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Note

***755** THE DISCLOSURE OF CAMPUS CRIME: HOW COLLEGES AND UNIVERSITIES CONTINUE TO HIDE BEHIND THE 1998 AMENDMENT TO FERPA AND HOW CONGRESS CAN ELIMINATE THE LOOPHOLE

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INTRODUCTION

Suppose that you are a college student interested in the outcome of several recent automobile burglaries in your apartment complex, which were committed by another student unknown to you. Similarly, suppose that you are a college faculty member whose office was recently vandalized, and you are interested in learning the details surrounding this incident, which is currently being adjudicated by the office of judicial affairs. Alternatively, suppose you are a reporter of the campus newspaper, and are interested in compiling and publishing a list of students who have recently committed crimes in violation of the institution's code of student conduct because your newspaper feels that this information would be beneficial to the campus community. What questions would you ask? Although each scenario presents a different range of questions you might ask, one inquiry seems common to all three scenarios: what are the details surrounding these incidents of campus crime? Although the particular university may oblige your request for information by providing you with crime- categorized statistical data, [FN1] the scope of your inquiry may be aimed more at actual incidents and details of campus crime. Obtaining a satisfactory answer to your inquiry depends not on the actual details surrounding incidents of campus crime, however, but on the particular college or university's policy on disclosure of campus crime.

The crucial piece of legislation that affects the disclosure of campus crime [FN2] is the Family Education Rights and Privacy Act ("FERPA" or the "Buckley ***756** Amendment"). [FN3] In 1998, Congress amended FERPA to allow, but not require, institutions of postsecondary education to disclose information about incidents of campus crime to third parties. [FN4] The information that universities may disclose is limited to the name of the perpetrator, the violation committed, and the result of the disciplinary proceeding. [FN5] Additionally, the amendment allows universities to disclose the names of other involved students, such as victims or witnesses, with the consent of those students. [FN6] Moreover, the university may only release information related to violent crimes or "nonforcible sex offenses." [FN7] It is significant to note, however, that the abovementioned conditions, which are required for disclosure to third parties, do not apply to records maintained by the institution's police department that were created for the purpose of law enforcement. [FN8] Put differently, campus law enforcement records are exempted from the scope of FERPA.

This Note will examine the inherent problems in the 1998 Amendment to FERPA [FN9] in its application tostudent disciplinary records, and it will propose several solutions for Congress to consider in addressing the problems. [FN10] This ***757** Note will argue that Congress should amend FERPA to expressly mandate, rather than permit, universities to disclose student disciplinary records upon request by a

third party. Additionally, this Note will argue that Congress should expand the scope of releasable disciplinary records to include all criminal offenses. In doing so, this Note will consider the legislative history of the amendment and the problems and ambiguities with the amendment. Additionally, this Note will consider the development of the controversy regarding the disclosure of student disciplinary records.

Part I will trace the enactment and development of FERPA, and it will discuss the recent debate over the "educational records" provision. Additionally, Part I will identify other relevant legislation affecting the disclosure of campus crime. Part II will identify the inherent problems of FERPA, and it will identify the costly ramifications that will likely occur if Congress does not amend FERPA. Part III will demonstrate why the current law is inadequate and why Congress should amend FERPA.

I. THE CHRONOLOGY OF FERPA AND EDUCATIONAL RECORDS

A. The Development of FERPA

In 1974, Senator James Buckley introduced FERPA to the Senate as a floor amendment extension to the Elementary and Secondary Education Amendments of 1965. [FN11] Buckley's primary justification for proposing FERPA was to control the careless release of educational information because of "the growing evidence of the abuse of student records across the nation." [FN12] Another purpose of FERPA was to grant parents and students access to educational records for purposes of inspection, and to ensure that parents and students may challenge the validity of the records if they find the records to be inaccurate, misleading, or wrongfully disclosed to a third party. [FN13] It is significant to note that these two justifications serve as the only recorded purposes of the Act. The Act does not contain a preamble, preface, or statement of purpose. [FN14] Moreover, FERPA was adopted with minimal floor discussion, and without public hearings or committee study or reports. [FN15]

In effect, FERPA prohibits universities from disclosing a student's educational records to unauthorized third parties. [FN16] Rather than providing a private cause of action for students whose educational records were released ***758** without authorization and rather than affirmatively prohibiting universities from releasing unauthorized educational records to third parties, FERPA conditions the receipt of federal funding to institutions that comply with its provisions. [FN17] This distinction was magnified in Student Bar Ass'n v. Byrd, which held that FERPA is not a law which prohibits the disclosure of student records, but merely imposes a funding precondition for nondisclosure. [FN18] In effect, an institution stands to lose a substantial portion of its federal funding if it discloses a student's educational records to an unauthorized third party. [FN19] In addition to students and parents of students having access to their records, FERPA also permits institutions to disclose records to "other school officials, including teachers ... who have been determined by such agency or institution to have legitimate educational interests ...." [FN20]

In 1979, FERPA was amended to permit universities to disclose educational records, without parental consent, to educational administrators for purposes of audits and program evaluations. [FN21] Congress again amended FERPA in 1986 to update its reference to the Internal Revenue Code. [FN22] In 1990, Congress substantively amended FERPA's provision on disclosure [FN23] to comply with the Crime Awareness and Campus Security Act of 1990 ("CSA"). [FN24] CSA requires institutions to publish and distribute statistical data on campus crime to prospective and current students. [FN25] Additionally, CSA permits institutions to inform the victims of violent crimes or nonforcible sex offenses of the result of any disciplinary proceedings. [FN26] To comply with this provision of CSA, Congress amended FERPA to permit universities to disclose the results of a disciplinary proceeding to the respective victim of a violent crime or nonforcible sex offense. [FN27] In 1992, Congress ***759** amended FERPA to provide that campus law enforcement records are not "educational records." [FN28] In 1994, Congress again amended FERPA to comply with the Improving America's Schools Act, which extended the Elementary and Secondary Education Amendments for another five years. [FN29] The 1994 amendments were intended to

provide greater parental access to records and to shift the burden of enforcing compliance from the schools to the Department of Education. [FN30] The 1994 amendments provided mandatory penalties for third parties to whom records were disclosed without authorization. [FN31] Additionally, the amendments changed the requirements for schools to comply with subpoenas for educational records, [FN32] added a clause permitting schools to inform staff members of the nature of pending disciplinary action where safety risks are involved, [FN33] and modified the general exception for unauthorized disclosure to allow reporting of unauthorized records to juvenile justice authorities. [FN34]

B. The "Educational Records" Controversy

Because FERPA, in effect, prohibits institutions from disclosing educational records to third parties without the student's consent, [FN35] there has been substantial debate, confusion, and litigation over what constitutes "educational records." FERPA defines educational records as "those records, files, documents, and other materials which contain material directly related to a student ...." [FN36] The crux of the dilemma was the question of whether student disciplinary records are "educational records" within the meaning of FERPA. Two state supreme courts recently confronted this issue.

***760** Red & Black Publishing Co., Inc. v. Board of Regents involved the student newspaper at the University of Georgia seeking access to records of disciplinary proceedings conducted by the University's Student Judiciary. [FN37] The University created the Office of Judicial Programs to hear and adjudicate cases involving misconduct by students and social organizations. [FN38] In the instant case, the student court was responsible for the adjudication of alleged misconduct and hazing committed by the University's fraternities and sororities. [FN39] Because the University refused to disclose the results of the adjudication on the grounds that the records were "educational records" protected by FERPA, The Red & Black claimed that the records should be released under Georgia's Open Records Act. [FN40]

The trial court held that The Red & Black had a right of access under the Open Records Act, and the University appealed. [FN41] The Georgia Supreme Court affirmed holding that the documents sought were not "educational records" within the meaning of FERPA. [FN42] Furthermore, the court noted that "the records are not the type [FERPA] is intended to protect, i.e., those relating to individual student academic performance, financial aid, or scholastic probation." [FN43] Moreover, the court drew another distinction between educational records and disciplinary records noting that the disciplinary records "are maintained at the Office of Judicial Programs, while 'education records' are maintained at the Registrar's Office." [FN44] Because the court concluded that the records were not protected by FERPA, the records were, therefore, subject to disclosure under the Georgia Open Meetings Act. [FN45]

Another case to address the question of whether disciplinary records are included in the "educational records" provision of FERPA was Miami Student v. Miami University. [FN46] The Miami Student, Miami University's student newspaper, sought to acquire disciplinary board records compiled over a three- year period. [FN47] The Miami Student was seeking to compile a list of general locations of alleged misconduct and sanctions imposed upon perpetrators. [FN48] The University disciplinary board adjudicates cases involving noncompliance with student rules and regulations including offenses such as underage ***761** drinking. [FN49] Additionally, the disciplinary board adjudicates criminal matters including physical or sexual assault offenses, which may or may not be reported to local law enforcement officials. [FN50] When editors from The Miami Student requested these records citing their lawful disclosure under the Ohio Public Records Act, the University refused on the grounds that the records were protected by FERPA. [FN51]

The Ohio Supreme Court held that the disciplinary records were not "educational records" within the meaning of FERPA because they were "nonacademic in nature." [FN52] The court adopted the reasoning of Red & Black holding that disciplinary records "do not contain educationally related information, such as grades or other academic data, and are unrelated to academic performance, financial aid, or

scholastic performance." [FN53] In reaching its decision, the court also acknowledged the escalation of crimes and student misconduct on university campuses. [FN54] In acknowledging the increase of campus crime, the court stressed, as an underlying policy for disclosure, that "[f]or potential students, and their parents, it is imperative that they are made aware of all campus crime statistics and other types of student misconduct in order to make an intelligent decision of which university to attend." [FN55] Additionally, the court stressed that the safety of students already enrolled in a university "is of utmost importance," and their safety would be compromised without "full public access" to disciplinary records. [FN56] Therefore, the court ordered the disclosure of the disciplinary records under the Public Records Act. [FN57] The court did, however, limit the scope of the records to include only the general location of the incident, the age and sex of the student (but not the identity or any identifiable information of the student), the nature of the offense, and the sanction imposed. [FN58]

It is significant to note that because the University disagreed with the verdict, it anticipated losing substantial federal funding because of literal noncompliance with FERPA. [FN59] The University petitioned the United States Supreme Court for certiorari. [FN60] The Court denied certiorari, and the decision of the Ohio Supreme Court stood for three years. [FN61] As a result, Ohio State University and Miami University of Ohio, the two public institutions that ***762** would be most affected by the Miami Student decision, advised the Department of Education that compliance with Miami Student would subject them to noncompliance with FERPA and possible loss of federal funding. [FN62] The Department of Education then sought a preliminary injunction from the United States District Court in Columbus, and that court preliminarily enjoined Ohio public universities from following the Miami Student opinion. [FN63] In reaching its decision, the district court noted that it is "abundantly clear" that student disciplinary records are "educational records" protected by FERPA. [FN64] From the time period between the district court's preliminary injunction and the 1998 FERPA amendment, various parties filed briefs on each side of the issue. [FN65]

Three years later and following the enactment of the 1998 amendment to FERPA, a federal district court in Ohio was forced to revisit the issue in March 2000. [FN66] In United States v. Miami University, the United States commenced suit on behalf of itself and the Department of Education alleging that Miami University and Ohio State University violated FERPA "by releasing disciplinary records containing personally identifiable information without the prior consent of the students or their parents." [FN67] The factual setting of the case is grounded in the dispute that arose in Miami Student v. Miami University. [FN68]

The court considered the "straightforward" issue of whether "student disciplinary records [are] 'education records' as defined by FERPA, and thus, protected from public disclosure ...." [FN69] Notwithstanding the rationale employed in Miami Student v. Miami University [FN70] and Red & Black Publishing Co. v. Board of Regents, [FN71] the district court viewed the case as an exercise in statutory interpretation, as "a federal court's interpretation of a federal law takes precedent over that of a state court." [FN72] Although the Chronicle of ***763** Higher Education ("Chronicle") [FN73] argued that "public policy favors openness and disclosure of disciplinary records," [FN74] the court nevertheless limited its analysis to the text of the statute and its legislative history. [FN75] The court concluded that because Congress expressed several narrow exceptions "permitting the disclosure of student disciplinary records in limited circumstances," Congress did not intend to permit disclosure of all disciplinary records. [FN76] The court, therefore, permanently enjoined Miami University and Ohio State University from releasing personally identifiable disciplinary records to third parties and in doing so, implicitly overruled Miami Student. [FN77]

C. The Interplay between FERPA and the Campus Security Act

While the Department of Education continued to insist that disciplinary records are protected by FERPA, there have been many "perceived conflicts" between the disclosure requirements of CSA and privacy protections of FERPA. [FN78] According to

the Department of Education, universities feared that disclosing campus crime statistical data in compliance with CSA was, in effect, noncompliance with the privacy protections of FERPA. [FN79] The Department of Education made clear, however, that no conflict existed between these two laws because FERPA was amended in 1990 to comply with CSA. [FN80]

The Department of Education's position was that because no conflict existed between the two laws, the current laws were an adequate means of both protecting student privacy rights and disseminating information to the community regarding campus crime. [FN81] This position was particularly problematic for two reasons. First, the Department of Education's position seems to be based on the premise that all universities were in full compliance with CSA. In 1996, however, University of Cincinnati professor Bonnie Fisher and Dr. Chunmeng Lu conducted a study to determine whether universities were ***764** complying with CSA's reporting requirements. [FN82] Fisher and Lu found that fewer than thirty-four percent of the 785 universities surveyed were in full compliance with CSA's disclosure requirement. [FN83] Second and perhaps more disturbing was the perceived loophole between the reporting requirement of CSA and the privacy protections of FERPA. Although CSA requires that universities disclose an annual campus crime report, [FN84] many universities were only disclosing "incidents handled directly by campus police." [FN85] Benjamin F. Clery, President of Security on Campus, Inc., a non-profit campus security organization, noted that:

> What many schools exclude is the spectrum of student-on-student crime that is reported to housing officials (drugs and alcohol), rape crisis centers/women's counselors (sexual assaults), and deans' offices (assaults, burglaries ...). By the time a felony or misdemeanor 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 [FERPA]. [FN86]

Although it is theoretically possible for a university to comply with both the disclosure requirements of CSA and the privacy safeguards of FERPA, many institutions found a loophole where certain incidents of campus crime were not included in the required annual crime report. Whether a particular incident of campus crime was included in the annual crime report, therefore, depended on to whom the incident was reported. Thus, the former state of CSA and FERPA provided universities with a method of manipulating crime statistics "to maintain the illusion of safe and crime free schools." [FN87]

***765** Prior to the 1998 amendment to FERPA and because of the growing evidence of problems with the implementation of CSA and FERPA, the Senate debated the Accuracy in Campus Crime Reporting Act of 1997 ("ACCRA"). [FN88] Although ACCRA purported to solve many of the problems presented by FERPA and CSA, ACCRA contained many provisions that were "worrisome and potentially counterproductive" and ACCRA was not adopted. [FN89]

D. The 1998 Amendment to FERPA

Because of the growing confusion and abuse of FERPA, the statute was amended in 1998. [FN90] The most significant change to FERPA is that it now expressly provides that nothing "prohibits" a school from releasing the "final results" of a student disciplinary proceeding regarding the commission of a violent crime or "nonforcible sex offense" to third parties. [FN91] The amendment, in effect, prohibits schools from declining to release student disciplinary information solely on the grounds that it is protected by FERPA. Conversely, the amendment does not mandate disclosure of student disciplinary records; [FN92] it merely codifies the holdings of Red & Black and Miami ***766** University that some student disciplinary records are not educational records protected by FERPA. [FN93]

In order for an institution to be able to release student disciplinary information, four requirements must be satisfied. First, the information must be the "final results" of any disciplinary proceeding. [FN94] The amendment defines "final results" to include the name of the student, the violation committed, and any sanction imposed by the institution. [FN95] Additionally, the "final results" may

include the names of any other involved students, such as victims or witnesses, but only with the written consent of those students. [FN96] Second, the student perpetrator must have committed either a violent crime [FN97] or a "nonforcible sex offense." [FN98] Third, the institution must conduct a disciplinary proceeding and determine that the student committed the act. [FN99] Finally, the violent crime or nonforcible sex offense must be a "violation of the institution's rules or policies." [FN100]

II. THE SHORTCOMINGS OF THE 1998 AMENDMENT

While it appears likely that Congress intended to end the "educational records" controversy with the 1998 amendment, the current state of FERPA still possesses many lingering problems. [FN101] First, the language of the amendment ***767** regarding disclosure is overly vague. Although the amendment clearly provides that nothing in the statute shall prohibit an institution from disclosing the final results of certain disciplinary proceedings, important questions remain whether institutions must disclose these records and whether institutions should disclose these records. [FN102] The language of the amendment leaves this determination to the discretion of the institution. Because Lu andFisher found that less than thirty-four percent of 785 institutions surveyed were in full compliance with CSA's crime statistics disclosure requirement [FN103] and because concerns exist that institutions were not adequately compiling and disclosing crime statistics in order "to maintain the illusion of safe and crime free schools," it appears likely that, given the choice, institutions will choose not to disclose student disciplinary records. [FN104] In other words, although institutions may choose to disclose the final results of disciplinary proceedings, it is unlikely that they will choose to do so.

Another related problem is the interplay between FERPA and state freedom of information laws. Although most states have freedom of information statutes that mandate the disclosure of criminal proceedings, private institutions are not affected by state freedom of information statutes. [FN105] Thus, private institutions are free to decline any and all requests for student disciplinary records. Private institutions are free to set their own policies regarding disclosure. Although both public and private institutions are required to compile and distribute annual crime statistics, common sense dictates that a university receiving little media attention for actual incidents of campus crime will be more attractive to prospective students than an institution receiving substantial media attention for actual incidents of campus crime. Thus, private institutions have an incentive not to disclose student disciplinary records in an effort to portray a safe campus and community.

Another problem with the amendment is the limited scope of the types of offenses, which may be disclosed. The fact that the amendment allows institutions to disclose the final results of any proceeding regarding only violent crimes or nonforcible sex offenses may produce an unintended result. [FN106] Even if institutions choose to disclose student disciplinary records, FERPA prohibits institutions from disclosing records of non-violent crimes such as theft, possession of drugs with intent to sell, illegal possession of a firearm, and vandalism. [FN107] Although Congress may have perceived the foregoing offenses ***768** to be less serious in nature, the amendment, in effect, allows institutions to continue to hide behind FERPA to conceal the details surrounding these crimes.

III. THE COMPELLING NEED FOR MANDATORY DISCLOSURE

Because of the inconsistencies presented by the 1998 amendment, FERPA should be amended to expressly mandate disclosure of the final result of all student disciplinary proceedings. There are five primary justifications for changing the language of FERPA's disclosure provision from permissive to mandatory. First, the current law unnecessarily affords students greater privacy rights than those afforded to all other citizens. Second, several provisions of the amendment are unconstitutional because they deny the public their constitutional right to attend criminal proceedings and to access judicial records. Third, the distinction between

public and private institutions in the application of FERPA creates drastic inconsistencies. Fourth, because many institutions are conducting student disciplinary proceedings for criminal offenses as an alternative to the court system, the issue of institutional competence must be examined because it affects the ultimate outcome of whether the records may be disclosed. Finally, the crimes that may be disclosed should not be limited to violent crimes and nonforcible sex offenses.

A. Unnecessary Heightened Privacy for Students

Under the 1998 amendment, institutions are narrowly permitted to disclose only the final results of a student disciplinary proceeding. As previously discussed, four requirements must be satisfied in order for an institution to disclose a disciplinary record. [FN108] As such, these requirements greatly limit the disclosure of the relevant facts and circumstances surrounding an incident of campus crime. FERPA only allows disclosure if a violent crime or nonforcible sex offense has been committed, if the offense is a violation of the institution's rules or policies, if the institution actually determines that the student committed the offense, and if only the final results are disclosed. [FN109] In effect, these rather narrow requirements afford students a heightened privacy protection. Thus, FERPA affords greater privacy protection to students that commit criminal offenses than to all other citizens that commit criminal offenses.

This incidental effect of the amendment raises the question of whether the privacy rights of college students should be greater than those afforded to all other citizens. "There is no reasonable explanation why an eighteen-year-old male on a college campus who engages in [criminal activity] has access to discreet 'secret hearings' ... while an eighteen-year-old male who commits the same crime in our society is subject to public arrest, bail requirements, a ***769** criminal hearing, fines and the prospect of incarceration." [FN110] Although this statement was made in the context of arguing in favor of adopting the ACCRA bill, it applies similarly to the 1998 amendment. Because institutions are only permitted to disclose the "final results" of disciplinary proceedings regarding violent crimes or "nonforcible sex offenses," a college student has access to a "secret hearing" solely because of his or her status of being a student. For example, if a college student is alleged to have violently assaulted another student, the alleged perpetrator will be afforded a secret hearing, and unless found guilty, the results of the proceeding will be protected by FERPA. [FN111] Conversely, if a non-college student commits the same assault, he will enjoy no such privacy protections. Similarly, if a college student and non-college student are jointly alleged to have possessed illegal drugs with the intent to sell and the college student is found guilty through a university disciplinary proceeding, the results of the student's proceeding are protected by FERPA. [FN112] Conversely, the non-student counterpart enjoys no such protections.

Missoulian v. Board of Regents of Higher Education applied a two-part test to determine whether a person has a protected privacy interest. [FN113] The particular test was whether the person had "a subjective or actual expectation of privacy and whether society is willing to recognize that expectation as reasonable." [FN114] As a matter of public policy, it seems unreasonable to assume that society is willing to recognize that college students enjoy greater privacy protections than those afforded to all other citizens. Although students may have an actual expectation of privacy based on the current protections afforded by FERPA, the above examples illustrate why society should be unwilling to recognize the expectation as reasonable.

Although the Missoulian court also noted that the public's right to know is not absolute, the court stressed that the facts and circumstances of each case must be balanced to determine whether the public's right to know outweighs the right of individual privacy. [FN115] This balancing test may be especially helpful ***770** in determining whether certain facts surrounding an incident of campus crime should be disclosed. For example, this balancing test could be employed to determine whether certain information, such as the identity of victims and witnesses, should be protected. The balancing test would, therefore, be the appropriate standard for

courts to apply to other parties involved in the incident, such as victims and witnesses, because the public interest in knowing the identity of the victims or witnesses is of less social value than the identity of the perpetrator. The two-pronged expectation of privacy test, however, is a more adequate justification for mandatory disclosure of the perpetrator's identity because society seems less likely to accept that a student enjoys greater privacy protection solely because he is a student. Furthermore, the public interest in adequate knowledge of campus crime outweighs the perpetrator's expectation of privacy. Therefore, FERPA produces an undesirable result that affords students with unnecessary heightened privacy protection for criminal misconduct.

B. Constitutional Problems with FERPA

Perhaps one of the most significant concerns of FERPA is its constitutionality. At the outset, it is significant to note that United States v. Miami University [FN116] addressed the constitutionality of FERPA under the First Amendment. [FN117] In its analysis, the court created a dichotomy between criminal proceedings and "other types of government information." [FN118] The court conceded that although there is a constitutional right of access to criminal proceedings, that right does not extend beyond "the realm of criminal trials and related criminal proceedings." [FN119] In Miami University, the United States sought to enjoin Miami University and Ohio State University from releasing disciplinary records containing personally identifiable information. [FN120] The disciplinary records at issue, however, were "not criminal in nature." [FN121] Because the particular records were not "criminal in nature," the First Amendment does not compel "private persons or governments" to supply (non-criminal) information. [FN122] The court in Miami University, therefore, held that FERPA's prohibition on the release of non-criminal disciplinary records does not violate the First Amendment. [FN123]

***771** The larger and more significant issue, which Miami University did not reach, is the constitutionality of FERPA, as applied to disciplinary records involving criminal offenses. The Supreme Court has consistently held that the public has a constitutional right to attend criminal proceedings. [FN124] FERPA, however, prohibits institutions from releasing any information during the disciplinary proceeding stage of the institutional adjudication process. [FN125] This conflict between well-established constitutional principles and the application of FERPA warrants significant discussion.

In Globe Newspaper Co. v. Superior Court, the Supreme Court held that the public and the press have a constitutional right of access to criminal proceedings. [FN126] Moreover, the right to attend criminal proceedings "is implicit in the guarantees of the First Amendment." [FN127] The presumption that criminal trials are open to the public is so firmly rooted that the Court was "unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country." [FN128] Although the disciplinary proceedings conducted by institutions of higher education are not identical to those performed by the court system, institutions of higher education are nevertheless conducting disciplinary proceedings where a student is charged with committing a criminal offense because the criminal offense is also a violation of the university's code of student conduct.

This comparison raises the question of whether criminal disciplinary proceedings conducted by institutions of higher education are analogous to criminal proceedings conducted by the court system for purposes of determining whether the proceedings should be open. Smyth v. Lubbers held that a college student at a public institution enjoys the same Fourth Amendment protections against unlawful searches and seizures for his or her dormitory room "as any other adult has in the privacy of his home, dwelling, or lodging." [FN129] Because college students at public institutions enjoy the same Fourth Amendment constitutional protections as all other citizens, it follows that the university community should enjoy the same First Amendment right of access to institutional criminal disciplinary proceedings as all other citizens. Additionally, Smyth held that a state cannot condition attendance at a state ***772** university on a waiver of constitutional rights. [FN130] Because a student at a

public university enjoys the same constitutional rights as all other citizens and because a university cannot require a student to waive these rights, a university cannot restrict the First Amendment rights of other students and all other citizens. Denying individuals their First Amendment right to attend criminal proceedings not only affords a college student accused of a crime unnecessary heightened privacy, but it also deprives other students and all other citizens of their constitutional rights. The foregoing discussion addresses the public's constitutional right to attend criminal proceedings. FERPA, however, only covers the disclosure of student records; it does not explicitly or implicitly address whether a third party has access to attend disciplinary proceedings. Because FERPA only covers access to a student's records and the constitutional rights discussed above apply only to the public's access to the hearing itself, this distinction might seem irreconcilable. It is possible, however, that some college and university administrators will interpret FERPA to implicitly require that the disciplinary proceedings remain closed because the final results have not yet been determined. [FN131] Because FERPA expressly prohibits institutions from releasing any disciplinary records during the proceeding stage and implicitly prohibits disciplinary proceedings from being accessible to the public, [FN132] it is unconstitutional.

In addition to FERPA's constitutional problem of restricting the public's right to attend criminal proceedings, it is also well established that the public has a constitutional right of access to judicial records. [FN133] In Nixon v. Warner Communications, Inc., the Supreme Court recognized a common- law constitutional right to inspect and copy judicial records. [FN134] Although the right to copy and inspect judicial records is not absolute, [FN135] the right may be curtailed only if the inspection interferes with the administration of justice. [FN136] FERPA also fails this constitutional standard because of its overbreadth in prohibiting access to all pending disciplinary records, not merely those that interfere with the administration of justice. In the rare instances where disclosing student disciplinary records would legitimately interfere with the administration of justice, disclosure could be postponed until the conclusion of the proceeding. Institutions should not, however, be able to claim that interference with ***773** the administration of justice includes the labor that accompanies preparing and distributing the records.

The underlying policy for the public's right to attend criminal proceedings and the public's right of access to judicial records seems to be based on the notion that the public should be aware of the crime that occurs in the particular community. [FN137] This raises the question of whether any other law, such as CSA, provides an adequate alternative for fulfilling this underlying policy. Although CSA requires institutions to record and distribute information regarding the occurrences of crimes ranging from murder to alcohol- related offenses, [FN138] it does not reach individual student records. That is to say that although CSA provides a means for members of a college or university community to learn whether these particular incidents have occurred on or in proximity of the campus, members of the campus community have no way of learning any information beyond the mere occurrence of these crimes. CSA does not provide any means for members of the community [FN139] to discover the identity of the perpetrator or the outcome of the incident. Furthermore, the list of crimes, which must be documented and distributed pursuant to CSA, is far too limited in scope to fulfill the importance of public awareness of campus crime. [FN140] For example, the institution is not required to publish statistics regarding occurrences of breaking and entering or vandalism that occur on or off campus. Moreover, even if CSA were amended to expand the scope of crimes that must be documented and distributed, there is no guarantee that the institution would fully comply with CSA's reporting requirements. [FN141] Although CSA concededly helps to some extent in fulfilling the constitutional policy of public awareness, it is insufficient by itself to fully advance this policy consideration. The solution lies in FERPA.

Because the public has a constitutional right to inspect judicial records and FERPA prohibits the disclosure of these records except under limited circumstances, the statute must be amended. For FERPA to pass constitutional muster, it must be amended to mandate disclosure of all student disciplinary records involving crimes. Similarly, to conform to the public's right of access to criminal proceedings

afforded by the First Amendment, FERPA must also be amended to mandate public access to disciplinary proceedings involving criminal misconduct. For offenses that do not rise to the level of crimes, ***774** however, secret proceedings are constitutional. [FN142] For example, a disciplinary hearing to determine whether a student cheated on an exam need not be open to the public to be constitutional because it is not a criminal offense. Similarly, the disciplinary records surrounding a student's hearing to determine whether he or she cheated on an exam need not be accessible to the public to pass constitutional muster. The constitutional right of access to criminal proceedings and judicial records applies only to criminal offenses. [FN143]

The foregoing discussion applies primarily to students at public institutions. It is well established that public institutions of higher education, including students, employees, and the institution itself, enjoy all of the protections and guarantees of the Constitution. FERPA's prohibition against disclosing disciplinary information during the proceeding stage directly conflicts with established First Amendment guarantees, and, therefore, produces an unconstitutional result in its application to public universities.

Private institutions, however, are limited by the state-action doctrine, which prohibits constitutional protection unless the state is directly involved "to some significant extent." [FN144] Under the present regime of constitutional law, it appears that FERPA's application to criminal disciplinary proceedings and judicial records at private institutions does not offend the Constitution. It is significant to note that a recent Supreme Court case has at least alluded to the notion that private institutions may one day be subject to the same constitutional protections as their public counterparts. [FN145] Because of the modern influx of federal funds to nearly all private universities, it is quite plausible that the Court will eventually recognize constitutional guarantees for individuals at private universities. [FN146] Although FERPA's application to ***775** private institutions does not offend the constitutional policy of public awareness of crime, it nevertheless frustrates the important public policy of public awareness of crime.

C. The Need for Uniformity between Public and Private Institutions

As previously noted, the current operation of FERPA yields inconsistent results between public and private schools. The current language of FERPA merely prohibits an institution from claiming that FERPA bars it from releasing the final results of a disciplinary proceeding regarding a violent crime or nonforcible sex offense. [FN147] The interplay between FERPA and state freedom of information laws may hasten the release of disciplinary records previously protected by FERPA. The problem, however, is that state freedom of information laws only apply to public institutions. Furthermore, each state's freedom of information law is different. Georgia, for example, is the only state where all disciplinary records at public colleges are open to the public. [FN148] ***776** Although all states have some form of freedom of information law, which may compel disclosure of records not protected by FERPA, it is plausible that a state institution may initially deny releasing these records even though it may be required to do so under the state's freedom of information law. Thus, it may require some form of legal action to compel disclosure under a state's freedom of information law. While seeking a court order to compel disclosure under a state's freedom of information law may be a feasible option for some of the nation's larger media corporations, it is reasonable to assume that most individuals possess neither the time, nor the resources to pursue legal action if a public institution refuses a request for disclosure. As a policy concern, individuals should not be required to rely solely on freedom of information laws to gain access to disciplinary records. Additionally, many university administrators are still unsure of exactly how FERPA applies to student records, as this will also delay the process of disclosure. [FN149] These issues at public institutions illustrate why FERPA should be amended to mandate disclosure of student disciplinary records.

The larger problem, however, lies in FERPA's application to private institutions. Although state freedom of information laws will likely compel disclosure of disciplinary records not protected by FERPA, state freedom of information laws only

apply to public institutions. Although private institutions can no longer use FERPA as a justification for not releasing records, they may use any other justification. In other words, if private institutions choose to adopt a policy of nondisclosure, the 1998 amendment has no effect whatsoever on private institutions. The amendment merely affords private institutions the option of releasing records not protected by FERPA.

Private institutions are currently forced "to make a decision about [whether to disclose records not protected by FERPA] because [they] are now allowed to release this information." [FN150] What incentive, if any, do private institutions have to release these records? If private institutions consider such factors as how a policy of full disclosure will affect recruitment and affect their reputation for safety, private institutions have very little incentive to adopt a full disclosure policy and stand only to lose by enacting such a policy. Until FERPA is amended to mandate disclosure of disciplinary records, this loophole will only continue to be abused. Additionally, an amendment mandating disclosure may serve as the only means of compelling disclosure by private institutions.

***777** D. Institutional Competence

FERPA's relation to each institution's adjudication processes raises a related concern. The question for consideration is whether colleges and universities are institutionally competent to adjudicate criminal offenses committed by students. In the latter part of the nineteenth century, many colleges and universities established honor boards to adjudicate violations of the institution's honor code; these violations were primarily academic in nature. [FN151] Many of the early honor boards existed to maintain a "gentlemen's code" of honor among students. [FN152]

The modern purpose for conducting disciplinary adjudications is somewhat similar, as it relates to education. Many institutions' disciplinary processes are "designed to educate and, where necessary, punish those students who violate [the] rules." [FN153] Somewhere along the line, however, colleges and universities began to include criminal offenses in their honor codes and adjudicate these offenses partly because "the District Attorney ... cannot begin to address all of the cases that might be theoretically handled by it." [FN154] Institutions are offering boilerplate arguments that their disciplinary processes are "not meant to replace or substitute for the criminal justice system." [FN155] Miami Student v. Miami University, however, is one example of where the institution did supplant the criminal justice system because Miami University was adjudicating criminal offenses not reported to local law enforcement agencies. [FN156] If institutions adjudicate criminal offenses committed by students, but fail to report these crimes to local law enforcement agencies, they are, in effect, supplanting the criminal justice system.

The purpose of educating students in the disciplinary adjudication process is clearly legitimate, but this purpose is only legitimate if it supplements the criminal justice system. If institutions of higher education are supplanting the criminal justice system with their own disciplinary proceedings, they are, in effect, providing an alternative to the criminal justice system. Therefore, the question remains whether universities are competent to provide an alternative ***778** to the criminal justice system. Even if a university judicial board was partially composed of practicing attorneys and judges, it is an undesirable policy to encourage universities to conduct criminal disciplinary proceedings as an alternative to the criminal justice system. In 1980, a study of the disciplinary proceeding processes at fifty-eight institutions was conducted, and the results indicated that institutions are omitting many aspects of procedural due process in their adjudications. [FN157]

It is axiomatic that institutions should adjudicate "code of conduct" violations that do not involve criminal offenses. [FN158] These adjudications would still achieve the purpose of educating students in the adjudication process as well as instilling each institution's honor code in students. [FN159] It is an undesirable public policy, however, to encourage institutions to adjudicate criminal offenses committed by students if these processes supplant the criminal justice system.

Another problem relating to the adjudication of criminal offenses affects whether records may be disclosed under FERPA. If an institution conducts a disciplinary proceeding to determine whether a student committed a criminal offense and the "prosecutors" are unable to prove that the student committed the criminal offense, the results of the proceeding will be protected by FERPA. [FN160] Thus, if a student is alleged to have committed a crime and the institution declines to report the crime to local law enforcement agencies, FERPA prohibits the institution from disclosing the final results unless the institution determines that the student committed the offense. The question of whether the public has access to student crime records, therefore, depends on whether the institution reports the crime to local law enforcement agencies. If the institution does, in fact, report the incident to local authorities, the public may access the record as a public record because FERPA does not apply to local law enforcement agencies. [FN161] If the institution does not report the incident to local law enforcement agencies, FERPA prohibits an institution from disclosing any disciplinary records unless the institution determines that the student committed the offense. [FN162] Thus, if an institution is unable to determine that the student committed the crime for whatever reason, FERPA prohibits any disclosure whatsoever. [FN163]

***779** This paradoxical example relates to the concept of institutional competence because it illustrates the importance of institutions disclosing all campus crimes to local authorities. Thus, this result can only be achieved through FERPA being amended to provide for mandatory disclosure. Without mandatory disclosure, university judicial affairs officers will continue to incompetently supplant the criminal justice system.

E. Expanding the Scope of Releasable Crimes

While it is imperative that FERPA be amended to mandate disclosure, amending the statute's language to mandate disclosure will only solve part of the problem. The other significant problem with the 1998 amendment is the rather narrow category of crimes that may be disclosed. As previously noted, FERPA allows institutions to disclose the final results of disciplinary records where the institution determines that the student committed a "crime of violence" or a "nonforcible sex offense." [FN164] Thus, FERPA expressly protects all student criminal records that do not rise to the level of a "crime of violence" or a "nonforcible sex offense."

Consider one perplexing example of this limitation. Suppose that Student A, the quintessential fraternity pledge, unlawfully enters another fraternity house with the intention of committing an otherwise harmless prank. Suppose further that the owner of the particular fraternity house, the university, chooses to conduct a disciplinary proceeding against Student A for breaking and entering. Assuming the institution determines that Student A did, in fact, commit the crime of breaking and entering, this student's disciplinary record would not be protected by FERPA because breaking and entering in a dwelling constitutes a "crime of violence." [FN165] Alternatively, suppose that Student B burglarizes the university's athletic facility with the intent of committing vandalism. Suppose further that Student B is caught with a significant amount of illegal narcotics and cocaine. Even if the institution determines that the Student B did commit burglary and even if the institution determines that Student B conspired to distribute narcotics and possessed cocaine with the intent to distribute, each of these criminal offenses are protected by FERPA because they are not "crimes of violence." [FN166]

***780** The above-mentioned example is one of many illustrations of why FERPA's disclosure requirements should not be limited to violent crimes and nonforcible sex offenses. Additionally, the "crimes of violence" limitation will yield inconsistent results between jurisdictions. What one federal circuit determines to be a violent crime will, therefore, only be releasable by that jurisdiction's colleges and universities. [FN167]

The most confounding feature of limiting releasable records only to violent crimes and nonforcible sex offenses is that the provision seems to imply that only violent

crimes and nonforcible sex offenses are "unsafe." The structure of the violent crimes and nonforcible sex offenses provision seems to suggest two underlying errors by Congress. The first is that crimes, which do not rise to the level of violent crimes, and nonforcible sex offenses are in an absolute sense less serious and not immediately threatening to the university community. By limiting what types of criminal offenses that may be disclosed, Congress has, in effect, deemed some crimes so unserious that they actually warrant federal protection. [FN168] The second error is that Congress has implicitly authorized institutions to again use FERPA as a shield for many criminal offenses. By requiring that the crime rise to the level of a violent crime or nonforcible sex offense Congress has placed all other crimes under the veil of "educational records" protected by FERPA. Not only is this result undesirable, but also it permanently seals these criminal records. To correct this problem, FERPA must be amended to mandate disclosure of all disciplinary records involving all criminal offenses.

CONCLUSION

To improve the safety of our nation's colleges and universities and to increase awareness of the incidents that occur on these campuses, FERPA must be amended to provide for mandatory disclosure of all student disciplinary records where the student has committed any criminal offense. Taken together, these changes to FERPA will adequately solve problems that have plagued our colleges and universities for the past twenty-five years. These changes will make it explicitly clear to all university administrators that FERPA may no longer be abused as a tool to hide campus crime and as a means to protect the students that commit criminal offenses. Additionally, institutions will no longer be able to hide behind FERPA's ambiguous language in order to portray the image of a safe campus.

The purpose of amending FERPA to mandate disclosure of all criminal disciplinary records is not to benefit the media. Nor is the purpose to punitively embarrass a student who commits a criminal offense within the campus ***781** community. Although these ancillary effects are likely to occur with a disclosure mandate, the public interest in access to crime records outweighs any punitive effect of embarrassing the student perpetrator. The public interest in granting access to all student disciplinary records involving criminal behavior closely mimics the same policies, which underlie why the public has a constitutional right to inspect judicial records and attend criminal proceedings. These policies include keeping the public informed of criminal incidents that occur in their community as well as providing a system of checks and balances in the administration of justice.

Under the current structure of FERPA, these secret campus courts will continue to provide both an inadequate system of justice and unwarranted privacy protections for the students that commit these crimes. Furthermore, as a likely result of the Miami University decision, courts will be bound by the current structure of the statute notwithstanding the strong public policy implications, which favor amending FERPA. [FN169] Congress must, therefore, consider the costly ramifications that will likely occur under the current structure of FERPA, and take appropriate action to remedy the foregoing problems by amending FERPA to provide for a mandate on disclosure of all disciplinary records involving all criminal offenses.

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[FN1]. See infra text accompanying note 25.

[FN2]. Equally important to the disclosure of campus crime, however, is the Crime Awareness and Campus Security Act of 1990 ("CSA"). See Pub. L. No. 101-542, § 204, 104 Stat. 2381, 2385-87 (1990) (codified as amended at 20 U.S.C. § 1092 (1994)). CSA requires colleges and universities to compile and distribute statistical data on crimes that occur both on and off campus. See 20 U.S.C. § 1092(f) (1994 and Supp. IV 1998). The crimes, which must be documented include: murder, forcible or nonforcible sex offenses, robbery, aggravated assault, burglary, motor vehicle theft, manslaughter, and arson. 20 U.S.C. § 1092(f)(i). Additionally, CSA was recently amended to also require that institutions record and distribute statistics regarding "liquor law violations, drug-related violations, and weapons possession[s]." 20 U.S.C. § 1092(f)(i)(IX). The "liquor law violation" reporting requirement, which became effective in July 2000, will likely result in the documentation of all public intoxication occurrences, as well as drunk driving-related incidents that occur on or off campus. Because CSA deals primarily with statistical data regarding campus crime and FERPA deals with the disclosure of individual student records, the primary focus of this Note addresses FERPA's application to individual student records.

[FN3]. 20 U.S.C. § 1232g (1994 & Supp. IV 1999). Although FERPA applies to all primary, secondary, and post-secondary institutions that receive federal funding, this Note only addresses the provisions that apply to post-secondary institutions.

[FN4]. See 20 U.S.C. § 1232g(b)(6)(B). Note that this provision only applies to post-secondary institutions of education.

[FN5]. See 20 U.S.C. § 1232g(b)(6)(C)(i).

[FN6]. See § 1232g(b)(6)(C)(ii).

[FN7]. See § 1232g(b)(6)(B).

[FN8]. See id. § 1232g(a)(4)(B)(ii). This exemption creates a puzzling dichotomy between records protected by FERPA and records not protected by FERPA. The student's police record (assuming it was created by the institution's police department for purposes of law enforcement) is expressly exempted from the scope of "education records" and, therefore, is not protected by FERPA. If an exact copy of the police record were placed in the student's file, however, that particular copy would be protected by FERPA. See id. § 1232g(a)(4)(A). The information could be disclosed to a third party only if the institution met the requirements for disclosure. See id. § 1232g(b)(6)(B). Although campus police records are not protected by FERPA, the records may nevertheless be protected by a particular state's shield statute or public records act.

[FN9]. See id.

[FN10]. It is significant to note that a recent issue regarding parental notification under FERPA has emerged, which raises the question of whether universities may and should disclose incidents of student misconduct to parents. Although this issue is currently receiving considerable attention in North Carolina, Texas, Virginia, and Wisconsin, it would be beyond the scope of this Note to examine this issue. For a discussion of how one university is responding to the issue, see Ryan West, Texas A&M Task Force: Tell Parents of Alcohol Offenses, THE BATTALION, July 19, 1999, at A1, available at 1999 WL 18807252.

[FN11]. See Education Amendments of 1974, Pub. L. No. 93-380, § 513, 88 Stat. 484, 571 (1974); see also S. CONF. REP. NO. 93-1026 (1974). See generally Lynn Daggett, Bucking Up Buckley I: Making the Federal Student Records Statute Work, 46 CATH. U. L. REV. 617, 620 (1997); Sandra Macklin, Note, Students' Rights in Indiana: Wrongful Distribution of Student Records and Potential Remedies, 74 IND. L.J. 1321, 1326 (1999).

[FN12]. 121 CONG. REC. S13,990 (1975) (statement of Sen. Buckley). Senator Buckley noted that schools had inconsistent policies regarding the disclosure of records, and many students' records were being disclosed to third parties without the student's consent. See id.

[FN13]. See 120 CONG. REC. S39,863 (1974) (statement of Sen. Buckley).

[FN14]. See 20 U.S.C. § 1232g (1994 & Supp. IV 1999).

[FN15]. See Dagget, supra note 11, at 620.

[FN16]. See 20 U.S.C. § 1232g(b)(1) (1994 & Supp. IV 1999).

[FN17]. See id. ("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 ...."). It is significant to note that FERPA only applies to institutions that receive federal funding.

[FN18]. 239 S.E.2d 415, 419 (1977). See also Bauer v. Kincaid, 759 F. Supp. 575, 589 (W.D. Mo.1991) (holding that funding may be withheld only if there is a finding that there has been a failure to comply with the provisions of FERPA).

[FN19]. 239 S.E.2d at 419.

[FN20]. 20 U.S.C. § 1232g(b)(1)(A).

[FN21]. See Pub. L. No. 96-46, § 4(c), 93 Stat. 338, 342 (1979); see also Daggett, supra note 11, at 621; Macklin, supra note 11, at 1328.

[FN22]. See Tax Reform Act of 1986, Pub. L. No. 99-514, § 2, 100 Stat. 2085, 2095 (1986) (replacing subsection(b)(1)(H) "Internal Revenue Code of 1954" with "Internal Revenue Code of 1986"); see also Daggett, supra note 11, at 621; Macklin, supra note 11, at 1328.

[FN23]. See 20 U.S.C. § 1232g(b)(6)(A); see also Daggett, supra note 11, at 621; Macklin, supra note 11, at 1328.

[FN24]. Pub. L. No. 101-542, § 204, 104 Stat. 2381, 2385-87 (1990) (codified as amended at 20 U.S.C. § 1092 (1994)).

[FN25]. See id.

[FN26]. See id.

[FN27]. 20 U.S.C. § 1232g(b)(6)(A) ("Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing, to an alleged victim of any crime of violence ... or nonforcible sex offense, the final results of any disciplinary proceeding conducted by such institution against the alleged perpetrator ....").

[FN28]. See Pub. L. No. 102-325, § 1555, 106 Stat. 448 (1992) (codified as amended at 20 U.S.C. § 1232g(a)(4)(B)(ii)) (term "educational 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 ....").

[FN29]. Pub. L. No. 103-382, 108 Stat. 3518 (1994) (codified as amended in scattered sections of 20 U.S.C.); see also Daggett, supra note 11, at 621; Macklin, supra note 11, at 1328.

[FN30]. See 140 CONG. REC. S10, 290 (daily ed. Aug. 2, 1994) (statement of Sen. Grassley); see also Daggett, supra note 11, at 622; Macklin, supra note 11, at 1329.

[FN31]. See 20 U.S.C. § 1232g(b)(6)(A); see also Daggett, supra note 11, at 622; Macklin, supra note 11, at 1329.

[FN32]. See 20 U.S.C. § 1232g(b)(1)(J); see also Daggett, supra note 11, at 622; Macklin, supra note 11, at 1329.

[FN33]. See 20 U.S.C. § 1232g(h); see alsoDaggett, supra note 11, at 622; Macklin, supra note 11, at 1329.

[FN34]. See 20 U.S.C. § 1232g(b)(1)(E); see also Daggett, supra note 11, at 622; Macklin, supra note 11, at 1329.

[FN35]. Although FERPA generally provides that either the student or his parents can consent to the release of the student's records, the statute contains an important limitation to the consent requirement. FERPA expressly provides that "whenever a student has attained the age of eighteen years of age, or is attending an institution of postsecondary education," only the student (and not the parents) can consent to the release of the student's disciplinary records. 20 U.S.C. § 1232g(d). Even absent consent, however, a student's records may be disclosed pursuant to a subpoena or court order. 20 U.S.C. § 1232g(b)(2)(B).

[FN36]. 20 U.S.C. § 1232g(a)(4)(A).

[FN37]. 427 S.E.2d 257, 259 (Ga. 1993).

[FN38]. See id. at 259-60.

[FN39]. See id. at 259 n.3.

[FN40]. See Ga. Code Ann. § 50-18-70(a) (Supp. 2000).

[FN41]. 427 S.E.2d at 259.

[FN42]. See id. at 261.

[FN43]. Id.

[FN44]. Id.

[FN45]. See id. at 262. The court justified the release of the records under the Open Meetings Act because the "Act was enacted in the public interest to protect the public--both individuals and the public generally--from 'closed door' politics and the potential abuse of individuals and the misuse of power such policies entail." Id. (citing Atlanta Journal v. Hill, 359 S.E.2d. 913, 914 (Ga. 1987)).

[FN46]. 680 N.E.2d. 956 (Ohio 1997).

[FN47]. See id. at 958.

[FN48]. See id. at 959.

[FN49]. See id.

[FN50]. See id.

[FN51]. See id. at 958.

[FN52]. See id. at 959.

[FN53]. Id.

[FN54]. See id.

[FN55]. Id.

[FN56]. See id.

[FN57]. See id. The court noted that releasing the records achieved the purpose of

the Ohio Public Records Act, which is meant to "foster openness and to encourage the free flow of information ...". Id.

[FN58]. See id. at 959-60.

[FN59]. See School Paper, School Await Records Decision, DAYTON DAILY NEWS, Mar. 31, 1997, at B4.

[FN60]. See Miami Univ. v. Miami Student, 522 U.S. 1022 (1997).

[FN61]. See id.

[FN62]. See Edward Stoner & Susan Schupansky, Disciplinary and Academic Decisions Pertaining to Students: A Review of the 1997 Judicial Decisions, 25 J.C. & U.L. 293, 308 (1998).

[FN63]. United States v. Miami Univ., No. C-2-98-0097 (S.D. Ohio Feb. 12, 1998) (order granting preliminary injunction).

[FN64]. See id.

[FN65]. See Stoner & Schupansky, supra note 62, at 308 n.127. The United States filed a motion that the injunction be made permanent. Additionally, the Association of Student Judicial Affairs, the National Association of Student Personnel Administrators, and the American College Personnel Association filed an amicus curiae brief supporting the position of the Department of Education that student disciplinary records are educational records within the meaning of FERPA. Conversely, The Chronicle of Higher Education filed a motion that the injunction be dissolved.

[FN66]. United States v. Miami Univ., 91 F. Supp.2d 1132 (S.D. Ohio 2000).

[FN67]. Id. at 1134.

[FN68]. See id. at 1135. See supra notes 46-58 and accompanying text.

[FN69]. Miami Univ., 91 F. Supp.2d at 1147.

[FN70]. 680 N.E.2d 956 (Ohio 1997).

[FN71]. 427 S.E.2d 257 (Ga. 1993).

[FN72]. Miami Univ., 91 F.Supp.2d at 1148 (citing Kuhlne Bros., Inc. v. County of Geauge, 103 F.3d 516, 520 (6th Cir. 1997)).

[FN73]. The court permitted The Chronicle of Higher Education to intervene as a

named defendant in the action. Miami Univ., 91 F. Supp. 2d at 1134.

[FN74]. Id. at 1148.

[FN75]. See id. at 1148-54.

[FN76]. Id. at 1151. The court applied the linguistic principle of expressio unius est exclusio alterius, which means that the expression of one thing implies the exclusion of others.

[FN77]. See id. at 1160.

[FN78]. See Security on Campus: Hearing Before Subcomm. of the Senate Comm. on Appropriations, 105th Cong. 36 (1998) (statement of David A. Longanecker, Assistant Secretary for Postsecondary Education). "Specifically, there remains a substantial amount of confusion about the privacy protection afforded by FERPA and the disclosure requirements of CSA." Id.

[FN79]. See id. Because CSA permits institutions to inform the victims of violent crime or nonforcible sex offenses of the result of any disciplinary proceedings, universities feared that disclosing such information would be literal noncompliance with FERPA. FERPA was amended, however, in 1990 to comply with this provision of CSA. See supra note 20 and accompanying text.

[FN80]. See id.

[FN81]. See id.

[FN82]. 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), available at http:// www.campussafety.org/STUDIES/fisher.html. The study consisted of a written request by a prospective student to 735 institutions requesting information regarding campus crime statistics.

[FN83]. See id. The results of this study directly contradict the 1996 statement by David A. Longanecker, Assistant Secretary for Postsecondary Education, to the New York Times that "I certainly don't see broad-based noncompliance ... there is no evidence at this point campuses aren't responding in the spirit of the law." Campus Crime & Accuracy in Campus Crime Reporting Act of 1997: Hearing on HR. 6 Before the Subcomm. on Postsecondary Educ., Training, and Lifelong Learning of the House Comm. On Educ. And the Workforce, 105th Cong. 69 (1998) (written testimony of Benjamin F. Clery) [hereinafter Clery Testimony].

[FN84]. See supra notes 23-25 and accompanying text.

[FN85]. See Clery Testimony, supra note 83, at 71.

[FN86]. Id.

[FN87]. Maureen Rada, Note, The Buckley Conspiracy: How Congress Authorized the Cover Up of Campus Crime and How it can be Undone, 59 OHIO ST. L.J. 1799, 1816 (1999). Another loophole with the former state of CSA and FERPA was that CSA did not require universities to include incidents of campus crime that occurred "off campus." That is to say that if a student was assaulted on campus and the incident was reported to campus police, the incident was required to be included in the annual report. Conversely, if a student was assaulted on a street immediately adjacent to campus, the incident was not required to be included in the annual report. The on-campus/off-campus distinction was especially problematic for obtaining accurate crime statistical data at schools situated on urban campuses. CSA was amended, however, to become the Jeanne Clery Disclosure of Campus Security Policy and Campus Statistics Act ("Clery"), which requires universities to collect and distribute annually to all students and employees information and crime statistics regarding crimes that occur both on and off campus. See 20 U.S.C.A. § 1092(f) (West 2000). Additionally, the Clery Act requires schools to maintain public police logs. The primary difference between CSA and the Clery Act is that the Clery Act requires schools to include crimes, which occur on "noncampus building[s] or property" or on "public property" in the annual crime report. See 20 U.S.C.A. § 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 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." See 20 U.S.C.A. § 1092(f)(6)(A)(ii)(I), (II). The Clery Act was named after Jeanne Ann Clery, a student murdered on the Lehigh University campus in April 1986.

[FN88]. See H.R. 715, 105th Cong. (1997).

[FN89]. Accuracy in Campus Crime Reporting Act: Hearings on HR 715 Before the Subcomm. on Labor, Health and Human Services, Educations and Related Agencies of the Senate Comm. on Appropriations, 105th Cong. 26 (1998) (testimony of Dolores A. Stafford). Among other things, ACCRA would permit all disciplinary records "to be open to public scrutiny, regardless of the stage of the proceeding, the truth or falsity of the accusation, or the relative seriousness of the conduct alleged." Id. at 24 (testimony of Michele Goldfarb, Director of the Office of Student Conduct at the University of Pennsylvania) [hereinafter Goldfarb Testimony].

[FN90]. 20 U.S.C. § 1232g (1994 & Supp. 1999).

[FN91]. 20 U.S.C. § 1232g(b)(6)(B).

[FN92]. Note that under the 1998 FERPA amendment, there is no affirmative mandate for institutions to disclose student disciplinary records. Although institutions can no longer use FERPA as a shield to hide disciplinary records, disclosure rests on the construction of state public information laws. See Kirwan v. Diamondback, 721 A.2d 196 (Md. Ct. App. 1998) (holding records relating to parking tickets accumulated by University of Maryland student- athletes are not "education records" protected by FERPA, and may be disclosed under Maryland Public Information Act because there is no public interest in keeping them confidential).

[FN93]. 20 U.S.C. § 1232g(b)(6)(B). This provision states that "[n]othing 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 an institution against a student who is an alleged perpetrator of any crime of violence ... or a nonforcible sex offense, if the institution determines as a result

of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense." See also HR Conf. Rep. 105-750 (Sept. 25, 1998), available at 1998 WL 658825. Note further than FERPA expressly excludes "records maintained by [the institution's] law enforcement unit ... that were created by the law enforcement's unit for purposes of law enforcement" from the purview of educational records. 20 U.S.C. § 1232g(a)(4)(B)(ii).

[FN94]. See 20 U.S.C. § 1232g(b)(6)(B).

[FN95]. 20 U.S.C. § 1232g(b)(6)(C)(i).

[FN96]. 20 U.S.C. § 1232g(b)(6)(C)(ii).

[FN97]. See 18 U.S.C.A. § 16 (West 2000) (defining a crime of violence as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property may be used in the course of committing the offense.").

[FN98]. See 20 U.S.C. § 1232g(b)(6)(B).

[FN99]. See id.

[FN100]. Id. Note that this requirement assumes that all institutions adopt their respective state and local criminal laws into its rules and policies.

[FN101]. An unrelated problem with FERPA is that of enforcement. Although the issue of enforcement is not unique to the 1998 amendment, enforcement has been an issue since the original enactment in 1974. Numerous cases have held that an institution's noncompliance with the privacy protections of FERPA does not itself give rise to a private cause of action. For a discussion of the courts' failure to recognize a private cause of action for FERPA noncompliance, see John Theuman, Validity, Construction, and Application of Family Educational Rights and Privacy Act of 1974, 112 A.L.R. FED. 1 (1993). For a discussion of alternative remedies for noncompliance with FERPA, see Macklin, supra note 11. In the context of enforcement by the Department of Education, however, a recent case held that the Department of Education and the United States are "statutorily authorized to bring civil actions [against noncompliant universities] to enforce FERPA. See United States v. Miami Univ., 91 F. Supp. 2d 1132, 1141 (S.D. Ohio 2000).

[FN102]. See supra note 100.

[FN103]. See supra notes 82-83 and accompanying text.

[FN104]. See Rada, supra note 87, at 1816. See also Clery Testimony, supra note 83, at 68.

[FN105]. See Kirwan v. Diamondback, 721 A.2d 196 (Md. Ct. App. 1998) (holding that the Maryland Public Information Act will compel disclosure of parking tickets

accumulated by student-athletes at the University of Maryland).

[FN106]. See 20 U.S.C. § 1232g(b)(6)(B).

[FN107]. See supra note 97 (defining crimes of violence). See also United States v. Jernigan, 612 F. Supp. 382 (E.D.N.C. 1985) (holding that possession with intent to distribute cocaine was not within the statutory meaning of "crime of violence"); United States v. Walker, 930 F.2d 789 (10th Cir. 1991) (holding that possession of an illegal firearm does not necessarily constitute a violent crime).

[FN108]. See supra notes 94-100 and accompanying text.

[FN109]. See id.

[FN110]. Clery Testimony, supra note 83, at 72.

[FN111]. See 20 U.S.C. § 1232g(b)(6)(B). Only after a student has been found to have committed a violent crime or nonforcible sex offense through a disciplinary proceeding may the final results be disclosed.

[FN112]. See id. The final results are protected because possession of drugs with intent to sell is not a violent crime.

[FN113]. 675 P.2d 962, 967 (Mont. 1984). Although this is a state case, it is particularly relevant because of the interplay between FERPA and state freedom of information laws. The case dealt with the question of whether the job performance evaluations of public university presidents were matters of individual privacy.

[FN114]. Id. In the instant case, the court found that the presidents' privacy interests clearly outweighed the public's right to know. Note that this standard is based on the well-established Fourth Amendment test for reasonableness articulated by the Supreme Court on several occasions. See Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (noting that the determination of whether one's privacy interests are protected requires "an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable"); California v. Ciraolo, 476 U.S. 207, 211 (1986).

[FN115]. See 675 P.2d at 971.

[FN116]. 91 F. Supp. 2d 1132, 1154 (S.D. Ohio 2000).

[FN117]. The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

[FN118]. 91 F. Supp. 2d at 1157.

[FN119]. Id. at 1156.

[FN120]. See id. at 1134.

[FN121]. See id. at 1157.

[FN122]. See id. at 1154 (citing Houchins v. KQED, Inc., 438 U.S. 1, 11 (1978) (Burger, C.J., plurality opinion)).

[FN123]. See id. at 1158. Cf. Norwood v. Slammons, 788 F. Supp. 1020, 1027 (W.D. Ark. 1991) (holding that "there is no constitutional right of general public access to the disciplinary or investigatory records of a post- secondary educational institution.").

[FN124]. See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980). See also Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); In re Oliver, 333 U.S. 257 (1948).

[FN125]. See 20 U.S.C. § 1232g(b)(6)(B). See generally DTH Publ'g. Corp. v. Univ. of North Carolina, 496 S.E.2d 8 (N.C. Ct. App. 1998) (holding that although a student court, which holds student disciplinary proceedings, is subject to North Carolina Open Meeting Laws, the student court may close its proceedings to the public in conformance with FERPA and not violate the First Amendment. This case would likely produce a different result today, however, because the case was decided on February 17, 1998, which is before the 1998 amendment to FERPA took effect).

[FN126]. 457 U.S. 596, 605 (1982).

[FN127]. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980).

[FN128]. 457 U.S. at 605 (quoting In re Oliver, 333 U.S. 257, 266 (1948)). Note that this finding does not include juvenile records, as juvenile records are viewed in camera for obvious public policy reasons.

[FN129]. 398 F. Supp. 777, 785 (W.D. Mich. 1975).

[FN130]. See id. at 788.

[FN131]. FERPA allows institutions to disclose only the "final results" of a criminal proceeding. Implicit in its language is the prohibition that institutions may not release or make available any information before the final results are determined. Thus, the proceeding itself might be interpreted as part of the process to reach the "final result" and because the final result has not yet been determined, FERPA implicitly prohibits the institution from allowing public access to student disciplinary proceedings. See 20 U.S.C. § 1232g(b)(6)(B). For institutions that conduct closed disciplinary hearings, administrators will likely hide behind this statutory ambiguity to maintain the practice of conducting closed hearings.

[FN132]. See supra notes 94-98.

[FN133]. See Newman v. Graddick, 696 F.2d 796, 803 (11th Cir. 1983).

[FN134]. 435 U.S. 589, 597 (1978).

[FN135]. See id. at 598.

[FN136]. See Belo Broad. Corp. v. Clark, 654 F.2d 423, 433-34 (5th Cir. 1981).

[FN137]. See supra notes 126-28, 134-35 and accompanying text.

[FN138]. The crimes, which must be documented include: murder, forcible or nonforcible sex offenses, robbery, aggravated assault, burglary, motor vehicle theft, manslaughter, arson, alcohol and drug-related offenses, and weapons possessions. 20 U.S.C. § 1092(f)(i).

[FN139]. The only exception to CSA is that the institution may disclose the final results of a disciplinary proceeding involving a violent crime or nonforcible sex offense to the respective victim. See Pub. L. No. 101-542, § 204, 104 Stat. 2381, 2385-87 (1990) (codified as amended at 20 U.S.C. § 1092 (1994)).

[FN140]. See supra note 138.

[FN141]. See supra notes 82-83 and accompanying text. Recall that Lu and Fisher found that fewer than thirty-four percent of the 785 institutions surveyed were in full compliance with CSA.

[FN142]. Although student disciplinary records that are "not criminal in nature" do not raise constitutional problems under FERPA, the statute's scope, which includes all disciplinary records -- both criminal and non-criminal -- renders it unconstitutional because of its overbreadth.

[FN143]. See Newman v. Graddick, 696 F.2d 796, 803 (11th Cir. 1983); Richmond Newspapers v. Virginia, 448 U.S. 555 (1980); Globe v. Superior Court, 457 U.S. 596 (1982); In re Oliver, 333 U.S. 257 (1948).

[FN144]. See Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961). See also Gilmore v. Montgomery, 417 U.S. 556 (1974).

[FN145]. United States v. Virginia, 518 U.S. 515, 599-600 (1996) (Scalia, J. dissenting). Justice Scalia noted that although the receipt of state governmental funding does not make a college or university a state actor for purposes of the Equal Protection Clause, a more difficult and unsettled question is "whether the government itself would be violating the Constitution by providing state support to single-sex colleges." Id. at 599. If this question were to be answered in the affirmative, it is equally clear that a state government would be violating the Constitution if the institution was engaged in any activity that would ordinarily

violate the Constitution. Justice Scalia further noted that "[i]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." Id. (quoting Lee v. Macon County Bd. of Educ., 267 F. Supp. 458, 475-76 (M.D. Ala. 1967)).

[FN146]. It would be beyond the scope of this Note to conduct an in-depth examination of whether the Supreme Court should recognize constitutional guarantees for individuals at private institutions. It is significant to note, however, that the Supreme Court could formulate a doctrine, which would allow constitutional guarantees to apply equally to both public and private institutions. Although it is generally accepted that individuals at private universities do not enjoy constitutional guarantees, this may be a grave mistake. It is well settled that the Fifth Amendment applies to action by the federal government. Through incorporation, the Fourteenth Amendment requires that there be some form of state action in order for the constitutional guarantees to apply. Thus, individuals at public universities, through the Fourteenth Amendment, are subject to constitutional protections because the state satisfies the state action requirement by operating the institution. The common argument why individuals at private institutions do not enjoy constitutional protections is because the state has not acted to trigger the Fourteenth Amendment. See Rendell-Baker v. Kohn, 457 U.S. 830, 839-43 (1982) (holding that a private school's receipt of state money does not in itself render the school a state actor). The answer to this paradox does not lie in the action of the state, however, but in the action of the federal government. While the state must act in "some significant extent" to trigger the Fourteenth Amendment, the Fifth Amendment applies to action by the federal government. See Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961). Under the Fifth Amendment, the Court could formulate a "federal action" doctrine where the federal government must act to some significant extent in order to trigger the Fifth Amendment. The issue of what would constitute federal action is the more difficult question. If the courts recognized a legal distinction between state funding and federal funding, the required federal action could potentially be met by the federal government's extensive funding to nearly every private institution. An alternative issue is whether the federal government itself would be violating the constitution by providing funding to a private institution that is violating the Constitution. See supra note 144. If the Court were to recognize a federal action doctrine through the Fifth Amendment, individuals at private institutions would enjoy the same constitutional guarantees as their public counterparts. Such a doctrine would have sweeping effects on current legal issues such as affirmative action and academic freedom in the private sector. Additionally, a federal action doctrine would definitively render FERPA's application to private institutions unconstitutional for the same reasons as it is unconstitutional in its application to public institutions.

[FN147]. See 20 U.S.C. § 1232g(b)(6)(B) (1994 & Supp. IV 1999). Note that language of FERPA only allows an institution to disclose the records; it does not mandate disclosure.

[FN148]. Lee Shearer, UGA Paper Helped Open Door on Campus Records, Associated Press News Wire, December 16, 1999, available in Westlaw, ALLNEWSPLUS database. See also Ga. Code Ann. § 50-18-70(a) (Supp. 2000). Note that Georgia's open records law is the only open records law in the country that mandates access to all disciplinary records at all public institutions in Georgia, not merely all disciplinary records involving a criminal offense. Note further that Georgia's open records law, which mandates access to all disciplinary records, conflicts with FERPA's provision, which limits releasable information to the "final results" of disciplinary proceedings where the institution determined that the student committed a violent crime or "nonforcible sex offense." See 20 U.S.C. § 1232g(b)(6)(B).

[FN149]. See Shearer, supra note 148 (noting that "a reporter got bucked all the way to a vice president" at Fort Valley State University in Georgia before gaining access to disciplinary records).

[FN150]. Brad Eaton, U. Dayton Judicial Proceedings May Open to Public, THE FLYER NEWS, March 17, 1999, available at 1999 WL 13770973 (statement of Dr. William Schuerman, vice president of student development and dean of students at the University of Dayton, a private institution).

[FN151]. See generally FREDERICK RUDOLPH, THE AMERICAN COLLEGE AND UNIVERSITY: A HISTORY, 369-372 (1962).

[FN152]. See id. at 370.

[FN153]. Goldfarb Testimony, supra note 89, at 24. See also Dana Hawkins, Is there any Justice in Campus Courts?, U.S. NEWS & WORLD REPORT, available at http://www.usnews. com/usnews/edu/college/articles/stcrime.htm (noting that colleges and universities began accepting cases dealing with criminal behavior in the 1960s and 1970s).

[FN154]. Goldfarb Testimony, supra note 89, at 24.

[FN155]. Id.

[FN156]. 680 N.E.2d.956 (Ohio 1997). Additionally, it is significant to consider an example of where a university failed to report a substantial portion of crime, that occurred on its campus. The University of Pennsylvania reported 18 armed robberies in its 1995 annual crime statistics report. According to campus police logs, however, nearly 200 armed robberies occurred in 1995. Although it is unclear whether these offenses were committed by students, and if so, whether they were adjudicated by the University's disciplinary board, this example shows that the majority of these offenses were not reported whatsoever to local law enforcement agencies. See Robyn Gearey, Schools Neglect to Report Crimes Committed on Campus, THE NEW REPUBLIC, Nov. 10, 1997, at 21.

[FN157]. See Hawkins, supra note 153. The study confirms that many judicial affairs staff members lack any substantive legal training and are omitting many or all components of procedural due process. Out of fifty-eight institutions surveyed, the findings indicate "that 36% did not allow cross-examination during proceedings, 55% did not guarantee the student an impartial judge or jury, 60% did not guarantee students the right to confront their accusers, and 91% did not compel witnesses to an alleged crime to testify." Id.

[FN158]. Obviously local law enforcement agencies possess neither the jurisdiction, nor the resources to be burdened with non-criminal student offenses.

[FN159]. See supra notes 152-53 and accompanying text.

[FN160]. See 20 U.S.C. § 1232g(b)(6)(B) (1994 & Supp. IV 1999). An institution may only disclose the final results of a disciplinary proceeding if the institution determines, as a result of the proceeding, that the student committed the offense.

[FN161]. See generally 20 U.S.C. § 1232g.

[FN162]. See § 1232g(b)(6)(B).

[FN163]. See id.

[FN164]. 20 U.S.C. § 1232g(b)(6)(B). For purposes of FERPA, a "crime of violence" is defined as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property may be used in the course of committing the offense." 18 U.S.C. § 16 (West 2000).

[FN165]. See United States v. Raynor, 939 F.2d 191, 196 (4th Cir. 1991) (holding that the offense of breaking and entering of a dwelling is a "crime of violence" under 18 U.S.C.A. § 16 because the offense "involve[d] substantial risk that physical force against the person or property of another might be used" (emphasis in original)).

[FN166]. See United States v. Talbot, 902 F.2d 1129, 1133 (4th Cir. 1990) (holding that burglary and breaking and entering that involved commercial structures were not "crimes of violence"). See also United States v. Diaz, 778 F.2d 86, 88 (2d Cir. 1985) (holding that conspiracy to distribute narcotics and possession with intent to distribute cocaine are not "crimes of violence").

[FN167]. Note further that what one federal circuit determines to be a violent crime in one jurisdiction might not necessarily be determined to be a violent crime in another jurisdiction.

[FN168]. The court in United States v. Miami University seemed to recognize this absurd dichotomy by stating that "[t]he fact that Congress has enacted various narrow provisions permitting the disclosure of student disciplinary records in limited circumstances shows that Congress obviously is concerned with protecting the privacy of disciplinary records." 91 F. Supp. 2d 1132, 1151 (S.D. Ohio 2000).

[FN169]. See 91 F. Supp. 2d at 1144.

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