DOE) brought suit against Miami to *prevent* it from releasing student disciplinary records.[83] According to a spokesperson for the DOE, the suit was a response to the University's release of disciplinary records with only the students' social security numbers deleted.[84] A district court judge granted the DOE's request for an injunction, explaining that "it is abundantly clear that the disciplinary records that are the subject of the instant case satisfy both prongs of the statutory definition of educational records."[85] Thus, Miami University, while waiting for a

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[81] *See* Miami Univ. v. Miami Student, 118 S. Ct. 616 (1997).

[82] *See supra* note 79. Note, however, that the Department of Education was clear in expressing its position that student disciplinary records come within the broad definition of "educational records" in a subsequent letter to Miami University. *See* Letter from United States Department of Education, LeRoy S. Rooker, Director, Family Policy Compliance Office, to James Garland, President, Miami University (Aug. 7, 1997) <http://www.campussafety.org/COURTS/MUOH/doe.html>.

[83] The DOE filed suit on January 22, 1998, in the District Court for the Southern District of Ohio, seeking an injunction against both Miami University and The Ohio State University and asking the court to define "educational records." *See* United States v. Miami Univ., No. C-2-98-0097 (S.D. Ohio filed Jan. 22, 1998). In its complaint, the United States charges that, "Defendants have violated [the duty to keep student educational records confidential] in the past and intend to continue to violate this duty in the future by publicly releasing student disciplinary records that contain personally identifiable information without the prior consent of the students or their parents." *Id. See generally* Ben L. Kaufman, *U.S. Challenges Miami Discipline Records Release*, CINCINNATI ENQUIRER, Jan. 24, 1998, at B8.

[84] *See* Kaufman, *supra* note 83, at B8. According to officials at Miami University, the school was deluged with requests for information in the wake of the Ohio Supreme Court decision, most notably from the Chronicle of Higher Education, a national publication. *See* Amy Beth Graves, *Two Colleges Are Barred From Releasing Disciplinary Records*, THE PLAIN DEALER, Feb. 14, 1998, at B5; Robert Ruth, *Court Blocks Release of Student Records*, COLUMBUS DISPATCH, Feb. 14, 1998, at C3. One must wonder, in light of the careful ruling made by the Ohio Supreme Court as to what may and may not be released as part of a student's disciplinary record, why Miami chose to delete *only* the students' social security numbers before releasing the information. Given such an egregious departure from the mandates of the Ohio Supreme Court, it is possible that the DOE felt it *had* to intervene in the matter—to settle once and for all the definition of "educational records."

[85] United States v. Miami Univ., No. C-2-98-0097 (S.D. Ohio Feb. 12, 1998). The "two-prong test" to which the district court judge referred is likely derived from the statutory definition of "educational records." Unlike the Ohio and Georgia Supreme Courts, the district court judge did not read in any requirement that the records be related to a student's financial status or academic record. Rather, the judge explained that, "the Court notes that nothing in the statutory scheme suggests that 'information directly relating to a student' pertains only to

definitive answer from the court, stood in the middle of a significant war over statutory interpretation.

With no U.S. Supreme Court opinion on the matter and in light of the DOE's troubling decision to construe "educational records" so broadly, lower courts are left to grapple with the issue for themselves.[86] Obviously, this does not bode well for those who advocate an across-the-board policy of disclosure of disciplinary board reports. If Buckley is to remain in its present form, judicial construction may be the only hope for those who seek the information buried in secret disciplinary boards;[87] yet the suit brought by the DOE may do much to undermine such attempts.[88] It is doubtful that universities will come to a similar understanding on their own.

III. THE CRUX OF THE PROBLEM: BENEFITS OF CONCEALMENT

Universities will not likely understand Buckley as allowing the disclosure of disciplinary records for one simple reason: schools benefit more from concealing information than they do from releasing it. There are at least three reasons for this. First, shrouding information on campus crime in disciplinary boards effectively makes those crimes disappear for purposes of the Campus Security Act,[89] a federal law that otherwise mandates disclosure of campus crime statistics. Second, by burying information within university disciplinary boards, schools are able to deny awareness of crime on campus. By denying the existence of crime, schools may be able to insulate themselves from tort liability. Third, by avoiding disclosure of potentially protected information, schools avoid the risk of violating the mandates of Buckley and, thereby, losing millions of

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academic performance, as the court in *The Miami Student* seemed to infer." *Id.* at 4.

[86] Only the Ohio and Georgia Supreme Courts have decided this exact issue so far.

[87] Importantly, schools that are compelled to release information by judicial decree will not be subjected to the withdrawal of federal funding otherwise mandated by Buckley. *See* 20 U.S.C. § 1232g(b)(2)(B) ("No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing . . . any personally identifiable information in education records . . . unless . . . such information is furnished in compliance with judicial order . . . ."). Thus, judicial construction may be imperative to the release of disciplinary records in the future.

[88] One must be careful, however, in assuming that this suit necessarily means that the DOE is committed to a policy of non-disclosure of disciplinary records. While that does appear to be the case, it may also be true that the suit was brought in response to Miami's having released the reports with only the students' social security numbers deleted. In the latter case, the DOE may not be so opposed to the way the Ohio Supreme Court interpreted "educational records," as it is to the way Miami carried out the court's order.

[89] *See* Student Right-to-Know and Campus Security Act of 1990, Pub. L. No. 101-542, 104 Stat. 2381 (codified as amended in scattered sections of 20 U.S.C.).

dollars in federal aid.

A. *Concealment and Better Crime Statistics*

The 1990 Student Right-to-Know and Campus Security Act (CSA)[90] requires all institutions of higher education that participate in federal funding programs to "prepare, publish and distribute... to all current students and employees... an annual security report."[91] At a minimum, the CSA requires a school to provide information on six categories of offenses[92] for the three preceding calendar years,[93] along with statements of policy on both law enforcement and the reporting of campus crimes.[94] Though the CSA was not specifically enacted for the purpose of closing the loopholes contained in Buckley,[95] Buckley has been amended to allow for the reporting of the information required by the CSA.[96] The goal has been *full* disclosure of *accurate* information.

While the intention of lawmakers may have been full disclosure, the result has been anything but:[97] image-conscious administrators have now found

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[90] 104 Stat. 2381.

[91] 20 U.S.C. § 1092(f)(1) (1994 & Supp. 1998).

[92] These six categories are: murder, sex offenses, robbery, aggravated assault, burglary, and motor vehicle theft. *See* 20 U.S.C. § 1092(f)(1)(F).

[93] *See* 20 U.S.C. § 1092(f)(1)(F) ("[s]tatistics concerning the occurrence on campus, during the most recent calendar year, and during the 2 preceding calendar years for which data are available").

[94] *See* 20 U.S.C. § 1092(f)(1)(A), (C).

[95] Rather, the CSA was enacted "(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 sexual assaults and racial violence on college campuses." Crime Awareness and Campus Security Act of 1990, Pub. L. No. 101-542, Title II, § 202, 104 Stat. 2384. The CSA has been applauded as a "consumer protection bill for students." 136 CONG. REC. 12,617 (1990) (remarks of Representative Coleman).

[96] *See* 20 U.S.C. § 1232g(b)(6) ("Nothing in this section shall be construed to prohibit an institution... 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."); *see also* Daggett, *supra* note 14, at 620–21 ("A single provision of [the CSA] modified Buckley to permit higher education schools to disclose the *outcome* of school disciplinary proceedings to victims of crimes of violence.") (emphasis added). Congress has then, to some extent, attempted to coordinate the functioning of Buckley and the CSA.

[97] *See, e.g.*, Bonnie Fisher & Dr. Chunmeng Lu, *The Extent and Pattern of Compliance with the Crime Awareness and Campus Security Act of 1990: A National Study* (Aug. 1996) <http://www.campussafety.org/STUDIES/fisher.html>.

dubious ways of evading full disclosure by channeling campus crimes into disciplinary boards.[98] According to Benjamin F. Clery, the current president of a non-profit campus security organization, Security on Campus, Inc.:

> Typically, the annual crime report is compiled by the Campus Security Department based on incidents handled directly by campus police. What many schools exclude is the spectrum of student-on-student crime that is reported to [housing officials, rape crisis centers, counselors, and deans]. By the time a felony or misdemeanor crime is channeled into the disciplinary committee, it becomes a "violation of the student code of conduct" and school administrators claim the crime is "confidential" under [Buckley].[99]

By channeling these incidents of criminal activity to disciplinary boards,[100] and then classifying them as mere violations of the student code, universities are able to maintain the illusion of safe and crime-free schools. Buckley thus provides a convenient loophole for side-stepping the reporting requirements of the CSA.[101]

As long as both the CSA and Buckley continue to exist in their present forms, the impulse for school officials to seek ways to manipulate crime statistics will also persist. The fact is, universities, like many other businesses, need to be marketable; glossing over alarming rates of crime is one step toward achieving superior marketability. Because concealing crimes benefits the university in such an important way, there is little incentive to disclose disciplinary reports. Moreover, this incentive is reinforced by the enforcement provisions of the CSA which, when compared with those for Buckley, are equally weak.[102]

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[98] *See Hearing on Campus Crime & the Accuracy in Campus Crime Reporting Act of 1997: Before the Subcomm. on Postsecondary Education, Training and Life-long Learning of the House Comm. on Education and the Workforce Comm.*, 105th Cong. (1997) [hereinafter *Hearing*] (testimony of Benjamin F. Clery).

[99] *Hearing*, *supra* note 98.

[100] The Miami University example, discussed *supra* Part I, is a poignant example of this trend.

[101] Note that the CSA and Buckley, while not intended to conflict with one another, are manipulated by school officials in such a way as to create a contradiction in terms: the CSA mandates disclosure, while Buckley, because of the disciplinary records loophole that schools have found, mandates confidentiality.

[102] The operative provision of the CSA makes continued federal funding contingent on a school's compliance with the CSA's reporting requirements. *See* 20 U.S.C. § 1232g(b)(1) (1994). However, as with Buckley, no school has ever lost funding due to inadequate reporting. *See* Michael C. Griffaton, *Forewarned is Forearmed: The Crime Awareness and Campus Security Act of 1990 and the Future of Institutional Liability for Student Victimization*, 43 CASE W. RES. L. REV. 525, 585 (1993). Also, like Buckley, the CSA does not provide for private enforcement actions; only the Secretary of Education can punish a non-compliant

B. *Concealment and the Avoidance of Liability: Ignorance is Bliss*

While modern courts do not look upon the university as the insurer of the safety of its students, it is nevertheless true that courts continue to hold universities liable in certain circumstances for the crimes that befall students. As with any tort, in order to prove a university liable, a student must prove the following four elements: (1) the school had a duty; (2) the duty was breached; (3) the student was injured; and (4) the school's breach of duty was the proximate cause of the student's injury.[103] Today, at least three theories of duty continue to hold sway in modern courts: a duty to be forthcoming about risks, a duty to warn about risks, and a duty to provide adequate protection.[104]

The duty to warn about risks assumes a "special relationship" between university and student such that the former is legally obligated to inform the latter as to foreseeable danger.[105] While campus crimes reported to campus law enforcement agencies may satisfy the requirement of foreseeability, channeling other crimes into disciplinary hearings puts the school officials in a position to argue that more serious offenses were not foreseeable—particularly in the case where serious assault charges have been classified only as "violations of the student code of conduct."[106]

Similarly, the duty to provide adequate security makes it incumbent on school officials to take certain precautions to deal with known dangers.[107] If a university has notice of criminal activities, either through specific complaints or because of statistics, a failure to provide adequate security to protect its students becomes actionable in tort. Again, the emphasis is on *foreseeable* criminal activity.[108]

With all of the emphasis that is put on foreseeable crime, it is hardly surprising that universities have an incentive to turn a blind eye to the student crime occurring on campuses. Channeling those crimes into disciplinary boards

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school by withholding funds. *See id.* at 586; *see also infra* Part III.C.

[103] *See* Griffaton, *supra* note 102, at 539 (explaining the requirements for establishing a prima facie case of civil liability against a college).

[104] *See id.* at 539–40.

[105] *See id.* at 542.

[106] At Carlton College in Northfield, Minnesota, a student accused of numerous sexual assaults was ultimately punished by the school's disciplinary board for "advancement without sanction," and at the University of Pennsylvania, rape is classified only as a "personal crime." *See* Kyle E. Niederpruem, *Families Lead the Way in Seeking Access to Campus Police Logs*, THE QUILL, Jun. 1, 1996, at 69, 70.

[107] *See* Griffaton, *supra* note 102, at 542–43 (discussing in full the duty to provide adequate security).

[108] *See id.*

allows for the kind of willful ignorance that may shield the university from liability. According to Dr. Chunmeng Lu and Professor Bonnie Fisher, authors of a 1994 University of Cincinnati study on compliance with CSA reporting requirements, "the benefits [of not disclosing] . . . are greater than the costs of legal compliance due to administrators' perception that their liability exposure increases as they create a 'standard of care.'"[109] Accurate crime statistics that indicate a problem with crime on a particular campus put the onus on school officials to address the problem or risk being held liable for foreseeable crimes. The easier course of action would seem to be to "resist accountability."[110]

The duty to be forthcoming, unlike the previously discussed duties, may mitigate in favor of accurate reporting, but liability under this duty may be avoided as well if school officials maintain a sufficient amount of ignorance as to crime on campus. The duty to be forthcoming essentially requires universities to be honest in their representations of the nature and extent of campus crime.[111] Thus, a school may be held liable for failing to disclose the reality of crime on its campus or for purposely misrepresenting the security of the campus in college brochures.[112] By this theory, even officials who purposely keep themselves ignorant as to conditions on the campus may be held liable. However, it is again the *level* of ignorance or accountability that is all important in attaching liability.[113] School officials still have an incentive under this duty, as well as with the other two, to divert cases of criminal misconduct into clandestine disciplinary hearings before they become aware of the circumstances surrounding the misconduct; in this way, they may "legitimately" disavow knowledge of campus crime.

C. *Concealment and Continued Funding*

A third important benefit that schools enjoy as a result of concealing vital information on campus crime is continued federal funding. As explained above, Buckley's only enforcement mechanism lies in its conditioning of federal funds on compliance with confidentiality requirements;[114] the incentive for schools to

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[109] *See Hearing*, *supra* note 98 (referring to the findings of Dr. Chunmeng Lu and Professor Bonnie Fisher).

[110] *See id.*

[111] *See* Griffaton, *supra* note 102, at 540–42 (discussing the duty to be forthcoming and how it has been interpreted in recent court cases).

[112] *See* David Davenport, *The Catalog in the Courtroom: From Shield to Sword?*, 12 J.C. & U.L. 201, 202 (1985) (arguing that college brochures are really advertisements, and thus carry with them the penalties for false advertisement, breach of contract, and the like).

[113] *See Hearing*, *supra* note 98.

[114] *See* 20 U.S.C. § 1232g(b)(1) (1994) ("No funds shall be made available . . . to any

err on the side of concealment is thus very great. In 1998 alone, close to fifty-eight billion dollars was budgeted by the federal government to support higher education.[115] A great amount of money is at stake.

The Miami Student again provides a compelling example.[116] After arguing the school's case to the Ohio Supreme Court, but before that court handed down its ruling, Gerald Draper, a Columbus lawyer representing the University, explained that the school stood to lose forty-million dollars in federal aid.[117] The amount of money Miami stood to lose helps explain why, in the period between 1994–1996, various types of campus crime were under-reported.[118] According to a DOE investigation into Miami's reporting methods, one of several deficiencies in the school's reports included the omission of crime statistics compiled by the office of Judicial Affairs—the office that oversees the operation of the University Disciplinary Board.[119] Underrepresentation of crimes also occurred as a result of Miami's not recognizing fraternity houses as part of the school's campus.[120] Buckley was used by the University to dodge the requirements of the CSA, thereby protecting its forty-million dollars in federal aid.

While it is true that universities see the threat of withdrawn federal aid as serious enough to merit concealment, it is also true that the DOE has never exercised its authority in this regard.[121] Not once since the enactment of Buckley has a college or university lost federal funding due to a violation.[122] Part of the problem stems from the fact that Buckley itself does not mandate disclosure; it instead induces schools to keep educational records confidential. The CSA attempts to compel disclosure,[123] but its enforcement mechanisms are equally

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educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein . . .) of students without the written consent of their parents . . . .").

115 *See Hearing*, *supra* note 98, at 3.

116 *See* The Miami Student v. Miami Univ., 680 N.E.2d 956 (Ohio 1997).

117 *See* DAYTON DAILY NEWS, *supra* note 13, at B4.

118 *See id.*

119 *See* Letter from U.S. Department of Education, Student Financial Assistance Programs, to Dr. James Garland, President Miami University 5 (Sept. 11, 1997) [hereinafter DOE Letter].

120 *See id.* at 6–7. According to the DOE investigation, a total of 66 burglaries, 28 liquor law arrests, 3 drug law arrests, 2 sexual assaults, and 13 aggravated assaults were not reported for the years 1994–1996 because the University failed to include fraternity houses in the definition of the school's "campus."

121 *See* Daggett, *supra* note 14, at 618.

122 *See id.*

123 Again, the CSA and Buckley are not in direct conflict by their own terms: the CSA attempts to compel disclosure of materials that are, in theory at least, not supposed to be protected by Buckley. The CSA deals with statistics on crime and law enforcement policy, a

deficient: a violation of the CSA is supposed to result in suspension of federal funds,[124] but no school has yet suffered such a penalty.[125] While the Secretary of the Department of Education is vested with exclusive enforcement authority, of both Buckley and the CSA, not a single line item in the 1998 budget for higher education was included for enforcement of reporting requirements.[126]

Nevertheless, it is the mere *potential* of losing millions of dollars in federal aid that induces schools to conceal disciplinary information.[127] Because there are virtually no consequences for failing to report under the CSA, it becomes very easy for schools to fall back on Buckley and do nothing; particularly when doing nothing avoids the chance of withdrawn funding. Furthermore, withholding information can be rationalized by other benefits as well: the potential avoidance of tort liability and the opportunity to advertise a safer campus. Combined with the threat of suspension of federal funding and the vagueness surrounding the term "educational records," these benefits all argue in favor of concealing information. The incentive structure that Congress has set up clearly favors continued concealment. Thus, educational institutions, wise to these incentives, opportunistically invoke Buckley to their benefit.

IV. PROPOSED LEGISLATION

In order to address the disciplinary board concealment problem, Representative John Duncan (Republican-Tennessee) introduced legislation in the U.S. House of Representatives in February of 1997.[128] Entitled "The

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separate area from that of confidential educational records. It is only through universities' interpretation of disciplinary records as educational records that we have arrived at this apparent conflict in the two pieces of legislation.

[124] *See* 20 U.S.C. § 1094(c)(1)(F) (1994).

[125] *See* Griffaton, *supra* note 102, at 586. Miami University, after having been found in violation of the CSA, was subject to only the mildest of sanctions that could not be considered a penalty. According to the investigators assigned to the case:

> The institution is required to review its disciplinary notification procedures to ensure that all policy statements, as well as actual enforcement, are in compliance.... In its current response, the institution must indicate additions/modifications to its current policy as well as how it will implement the required policies and procedures.

DOE letter, *supra* note 119, at 9.

[126] *See Hearing*, *supra* note 98, at 3.

[127] *See* Jane Kirtley, *Shedding Light on Campus Crime*, 19 AM. JOURNALISM REV. 50 (1997) (explaining that since the enactment of Buckley, schools have invoked it to justify the sealing of any record that identifies a student).

[128] *See* 143 CONG. REC. H522 (daily ed. Feb. 12, 1997) (introduction of H.R. 715 by Representative Duncan).

Accuracy in Campus Crime Reporting Act," H.R. 715 sought to "close some of the loopholes that have allowed many colleges and universities to not report many instances of criminal activity on their campuses."[129] Specifically, the bill "will... change Federal educational privacy laws that have shielded students who have been charged with criminal acts because of a definition that considers such charges as part of [a]... student's private academic record."[130]

The improvements that H.R. 715 sought were ambitious. The legislation attempted not only to coerce accurate reporting, but also to reconcile the competing goals of Buckley and the CSA. In particular, the bill: (1) required disciplinary officers, housing officials, counselors, deans, athletic department officials, and administrators to report criminal offenses to the university;[131] (2) directed the Secretary of Education to report each school's statistics to certain congressional committees, to each institution, and to the public via printed and electronic means;[132] (3) required campus law enforcement agencies to maintain publicly-available log books detailing reported crimes, including the names of those charged in the offense, the date, the time, and the location of the offense, and the disposition of the offense;[133] (4) directed university disciplinary boards to open their records for public inspection;[134] and (5) established a penalty scheme whereby institutions found in noncompliance would have at least one percent of federal assistance suspended for each count of non-compliance.[135]

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[129] *Id.* at E230.

[130] *Id.* at E230.

[131] *See* H.R. 715, 105th Cong. (1997) ("[The CSA] is amended... by striking 'campus security authorities or local police agencies' and inserting 'campus security or law enforcement; other campus officials (including administrators, deans, disciplinary officers, athletic department officials, housing officials, and counselors) to whom crimes are reported; or local law enforcement.'"). This provision thus amends the CSA to provide for the publishing of statistics on crimes reported not just to campus police or local police, but to all the other enumerated officials.

[132] *See id.* ("The Secretary shall collect such statistics and report each set in its entirety, with each institution and campus clearly identified, to the Committee on Education and the Workforce..., the Committee on Labor and Human Resources..., each participating institution, and the public via printed and electronic means as the Secretary shall determine.").

[133] *See id.* ("Each institution participating in any program under this title which maintains either a police log or security department of any kind shall make, keep, and maintain a daily log, written in a form that can be easily understood, recording in chronological order all crimes reported to such police or security department....").

[134] *See id.* ("[A]ll records of any such campus disciplinary proceeding brought alleging criminal misconduct shall be open to public inspection during the regular business hours of the custodian of such records....").

[135] *See id.* ("For each separate count of noncompliance found, the Secretary shall suspend not less than 1 percent of the financial assistance provided by the Department to such

The potential of the Accuracy in Campus Crime Reporting Act's attempts to open up disciplinary board records was, in and of itself, very ambitious. More than simply requiring such boards to release materials to those who request them, the bill would actually have required that disciplinary boards: (1) prepare and distribute a statement of policy regarding disciplinary practices in cases of alleged violations of both the student code of conduct *and* federal, state, or local laws and how those violations are handled;[136] (2) notify students reporting crimes to disciplinary boards of their right to also notify proper law enforcement;[137] (3) notify students involved in disciplinary board hearings of their right to have others present at the hearing;[138] (4) notify both the accuser and the accused of the outcome of any disciplinary hearing;[139] and (5) open all disciplinary records involving criminal misconduct to public inspection during regular business hours.[140] Summarily, the boards would have been *affirmatively required* to disseminate information on their policies and practices. In addition, the bill would have made clear that reports containing information on students' criminal offenses are *not* educational records within the meaning of Buckley—

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institution."). While this may not seem like a significant amount, consider again Miami University: if forty-million dollars in federal aid is given to the University in one year, just one count of noncompliance would cost the school $400,000.

136 *See id.*:

> Each institution of higher education participating in any program under this title shall develop and distribute... a statement of policy regarding... such institution's on-campus disciplinary practices in cases of alleged infractions of the institution's code of conduct, or other policies, resulting from an act or series of acts that would constitute a crime or crimes within the meaning of local, State, or Federal law, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction; and... the procedures followed once a crime has occurred.

Id. This sweeping change, in and of itself, would have done much to eradicate the loophole presently found in Buckley: schools would no longer be able to classify offenses as mere violations of the student code of conduct and dodge the reporting requirements of the CSA—instead they would be required to look to local, state, and federal law for classification.

137 *See id.* ("[A]ll students reporting an offense shall be informed of their options to notify proper law enforcement, including on-campus and local police....").

138 *See id.* ("[T]he accuser and the accused are entitled to the same opportunities to have others present during a campus disciplinary proceeding....").

139 *See id.* ("[B]oth the accuser and the accused shall be informed of the outcome of any campus disciplinary proceeding brought alleging criminal misconduct....").

140 *See id.* ("[A]ll records of any such campus disciplinary proceeding brought alleging criminal misconduct shall be open to public inspection during regular business hours of the custodian of such records....").

no matter who the custodian is.[141]

H.R. 715 enjoyed the support of many in the House of Representatives who would like to see an end to the status quo.[142] Sixty-five House members joined on as cosponsors of the legislation within nine months of its introduction.[143] Yet the future of this key piece of legislation is unclear. As of this date, the bill remains in the Subcommittee on Postsecondary Education, Training, and Life-long Learning (after being referred from the House Committee on Education and the Workforce), where hearings were held on July 17, 1997.[144]

V. RECOMMENDATIONS

As has already been mentioned, H.R. 715 sought significant changes in the area of campus crime reporting. Regardless of whether or not the legislation is passed, at least some of the problems involved with securing accurate and thorough crime statistics will persist. This persistence is due to H.R. 715's failure to include off-campus areas in mandatory crime reports, its failure to adequately remove incentives for school administrators to conceal information, and its failure to provide for private enforcement.

A. *Inclusion of Off-Campus Areas*

While H.R. 715 takes significant steps to ensure that accurate and thorough information is released on campus crimes, the bill fails to address the multitude of crimes that occur just off university campuses. In fact, off-campus crime statistics play as great a role as on-campus statistics in the decisionmaking process of selecting a college. It is difficult to imagine that a college can accurately portray the safety of a campus without reference to overall student security, both on- and off-campus.[145]

When the CSA was originally proposed in the U.S. Senate, it contained a

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[141] *See id.* (inserting language into Buckley that includes disciplinary records in the list of things that are not "educational records"). While Buckley currently makes it clear that a law enforcement agency's records are not "educational records," this bill will expand that definition to include disciplinary boards.

[142] *See, e.g.*, 143 CONG. REC., *supra* note 128, at E230.

[143] *See id.* at E230.

[144] *See Hearing*, *supra* note 98. This piece of legislation, due to subsequent events in Congress, will likely not be voted on. On October 7, 1998, Congress passed the Higher Education Amendments of 1998 and, in doing so, amended Buckley in a way that makes clear, once and for all, that disciplinary records are *not* educational records. *See infra* part VI.

[145] *See* Griffaton, *supra* note 102, at 571.

provision to deal with off-campus student crime.[146] The House of Representatives, however, did not adopt this version of the bill. According to the CSA's sponsor, Representative Goodling, the Senate version was rejected because:

> 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.[147]

Thus, the CSA was ultimately passed without the provision dealing with off-campus crime.

An understanding of "campus crime" as dealing only with those crimes that occur immediately on campus and not those that occur just off-campus is, however, extremely myopic.[148] No doubt the majority of students attending college, in the course of their education, spend a great deal of time off-campus.[149] Plus, few universities are able to offer campus housing for all students.[150] Apprising students of dangers lurking just off-campus and requiring disciplinary boards to reveal information on those crimes, is necessary to adequately inform the student body.[151]

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[146] *See infra* note 149.

[147] 136 CONG. REC. H11,499-500 (daily ed. Oct. 22, 1990) (remarks of Representative Goodling); *see also* H.R. REP. NO. 101-518, at 9 (1990) ("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.").

[148] Indeed, when one considers where the most troubling crimes occur, it is *not* in academic buildings. While it is true that college campuses suffer their fair share of vandalism and property crimes and that significant numbers of violent crimes occur in student dormitories, the average student is significantly more concerned with personal crimes such as assault and rape—particularly those that threaten their safety while away from the campus's safe environs.

[149] In Ohio, for example, 99% of students attending Cleveland State University, 98% attending Youngstown State University, 81% of those attending The Ohio State University, and 92% attending the University of Toledo live off-campus. *See* Griffaton, *supra* note 102, at 572 n.294 (summarizing BARRON'S PROFILE OF AMERICAN COLLEGES 1228–43 (17th ed. 1990)).

[150] *See* Griffaton, *supra* note 102, at 572 (quoting Senator Specter).

[151] *See id.* at 571–72:

> [I]t is difficult to imagine that a college can describe realistically its campus safety without reference to overall student safety, whether on-campus or off. Since it is probable that

Taking the Miami example,[152] it is clear that students need to be cautioned as to the dangers that exist just yards away from their classrooms. In the Miami illustration, the off-campus rape occurred not even a mile away from most dormitories.[153] The administration at Miami would be hard pressed to argue that crimes such as the one perpetrated against its first-year student are not relevant and worthy of disclosure. Surely the victim sees it differently. And under the current system, the thousands of women currently enrolled at Miami remain ignorant to this violent assault and others like it. Legislation that takes off-campus crime into account would make crimes like the one at Miami, perpetrated by an off-campus student, known to college communities.

The notion expressed by Representative Goodling that including off-campus statistics in annual crime reports "skews" those reports is inaccurate and, indeed, circular. If the goal is informing students as to the statistical likelihood of crimes occurring during their tenure at a university, then surely off-campus offenses are relevant; relevant offenses will not skew a report. Furthermore, any potential problem could be solved by allocating a separate section of the report to those crimes that occurred off-campus.[154] A uniform definition of "off-campus" could also be promulgated, *e.g.*, a five-mile radius from the center of campus.[155] Only by reporting the full panoply of crimes that a student faces while at school can schools adequately convey the level of safety the student will encounter. To allow disciplinary boards to conceal off-campus crime information is to dangerously misrepresent the college environment. If the goal of the reporting requirements is to fully inform students of risks, then any corrective legislation must address off-campus crime as well.

B. *Eradicating Incentives to Conceal*

The reporting schemes currently in place provide several incentives to

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many students will live, or at least venture, off-campus at some point in their college careers, informing students of the crime risks present in the enveloping community is necessary.

Id.

[152] *See supra* text accompanying notes 1–8.

[153] *See supra* note 2.

[154] Michael Griffaton argues for this same off-campus reporting. *See* Griffaton, *supra* note 102, at 574 ("To prevent skewed data, off-campus crime statistics can be recorded in a separate category labeled, for example, 'off-campus student victimization as compiled through voluntary student disclosure.'").

[155] Obviously this might pose a problem when comparing a small, rural college to a larger, urban one. Thus, an alternative could be individualized definitions of "off-campus" depending on the character of the school.

conceal disciplinary reports.[156] While H.R. 715 would have addressed the basic flaw in Buckley—the classification of disciplinary reports as educational records—the legislation fails to remove the strong incentives that compel a university to channel information to a disciplinary board in the first place: that is, the benefit of better crime statistics, avoidance of tort liability, and continued federal funding. While no regulatory scheme could eradicate all three benefits entirely, there are still steps that could be made in this regard.

1. *Uniform Enforcement*

First, any legislation proposing to deal with Buckley and the CSA must be universally enforced. That is, enforcement must be such that *all* schools are dealt with consistently and in the same manner. Miami University, for example, would be reluctant to come forward with its crime statistics if there is evidence that several competitor schools have manipulated their own data. It must be "safe" for universities to disclose fully. Thus, the Secretary of Education must be diligent in efforts to sanction those schools that do not fully and honestly comply. Perhaps no amount of diligence can fully ensure that image-conscious administrators will feel comfortable reporting on the safety hazards of their own campuses, but at least with a level playing field there is more incentive than not to comply.

2. *A Chance to Explain*

In addition, legislation should include a requirement that universities explain their statistics in their reports.[157] Because students and the public could likely misinterpret an initially high crime rate as indicative of lax security measures (as opposed to an increase in reporting of crimes), a school's explanation could do much to mitigate the otherwise harsh reporting requirements. Studies indicate that the number of students attending a college, the number of commuters at a school, the nature of the campus environment (*i.e.*, rural versus urban), and the number of male students on a campus all influence the crime rate;[158] giving schools the opportunity to explain this could make the difference between compliance and continued concealment.

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156 *See supra* Part III.

157 *See* Griffaton, *supra* note 102, at 578 (arguing for an amendment to the CSA that would require schools to explain what their statistics signify in order to combat the confusion surrounding raw data).

158 *See id.* (listing factors to be taken into account when analyzing statistical data from colleges and universities).

3. *Dealing with Tort Liability*

Moreover, any corrective legislation must address the issue of tort liability. As was explained earlier, universities face liability for those foreseeable acts of which the school is aware;[159] thus, legislation that forces schools to take into account more criminal activities is likely to be resisted. The answer, then, lies in educating administrators: it must be understood that while recognizing crime increases the potential for liability, taking adequate steps to deal with known safety risks lowers that potential.[160] Similarly, administrators must understand that schools are not liable for the crimes that occur off-campus.[161]

In addition, pressure could be applied to schools to fortify efforts in campus law enforcement generally in order to lessen the school's exposure to tort liability that may come as a result of increased recognition of crimes. Funding could be offered for the creation of voluntary student-staffed patrols or for the implementation of safety awareness seminars. Schools could also make concerted efforts to encourage student-victims to pursue remedies against offenders: requiring such information to be provided to victims offers the twin benefits of ensuring that colleges cannot conceal information and decreasing the likelihood that the school is sued for misrepresentation.[162]

4. *Closing the Loopholes*

Finally, any effort to close the significant loophole contained in Buckley must make non-compliance more expensive than disclosure. Unless a clear statement is made that disciplinary reports are definitely *not* educational records covered by Buckley, schools will always err on the side of concealment: the transaction costs of disclosing under the current system are otherwise too great. Because Buckley mandates that educational records be kept confidential and threatens the withdrawal of funding only if schools improperly disclose information (or deny information to parents), a corresponding piece of legislation must make the following clear: (1) disciplinary reports are not educational

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[159] *See id.* at 578–79.

[160] While the area surrounding tort liability for foreseeable crimes is quite complex, it is generally true that in order for plaintiffs to prevail, they must prove that the university had prior notice of the assaults on campus *and* failed to take sufficient corrective measures. *See, e.g.*, Miller v. New York, 467 N.E.2d 493 (N.Y. 1984) (holding university liable for failing to take even minimal security precautions after receiving complaints); *see also* Griffaton, *supra* note 102, at 578–83 (discussing tort liability for foreseeable campus crimes).

[161] *See* Griffaton, *supra* note 102, at 573 ("[C]olleges and universities are neither liable nor responsible for off-campus crimes committed against their students.").

[162] *See id.* at 583.

records, and (2) disciplinary reports must be disclosed. Only legislation that serves this goal will effectively reconcile the contrasting goals, as they have been interpreted, of the CSA and Buckley. Additionally, Congress must ensure that part of the budget for higher education is allocated for enforcement of this new legislation.

C. *Providing for Private Enforcement and Remedies*

As explained above, Buckley currently provides for no private enforcement, and courts have consistently refused to allow for private causes of action.[163] Thus, under the current system the onus is on the Secretary of the Department of Education to ferret out instances of non-compliance with both Buckley and the CSA and to sanction violator-schools accordingly. It is no wonder that under the current system much non-compliance falls through the cracks, enabling schools to perpetuate this conspiracy of silence. Even under H.R. 715, this Secretary-driven model would persist.[164]

On the other hand, a system that offers those with the strongest interest in securing the release of vital crime reports—students and their families—the opportunity to compel disclosure would make for an altogether more responsive and accountable system.[165] Students, concerned for their own personal safety and empowered by an improved Buckley, could easily bring suit to coerce disclosure. Universities, keenly aware of the potential of a proliferation of lawsuits, would make accurate and full reporting a top priority. In this way, the incentive structure will have changed.

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[163] *See supra* note 50. Courts have denied private remedies for those damaged by the *release* of information as well as for those damaged by a *failure* to release information. In either case, the only recognized remedy available to the aggrieved party is § 1983—for state violations of individual civil rights. *See* 42 U.S.C. § 1983 (1994).

[164] *See* H.R. 715, 105th Cong. (1997) ("If any participating institution of higher education fails or refuses to comply with any provision of this subsection, the Secretary shall forthwith terminate all assistance to the institution . . . .").

[165] Michael Griffaton, in arguing for private enforcement of the CSA, analogizes a student-driven system to neighborhood crime watch groups. In his view, a student-driven system will encourage students to vigilantly police their own campuses, educate others about the importance of their interests, and will induce colleges and universities to comply with the reporting requirements. *See* Griffaton, *supra* note 102, at 587–88. Neighborhood watch programs generally have resulted in citizens taking an active role in policing their neighborhoods and a concomitant reduction in overall crime. *See* Douglas I. Brandon et al., *Self-Help: Extrajudicial Rights, Privileges and Remedies in Contemporary American Society*, 37 VAND. L. REV. 845, 894–95 (1984) ("Recent evaluations of the effectiveness of these programs are encouraging. One study strongly suggested that neighborhood watch programs appreciably deter criminal activity.").

Take again *The Miami Student*. Had a system of private enforcement been in place, the editor of *The Miami Student* could have compelled Miami to release the requested information with relative ease, and a lengthy court battle over the meaning of "educational records" could have been avoided. Similarly, Miami students acting on their own behalf might have secured the release of disciplinary records relating to student rapes earlier, prompting students like Erin R. to be more cautious in the first instance.

It is important to note that under a student-driven system, however, adequate penalties must attach for withholding information. These could range from injunctions and heavy fines, to attorney's fees and costs.[166] Imposing such monetary sanctions would fulfill the twin objectives of both providing students with the incentive to comply and deterring universities from concealing information. Again, this would bring about a much needed change in the existing incentive structure: universities would find that, with active outside policing by students, they would no longer be able to collectively subvert the purposes of the CSA.[167]

VI. CONCLUSION

On October 7, 1998, Congress passed the Higher Education Amendments of 1998[168] and effectively accomplished much of what this Note argues for. In particular, one part of the Higher Education Amendments, the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act,[169] requires universities to collect statistics on crime and distribute them annually to all students and employees,[170] and, more importantly, requires those statistics to be collected for crimes that occur on campus,[171] on noncampus buildings or property,[172] and on public property.[173] Even more significantly, this latest

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166 *See* Griffaton, *supra* note 102, at 586–87.

167 Indeed, part of the current problem is that schools' efforts at concealing information are mutually reinforcing: the status quo is concealment, and "everybody is doing it." Buckley has allowed for this self-protectionist behavior on the part of universities by providing for such lax policing.

168 20 U.S.C. § 1092 (1998). For a detailed legislative history, see *Campus Security Legislation* (visited Feb. 24 1999) <http://www.soconline.org/LEGIS/105>.

169 This Act was named for Jeanne Clery, a college student murdered on the campus of Lehigh University in April, 1986. *See* Floor Statement of Senator Jim M. Jeffords, July 9, 1998 <http://www.soconline.org/LEGIS/105/jeffords1.html>.

170 *See* 20 U.S.C. § 1092(f).

171 *See id.* § 1092(f)(1)(F).

172 *See id.* § 1092(f)(1)(F) "Noncampus building or property" means "any building or property owned or controlled by a student organization recognized by the institution," and "any

legislation amends Buckley to make clear that nothing in Buckley *prohibits* universities from releasing student disciplinary records.[174]

So while Congress has set out to undo much of the damage that has been done, the effect of this legislation is yet unclear. In a recent newsletter circulated at Miami University, the Office of Judicial Affairs reported that, "[t]he amendments to FERPA do not *mandate* public release of information from student disciplinary records but they do allow institutions to disclose personally identifiable information from disciplinary records of students."[175] Thus Miami University has seized on the lack of any affirmative language requiring the release information, and it is likely that other universities will do the same. It may well be that the 1998 Amendments to the Higher Education Act, while gaining some ground in the fight against campus crime, simply have not gone far enough.

Thus notwithstanding the efforts made by Congress to deal with the growing problem of campus crime, serious problems with the status quo persist. University disciplinary boards have come to fulfill a unique and ever-expanding role at many of the nation's colleges and universities. Once formed to deal with minor infractions, college students now oversee adjudication of rapes, assaults, and drug offenses with little or no legal expertise in these areas. Offenders suffer only the most nominal of punishments, and victims, having been encouraged to resolve the offenses through university disciplinary boards, are left to ponder the ineffectiveness of a system most are not even aware exists. Other students on the campus remain ignorant of the dangers they face on a daily basis, and administrators enthusiastically tout their schools as safe and secure places for incoming students. The Buckley loophole provided this opportunity to the administrators at Miami University, and it will continue to do so for the hundreds of other colleges and universities across the country that have implemented these secret tribunals.

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building or property . . . owned or controlled by an institution of higher education that is used in direct support of, or in relation to, the institution's educational purposes, is used by students, and is not within the same reasonably contiguous geographical area of the institution." *Id.* § 1092(f)(6)(A)(ii)(I), (II).

[173] *See id.* § 1092(f).

[174] *See id.* § 951(2)(C) ("Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student who is an alleged perpetrator of any crime of violence.").

[175] *Open Records Laws and Student Disciplinary Records*, JUDICIAL AFFAIRS UPDATE, Winter 1998, at 2. The Newsletter went on to report that, "[S]ince the amendments do not mandate the release of information, careful consideration must be given to the broader issues before policies are developed." *Id.* Clearly, Miami University does not see the 1998 legislation as affirmatively requiring any disclosure.

Now that lawmakers have been made aware of the conspiratorial state of events on campuses across the nation, it is incumbent on them to address the problem. Only comprehensive legislation that takes into account the existing incentives for administrators to conceal crucial information will successfully address the problem; H.R. 715, while a laudable effort, falls short of this goal. If Congress is serious about exposing and reversing the cover-up of campus crime, it will set itself to the task of drafting such comprehensive legislation.