Commonwealth of Massachusetts
Office of the Attorney General

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Attorney General

CURRENT ISSUES IN CAMPUS LAW ENFORCEMENT

University of Massachusetts - Amherst
January 28, 1993

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Office of the Attorney General
One Ashburton Place,
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January 28, 1993

Dear Participant:

I am pleased to welcome you to the Attorney General's training conference on "Current Issues in Campus Law Enforcement." This is the first conference sponsored by the Attorney General's Office which focuses on the interrelationship between college disciplinary procedures and law enforcement.

Today it is evident that colleges and universities across the Commonwealth are no longer safe havens from the problems of society at large. From incidents of drug and alcohol abuse to date rape to hate crimes, our college campuses have sadly become a reflection of our increasingly troubled society. This conference is designed to provide you with the legal guidance needed to deal effectively with these difficult and complex issues. The afternoon workshops are designed to allow campus law enforcement officers and administrators to meet and discuss problems they are experiencing on their campuses and learn about how other schools have addressed these issues.

I look forward to working with you today and in the future on resolving the problems of crime and violence on our college campuses. I am confident that through training, education and multidisciplinary prevention efforts, we will be able to make our college campuses safer and more secure places in which to learn. Thank you for your participation in this important effort.

Sincerely,

Scott Harshbarger

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22C § 63. Employees of colleges, universities, other educational institutions and hospitals; appointment as special officers

Text of section effective July 1, 1992

The colonel may, upon such reasonable terms and conditions as may be prescribed by him, at the request of an officer of a college, university, other educational institution or hospital licensed pursuant to section fifty-one of chapter one hundred and eleven, appoint employees of such college, university, other educational institution or hospital as special state police officers. Such special state police officers shall serve for three years, subject to removal by the colonel, and they shall have the same power to make arrests as regular police officers for any criminal offense committed in or upon lands or structures owned, used or occupied by such college, university, or other institution or hospital.

Each application for appointment as a special state police officer or a renewal thereof shall be accompanied by a fee, the amount of which shall be determined annually by the commissioner of administration under the provision of section three B of chapter seven.

The colonel may promulgate such rules and regulations as may be necessary to ensure proper standards of skill. Said rules and regulations shall conform to the provisions of chapter thirty A.

Added by St.1991, c. 412, § 22.

41 § 98A. Arrest on fresh and continued pursuit

A police officer of a city or town who is empowered to make arrests within a city or town may, on fresh and continued pursuit, exercise such authority in any other city or town for any offence committed in his presence within his jurisdiction for which he would have the right to arrest within his jurisdiction without a warrant. Said officer may return any person so arrested to the jurisdiction wherein said offence was committed. Nothing contained in this section shall be construed as limiting the powers of a police officer to make arrests and in so far as possible this section shall be deemed to be declaratory of the common law of the commonwealth.

Added by St.1967, c. 263.

41 § 98F

§ 98F. Daily logs; public records

Each police department and each college or university to which officers have been appointed pursuant to the provisions of ~~section ten G of chapter one hundred and forty seven~~ Chapter 22C Section 63 shall make, keep and maintain a daily log, written in a form that can be easily understood, recording, in chronological order, all responses to valid complaints received, crimes reported, the names, addresses of persons arrested and the charges against such persons arrested. All entries in said daily logs shall, unless otherwise provided in law, be public records available without charge to the public during regular business hours and at all other reasonable times.

Added by St.1980, c. 142. Amended by St.1991, c. 125.

§ 98G. Domestic abuse; police reports

Any city, town or district police department which requires an investigating police officer to make a report concerning an incident, offense or alleged offense investigated, or any arrest made, on a form provided by the department, shall include on said form a space to indicate whether said incident, offense, alleged offense or arrest involved abuse as defined in section one of chapter two hundred and nine A.

Added by St.1987, c. 93, § 2.

M.G.L. c.73, Section 18

73 § 18. Control, movement and parking of motor vehicles

The trustees shall make rules and regulations for the control, movement and parking of vehicles on the campus or other land of a state college and may provide reasonable penalties for the violation of said rules and regulations. The trustees may appoint as police officers persons in the employ of such college who in the enforcement of said rules and regulations and throughout the property of such college shall have the powers of police officers, except as to service of civil process. Notwithstanding any other provision of law, all fines and penalties recovered for violation of rules and regulations made under authority of this section shall be accounted for by the clerk of the court and forwarded to the trustees of the division of state colleges who shall deposit the same in the scholarship trust fund of such college for scholarship purposes.

Added by St.1963, c. 642, § 15.

M.G.L. c. 75, Section 32A

75 § 32A. Control, movement and parking of motor vehicles

The trustees shall make rules and regulations for the control, movement and parking of vehicles on the campus of the university and on other land of the university, and may provide reasonable penalties for the violation of said rules and regulations. The trustees may appoint as police officers persons in the employ of the university who in the enforcement of said rules and regulations and throughout university property shall have the powers of police officers, except as to service of civil process. Notwithstanding any other provision of law, all fines and penalties recovered for violation of rules and regulations made under authority of this section shall be accounted for by the clerk of the court and forwarded to the trustees of the university to be deposited in the scholarship trust fund of the university for scholarship purposes.

Added by St.1962, c. 648, § 2.

The Interrelationship Between Campus Discipline Proceedings and the Prosecution of a Criminal Case

January 28, 1993

CASE SCENARIO

Karen is a senior at Hills University, located in an urban campus in Massachusetts. She is currently attending college on a full engineering scholarship and has a promising future as an electrical engineer - she has already received job offers from several major aerospace firms. She lives in the Seniors Honor Dorm.

Doug is a senior at Valley College, located in a neighboring suburb near Hills University. Doug is a senior majoring in computers and is working part-time to fund his education. Doug lives in a fraternity on campus.

Karen and Doug met at a party in January of 1992. At the time, Karen had just broken up with a long-time boyfriend, and Doug was dating several girls on a regular basis. Karen and Doug began to see each other regularly, and by March, 1992, were seeing each other exclusively.

On April 1, 1992, Karen and Doug went to a party in Karen's dorm, where both drank heavily. During the party, Doug became angry that Karen was spending "too much" time with her male friends. Karen laughed at him and told him to "get a life." Doug became verbally abusive, and demanded that she leave the party with him. Friends intervened and calmed Doug down. Doug went to sleep in a friend's room for the night and the party continued.

On April 10, 1992, Doug showed up unannounced at Karen's dorm. He accused her of seeing her ex-boyfriend behind his back. When Karen denied it and tried to walk away from him, he grabbed her by the hair and threw her to the ground. He said, "If I see you with Mike, it's over between us." Doug then left.

Later that day, Karen told her best friend, Nancy, about the incident and swore that she had not seen Mike since she and Doug had started dating. Nancy was concerned about Doug's behavior and advised Karen to break up with Doug.

Kathy also discussed the incident with the Resident Advisor who was very sympathetic but said that since Doug wasn't a student at the school there wasn't much she could do.

Karen did not see Doug again after the incident on April 10, 1992. However, between April 13, and April 25, she received 50 hang-up calls. She suspected that Doug was checking up on her. During this same period of time, her

ex-boyfriend, Mike told her that he had seen Doug around his (Mike's) apartment building late at night. Karen decided to tell Doug to leave her and her friends alone.

On April 26, 1992, Karen invited Doug to her dorm room, where she told Doug that she wanted to have nothing more to do with him. Doug became enraged, accused her of cheating on him with Mike, and grabbed her by the shoulders and began to shake her. Doug slapped her, slammed her head against the wall, and then began to kick her in the ribs. She threatened to call the police if he didn't stop. Doug started to cry and apologized. He told her that it would never happen again, and that he was upset because he loved her so much and did not want to lose her.

The campus police were called by dorm residents who heard Karen's screams. When the police arrived, Karen was upset and crying. However, Karen and Doug told the campus police that they would work it out themselves. The campus police warned Doug that if they are called again, they would arrest him. The police left and there was no further violence that evening.

From April 26, 1992, through June 1, 1992, there were no further incidents of violence between Karen and Doug. They saw each other at least twice a week and he was the "perfect boyfriend." Doug persuaded Karen to spend the summer at Hill University to finish up a research project. She agreed but decided to live in the dorm.

On June 1, 1992, Doug and Karen, while on a hike in State Forest, started arguing over a letter that Karen received from Mike, her ex-boyfriend. Doug lunged at Karen, and knocked her to the ground. He slapped her face, arms, and legs, leaving numerous bruises. He grabbed Karen around the neck and screamed that she should die for lying to him. He told her that he had a gun in his room and that if she left him, he would find her and kill her. Karen, in fear of her life, promised Doug she would never leave him and he let her go.

After this incident, Karen wanted nothing more to do with Doug, and remained away from him. She did not return his repeated phone calls and she told the Resident Director that he was not to be allowed into the dormitory.

Karen began to receive hang-up calls in the middle of the night which she reported to the Resident Director. She saw Doug waiting outside of the research lab where she worked and around the student union two or three days in a row. Her best friend, Nancy, told her that Doug had been calling her to see if Karen was there. Her ex-boyfriend, Mike, told Karen that his car tires had been repeatedly punctured and that he had also been receiving hang-up calls. Karen went to the campus police.

WORKSHOP MATERIALS

Hate Crimes and Police Liability

§ 11H. Violations of constitutional rights; civil actions by attorney general; venue

Whenever any person or persons, whether or not acting under color of law, interfere by threats, intimidation or coercion, or attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, the attorney general may bring a civil action for injunctive or other appropriate equitable relief in order to protect the peaceable exercise or enjoyment of the right or rights secured. Said civil action shall be brought in the name of the commonwealth and shall be instituted either in the superior court for the county in which the conduct complained of occurred or in the superior court for the county in which the person whose conduct complained of re 'des or has his principal place of business.

Added by St.1979, c. 801, § 1. Amended by St.1982, c. 634, § 4.

§ 11J. Violations of constitutional rights; temporary restraining orders and injunctions; violations; punishment; vacation of order

In actions brought pursuant to section eleven H or eleven I, whenever the court issues a temporary restraining order or a preliminary or permanent injunction, ordering a defendant to refrain from certain conduct or activities, the order issued shall contain the following statement: VIOLATION OF THIS ORDER IS A CRIMINAL OFFENSE.

After any such order has been served upon the defendant, any violation of such order shall be punishable by a fine of not more than five thousand dollars or by imprisonment for not more than two and one-half years in a house of correction, or both such fine and imprisonment; provided, however, that if bodily injury results from such violation, the violation shall be punishable by a fine of not more than ten thousand dollars or by imprisonment for not more than ten years, or both.

The clerk shall transmit two certified copies of each such order issued under section eleven H or eleven I to each appropriate law enforcement agency having jurisdiction over locations where such defendant is alleged to have committed the act giving rise to the action, and such law enforcement agency shall serve one copy of the order upon such defendant. Unless otherwise ordered by the court, service shall be by delivering a copy in hand to the defendant. Law enforcement agencies shall establish procedures adequate to ensure that all officers responsible for the enforcement of the order are informed of the existence and terms of such order. Whenever any law enforcement officer has probable cause to believe that such defendant has violated the provisions of this section, such officer shall have the authority to arrest said defendant.

Following the final disposition of a criminal contempt proceeding initiated by the attorney general for violation of an order issued in an action brought by the attorney general under section eleven H, the commonwealth shall move to dismiss any charges brought under this section against such defendant for such violation of the order.

Whenever the court vacates a temporary restraining order or a preliminary or permanent injunction issued under section eleven H or eleven I, the clerk shall promptly notify in writing each appropriate law enforcement agency which had been notified of the issuance of the order and shall direct each such agency to destroy all record of such vacated order, and such agency shall comply with such directive.

Added by St.1985, c. 619.

GENERAL LAWS c. 265, § 37

No person, whether or not acting under color of law, shall by force or threat of force, willfully injure, intimidate or interfere with, or attempt to injure, intimidate, or interfere with, or oppress or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the Commonwealth or by the constitution or laws of the United States. Any person convicted of violating this provision shall be fined not more than one thousand dollars or imprisoned not more than one year or both; and if bodily injury results, shall be punished by a fine of not more than ten thousand dollars or by imprisonment for not more than ten years, or both.

If no bodily injury results, violation of this statute is a misdemeanor with no statutory right of arrest. If could, however, be arrestable if a breach of the peace takes place in the officer's presence.

ELEMENTS OF GENERAL LAWS c. 265 § 37

Commonwealth must establish:

1. That a person (the defendant) by force or threat of force,
2. Willfully,
3. Injures, intimidates, or interferes with, or attempts to injure, intimidate, or interfere with, or oppresses or threatens,
4. Any person in the free exercise or enjoyment of any right or privilege secured by the constitution or laws of the United States or the Commonwealth.
5. For a felony, bodily injury results.

Instruction 5.69
Issued December, 1983
CIVIL RIGHTS ACT (G.L. c. 265, s. 37)

The defendant is charged with violating the Massachusetts Civil Rights Act, G.L. c. 265, s. 37. In order to find the defendant guilty of this crime, the Commonwealth must prove the following elements beyond a reasonable doubt:

First: That the defendant used force or threat of force.

Second: That (victim's name) was exercising or enjoying a right or privilege secured to him by the constitution or laws of the Commonwealth of Massachusetts or of the United States.

Third: That the defendant either injured, intimidated, interefered with, oppressed, or threatened [or attempted to injure, intimidate, or interfere with] [victim]'s exercise or enjoyment of a secured right.

Fourth: That the defendant was acting wilfully.

Force. "Force" means physical force. **Comm. v. Mosby** 163 Mass. 291, 294, 39 N.E. 1030 (1895).

The amount of force actually used does not matter. Even a minimal amount of force is sufficient. **Comm. v. Jones**, 362 Mass. 83, 87-90, 283 N.E.2d 840, 843 (1972).

Force used against a person and force used against property are both considered "force." **Comm. v. Richards**, 363 Mass. 299, 302, 293 N.E.2d 854, 857 (1973); **Low v. Elwell**, 121 Mass. 309 (1876).

Threat of Force. A threat of force is an expression of an intention to use force which is communicated to the victim. The person making the threat must appear to the victim to have the physical capability of carrying out the threat. This capability must be viewed objectively, not

through the eyes of the victim. **Comm. v. Chalifoux**, 362 Mass. 811, 816, 291 N.E.2d 635, 638 (1973); **Comm. v. Corcoran**, 252 Mass. 465, 483-484, 148 N.E. 123, 127 (1925).

Exercise of Right. A person is exercising or enjoying a right or privilege secured by the constitution or laws of the Commonwealth or of the United States if that person's behavior or interest is guaranteed by a provision of state or federal constitutional or statutory law. I instruct you that [specify constitutional or statutory provision] secures to [specify persons protected] the right to [specify right]. The victim does not have to know that the law provides him with that right. Nor does the victim have to know that he or she is in fact exercising the right.

Injure, Intimidate, Interfere with, Oppress, or Threaten. To injure, intimidate, interfere with, oppress, or threaten another person in the free exercise or enjoyment of a right or privilege means in general to impede or prevent the full and free benefit of that right. The victim need not be completely prevented from exercising the right, just hampered in exercising it. To intimidate means to put in fear. To interfere means to hamper, hinder, disturb, intervene or intermeddle in any way in the affairs of another. To oppress means to use authority or power abusively or excessively. To threaten means to express an intention to harm another's person or property. Proof that the defendant negatively affected the victim's rights in any one of these ways satisfies this element.

Attempt to Injure, Intimidate or Interfere With. Proof of an attempt to injure, intimidate, or interfere with another person in the free exercise or enjoyment of a right or privilege requires proof of two things:

First: That the defendant took a step towards interfering with the victim's rights; and

Second: That the defendant did so with a specific intention or purpose to interfere with that right.

Neither the defendant's intent alone nor his making preparations to injure, intimidate, or interfere by itself is enough. You must find that the defendant's act was designed to interfere with the victim's rights, and that this overt act came reasonably close to doing so, although it did not result in this instance in interference with the victim's rights. **Comm. v. Ware**, 375 Mass. 118, 120, 375 N.E.2d 1183, 1184 (1978); **Comm. v. Gosselin**, 365 Mass. 116, 121, 309 N.E. 2d 884, 888 (1974); **Comm. v. Peaslee**, 177 Mass. 267, 271-274, 59 N.E.55, 56 (1901); **Comm. v. Burns**, 8 Mass. App. Ct. 192, 392 N.E.2d 865, 867-868 (1979).

Wilfully. (A) The defendant's act must have been done wilfully. An act is done wilfully if it is done voluntarily and intentionally, that is to say not accidentally, or if it is done recklessly and wantonly. **Comm. v. Welansky**, 316 Mass. 397-98, 55 N.E.2d 902, 911-912 (1944).

(B) The defendant's act must have been done wilfully in the sense that it was either done with the purpose of interfering with the victim's enjoyment of the interests protected by the right to [specify right] or was done on account of the victim having exercised that right. The defendant did not have to know that the right to [specify right] exists or that it is protected by the constitution or laws of Massachusetts or the United States. The defendant need only have intended to affect negatively the activities or benefits which are secured by the right to [specify right]. **United States v. Erlichman**, 546 F.2d 910, 921 (D.C. Cir. 1976), **cert. den.**, 429 U.S. 1121 (1977); **see** also **Screws v. United States**, U.S. 91, 101-107 (1945).

The defendant's intent cannot be proved directly because there is no way of directly revealing the operations of the human mind. But you may determine the defendant's intent from all the circumstances surrounding his conduct. These circumstances include any statement made by the defendant or any act done by him, and all other facts, events, and circumstances in evidence which indicate his state of mind. These circumstances include the defendant's prior statements and conduct with respect to the victim or the victim's class. **Comm. v. Correia**, 381 Mass. 65, 83, 407 N.E.2d 1216, 1228 (1980); **Comm. v. Niziolek**, 380 Mass. 513, 527-28, 404 N.E.2d 643, 651 (1980); **Comm. v. Imbruglia**, 377 Mass. 682, 695-696, 387 N.E.2d 559, 567 (1979).

If you find that the defendant used force or threat of force wilfully to interfere with [victim's name] exercise of his right to [specify right] or to intimidate, threaten or oppress [victim's name] in the free exercise of that right, then you must find the defendant guilty of violating his rights secured by the Civil Rights Act.

See Motes v. United States, 178 U.S. 458, 462-463 (1900).

NOTE

The foregoing charge was proposed by the Office of the Attorney General and is recommended for use in the District Court. References to bodily injury have been deleted for jurisdictional purposes.

Article I of the Declaration of Rights of the Constitution of Massachusetts provides:

> All people are born free and equal and have certain natural essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; . . . that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.

The Massachusetts statute is patterned after 42 U.S.C. s. 1983 which provides for the imposition of civil liability on every person who under color of law deprives another of his civil rights secured by the constitution and laws of the United States. It should be noted that the forbidden action must be one taken under color of law, while the provisions of G.L. c. 265, s. 37 apply to conduct whether or not the same constituted an act "under color of law." It should be further noted that s. 37 apply to conduct where force or threat of force is an element, contrasted with s. 1983 where force is not necessarily an element.

General Laws c. 265, s. 37 is a misdemeanor within the jurisdiction of the District Court unless bodily injury results as a result of the civil rights violation, in which event the violation becomes a felony and not within the jurisdiction of the District Court.

[See Instructions on Threats and Attempts]

SELECTED SECURED RIGHTS

Fair Housing Rights. The right to own, rent, and occupy housing with discrimination or other manner of denial because of race, color, religion, sex, or national origin is guaranteed by the federal Fair Housing Act of 1968. 42 U.S.C. s. 3601 **et seq.**; **Trafficante v. Metropolitan Life Inst. Co.**, 409 U.S. 205 (1972).

The right to occupy and enjoy housing is protected against racially motivated interference, regardless of whether the interference is caused by owners of the property or by third persons who have no connection with the leasing or selling of the housing. **Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights**, 558 F.2d 1283, 1294 (7th Cir. 1977), **cert. den.**, 434 U.S. 1025 (1978).

Black citizens have the same right to inherit, purchase, lease, sell, hold, and convey residential property that white citizens have. 42 U.S.C. s. 1982.

This means that black persons have the right to live wherever white persons have the right to live, and cannot lawfully be prevented from exercising this right on the grounds of race. **Jones v. Alfred H. Mayer Co.**, 392 U.S. 409, 443 (1968).

White persons have the right to associate with black persons and have black guests in their homes without discrimination or interference. **Tillman v. Wheaton-**

Haven Recreation Ass'n., 410 U.S. 431, 439-40 (1973).

Transportation and Travel Rights and Access to Public Accommodations. The Massachusetts Public Accommodations Law guarantees to all persons the full and equal use of all places of public accommodations free from any distinction, discrimination, or restriction on account of race, color, religious creed, national origin, sex, deafness, blindness, ancestry, or any physical or mental disability. G.L. c. 272, ss. 92A, 98.

Public Transportation. Public transportation vehicles (such as MBTA buses, subway cars, and streetcars) and bus stops and subway stations and platforms are all places of public accommodations covered by the law. G.L. c. 262, s. 92A.

Public Facilties, Streets, and Sidewalks. Public facilities such as parks, playgrounds, government buildings, public beaches, highways, streets, and sidewalks are all places of public accommodations covered by the law. G.L. c. 272, s. 92A.

***Private* Establishments Open To The Public.** Privately owned facilities (such as stores, restaurants, taverns, gas stations, theaters, and arcades) which are open to the public and which solicit or accept the patronage of the general public are also places of public accommodations covered by the law. G.L. c. 272, s. 92A; 804 CMR s. 5.01 (1979).

Right to Travel. Under the United States Constitution, all persons have a right to travel freely between the states. **Griffin v. Breckenridge,** 403 U.S. 88, 105-06 (1971).

Right to Perform Employment Duties. The right to work without discrimination because of race, color, religious creed, national origin, or ancestry is a right and privilege of all inhabitants of the Commonwealth. St. 1946, c. 368, s. 1.

All persons are guaranteed the same right to make and perform employment contracts as the right enjoyed by white citizens. 42 U.S.C. s. 1981; **Johnson v. Railway Express Agency**, 421 U.S. 454, 459-60 (1975).

This federal right is violated by third parties who have no connection with a person's job or employer, who interfere with a person's right to make a living on account of race.

Vietnamese Fishermen's Assoc. v. Knights of the Ku Klux Klan, 518 F. Supp. 993, 1008 (S.D. Tex 1981); **Wallace v. Brewer**, 315 F. Supp. 431, 4558 n. 51 (M.D. Ala. 1970).

It is an unlawful discriminatory practice for any employer or his agent to discriminate against an applicant or employee in compensation or terms, conditions, or privileges of employment because of race, color, religious creed, national origin, sex, age, or ancestry or for any person to aid, abet, incite, compel, or coerce such discrimination. G.L. c. 151B, s. 4.

Religious Exercise. The right to free exercise of religion is secured by Articles 2 and 3 of the Declaration of Rights of the Massachusetts Constitution and by the First Amendment to the United States Constitution. This right protects religious worship, religious practices, meetings for these purposes, and ownership and use of buildings and other property for religious purposes. It protects the religious activities of individuals, congregations, and their spiritual leaders. Mass. Const., Pt. 1, arts. 2, 3; U.S. Const., Am. 1, 14.

Voting. The right to elect public officials and to be elected to public office is guaranteed by Article 9 of the Massachusetts Declaration of Rights. **Batchelder v. Allied Stores Int'l**, 388 Mass. 83, 445 N.E.2d 590 (1983).

Right to Nonsegregated Education. Public school students have a right to attend school and be educated without discrimination or segregation on account of race, under state and federal law. U.S. Const., Amend. 14; **Brown v. Bd. of Education**, 347 U.S. 483 (1954); Mass. Const., Art. 1; G.L. c. 76, s. 5.

A student's exercise of the right to nonsegregated education as secured by the Equal Protection Clauses of the Massachusetts and United States constitutions is interfered with by conduct which intentionally prevents the student from attending a nonsegregated school and from enjoying all its advantages, or which intimidates or punishes that student on account of his or her attendance at a nonsegregated school.

Right To Personal Security. All persons have the same right to the full and equal benefit of all laws and proceedings for the security of persons and property that is enjoyed by white citizens. U.S. U.S.C. s. 1981.

This right is violated by racially motivated violence. **Mahone v. Waddle**, 564 F.2d 1018 (3rd Cir. 1977), cert. den., 438 U.S. 904 (1978).

This right is violated by violence against a person who is selected as a victim and harmed because of his race.

This right is violated by violence against a person which is greater in degree or in kind because of the victim's race.

This right is violated by racially motivated violence by private persons, that is, persons who are not acting in any official, governmental capacity. **Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan**, 518 F. Supp. 993, 1008-09 (S. Tex. 1981); **Gannon v. Action**, 303 F.Supp. 1240, 1244-45 (E.D. Mo. 1969), **aff'd**, 450 F.2d 1227 (8th Cir. 1971).

Right To Due Process From Law Enforcement Officials. The use of excessive force by law enforcement officials is a violation of one's civil rights. **Human Rights Comm'n of Worcester v. Assad**, 370 Mass. 482, 487, 349 N.E. 2d 341, 344-345 (1976).

Officials such as police officers or corrections officers may use reasonable force to overcome resistance by a person who they are taking custody or holding in custody, but they cannot use unreasonable force. **Landrigan v. City of Warwick**, 628 F.2d 736, 741-42 (1st Cir. 1980); **United States v. Villarin Gerena**, 553 F.2d 723, 724 (1st Cir. 1977).

The constitutional right to due process under the Fourteenth Amendment includes the right not to be treated with unreasonable, unnecessary or unprovoked force by those charged by the state with the duty of keeping accused persons or convicted offenders in custody. **United States v. McQueeney**, 674 F.2d 109, 113 (1st Cir. 1982) (quoting **U.S. v. Stokes**, 506 F.2d 771, 776 (5th Cir. 1975)); **United States v. Golden**, 671 F.2d 369, 370 (10th Cir. 1982).

A police officer making an arrest may use only such force as is reasonably necessary to effect an arrest or to defend himself or others from bodily harm. **United States v. McQueeney**, 674 F.2d 109, 113 (1st Cir. 1982).

It is for the trier of fact to determine what force is reasonable under the circumstances. **Comm. v. Young**, 326 Mass. 597, 603, 96 N.E.2d 133, 136 (1950).

Reasonable force is that force which an ordinary prudent person would deem necessary under the circumstances. It does not include force which continues after the need for such force is gone. Any force beyond such reasonable force is excessive force and is illegal force. **Powers v. Sturtevant**, 199 Mass. 265, 266, 85 N.E. 84 (1908).

The right to due process of law guarantees to persons under arrest a criminal trial in a court of law, not a "trial by ordeal" in which the law enforcement official takes the law into his own hands and acts as prosecutor, jury, judge, and executioner. **Screws v. United States**, 325 U.S. 91, 106 (1945).

The defendant's intent to deprive an arrested person of his right to a trial before being punished need not be expressed, but may be reasonably inferred from all the circumstances. Id.

Under state law, correction officials may use only reasonable force in controlling prisoners. G.L. c. 124, s. 1(b), 1(g); 103 CMR 505.05 (5), 505.06.

Under the Fourteenth Amendment to the United States Constitution, the state cannot hold and physically punish a person and thereby deprive him of liberty without due process of law. **Ingraham v. Wright**, 430 U.S. 651, 673 (1977).

A mental patient has a constitutional right to basically safe and humane living conditions which include the protection of the patient from assault by staff members. **Goodman v. Parwatikar**, 570 F 2d 801, 804 (1978).

Under the Eighth and Fourteenth Amendments, there is a basic right of a person held in confinement by the state to be protected from assault by staff members. **New York State Association v. Rockefeller**, 357 F.Supp. 752, 764-765 (E.D. N.Y. 1979). See also **Welsch v. Likins**, 373 F.Supp. 487, 502-503 (D. Minn. 1974); **Harper v. Caerr**, 544 F.2d 1121 (1976).

PROVING A VIOLATION OF THE MASSACHUSETTS CIVIL RIGHTS ACT, G.L. c.265, §37

Anthony P. Sager

I. INTRODUCTION: THE ELEMENTS OF THE OFFENSE

The criminal provision of the Massachusetts Civil Rights Act, G.L. c.265, §37,[1/] requires proof of the following elements:

1. A person who interferes with another's exercise of his rights.

2. That person's use of force or threat of force.

3. That person (a) injures, intimidates, or interferes with or (b) attempts to injure, intimidate, or interfere with another's exercise of rights.

4. Another person is exercising or enjoying a protected right.

1/ General Laws c.265, §37, as inserted by St. 1979, c.801, §2, provides:

> No person, whether or not acting under color of law, shall by force or threat of force, willfully injure, intimidate or interfere with, or attempt to injure, intimidate or interfere with, or oppress or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the commonwealth or by the constitution or laws of the United States. Any person convicted of violating this provision shall be fined not more than one thousand dollars or imprisoned not more than one year or both; and if bodily injury results, shall be punished by a fine of not more than ten thousand dollars or by imprisonment for not more than ten years, or both.

5. The right is secured to the other person by the constitution or laws of the Commonwealth or the constitution and laws of the United States.

6. The perpetrator acts willfully.

In deciding whether or not to charge under the Act, a prosecutor or police officer must determine whether each element is proven by the available facts. Often, facts beyond those reported in the initial incident report are necessary to prove that the conduct was done with an intent to interfere with the exercise of a protected right. For example, other incident reports involving the same perpetrator's use of racial epithets, his past misconduct, etc., should be reviewed.

II. DEFINITIONS OF STATUTORY TERMS

A. Person

A "person" includes natural persons and also corporations, societies, associations and partnerships. See G.L. c.4, §6, twenty-third.

B. Force

"Force" is defined as, among other things:

> a: power, violence, compulsion, or constraint exerted upon or against a person or thing..... b: strength or power of any degree that is exercised without justification or contrary to law upon a person or thing...c: violence or such threat or display of physical aggression toward a person as reasonably inspires fear of pain, bodily harm, or death...

Webster's Third New International Dictionary (1964) at 887.[2/] Under Massachusetts case law, "force" may be applied against a person, see, e.g., Commonwealth v. Richards, 363 Mass. 299, 302 (1973)(and cases cited), or against property, see, e.g., Low v. Elwell, 121 Mass. 309 (1876).

"Force" includes personal violence. See, e.g., Sampson v. Smith, 15 Mass. 365, 367-69 (1819). But the amount of force actually used is not material, that is, it can be minimal. See Commonwealth v. Goldenberg, 338 Mass. 337, 383 (1977)(force sufficient for rape conviction can be merely so much force as is necessary to effect carnal intercourse, as upon a sleeping or drugged woman); Commonwealth v. Jones, 362 Mass. 83, 87-90 (1972)(amount of force necessary to snatch a woman's purse is sufficient for robbery by force).

Two analogous federal criminal statutes protecting civil rights employ the term "force or threat of force". Title 18, U.S.C. §245(b), added by §101(a) of Title I of the Civil Rights Act of 1968, Pub.L. 90-284, 82 Stat. 73, penalizes interference "by force or threat or force" with certain federally protected rights. The Supreme Court has said that "[this] provision on its face focuses on the use of force, and its legislative history confirms that its central purpose was to prevent and punish violent interferences with the exercise of specified

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2/ The Model Penal Code does not define "force", but distinguishes between "unlawful force" generally and "deadly force" in particular. See Model Penal Code §3.11, 10 Uniform L. Anno. (1974) at 490.

rights . . . " Johnson v. Mississippi, 421 U.S. 213, 224 (1975). Section 901 of the Fair Housing Act, 18 U.S.C. §3631, added by Title IX of the Civil Rights Act of 1964, Pub.L. 90-284, 82 Stat.89, as amended by Pub.L.93-383, Title VIII, §808(b)(4), 88 Stat. 729, penalizes interference "by force or threat of force" with housing rights. It was held to be violated by Klansmen's shooting into blacks' homes. See United States v. Johns, 615 F.2d 672, 674-75 (5th Cir.), cert. denied 449 U.S. 829 (1980).

C. Threat of Force

In Commonwealth v. Chalifoux, 362 Mass. 811, 816 (1973), the Supreme Judicial Court cited Robinson v. Bradley, 300 F.Supp. 665, 668 (D.Mass.1969) "for the meaning of 'threat'". The Robinson case there states:

> The word "threat" has a well established meaning in both common usage and in the law. It is "the expression of an intention to inflict evil, injury, or damage on another". Webster's New International Dictionary, n.1 (1966 ed. unabridged). In law "threat" has universally been interpreted to require more that the mere expression of intention. It has, in fact, been interpreted to require both intention and ability in circumstances which would justify apprehension on the part of the recipient of the threat.

Id. (citations omitted).

D. Willfully

"Willfully" generally means intentionally. See

Commonwealth v. Welansky, 316 Mass. 383, 397(1944).[3/] However, as used in a civil rights statute protecting the exercise of unspecified rights secured by the Constitutions and laws of the United States and of the Commonwealth, it will most likely be construed to require proof of a specific intent to interfere with a protected right. Without a specific intent requirement, a defendant could be convicted under §37 for interfering with a right he could not, as a matter of fact, have known that the victim was exercising.

Federal courts, construing the term "willfully" as it appears analogous federal criminal civil rights statutes, have construed it to require specific intent. See, e.g., Screws v. United States, 325 U.S. 91, 101-107 (1945)(18 U.S.C. §242); United States v. Griffin, 525 F.2d 710, 712 (1st Cir. 1975), cert.denied 424 U.S. 945 (1976)(18 U.S.C. §245(b)). Cf. United States v. Price, 383 U.S. 787, 806 n.20(1966)(specific intent requirement read into 18 U.S.C. §241). However, federal courts have not been entirely consistent in deciding just what evidence is sufficient to prove a specific intent to deprive of a protected right. Compare, e.g., United States v. McClean, 528 F.2d 1250, 1255 (2nd Cir. 1976)(evidence of willful extortion of money by police officers from narcotics dealers is sufficient to prove intention to deprive of due process of

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3/ Cf. United States v. Pomponio, 429 U.S. 10, 12 (per curiam), reh.denied 429 U.S. 987 (1976)(willful filing of false tax return proven by voluntary and intentional violation of known legal duty).

law), and Apodaca v. United States, 188 F.2d 932 (10th Cir. 1951)(intent proven by willingness to commit act charged) with, e.g., United States v. Shafer, 384 F.Supp. 496, 499-503 (D.Ohio 1974)(evidence insufficient to prove that national guardsmen who shot Kent State students intended to deprive victims of constitutional rights).

Nevertheless, it is clear that for a defendant to be convicted of infringing a protected right, it is not necessary to show that he was "thinking in constitutional terms", but simply that his "aim was...to deprive a citizen of a right and that right was protected...." Screws, 325 U.S., at 106. Accord, U.S. v. McClean, 528 F.2d, at 1255. The defendant "need not know the exact extent, or the [source] of that right". U.S. v. Griffin, 525 F.2d, at 712. The factual question for the jury has been framed as follows:

> Did the defendant commit the act in question with the particular purpose of depriving the...victim of his enjoyment of the interests protected by [the] right?

United States v. Erlichman, 546 F.2d 910, 921 (D.C.Cir.1976), cert. denied 429 U.S. 1120 (1977).

Specific intent, as a necessary element of an offense, may be inferred from the circumstances. E.g., Commonwealth v. Correia, Mass. Adv. (1980) 1601, 1619. In Screws, the Court noted that the requisite specific intent "may at times be reasonably inferred from all the circumstances attendant upon the act", 325 U.S., at 106, such as "the malice of

[defendants], the weapons used in the assault, its character and duration, the provocation, if any, and the like". Id., at 107. The facts in the Griffin case illustrate this. The defendant was indicted under 18 U.S.C. §245(b) for willfully injuring a person in order to intimidate any other persons from attending a public school without discrimination on account of race or color. The evidence showed that the defendant was in a crowd at an intersection through which school buses usually passed, near a public school in South Boston. Objects were thrown from the crowd and the defendant shouted such things as "Where are the (obscene) niggers?" When a black man drove his car through the intersection before any buses had arrived, the crowd stopped him and the defendant beat him with a club. The victim was neither a student nor a parent or in any way connected with any Boston public school, and no buses were in the area. The court held that the evidence was sufficient to convict under §245(b), and said:

> Given the circumstances, the jury could well find that defendant intended the indiscriminate beating of an innocent black on the public street near a school at school release time, with the police unable to prevent it, to have a chilling effect upon other blacks, parents or children.

525 F.2d, at 712.

In addition, the intent necessary for a violation of federal civil rights statutes need not be the sole or primary purpose of the defendants' actions; it must only be one of their purposes. See Anderson v. United States, 417 U.S. 211,

226 (1974)(conspiracy); United States v. Ellis, 595 F.2d 154, 162 (3rd Cir.1979)(same). The Massachusetts statute should be similarly construed.

As an illustration, assume that a white man comes upon a black man who is standing on the sidewalk of a residential street. The white shouts, "Get out of here, nigger", and beats the black man. Just before the white arrived, and not seen by him, the black had walked out of his house and onto the sidewalk. From these facts it is clear that the victim was attacked because of his color and his presence on the sidewalk. It need not be proved that the white knew his victim had a right to use the sidewalk under the Massachusetts Public Accommodations Law, G.L. c.272, §§92A, 98. These facts are sufficient to prove a violation of the Civil Rights Act. However, a violation of the Act could not be sustained for an interference with the victim's exercise of housing rights under the Fair Housing Act, 42 U.S.C. §§3604, 3617, or under 42 U.S.C. §1982, because it cannot fairly be inferred from these facts that the white knew that the victim was doing anything in connection with his housing.

Lastly, it should be noted that specific intent has been required in applying analogous federal civil rights statutes in order to avoid a serious problem of unconstitutional vagueness. See Screws, 325 U.S., at 94-107. For example, 18 U.S.C. §242 penalizes the deprivation of broad constitutional

rights, such as those guaranteed by the Due Process, Equal Protection, and Privileges and Immunities Clauses. The specific intent which has been there required is "an intent to deprive a person of a right which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them". Id., at 104. This requirement presents "a purely legal determination" for the trial court: "Is the constitutional right at issue clearly delineated and plainly applicable under the circumstances of the case?" U.S. v. Erlichman, 546 F.2d, at 921. In most conceivable prosecutions under G.L. c.265, §37, however, the right allegedly interfered with will be a well defined statutory right, not a broad constitutional right. Therefore the vagueness problem addressed in Screws will not be present.

GENERAL LAWS c. 265, § 39

Whoever commits an assault or a battery upon a person or damages the real or personal property of another for the purpose of intimidation because of said person's race, color, religion, or national origin, shall be punished by a fine of not more than five thousand dollars or not more than three times the value of the property destroyed or damaged, whichever is greater, or by imprisonment in a house of correction for not more than two and one-half years, or both.

Violation of this statute is a misdemeanor. There is no statutory right of arrest for this offense. If, of course, the act is committed in the officer's presence and it constitutes a breach of the peace, it will be an arrestable offense.

ELEMENTS OF GENERAL LAWS c. 265, § 39

Commonwealth must establish:

1. That whoever (the defendant) commits an assault or a battery upon a person OR damages the real or personal property of another,
2. For the purpose of intimidation,
3. And that intimidation was intended because of said victim's race, color, religion, or national origin.

GENERAL LAWS c. 266, § 127A

Any person who willfully, intentionally and without right, or wantonly and without cause, destroys, defaces, mars, or injures a church, synagogue or other buildings, structure or place used for the purpose of burial or memorializing the dead, or a school, educational facility or community center for the grounds adjacent to and owned or leased by any of the foregoing or any personal property contained in any of the foregoing shall be punished by a fine of not more than two thousand dollars or not more than three times the value of the property so destroyed, defaced, marred or injured, whichever is greater, or by imprisonment in a house of correction for not more than two and one-half years, or both; provided, however, that if the damage to or loss of such proper- exceeds five thousand dollars, such person shall be punished by a fine of not more than three times the value of the property so destroyed, defaced, marred or injured or by imprisonment in a state prison for not more than five years, or both.

Violation of this statute is a misdemeanor unless the actual damage to or loss of property exceeds five thousand dollars. The misdemeanor offense is only arrestable if it constitutes a breach of the peace committed in the officer's presence.

ELEMENTS OF GENERAL LAWS c. 266, § 127A

Commonwealth must establish:

1. That any person (the defendant),
2. willfully, intentionally and without cause OR wantonly and without cause,
3. Destroys, defaces, mars or injures,
4. A church, synagogue or other building, structure or place used for the purpose of burial or memorializing the dead, or a school, educational facility, community center or the grounds adjacent to and owned or leased by any of the foregoing or any personal property contained in any of the foregoing.
5. For a felony, that the actual damage to or loss of property exceeds five thousand dollars ($5000.00)

Domestic Violence and Sexual Assault

THE ABUSE PREVENTION ACT: CHAPTER 209A

OCTOBER, 1992

I. Chapter 209A of the General Laws, known as the Abuse Prevention Act, represents a strong statement of public policy: Domestic violence is a serious crime and is not simply a matter of personal family business. Law enforcement personnel play a key role in the implementation of this policy. Because they are most likely to be called upon to intervene when domestic violence occurs, police officers are generally the victim's first contact with the criminal justice system. These materials describe the duties and obligations of police under c. 209A.

II. STATUTORY OVERVIEW

Chapter 209A contains nine sections.[1/] Sections Six and Seven are the most important for law enforcement personnel because they set forth the obligations of police under c. 209A. However, police officers should be familiar with all sections of c. 209A so that they can provide complete and accurate information to victims.

1/ G.L. c. 209A was signed into law in July, 1978. It has been amended in 1983, 1984, 1987, and 1990. The 1990 amendments went into effect on January 31, 1991.

Reprinted: Domestic Violence: Beyond Chapter 209A
Commonwealth of Mass., Attorney General's Office
October 22, 1992

SECTION ONE [Definitions]

Section One sets forth definitions of "abuse", "court", "family or household member", "law officer", and "vacate order" as follows:

"Abuse", is the occurrence of one or more of the following acts between family or household members:

a. attempting to cause or causing physical harm;

b. placing another in fear of imminent serious physical harm;

c. causing another to engage involuntarily in sexual relations by force, threat or duress.

Police should interpret this definition broadly when responding to a complaint. Category (a) applies to any type of physical harm or attempt to cause physical harm, for example, punching, kicking, shoving, etc. Category (b) applies to threats and to situations where the abuser has assaulted the victim but no battery has occurred. Note that the parties' marital status is irrelevant to the application of category (c). Massachusetts law contains no spousal exclusion which would prevent a married woman from charging her husband with rape. Commonwealth v. Chretien, 383 Mass. 123 (1981).

"Court", includes the superior, probate and family, district, or Boston municipal court departments of the trial court.

"Family or household members", are persons who:

a. are or were married to one another;

b. are or were residing together in the same household;

c. are or were related by blood or marriage;

d. have a child in common regardless of whether they have ever married or lived together; or

e. are or have been in a substantive dating or engagement relationship, which shall be adjudged by district, probate or Boston Municipal courts after consideration of the following factors: (1) the length of time of the relationship; (2) the type of relationship; (3) the frequency of interaction between the parties; and (4) if the relationship has been terminated by either person, the length of time elapsed since the termination of the relationship.

While c. 209A was originally intended to provide legal remedies to battered women, it can be used by both men and women, adults and minors. Under the definition of "family or household member", any person, regardless of sex or age, who has been abused by a spouse, former spouse, household member or former household member (who need not be of the opposite sex), past or present in-laws, step-children, or a blood relative, (including a minor child) may file a c. 209A abuse petition. Note that blood relatives, in-laws, or step-children need not reside or have resided with the plaintiff. The protections of c. 209A have also been extended to individuals who are or were involved in what is termed by the statute as "a substantive dating or engagement relationship".

"Law officer", any officer authorized to serve criminal process.

"Vacate order" court order to leave and remain away from a premises and surrendering forthwith any keys to said premises to the plaintiff. The defendant shall not damage any of the plaintiff's belongings or those of any other

> occupant and shall not shut off or cause to be shut off any utilities or mail delivery to the plaintiff. In the case where the premises designated in the vacate order is a residence, so long as the plaintiff is living at said residence, the defendant shall not interfere in any way with the plaintiff's right to possess such residence, except by order or judgment of a court of competent jurisdiction pursuant to appropriate civil eviction proceedings, a petition to partition real estate, or a proceeding to divide marital property. A vacate order may include in its scope a household, a multiple family dwelling and the plaintiff's workplace. When issuing an order to vacate the plaintiff's workplace, the presiding justice must consider whether the plaintiff and defendant work in the same location or for the same employer.

Thus, the defendant must turn over the keys to the premises to the victim and must leave and remain away from the premises and the victim's workplace. The defendant is also barred from interfering with the victim's occupancy of the premises, damaging any of the household contents, shutting off the utilities, or stopping the victim's mail. (Police Guidelines, § 2.0, pp. 3-4; § 3.4, pp. 7-8; § 3.7, pp. 8-9)

SECTION TWO [Venue]

Section Two permits the victim to file a complaint in the appropriate court, as defined in Section One, where the victim resided at the time the abuse occurred or where the victim resides at the time of the complaint if he/she has left the residence or household to avoid the abuse.

SECTION THREE [Content of Orders]

Section Three sets forth the types of court orders that a victim may request by filing a complaint. Court orders include but are not limited to:

a. ordering the defendant to refrain from abusing the plaintiff whether the defendant is an adult or minor;

b. ordering the defendant to refrain from contacting the plaintiff, unless authorized by the court, whether the defendant is an adult or minor;

c. ordering the defendant to vacate forthwith and remain away from the household, multiple family dwelling, and workplace. Notwithstanding the provisions of section thirty-four B of chapter two hundred and eight, an order to vacate shall be for a fixed period of time, not to exceed one year, at the expiration of which time the court may extend any such order upon motion of the plaintiff, with notice to the defendant, for such additional times as it deems necessary to protect the plaintiff from abuse;

d. awarding the plaintiff temporary custody of a minor child;

e. ordering the defendant to pay temporary support for the plaintiff or any child in the plaintiff's custody or both, when the defendant has a legal obligation to support such a person. In determining the amount to be paid, the court shall apply the standards established in the child support guidelines;

f. ordering the defendant to pay the person abused monetary compensation for losses suffered as a direct result of such abuse. Compensatory losses shall include, but not be limited to, loss of earnings or support, costs for restoring utilities, out-of-pocket losses for injuries sustained, replacement costs for locks or personal property removed or destroyed, medical and moving expenses and reasonable attorney's fees;

g. ordering the plaintiff's address to be impounded as provided in Section Nine;

h. ordering the defendant to refrain from abusing or contacting the plaintiff's child, or child in plaintiff's care or custody, unless authorized by the court;

i. the judge may recommend to the defendant that the defendant attend a recognized batterer's treatment program.

A court is explicitly authorized under Section Three to order the defendant to refrain from contacting the victim or the victim's child or any child in the victim's care. Such "no contact" orders apply to multiple family dwellings as well as to the victim's household and workplace. (§§ 3(c) and 3(d)) In addition, a court may also issue child custody orders (even where the parties have never been married) and child support orders in accordance with the child support guidelines. However, a child support order is only permissible where the defendant has a pre-existing legal obligation to pay support. (§§ 3(d) and 3(e)).

A judge may order the defendant to pay the victim for any expenses caused by the abuse such as physician or hospital bills, lost wages, attorney's fees, or shelter expenses. Such an order may also include costs for restoring utilities and replacement costs for locks and personal property removed or destroyed. (§ 3(f))

The judge may also recommend that a defendant attend a recognized batterer's treatment program. (§ 3(i))

Section Three prohibits a court from compelling mediation. Although the judge may refer the case to the probation department or a victim/witness advocate for an information gathering session, the court may not compel the parties to meet together at these sessions.

Section Three also limits the power of the court to issue mutual restraining orders, requiring a judge to make "specific written findings of fact in the event that mutual orders are issued." (§ 3(j))

There is no statute of limitations on the filing of a complaint under Section Three of c. 209A: "A court shall not deny any complaint filed under this chapter solely because it was not filed within a particular time period after the last alleged incident of abuse."

Section Three provides that every order must state the time and date of its expiration and include the date and time for a continuation hearing. Any order remains in effect until such hearing is held. Although any relief granted by the court shall not exceed one year, the victim may obtain an extension of orders under the following circumstances:

> If the plaintiff appears at the court at the date and time the order is to expire, the court shall determine whether or not to extend the order for any additional time reasonably necessary to protect the plaintiff or to enter a permanent order. The court may also extend the order upon motion of the plaintiff, for such additional time as it deems necessary to protect from abuse the plaintiff or any child in the plaintiff's care or custody.

In addition, the fact that no abuse has occurred while the order was in effect will not, by itself, prevent the extension of the order or the issuance of a new order.

These orders are not exclusive. The court may draft specific orders tailored to the individual needs of the victim. For example, a court may issue an order directing the defendant to return all house or car keys, or to remain away from the victim's school, etc.

The victim may not be charged a fee for filing a complaint. Neither the victim nor his/her attorney shall be charged for certified copies of any orders entered by the court or for copies of the file.

Orders issued under c. 209A do not affect title to real property. Moreover, c. 209A orders affecting custody or support are superseded by any subsequent custody or support order from the probate or family court. In addition, a judge cannot issue orders for custody or support under c. 209A, where there are prior or pending custody or support orders from the probate or family court. Chapter 209A does not empower the district court to award visitation rights to the defendant.

The filing of a c. 209A complaint does not preclude any other civil or criminal remedies. However, a person who files a complaint under c. 209A must disclose prior or pending actions for divorce, annulment, paternity, custody or support,

guardianship, separate support or legal separation or abuse prevention. In cases where there are outstanding orders, a person should not be discouraged from filing subsequent c. 209A complaints.

Note that a defendant's violation of a prior protective order constitutes both a criminal misdemeanor and contempt of court. The victim may file a civil or criminal contempt action in addition to seeking criminal charges and may seek any or all of these remedies simultaneously.

SECTION FOUR [Temporary Orders]

Section Four describes the procedure for obtaining temporary orders. A court may issue a temporary order upon the victim's filing of a complaint.

Abuse prevention cases follow a two-step procedure. At the first (ex-parte) hearing at which the abuse is established, the victim can request a number of protective orders (See Section Three, above). Following this first hearing, a temporary order is issued which is valid for a period of ten (10) days. The plaintiff receives a copy of the order, a second copy is sent to the police, and the third copy is served on the defendant. However, the defendant need not be served in hand. (c. 209A, §§ 4, 7; Police Guidelines, § 3.7, p. 8.) Assuming that the defendant is served, a second hearing is held at which both

parties are present.[2/] The court can then vacate, modify or continue the temporary orders for up to one year. A judge is also required to set up a continuation hearing on the date such orders are to expire. As long as the defendant has been served with the temporary order, the plaintiff is entitled to ask that the temporary orders be extended or that a permanent order be entered regardless of whether or not the defendant appears at the hearing. (See Section Three, above)

SECTION FIVE [Afterhours Orders]

Any judge of the superior, district, family and probate, or Boston Municipal Court may issue an order granting relief to a victim who demonstrates a substantial likelihood of immediate danger of abuse. The order then must be certified by the clerk magistrate on the next court day.

Temporary orders can be issued by phone when the court is not in session:

> In the discretion of the justice, such relief may be granted and communicated by telephone to an officer or employee of an appropriate law enforcement agency, who shall record such order on a form of order promulgated for such use by the chief administrative justice and shall deliver a copy of such order on the next court day to the clerk-magistrate of the court having venue and jurisdiction over the matter.

2/ If the defendant has been served with notice of the order but does not appear at the hearing, the temporary order continues in effect without further court order. (c. 209A, § 4)

Police are required to access the emergency judicial system when the court is closed for business. (c. 29A, § 6; Police Guidelines, § 2.0(E), p.2)

If the plaintiff receives an order under this section without filing a complaint, he/she must appear at court on the next business day to file a complaint. The notice and hearing requirements set forth in Section Four apply to orders issued under this section.

Since most cases of domestic violence occur during non-business hours, police should know all of the procedures that apply during this period.

SECTION SIX [Police Responsibilities]

A. Powers and Duties of the Police

Section Six describes the powers and duties of the police. When an officer has reason to believe that a family or household member, as defined in Section ONe, has been abused or is in danger of being abused, c. 209A requires the officer to use all reasonable means to prevent further abuse. The steps that an officer shall take, but not be limited to, include the following:

> (1) remain on the scene of where said abuse occurred or was in danger of occurring as long as the officer has reason to believe that at least one of the parties involved would be in immediate physical danger without the presence of a law officer. This shall include but not be limited to remaining in the dwelling for a reasonable period of time;

(2) assist the abused person in obtaining medical treatment necessitated by an assault, which may include driving the victim to the emergency room of the nearest hospital, or arranging for appropriate transportation to a health care facility, notwithstanding any law to the contrary;

(3) assist the abused person in locating and getting to a safe place; including but not limited to a designated meeting place for a shelter or a family member's or friend's residence. The officer shall consider the victim's preference in this regard and what is reasonable under all the circumstances;

(4) give such person immediate and adequate notice of his or her rights. Such notice shall consist of handing said person a copy of the statement which follows below and reading the same to said person. Where said person's native language is not English, the statement shall be then provided in said person's native language whenever possible.

> "You have the right to appear at the Superior, Probate and Family, District or Boston Municipal Court, if you reside within the appropriate jurisdiction, and file a complaint requesting any of the following applicable orders: (a) an order restraining your attacker from abusing you; (b) an order directing your attacker to leave your household, building or workplace; (c) an order awarding you custody of a minor child; (d) an order directing your attacker to pay support for you or any minor child in your custody, if the attacker has a legal obligation of support and (e) an order directing your attacker to pay you for losses suffered as a result of abuse, including medical and moving expenses, loss of earnings or support, costs for restoring utilities and replacing locks, reasonable attorney's fees and other out-of-pocket losses for injuries and property damage sustained.
>
> For an emergency on weekends, holidays, or weeknights, the police will refer you to a justice of the superior, probate and family, district or Boston municipal court departments.
>
> You have the right to go to the appropriate district court or the Boston municipal court and seek a criminal complaint for threats, assault and battery, assault with a deadly weapon, assault with intent to kill or other related offenses.

If you are in need of medical treatment, you have the right to request that an officer present drive you to the nearest hospital or otherwise assist you in obtaining medical treatment.

If you believe that police protection is needed for your physical safety, you have the right to request that the officer present remain at the scene until you and your children can leave or until your safety is otherwise ensured. You may also request that the officer assist you in locating and taking you to a safe place, including but not limited to a designated meeting place for a shelter or a family member's or a friend's residence, or a similar place of safety.

You may request a copy of the police incident report at no cost from the police department."

(5) assist such person by activating the emergency judicial system when the court is closed for business; (See Section Five, above)

(6) inform the victim that the abuser will be eligible for bail and may be promptly released; and

(7) arrest any person a law officer witnesses or has probable cause to believe has violated a temporary or permanent vacate, restraining, or no-contact order or judgment issued pursuant to section eighteen, thirty-four B or thirty-four C of chapter two hundred and eight, section thirty-two of chapter two hundred and nine, section three, four or five of this chapter, or sections fifteen or twenty of chapter two hundred and nine C. When there are no vacate, restraining, or no-contact orders or judgments in effect, arrest shall be the preferred response whenever an officer witnesses or has probable cause to believe that a person:

(a) has committed a felony;

(b) has committed a misdemeanor involving abuse as defined in section one of this chapter;

(c) has committed an assault and battery in violation of section thirteen A of chapter two hundred and sixty-five.

> The safety of the victim and any involved children shall be paramount in any decision to arrest. Any officer arresting both parties must submit a detailed, written report in addition to an incident report, setting forth the grounds for dual arrest.

Subsection (7) of Section Six now mandates an arrest where a temporary or permanent restraining order has been violated in the presence of police or where police have probable cause to believe that such a violation has occurred. In addition, a violation of a "vacate," "refrain from abuse" or "no contact" order issued under G.L. Chapters 208, 209, 209A or 209C mandates an arrest and is subject to criminal penalties under c. 209A, § 7.

Please note that when a judge has issued a vacate, no-contact, and/or refrain from abuse order under c. 209A, certain additional conditions may have been imposed by the judge. These additional conditions may include granting temporary custody of the minor children to the petitioning parent or ordering the defendant to pay for child support, damage to property, replacement of locks, etc. In the past, there has been some confusion as to whether a criminal complaint for violation of a 209A order can be pursued if, for example, a defendant fails to pay the monies ordered by the court but has not violated either the vacate or refrain from abuse order. A criminal complaint and related criminal sanctions for violation of a c. 209A order are only permissible when the vacate, no contact, and/or refrain from abuse

provisions of the order have been violated. Violations of other conditions are enforceable through civil contempt proceedings.

Pursuant to Subsection (7) of Section Six, arrest is the "preferred response" when no orders are in effect but the officer has probable cause to believe that a person has committed a felony, an assault and battery or a misdemeanor involving "abuse". Abuse is specifically defined in Section One to include "placing another in fear of imminent serious physical harm" which, under appropriate circumstances, could include threats. (c. 209A, §§ 1, 7; Police Guidelines, § 2.0 (G) and (H), p. 2). While arrest under these circumstances is authorized, it is not mandated under the law.

Nothing in c. 209A requires the officer to present a complaint to a court or justice or to obtain a warrant before making an arrest, if the criteria for arrest set forth in Subsection 7 of Section Six are met. The authority to arrest for a misdemeanor involving abuse is a statutory exception to the complaint and warrant requirements of G.L. c. 275, §§ 2, 3 discussed in Wagenmann v. Adams, 829 F.2d 196, 207-08 (1st Cir. 1987).

B. Additional Provisions

"Reasonable efforts" must be made by anyone authorized to make bail to inform the victim prior to a defendant's release upon posting bail.

Additionally, Section Six now requires that upon request by the victim, either the court or an emergency response judge can issue a written no-contact order.

Finally, Section Six also addresses a police officer's civil liability for responding to a domestic violence call:

> No law officer shall be held liable in any civil action regarding personal injury or injury to property brought by any party to a domestic violence incident for an arrest based on probable cause when such officer acted reasonably and in good faith and in compliance with this chapter and the statewide policy as established by the secretary of public safety.

C. Violation of Orders Issued by Probate, Family, or Superior Courts

1. Probate and Family Court: Historically, when an order to vacate or refrain from abuse issued by the Probate or Family Court pursuant to c. 208, § 34B was violated, c. 208, § 34C provided for criminal penalties. However, in 1990, Section 34C was amended to provide for criminal penalties for violation an order for custody issued pursuant to any abuse prevention action as well as for violation of an order prohibiting a person from imposing any restraint on the personal liberty of another person under c. 209A, §§ 3, 4, or 5, and c. 209C, §§ 15 or 20. As a result, it now appears that violation of a custody order is a criminal offense under § 34C. However, violation of a custody order is not an arrestable offense under c. 209A, § 6(7). In addition, in most cases, there will be no other crime to be charged in addition to violation of a restraining order. This is in contrast to other actions which often suggest other criminal charges. For example, violation of a vacate order

suggests trespass; violation of a no-contact order suggests threats or assault; and violation of a refrain from abuse order suggests assault and battery, etc. However, interference with the custody rights of another suggests a civil remedy except in the instance of a parental kidnapping. Thus, Chapter 34C requires further amendment to correct this problem.

2. Superior Court: The police frequently receive copies of Superior Court restraining orders, enjoining parties from contacting or visiting another party, which are issued in the course of litigation that has nothing to do with divorce, separate support or disputes between family or household members. These orders are civilly enforceable only; police response is the same as in any non-domestic matter. However, any vacate or restraining order issued under c. 209A, whether from District, Probate and Family, Superior or Boston Municipal Court, is criminally enforceable and its violation requires an arrest.

D. Victim Safety

The victim's safety is paramount in any domestic violence case. Under c. 209A, the police are required to take all reasonable steps to insure that the victim is safe. In addition to making arrests when appropriate, the police may be required to remain on the scene until the victim's safety is assured, to transport the victim elsewhere, and to assist the

victim in obtaining necessary medical treatment. (c. 209A, § 6 (1), (2) and (3); Police Guidelines, § 2.0 (C), p. 2) If the defendant agrees to leave the residence but to pack his belongings in another room, police may keep the defendant in view by following him through the residence. Commonwealth v. Rexach, 20 Mass. App. Ct. 919 (1985). Under c. 209A, police must read aloud a notice of rights to the victim and provide him/her with a printed copy of such rights in the victim's native language when possible.

Issues of tenancy, immigration status, custody and visitation, and marital status must not affect and are not relevant to the enforcement obligations of police under c. 209A. Arrests should be made and outstanding protective orders enforced without regard to any argument by the defendant that, for example, his name on the lease to the apartment gives him possessory rights, or that a custody agreement entitles him to visit the home.

Police officers must fill out incident reports whenever they respond to domestic violence calls in accordance with the standards of the officer's law enforcement agency. Documentation of a defendant's prior mistreatment of the victim may be admissible in some cases to show the defendant's mental state or intent to harm the victim. Commonwealth v. Jordan, (No. 1), 397 Mass. 489, 492 (1986). In the event of a dual

arrest, the police must submit a detailed written report in addition to the incident report setting forth the basis for the dual arrest. The police may not suggest a dual arrest as a means of discouraging requests for law enforcement intervention. (c. 209A, § 6(7); Police Guidelines § 2.0, p. 3)

SECTION SEVEN [Service and enforcement of orders]

This section pertains to the service of court orders on the defendant. It requires that the court clerk transmit two certified copies of all orders and one copy of the complaint and summons to the appropriate law enforcement agency. Unless otherwise ordered by the court, the police must serve one copy of all orders and the copy of the complaint and summons on the defendant. There is no requirement, however, that the defendant be served in hand. In addition, Section Seven specifically authorizes service of complaints, summonses, and orders on Sunday.

Each order must contain the statement: VIOLATION OF THIS ORDER IS A CRIMINAL OFFENSE. As set forth in this section, a violation is punishable by a fine of not more than five thousand dollars or by imprisonment in the house of correction for not more than two and one-half years, or both. The court must notify the police when any order is vacated.

If a defendant is convicted of a violation of a restraining order, and has no prior record of any crime of violence, then the court can ask that he be evaluated by a certified batterer's treatment program. If the evaluation indicates that he is amenable to treatment, then the court may order the defendant to receive appropriate treatment in addition to any other penalty. If the defendant fails to participate in treatment as ordered, then any suspended sentence will be imposed. The court may also order treatment for substance abuse. The defendant is responsible for the cost of the treatment, if he can afford it.

Where an abuse prevention order is violated, the court may order the defendant to pay the victim for all damages including, but not limited to, cost for shelter or emergency housing, loss of earnings or support, out-of-pocket losses for injuries sustained or property damaged, medical expenses, moving expenses, cost for obtaining an unlisted telephone number, and reasonable attorney's fees.

The criminal remedies provided in Section Seven are not exclusive. A criminal action does not preclude enforcement of such orders by civil contempt procedure.

SECTION EIGHT [Confidentiality of records.]

This section permits the court to impound the victim's address. The victim may request that the court impound his/her

address, keep it from appearing on orders, and otherwise ensure that the address remains confidential.

Records of cases brought under c. 209A shall be withheld from public inspection.

SECTION NINE [Standard complaint form.]

Section Nine requires the administrative judges of the superior, district, family and probate, and Boston municipal court departments to promulgate a standard form complaint. If no form complaint is available, a plaintiff may prepare and file a complaint pro se.

0398T

The Commonwealth of Massachusetts
Office of the Attorney General
One Ashburton Place,
Boston, MA 02108-1698

SCOTT HARSHBARGER
ATTORNEY GENERAL
(617) 727-2200

MEMORANDUM

TO: Chiefs of Police

FROM: Scott Harshbarger SH

DATE: May 21, 1992

RE: Chapter 31 of the Acts of 1992, An Act Establishing The Crime Of Stalking

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Attached for your information is a copy of the recently-enacted Chapter 31 of the Acts of 1992, establishing the crime of stalking. This statute adds a new Section 43 to Chapter 265 of the General Laws. Governor Weld signed an emergency preamble to the legislation, rendering it effective immediately upon receiving his approval. Therefore, the statute applies to acts occurring after 11:33 a.m. on May 18, 1992. A brief analysis of the legislation follows.

SUMMARY

The statute creates the crime of stalking, with two sentence enhancement provisions. The crime is a felony, allowing arrest based on probable cause, whether or not committed in the officer's presence.

1. Any person who willfully, maliciously and repeatedly follows or harasses* another person and who makes a threat with the intent of placing that person in imminent fear of death or serious bodily injury is guilty of the crime of "stalking", a felony, and subject to a maximum state prison sentence of five years, or a house of correction sentence of up to two and one-half years, or a fine of up to $1000, or both fine and imprisonment. G.L. c.265, §43(a).

   *"Harasses" is defined in the statute (subsection (d)) as "a knowing and willful pattern of conduct or series of acts over a period of time directed at a specific person, which seriously alarms or annoys the person . . . [and which is] such as would cause a reasonable person to suffer substantial emotional distress."

2. Any person who commits the crime of "stalking" in violation of a vacate, restraining, or no-contact order issued under G.L. c. 208 or G.L. c. 209A, or any other temporary restraining order or preliminary or permanent injunction issued by the superior court, faces a mandatory minimum one year sentence (with the maximum sentence remaining five years in state prison). G.L. c.265, §43(b).

3. Any person convicted of a second or subsequent violation of any provision of the stalking law faces a maximum ten year state prison sentence, and a mandatory minimum two-year sentence. G.L. c.265, §43(c).

ELEMENTS

Therefore, the following elements constitute the crime of stalking in violation of G.L c.265, §43(a):

1. That the defendant acted willfully;

2. That the defendant acted maliciously;

3. That the defendant followed OR harassed another person;

4. That the defendant engaged in the conduct repeatedly;

5. That the defendant made a threat, with the intent to place the victim in imminent fear of death or serious bodily injury.

For the mandatory minimum sentences to apply, it must also be alleged and proven that:

6. The acts were committed in violation of one of the orders or injunctions spec[illegible] in the statute (G.L. c.265, §43(b));

OR

7. That the defendant had previously been convicted of the crime of stalking (G.L. c.265, §43(c)).

NOTE: Complaints or indictments should be drawn in the precise wording of the statute. If the acts alleged are covered by the mandatory minimum sentencing provisions of the statute, and the prosecutor wishes to ensure that these sentencing provisions apply, the complaint or indictment should be drawn in two parts, with the second page alleging, in the specific terms of the statute, the relevant aggravating factor (i.e., violation of a court order or previous conviction for stalking).

The statute is intended to fill a void in current law, allowing police and the courts to intervene in certain circumstances before abuse escalates. Instead of being faced with various isolated misdemeanor offenses which must be proved separately, these separate acts of harassment can be joined to prove a dangerous pattern resulting in a felony offense.

If you have any questions about the provisions of the statute, please feel free to call either Jane Tewksbury, Chief of the Family and Community Crimes Bureau in this office, or Diane Juliar, Director of Policy and Training. Either can be reached at (617) 727-2200.

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STALKING BILL

By: Robert J. Bender, Assistant District Attorney,
Essex County District Attorney's Office

On Monday, May 18, 1992, Governor Weld signed Senate Bill 1493, St. 1992, c. 31, which creates two new crimes, "stalking" and stalking in violation of a court order, G.L. c. 265, §§43(a) and 43(b), respectively. There are enhanced penalties for second and subsequent convictions of stalking, added as §43(c). An emergency preamble was signed, which made these new crimes effective at 2:30 p.m. Monday, May 18, 1992.

ELEMENTS

"STALKING:" c. 265, §43(a)

(1) "whoever willfully, maliciously, and repeatedly"

(2) "follows or harasses another person"

(3) "and who makes a threat with the intent to place that person in imminent fear of death or serious bodily injury"

"STALKING IN VIOLATION OF A COURT ORDER:" c. 265, §43(b)

(1) "whoever commits the crime of stalking"

(2) "in violation of a temporary or permanent vacate, restraining, or non-contact order or judgment issued pursuant to" G.L. c. 208, §§18, 34B, or 34C, or G.L. c. 209, §32, or G.L. c. 209A, §§2, 4, or 5, or G.L. c. 209C, §§15 or 20, or a temporary restraining order or preliminary or permanent injunction issued by the superior court.

ANALYSIS

The Legislature has recognized that some offenders have been committing serious misconduct which seemed to "borrow" elements of certain "traditional" crimes, but as a whole was not targetted by any crime. This new statute defines a new crime, "stalking," and spells out its elements with particular care to give proper notice of what misconduct falls within its scope. The new crime is not intended to replace but to complete the familiar list of offenses against persons which

have been used to address such behavior. It is certain that in the past some offenders have committed acts best described as "stalking," but until now these offenders usually could be prosecuted only for misdemeanors. Now, if every element of the crime of stalking can be shown to have occurred since 2:30 p.m. on May 18, 1992, a felony can be prosecuted in appropriate cases.

Jurisdiction and Penalties

"Stalking," G.L. c. 265, §43(a), is punishable by a fine or by 5 years imprisonment in state prison or by 2 1/2 years in the house of correction. Thus it falls within the concurrent jurisdiction of the District Court and the Superior Court. "Stalking in violation of a court order," G.L. c. 265, §43(b), also is punishable by 5 years imprisonment in state prison or by 2 1/2 years in the house of correction, but this crime carries a mandatory minimum sentence of one year, which may not be suspended or reduced by probation, parole, work release, or furlough. The statute uses the same language for the mandatory portion of the sentence as is used in G.L. c. 94C, §32H, concerning mandatory minimum sentences for certain drug offenses. This crime too falls within the concurrent jurisdiction of the District Court and the Superior Court.

Second and Subsequent Offenses

Under G.L. c. 265, §43(c), if a prior conviction for "the crime of stalking" is proven, the authorized penalty doubles to 10 years imprisonment in state prison, with a house of corrections alternative. There is a 2 year mandatory minimum term. G.L. c. 218, §26, has not been amended to bring second and subsequent offenses within the jurisdiction of the District Court. Now it is a 10 year felony within the jurisdiction of the Superior Court only. Note that §43(c) is not as clear as it should be regarding what "counts" as a "prior conviction." It is certain that repeat violations of §43(a), which is defined specifically as "the crime of stalking," are to be treated as "second and subsequents" subject to §43(c)'s enhanced penalties. The crime of stalking in violation of a court order, as defined by §43(b), is an "aggravated" form of stalking, so that logically a previous conviction under §43(b) should make the repeat offender one who has "been convicted of the crime of stalking." It may be argued, however, that §43(c) applies by its very terms only to prior violations of §43(a).

Definition of "Harasses"

As the elements show, stalking is either willful, malicious, and repeated "following" with proof of actual threat, or willful, malicious, and repeated "harassment" with proof of actual threat. The new statute defines "harasses" in such a manner that if one can prove the statutory element of "harasses," one also will have proved "willfully, maliciously, and repeatedly." To prove "harasses," one must show "a knowing and willful pattern of conduct or series of acts over a period of time," which is the functional equivalent of "willfully" and "repeatedly." This choice of language implies that to establish "harasses," it is not enough to prove that the offender committed several distinct acts (which seriously alarm or annoy) at one time or in one criminal contact with the victim. It is necessary to prove distinct acts which occurred "over a period of time." Stalking is repeated harassment. Harassment is repeated if it occurs on more than one occasion; harassment is repeated even if the offender does not repeat the first pattern of conduct but changes to a different type of harassing conduct.

The second part of the definition of "harasses" requires that the misconduct "seriously alarms or annoys the person" and is "such as would cause a reasonable person to suffer substantial emotional distress." Thus the statute requires that the victim actually feel serious alarm or serious annoyance due to the offender's actions directed at that person, and that the offender's actions be "such as would cause" any reasonable person to suffer such "substantial emotional distress."

Evidence of a Threat

The third element of "stalking," that of "and who makes a threat with the intent to place that person in imminent fear of death or serious bodily injury," cannot be overlooked. An offender who repeatedly makes such threats does maliciously harass, but one does not commit the crime of stalking by following or harassing alone. There must be proof of an actual threat. The "threat" element of stalking is "narrower" than the familiar "threat to commit a crime" offense in G.L. c. 275, §3. The threat in stalking requires proof that the offender had the specific intent to place the victim "in imminent fear of death or serious bodily injury." It is not enough that the victim feel threatened or that the offender's acts or words "seriously alarm or annoy" the victim. Proof of stalking requires evidence of the offender's state of mind or

intention. In practical terms, however, specific intent to place the victim in imminent fear may be inferred from the offender's acts or words as reported by the victim. It is not necessary to establish that "a reasonable person" would have been placed in fear by the threat, but if that is established, the inference that the offender intended to place the victim in fear is strong. In addition, specifying that the threat be made with the intent to cause the victim "imminent fear" should be read to mean that the offender intended that the victim be in fear immediately. This does not require that the threat be one of immediate harm. It is enough that the offender intend the victim to be immediately and/or continuously in fear of a harm which could occur at any time, without warning. The statute does not require that the threat be made "in person."

Stalking by Following

Finally, the mere willful and repeated following of another is not "stalking." The offender must follow "maliciously," and also must make the requisite threat. The threat does not need to occur during the act of following, and once the threat is made, the "malice" of the act of following may be more evident. It would seem that any acts of malice during the following also establish the malicious intent.

Stalking in Violation of a Court Order

Stalking in violation of G.L. c. 265, §43(a), is a lesser included offense, or necessary element of stalking in violation of a court order, under G.L. c. 265, §43(b). The "aggravated" form of stalking carries the additional element that the stalking occur in violation of the terms of a court order that the offender "vacate" the victim's home, or have "no contact," or "refrain from abuse." The court orders listed in the stalking statute are the same ones listed in G.L. c. 209A, §7, orders which will have been served on the offender pursuant to G.L. c. 209A, §7. Of course, violation of such court orders is itself a crime, created by G.L. c. 209A, §7, and punishable by a fine or by up to two and one half years in jail. Stalking in violation of a court order thus appears as an "aggravated" form of this misdemeanor too.

No court order is violated by acts which occur before such an order is issued, and it is not necessary to prove that the offender intended to violate the court order to prove this crime; it is only necessary to prove that the offender willingly, maliciously, and repeatedly did the acts which constitute stalking. By the act of stalking, one may commit an

act of abuse ("placing another in fear of imminent serious physical harm") or otherwise violate a "no-contact" or vacate (and stay away) order. It does not appear necessary to prove that the offender had been served with the court order, but it is prudent to show that the offender was served or otherwise knew about the court order because such evidence strengthens the inferences of malice and intent to place the victim in imminent fear, each an element of stalking. A prosecutor may argue that one who stalks may be guilty without knowledge of the court order on a strict liability basis. See Commonwealth v. Miller, 385 Mass. 521, 524-525 (1982) (statutory rape).

Acts of Stalking Committed Before May 18, 1992

It is important to realize that conduct which occurred before the time that stalking became a crime may be used only to put the offender's conduct after criminalization into context. See, e.g., Commonwealth v. Gordon, 407 Mass. 340, 351 (1990) (evidence of acts which occurred before issuance of restraining order may be admissible at trial for violation of that order). The offender must act repeatedly and make the requisite threat after the passage of the statute, regardless of his or her earlier conduct.

Form of Complaint or Indictment

Complaints or indictments should be drawn in the precise wording of the statute. If the acts alleged are covered by the mandatory minimum sentencing provisions of the statute, and the prosecutor wishes to ensure that these sentencing provisions apply, the complaint or indictment should be drawn in two parts, with the second page alleging, in the specific terms of the statute, the relevant aggravating factor (i.e., violation of a court order or previous conviction for stalking).

CONCLUSION

While the Stalking Bill may not be the solution to every case, it will prove to be an important protection or prevention only if it is implemented and not ignored. Do not hesitate to contact your District Attorney's office or the Attorney General's office (Jane Tewksbury, Chief of the Family and Community Crimes Bureau, or Diane Juliar, Director of Policy and Training, (617) 727-2200) with questions, suggestions, or comments based on your experiences with this new statute. Do not be deflected from prosecutions by challenges to the statute which will be addressed one by one in the trial courts, appellate courts, and perhaps in the Legislature.

TEXT OF G.L. c. 265, §43, the "Stalking Bill"

Section 43(a): Whoever willfully, maliciously, and repeatedly follows or harasses another person and who makes a threat with the intent to place that person in imminent fear of death or serious bodily injury shall be guilty of the crime of stalking and shall be punished by imprisonment in the state prison for not more than five years or by a fine of not more than one thousand dollars, or imprisonment in the house of correction for not more than two and one-half years or both.

Section 43(b): Whoever commits the crime of stalking in violation of a temporary or permanent vacate, restraining, or non-contact order or judgment issued pursuant to sections eighteen, thirty-four B, or thirty-four C of chapter two hundred and eight; or section thirty-two of chapter two hundred and nine; or sections three, four, or five of chapter two hundred and nine A; or sections fifteen or twenty of chapter two hundred and nine C; or a temporary restraining order or preliminary or permanent injunction issued by the superior court, shall be punished by imprisonment in a jail or the state prison for not less than one year and not more than five years. No sentence imposed under the provisions of this subsection shall be less than a mandatory minimum term of imprisonment of one year.

A prosecution commenced hereunder shall not be placed on file or continued without a finding, and the sentence imposed upon a person convicted of violating any provision of this subsection shall not be reduced to less than the mandatory minimum term of imprisonment as established herein, nor shall said sentence of imprisonment imposed upon any person be suspended or reduced until such person shall have served said mandatory term of imprisonment.

A person convicted of violating any provision of this subsection shall not, until he shall have served the mandatory minimum term of imprisonment established herein, be eligible for probation, parole, furlough, work release or receive any deduction from his sentence for good conduct under sections one hundred and twenty-nine, one hundred and twenty-nine C and one hundred and twenty-nine D of chapter one hundred and twenty-seven provided, however, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of correctional

institution, grant to said offender a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of next of kin or spouse; to visit a critically ill close relative or spouse; or to obtain emergency medical services unavailable at said institution. The provisions of section eighty-seven of chapter two hundred and seventy-six relating to the power of the court to place certain offenders on probation shall not apply to any person seventeen years of age or over charged with a violation of the subsection. The provisions of section thirty-one of chapter two hundred and seventy-nine shall not apply to any person convicted of violating any provision of this subsection.

Section 43(c): Whoever, after having been convicted of the crime of stalking, commits a second or subsequent such crime shall be punished by imprisonment in a jail or the state prison for not less than two years and not more than ten years. No sentence imposed under the provisions of this subsection shall be less than a mandatory minimum term of imprisonment of two years.

A prosecution commenced hereunder shall not be placed on file or continued without a finding, and the sentence imposed upon a person convicted of violating any provision of this subsection shall not be reduced to less than the mandatory minimum term of imprisonment as established herein, nor shall said sentence of imprisonment imposed upon any person be suspended or reduced until such person shall have served said mandatory term of imprisonment.

A person convicted of violating any provision of this subsection shall not, until he shall have served the mandatory minimum term of imprisonment established herein, be eligible for probation, parole, furlough, work release or receive any deduction from his sentence for good conduct under sections one hundred and twenty-nine, one hundred and twenty-nine C and one hundred and twenty-nine D of chapter one hundred and twenty-seven; provided, however, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of correctional institution, grant to said offender a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of next of kin or spouse; to visit a critically ill close relative or spouse; or to obtain emergency medical services unavailable at said institution. The provisions of section eighty-seven of chapter two hundred and seventy-six relating to the power of the court to place certain offender on probation shall not apply to any

person seventeen years of age or over charged with a violation of this subsection. The provisions of section thirty-one of chapter two hundred and seventy-nine shall not apply to any person convicted of violating any provision of this section.

Section 43(d): For the purposes of this section, "harasses" means a knowing and willful pattern of conduct or series of acts over a period of time directed at a specific person, which seriously alarms or annoys the person. Said conduct must be such as would cause a reasonable person to suffer substantial emotional distress.

Effective Date: May 18, 1992

SCOTT HARSHBARGER
ATTORNEY GENERAL
(617) 727-2200

The Commonwealth of Massachusetts
Office of the Attorney General
One Ashburton Place,
Boston, MA 02108-1698

MEMORANDUM

TO: CHIEFS OF POLICE

FROM: SCOTT HARSHBARGER

DATE: OCTOBER 19, 1992

RE: DOMESTIC VIOLENCE REGISTRY BILL

Attached for your information is copy of the recently enacted Domestic Violence Registry Bill (Chapter 188 of the Acts and Resolves of 1992), which establishes a statewide central registry system for domestic violence civil restraining orders and for criminal violations of those orders. This law which was enacted with an emergency preamble went into effect at 2:58 p.m. on September 18, 1992.

This bill amends all of the sections of the Massachusetts General Laws under which civil domestic violence restraining orders are issued including Chapter 208 (Divorce), Chapter 209 (Husband and Wife), Chapter 209A (The Abuse Prevention Act), and Chapter 209C (Children Born Out of Wedlock).

1. Basically what this bill does is to require the Commissioner of Probation to include the issuance of civil restraining orders, and violations of those orders, in the Court Activity Record Information system (CARI). This will give the judge, through Board of Probation checks, and the police, through the Criminal Justice Information System (CJIS), information regarding probation and default or other court warrants. (CORI information and information regarding arrest warrants are not included in this system and must be accessed separately through CJIS.)

(**NOTE:** All civil restraining orders issued since September 7, 1992, under the sections affected by this bill, have been registered.)

2. Second, the bill requires a judge who is conducting a civil ex parte or 10 day restraining order hearing to access the statewide domestic violence registry maintained by the Commissioner of Probation.

3. Third, if as a result of this record check, the judge determines that there is an outstanding warrant against the defendant, then the judge must notify the appropriate law enforcement officials and provide them with whatever information the court has about the whereabouts of the defendant.

4. Finally, if there is a warrant, the judge must also determine "based upon all of the circumstances" and after reviewing the domestic violence registry information and the defendant's criminal record, if any, whether or not "an imminent threat of bodily injury exists to the petitioner." If the judge so determines, the judge must notify the appropriate law enforcement officials of this finding and the law enforcement officials must then execute the warrant "as soon as is practicable."

OTHER MISCELLANEOUS PROVISIONS

1. The court must inform the victim that the restraining order process itself is civil and that only violations of a restraining order are criminal. In addition, the court must provide the victim who has sought issuance of the civil restraining order with information prepared by the appropriate district attorney's office regarding the fact that criminal proceedings may be available.

2. The District Attorneys' offices are required to "instruct" the victim as to how to seek a criminal complaint.

NOTE: This new law applies only to orders issued between "related" parties. It does not apply to the occasional Superior Court restraining order issued between unrelated parties, e.g., co-workers.

If you have any questions about the provisions of the bill, please contact the Family and Community Crimes Bureau at 727-2200.

WPP90

Trial Court of the Commonwealth
District Court Department

MUEL E. ZOLL
Chief Justice

HOLYOKE BUILDING
HOLYOKE SQUARE
SALEM, MASSACHUSETTS 01970

Telephone
508/745-9010

M E M O R A N D U M

TO: To all District Court judges, clerk-magistrates and chief probation officers
FROM: Chief Justice Zoll
DATE: October 8, 1992
SUBJECT: New law affecting the right to bail and release on personal recognizance

A new law, St. 1992, Ch. 201, has been enacted regarding bail and personal recognizance. It was signed by the Governor on Wednesday, October 7, 1992, at 12:46 p.m., and went into effect upon signing under an emergency preamble. A copy is attached.

The law contains (1) restrictions on the authority of persons other than judges to admit arrestees to out-of-court bail or personal recognizance in crimes involving domestic abuse, (2) the addition of dangerousness as a general criterion for denying personal recognizance and imposing bail for any crime, and (3) the addition of specific abuse-related factors as criteria for denying personal recognizance and imposing bail for any crime.

1. Limitations on out-of-court release.

Section 2 of the new law adds a paragraph to G.L. c. 276, § 57 that prohibits out-of-court release by anyone other than a judge for any arrestee charged with:

(1) a violation of a protective order issued under G.L. c. 209A, c. 208, 209, 209C, or

(2) any misdemeanor or felony involving "abuse" as defined in G. L. c. 209A, § 1, while a protective order under c. 209A is in effect against that defendant.

To comply with this law, the person responsible for an out-of-court release decision (other than a judge) will have to determine the nature of the criminal charge. If one or more of the charges involve violation of one of the listed types of protective orders, the arrestee cannot be released by that person. If no violation of a protective order is charged, but one or more of the charges involves "abuse" as that term is defined in G.L. c. 209A, § 1, and there is an existing c. 209A order against the arrestee, then the defendant will not be eligible for out-of-court release by a non-judge.

Compliance with the second of these two ineligibility provisions requires familiarity with the definition of "abuse" under G.L. c. 209A, § 1:

> "Abuse, the occurrence of one or more of the following acts between family or household members:
>
> (a) attempting to cause or causing physical harm;
>
> (b) placing another in fear of imminent serious physical harm;
>
> (c) causing another to engage involuntarily in sexual relations by force, threat or duress.
>
> "Family or household members", persons who:
>
> (a) are or were married to one another;
>
> (b) are or were residing together in the same household;
>
> (c) are or were related by blood or marriage;
>
> (d) having [sic] a child in common regardless or whether they have ever married or lived together, or
>
> (e) are or have been in a substantive dating or engagement relationship, which shall be adjudged by district, probate or Boston municipal court's consideration of the following factors: (1) the length of time of the relationship; (2) the type of relationship; (3) the frequency of interaction between the parties; and (4) if the relationship has been terminated by either person, the length of time elapsed since the termination of the relationship.

If no protective order violation is charged, but it is determined that one or more of the charges involves "abuse," the person making the release decision must check the Statewide Domestic Violence Record Keeping System. If the arrestee has an existing order under c. 209A against him or her, the arrestee is ineligible for out-of-court release other than by a judge.

Note that the existing order may involve a victim other than the alleged victim of the crime that was the basis of the arrest. Note also that the existence of an order other than one issued under c. 209A would not appear to render the arrestee ineligible for release, notwithstanding the fact that the criminal charge involves abuse.

There may be a problem in determining whether an arrestee is the subject of an existing order insofar as the Domestic Violence Record Keeping System does not necessarily list orders issued prior to September 8, 1992. The police who made the arrest should be able to determine if any orders against the defendant issued to them for service in their jurisdiction are in existence, but the existence of orders predating September 8, 1992 involving other departments may not be ascertainable.

2. "Safety" and "dangerousness" as factors for setting bail rather than allowing personal recognizance.

Section 1 of the new law amends the general provision in G.L. c. 276, § 57 for admitting a person to bail by adding that the authorized person (judge, clerk, master in chancery, etc.) may set bail if he or she "determines that such release will reasonably assure the appearance of the person before the court and will not endanger the safety of any other person in the community." Thus, community safety has been added to reasonable likelihood of future court appearance as a reason for setting bail.

This same change is added by Section 3 of the new law to G.L. c. 276, § 58 regarding the presumption in favor of personal recognizance. Formerly, a defendant was entitled to release on his or her own recognizance unless the judge or other person making the bail decision determined as a matter of discretion that such release would not "reasonably assure" future court appearances. The new law adds a new criterion: the presumption in favor of personal recognizance does not obtain if the releasing authority determines as a matter of discretion "that such release will endanger the safety of any other person or the community." Thus, a discretionary determination regarding the risk of non-appearance in court or danger to the safety of another person or the community can overcome the presumption in favor of personal recognizance.

Section 4 of the new law adds dangerousness to the list of specific factors in G.L. c. 276, s. 58 that must be considered in making the release decision: the releasing authority "shall on the basis of any information which he can reasonably obtain, take into account the nature and seriousness of the danger to any person or the community that would be posed by the prisoner's release, ..." G.L. c. 276, s. 58, first par. (new language underlined).

It is important to note that the addition of community safety and dangerousness as factors for denying personal recognizance and setting bail are not limited to issues involving domestic abuse. Community safety and dangerousness, however determined, must now be considered by the judge or other authorized person in every release decision. Of course, certain defendants are now ineligible for any out-of-court release by a non-judge, as discussed in section 1, above.

3. New abuse-related criteria for denying personal recognizance and setting bail.

Two additional, abuse-related criteria are added by Section 5 of the new law to the list of factors that must be considered in making the decision between personal recognizance or bail:

(1) whether the acts alleged [in the criminal charges] involve abuse as defined in G.L. c. 209A, § 1 or violation of a temporary or permanent order issued under G.L. c. 208, ss. 18 or 34B; G.L. c. 209, s. 32; G.L. c. 209A, ss. 3, 4 or 5; or G.L. c. 209C, ss. 15 or 20; or

(2) whether the prisoner has "any history of orders issued against him pursuant to the aforementioned sections."

These factors must now be considered along with dangerousness and the fourteen other factors listed in G.L. c. 276, s. 58 for every defendant for whom a decision on release is required.

In Section 6, the new law requires the Secretary of Public Safety to collect data and report to the Legislature regarding a number of matters relating to implementation of laws pertaining to domestic abuse and pretrial release.

* * *

District Court Form CR-6, Reasons for Ordering Bail, will be amended to reflect the new bases on which bail can be set and release on personal recognizance denied. Until the new form is available, appropriate notations should be added to the current form whenever personal recognizance is denied on one or more of the new bases.

SEZ:msr

enc.

SCOTT HARSHBARGER
ATTORNEY GENERAL
(617) 727-2200

The Commonwealth of Massachusetts
Office of the Attorney General
One Ashburton Place,
Boston, MA 02108-1698

Domestic Violence Facts

* In Massachusetts, on average, a woman was killed by her batterer every 22 days in 1990, every 16 days in 1991, every 9 days in April, 1992, and as of September 1992, every 5 days (Massachusetts Department of Public Health).

* National surveys indicate that at least 2 million women per year are severely assaulted by their male partner (Straus and Gelles, 1990).

* From 1976 through 1987, the deaths of approximately 38,648 people over the age of 15 resulted from one partner killing another. Of these deaths 61% of the victims were women killed by their husbands or boyfriend, and 39% were men killed by women partners (Browne and Williams, in press).

* In a national survey over half of the males who were violent toward female partners also abused their children (Finkelhor, et al., 1983).

* In the United States women are more at risk to be assaulted and injured, raped, or killed by a current or ex-male partner than by all types of assailants combined (Finkelhor and Yllo, 1985; Browne and Williams, 1989).

* Abused women make up approximately 22 - 35% of women presenting with injury to hospital emergency rooms (Randall, 1990).

* Police in Massachusetts estimate that 40 - 60% of their calls involve family violence (C.J.T.C. Domestic Violence Manual, 1986).

* About 3 million children each year witness abuse of one parent by another (Robert S. Pynoos, M.D., U.C.L.A. School of Medicine).

* Violence by intimate partners is the leading cause of injury for women, "responsible for more injuries than car crashes, rape, and muggings combined" (Centers for Disease Control).

* Abuse of pregnant women is the leading cause of birth defects and infant mortality (March of Dimes study).

* In Norfolk and Walpole prisons, at least 80% of the inmates have been victims of or witness to family violence (Department of Social Services).

BIDEN "VIOLENCE AGAINST WOMEN ACT OF 1993"
(S.11)

Title I -- Safe Streets for Women

Creates New Penalties for Sex Crimes
- Creates new penalties for sex offenders.
- Increases restitution for the victims of sex crimes.

Encourages Women to Prosecute Their Attackers
- Extends "rape shield law" protection to civil cases (e.g. sexual harassment cases) and all criminal cases (other than sexual assault cases where it already applies) to bar embarrassing and irrelevant inquiries into a victim's sexual history at trial.
- Bars the use of a woman's clothing to show, at trial, that the victim incited or invited a sexual assault.
- Requires States to pay for rape exams.

Targets Places Most Dangerous for Women, Including Public Transit and Parks
- Authorizes $300 million for law enforcement efforts to combat violence against women, aiding police, prosecutors and victim advocates.
- Funds increased lighting and camera surveillance at bus stops, bus stations, subways and parking lots and targets existing funds for increased lighting, emergency telephones and police in public parks.

Education and Prevention
- Authorizes $65 million for rape education, starting in junior high.

Establishes the "National Commission on Violent Crime Against Women"
- Creates a commission to develop a national strategy for combating violence against women.

Title II -- Safe Homes for Women

Protects Women from Abusive Spouses
- Creates federal penalties for spouse abusers who cross state lines to continue their abuse.
- Requires all states to enforce any "stay-away" order, regardless of which state issues it.

Promotes Arrests of Abusive Spouses
- Authorizes $25 million for states that promote the arrest of abusing spouses and experiment with new techniques to increase prosecution.

Provides More Money for Shelters
- Boosts funding for battered women's shelters.

Establishes a National Domestic Violence Hotline
- Provides federal funding for a national domestic violence hotline (Senator Kennedy).

Increases Research and Data
- Authorizes research and increases data collection on violence against women.

Title III -- Civil Rights for Women

Extends "Civil Rights" Protections to All Gender-Motivated Crimes
- Makes gender-based assaults a violation of federal civil rights laws.
- Allows victims of all felonies "motivated by gender" to bring civil rights suits against their assailants.

Title IV -- Safe Campuses for Women

Funds Rape Prevention Programs

* Boosts to $20 million funding for the neediest colleges to fund campus rape education and prevention programs.

Title V -- Equal Justice for Women

Makes Courts Fairer by Training Judges

* Creates training programs for State and Federal judges to raise awareness and increase sensitivity about crimes against women.

BELLA ENGLISH

Where bruises don't belong

THE FOUR TEEN-AGE girls sat around a conference table at Cambridge Rindge and Latin for their weekly support group on dating violence and sexual abuse. Their matter-of-fact manner made their words all the more chilling.

"We were at a park, and I said hi to another boy. So my boyfriend smacked me. I hit him back. He hit me again. I had a big bruise on my eye." The girl is 4 feet 10 inches tall, 16 years old.

Said another girl: "This boy came over, real mad . . . I opened the door, and he was yelling and screaming at me. He shook me. When boys do things like that, you don't even tell your best friend, because if the boy finds out, he might even do something worse. I think a lot of girls are walking around with a lot of secrets."

Two years ago, when one of the girls was 14, she broke up with her boyfriend. Just like battered wives, teen-age girls seem most at risk when they try to leave a relationship. "He acted like my father; I couldn't do this or wear that," the girl recalled. "When I broke up with him, he threatened to kill me. He'd crank-call my house all night. The police said they couldn't do anything. My mother finally got an unlisted number."

Another of the girls was arguing with her mother one night. She stormed out of the house just as a boy she had been dating came by. "He punched me as hard as he could. My tooth went through my skin," said the girl. "I asked, 'What was that for?' He said, 'Don't talk to your mother like that.' "

The girls described being hit with shoes, being sexually fondled against their will, being punched and slapped ("He didn't leave a bruise, just his hand print," said one). A 15-year-old sighed. "Girls go through a lot of stuff from guys," she said. Recently, some of that stuff has proved lethal. Fifteen-year-old Beth Brodie of Groveland was allegedly murdered by a spurned teen-ager; 14-year-old Amy Carnevale of Beverly was murdered by her boyfriend.

Carole Sousa, who leads the Cambridge support group, is one of the few people in Greater Boston dealing with violent relationships among adolescents. She is sponsored by Transition House, a shelter for battered women, and Emerge, a treatment program for batterers, both in Cambridge. She visits schools, doing classroom presentations and assisting support groups.

"This year, I've been seeing more girls in potentially lethal situations," Sousa said. "A couple of girls, I've said to myself, 'I'm going to read about them in the newspaper.' The violence is due to more drugs, more access to weapons. And men for good role models are absent in a lot of boys' lives."

School administrators have been slow to respond to dating violence, Sousa said. Last year, she said, one jealous boy pinned his girlfriend against a wall at school, punched her repeatedly and knocked her down. The principal saw it as two kids fighting and suspended both. "She had bruises, he had none," Sousa recalled. "The boy was told by a male counselor that the only reason he was suspended was because he was a boy."

Another serious incident occurred when a teen-age boy – who had a restraining order against him – broke into a girl's house as she was taking a shower, Sousa said. He pulled the girl out and beat her up. "The school handled it like, 'Both of you have to stay away from each other.' There was no recognition that there was a victim and perpetrator," Sousa said. The boy, whose father was a Harvard professor, was later thrown out for beating another boy with a bat.

Three eighth-grade boys at one school attacked a girl, grabbing her breasts and reaching inside her underwear to fondle her. "The principal said it wasn't his position to judge who was at fault," Sousa said. So Sousa used a time-honored weapon: "What if this girl's parents sue the school?" The principal then agreed to an eight-week counseling program for the boys, but said they didn't have to attend.

Sousa thinks defense lawyers are part of the problem, too. The boys in that case bragged that their lawyers told them it wasn't their fault, that the girl "asked" for it. Gentlemen – and ladies – of the bar, this line is getting old, and juries aren't buying it like they used to, thank God.

Listen to Sousa's conversation with one teen-age boy. "I met this girl at a party, she was 12 or 13," the boy said. "She was saying she didn't want to, but she really did. So I did it. She was crying and peed the bed."

Sousa asked the boy why he didn't stop when she said no.

"Because it was so sweet," the boy replied.

Sweet, schmeet. It was rape, and the kid belongs in jail. Clearly, Sousa has her work cut out for her. It would be nice if she could be cloned 100 times. And it would be nice if school administrators would make her job a little easier by using plain old common sense.

For more information on the Dating Violence Intervention Project, call 868-8328.

Dating Violence: How to Talk to Perpetrators

A young perpetrator of dating violence or date rape is likely to have a variety of misconceptions about himself, his girlfriend, and how to maintain a relationship. He is likely to project blame for his violence onto his girlfriend and to deny his problem He is also likely to be a repeat offender. He is not likely to ask for help or evento recognize he needs help. The following do's and don'ts are guidelines for individual interventions.

Do:

- Ask him specifically about the violence, without using vague or general language like "fighting" of "losing your temper." Ask about specific actions such as grabbing, restraining, pushing, slapping, threats, using weapons, etc. This will help him to be more specific and will also make it clear that these acts are violent acts.

- Ask him about other kinds of abusive and controlling behaviors such as yelling, criticizing, making jealous accusations, and being possessive. Point out that these are controlling acts that have the effect of driving others away from him.

- Support him for talking about his violence. Tell him it takes courage to face up to problems.

- Help him to identify the *effects* and consequences of violence. Besides the legal consequences, violence creates resentment, spitefulness, and loss of closeness. This may help him to see how self-defeating his abuse is. *Ask if his violence has helped his girlfriend to feel closer to him.*

- Tell him that it's okay to feel angry, but there is a difference between what he feels and what he does. Anger and violence are not the same.

- Point out the differences between possessive control and love. Love means respecting his partner's rights and feelings, without using intimidation or pressure tactics.

Don't:

- Be taken in by his excuses. He will probablyblame his girlfriend for "provoking" his violence, or for "leading him on" when there has been coerced sex. Keep in mind that abusers often distort or mischaracterize their victim's behavior in in order to justify their violence. For instance, he may report that she was "provoking" him when she was simply expressing anger or asserting herself in some way. Point out that regardless of her actions, violence is not justified and can only make matters worse. He may blame alcohol. Tell him that alcohol does not cause him to be violent, though it may prevent him from getting the help he needs to deal with his violence. For this reason, it may also be necessary for him to get help for his drinking.

- Assume that it won't happen again. Tell him it probably will happen again and may be worse the next time. Abusers want a "quick fix" to their problems. During the "honeymoon period" that follows many abuse incidents, the abuser is remorseful and will swear he will never be violent again. But remorse, by itself, does not lead to change. Real change usually requires specialized interventions. If you downplay the violence, it will likely reinforce his minimization and denial.

- Threaten him with violence or physical punishment. This will only reinforce his belief that violence is a good way of solving problems. Instead, be firm and point out the personal, social, and legal consequences of violence.

- Think that one good talk will make him nonviolent. Refer him for more help and make sure that he follows through on the referral.

Dating Violence: How to Talk to Victims

A victim of dating violence or date rape may be hesitant to disclose or talk about her situation for a number of reasons. She may blame herself for the violence or be fearful that disclosure will bring about further violence. She may minimize the violence for fear of losing him or fearing her parents' reactions. She may be ashamed to disclose that she is going out with someone who abuses her. Or she may think no one cares. The following are guidelines for responding sensitively to individual victims in crisis situations.

Do:

- Assure her of confidentiality, and ask her permission to tell anyone else. If you feel you need to report the incident to police, child protective services or other authorities, let her know you're doing this and work out a plan with her on how she can maximize her safety.

- Ask questions that will help her recognize what has happened to her and to identify it as abuse.

- Support her courage in asking for help or seeking focus on what she wants, respecting her limits. If she wants to remain in the relationship, don't tell her that's wrong, but tell her you're worried for her safety and help her to see the risks. If she says she wants closeness, help her to see if she's truly getting that from her boyfriend.

- Help her to recognize his excuses for abuse. He (and she) may blame alcohol. Tell her that even though he may have a drinking problem, alcohol doesn't cause him to be violent. He may tell her that he "loses control." Tell her that abuse is not being "out of control;" it is controlling behavior. He may blame her for "provoking him." Help her to see that her words and actions do not justify violence. He may have told her that he wouldn't be violently possessive or jealous unless he loved her. Tell her that jealousy and possessiveness do not equal love.

Don't:

- Assume she wants to leave or assume that you know what's best for her. This may make her afraid of disappointing or angering you. While the boyfriend is the perpetrator, you become the rescuer if you try to control her. This kind of response reinforces her role as a victim.

- Ask her what she did to "provoke him." This will only reinforce any feelings of self-blame that she may already have and prevent her from expecting him to take responsibility for his violence.

- Talk to her and him together. This will make her more fearful of opening up since it places her in the position of having to placate him. Don't talk to him at all without her permission. You may be jeopardizing her safety.

- Take second-hand information.

- Pressure her into making decisions. Remember, she is is already under a lot of stress and is probably feeling much pressure from him.

M.G.L. Chapter 112: Physicians and Surgeons

M.G.L. Chapter 112, Section 12A½ : Rape Reporting Law:

Every physician attending, treating, or examining a victim of rape or sexual assault, or, whenever any such case is treated in a hospital, sanitorium or other institution, the manager, superintendent or other person in charge thereof, shall report such case at once to the commissioner of public safety and to the police of the town where the rape or sexual assault accurred but shall not include the victim's name, address, or any other identifying information. The report shall describe the general area where the attack occurred.

Whoever violates any provision of this section shall be punished by a fine of not less than fifty dollars nor more than one hundred dollars.

§ 21B. Evidence of Victim's Sexual Conduct.

Evidence of the reputation of a victim's sexual conduct shall not be admissible in any investigation or proceeding before a grand jury or any court of the commonwealth for a violation of sections thirteen B, thirteen F, thirteen H, twenty-two, twenty-two A, twenty-three, twenty-four and twenty-four B of chapter two hundred and sixty-five or section five of chapter two hundred and seventy-two. Evidence of specific instances of a victim's sexual conduct in such an investigation or proceeding shall not be admissible except evidence of the victim's sexual conduct with the defendant or evidence of recent conduct of the victim alleged to be the cause of any physical feature, characteristic, or condition of the victim: provided, however, that such evidence shall be admissible only after an in camera hearing on a written motion for admission of same and an offer of proof. If, after said hearing, the court finds that the weight and relevancy of said evidence is sufficient to outweigh its prejudicial effect to the victim, the evidence shall be admitted; otherwise not. If the proceeding is a trial with jury, said hearing shall be held in the absence of the jury. The finding of the court shall be in writing and filed but shall not be made available to the jury. (1977, 110; 1983, 367.)

M.G.L. Chapter 41: Cities, Towns, and Districts

M.G.L. Chapter 41, Section 97D: Confidentiality of rape and related offenses; violations; penalties:

All reports of rape and sexual assault or attempts to commit such offenses and all conversations between police officers and victims of said offenses shall not be public reports and shall be maintained by the police departments in a manner which will ensure their confidentiality. Whoever violates any provision of this section shall be punished by imprisonment for not more than one year or by a fine of not more than one thousand dollars, or both.

M.G.L. Chapter 265, Section 24C

265 § 24C. Victim's name; confidentiality

That portion of the records of a court or any police department of the commonwealth or any of its political subdivisions, which contains the name of the victim in an arrest, investigation or complaint for rape or assault with intent to rape under section thirteen B, twenty-two, twenty-two A, twenty-three, twenty-four or twenty-four B, inclusive, of chapter two hundred and sixty-five, shall be withheld from public inspection, except with the consent of a justice of such court where the complaint or indictment is or would be prosecuted.

Said portion of such court record or police record shall not be deemed to be a public record under the provisions of section seven of chapter four.

Except as otherwise provided in this section, it shall be unlawful to publish, disseminate or otherwise disclose the name of any individual identified as an alleged victim of any of the offenses described in the first paragraph. A violation of this section shall be punishable by a fine of not less than two thousand five hundred dollars nor more than ten thousand dollars.

Added by St.1986, c. 234. Amended by St.1987, c. 177, §§ 1, 2.

RADCLIFFE COLLEGE *Ten Garden Street, Cambridge, Massachusetts 02138 (617) 495-8601*

Office of the President

November 14, 1990

Dear Directors Radcliffe Union of Students, Response, and Presenters at the November 7 Administrative Board Meeting,

Let me repeat for all of you what I expressed to Annie Blais and others of you at the meeting with the Administrative Board of Harvard and Radcliffe Colleges last Wednesday: The meeting was, I believe, a very important step in improving the campus environment for women. The student presentations were superbly organized and articulated; they were powerful in their content and in their quiet, but intense delivery. The discussion which followed was a good one, yielding important information and clarification from Ad Board members and demonstrating the willingness of administrators, faculty and students alike to search for effective improvements in both preventive education and judicial processes.

I believe strongly that date rape is repugnant in any environment, but it is especially so in a university community, where trust and mutual respect are essential to our purposes. I also believe that since this is an institution of learning whose students come from many different backgrounds, with high expectations as well as uncertainties, we should make very clear at the outset what the standards of behavior are here. We should make quite clear that there is no room for violence in our interpersonal relationships. We should also search for the causes of stress and aggression and find ways to overcome them and develop constructive ways to minimize their negative effects.

Further, let me make very explicit that I believe that resolving the issue of date or acquaintance rape is central in the social transformation to incorporate women fully in society. When we have convinced both men and women that intimate sexual relationships must involve genuinely mutual consent and that neither party has the right to proceed without that consent, we will have accomplished a fundamental change in attitude. From this change other valuable improvements in living, learning and working environments, for both men and women, will follow. That this standard is new, that it changes centuries of contrary thought and behavior, must not deflect our insistence on its rightful place at last.

The judicial processes are one critical element in communicating clearly this standard of behavior. Preventive education is even more important because victims of rape not only suffer the trauma of the event, but also the pain of suffering thereafter in silence or the pain of the procedures of justice, however sensitively they are executed.

Part of the mission of Radcliffe College is advocacy for women in the Harvard/Radcliffe community. That advocacy takes many forms. Much of it, indeed perhaps the most effective efforts, are not visible to the general student population. That lack of visibility does not mean that the advocacy is lacking or ineffective. Let me assure you that I look for and take advantage of opportunities to press my advocacy for women

and, in particular, my views about date rape, in my interactions with faculty, students, and administrators, and I do not carry the responsibility alone. My colleagues at Radcliffe pursue advocacy in vigorous, creative ways. I am pleased to note that even in the short time I have been here, I have seen progress.

I will continue to pursue the interests of women students with vigor. And, recognizing how students crave evidence of such support, I will also look for effective new ways to make our efforts more explicit. I hope this letter will serve as a useful first step. I invite your suggestions of credible and effective mechanisms for Radcliffe's communication with students.

Again, let me congratulate the Radcliffe Union of Students, Response, Women's Center, and the Bisexual, Gay and Lesbian Student Association on a job well done.

Sincerely,

Linda S. Wilson

Linda S. Wilson
President

cc: Administrative Board of Harvard
& Radcliffe Colleges
Dean Jewett
Janet Vigianni
Nancy-Beth Sheerr

STARTLING FACTS ABOUT RAPE

- Rape is a crime of violence motivated by a need to show power over or to express anger against another person. Sex is used as the weapon.

- Rape is no respecter of age. Victims range in age from several days to over 100.

- Rape is no respecter of gender. Boys and men are raped by heterosexual men who want to show power or to express anger. An estimated 1 out of every 12 rape victims is male (National Crime Survey, 1989).

- Rape is no respecter of relationship. A woman's risk of being raped by someone she knows is 4 times greater than being raped by a stranger (Robin Warshaw, I Never Called It Rape, 1988).

- In 1989, 94,504 rapes were reported in the US. Based on reports to police, 16 rapes are attempted and 10 women are raped every hour (FBI Uniform Crime Report, 1989).

- For years following a rape, 60% of rape victims experience post traumatic stress disorder and 16% still suffer with emotional problems 15 years following the rape (HRS Rape Awareness Program, Tallahassee, FL, 1987).

- Rape is the most underreported violent crime, with only 5% to 20% reporting (Helen Benedict, Recovery: How To Survive Sexual Assault, 1985).

- 1 woman in 3 will be raped in her lifetime (Los Angeles Commission on Assaults Against Women, 1985).

- 1 in 4 girls and 1 in 7 boys will have been sexually assaulted by age 18 (Russell, 1983; Finkelhor, 1978; Sgroi, 1978).

- 10% of all rape victims are under age 5 (Robert Geiser, The Hidden Victim: The Sexual Abuse of Children, 1979).

- 27% of girls aged 15 to 19 have been victims of rape or attempted rape. 84% of these victims knew their attacker (Koss, 1987).

- 83% of child molesters are heterosexual; the remaining 17% are bisexual (A. Nicholas Groth. Why Men Rape, 1979).

- 10% to 14% of all married women have been raped by their husbands (Diana Russell, Rape in Marriage, 1983).

- Offenders who begin their sexual victimization "careers" in the teenage years commit an average of 380 sexual crimes by the time they are caught as adults (Abel, Mittleman, and Becker, 1984).

Statistics from the National Coalition Against Sexual Assault
For more information, Contact the Educator/Advocate Program at 545-3474

THIRD PARTY SEXUAL ASSAULT REPORT
Massachusetts Institute of Technology
Campus Police Department

The purpose of this form is to assist the campus police with statistical information when a victim does not want to report a sexual assault formally to the police. This form should only be utilized if the victim agrees to have this information released to the campus police.

1. Date of Report:_____ Time:_____

2. Date of Assault:_____ Time:_____

3. Sex of Victim? _____Female _____Male Age of Victim?_____

I. Victim/Survivor

4. Affiliation to Institute
   - (1) Undergraduate
   - (2) Graduate
   - (3) Faculty
   - (4) Staff
   - (5) Not Affiliated
   - (6) Other_____

5. Victim Lives:
   - (1) Dorm
   - (2) Frat/ILG
   - (3) Off Campus

6. Race/Ethnicity
   - (1) White
   - (2) Black
   - (3) Asian
   - (4) Hispanic
   - (5) Native American
   - (6) Mixed
   - (7) Other_____

II. Assault

7. Type of coercion/force involved (circle all that apply)
   - (1) Verbal
   - (2) Physical
   - (3) Presence of a weapon
   - (4) Threat of Death
   - (5) Abduction
   - (6) Other_____

Assault Info continued:

8. Reported Assault (circle all that apply)
   - (1) Completed Rape
     - (1a) Penetration yes no
     - (1b) vaginal, oral, anal
   - (2) Attempted Rape
   - (3) Sexual Assault (Physical)
   - (4) Sexual Assault (Verbal)

9. Place Where Assault Occurred (circle all that apply)
   - (1) Victim's House
   - (2) Offender's Home
   - (3) Fraternity:_____
   - (4) Sorority:_____
   - (5) Residence Hall:_____
   - (6) Public Campus Facility (gym, library, other)
   - (7) Parking Lot:_____
   - (8) Outdoors:_____
   - (9) Car/Vehicle
   - (10) Workplace
   - (11) Other_____

10. Was victim using drugs/alcohol at time of assault?
    - (1) Yes (Alcohol - Drugs)
    - (2) No (Alcohol - Drugs)

11. If Yes, did victim feel pressured to consume/use? Yes - No

College Men as Perpetrators of Acquaintance Rape and Sexual Assault: A Review of Recent Research

Alan Berkowitz, PhD

Abstract. This article reviews literature since 1980 on college men as perpetrators of acquaintance rape and other forms of sexual assault. Topics include (1) the definition and incidence of acquaintance rape and sexual assault; (2) perpetrator characteristics; (3) situations associated with sexual assault; and (4) men's misperception of women's sexual intent. An integrated theory of sexual assault is proposed, along with implications for the development of effective rape-prevention programs for men.

Key Words. acquaintance rape, rape prevention, sexual assault

A substantial proportion of college women are at risk of becoming victims of acquaintance rape on campus. Prevalence figures range from 15% to 44%,[1] and even greater numbers of women experience other forms of sexual assault. Although this review and most other research examine heterosexual dating situations, there is evidence that acquaintance rape occurs at similar rates among gay men and lesbian women.[2]

Outreach programs and prevention strategies developed to address this problem have focused primarily on reducing women's risk of sexual victimization or have used coeducational audiences in an effort to examine the social and interpersonal behaviors associated with rape. Despite the existence of a substantial literature identifying attitudes, behaviors, and personal characteristics of college men who are prone to commit sexual assault, few programs that focus on men's issues in relation to acquaintance rape have been developed specifically for all-male groups.

This article reviews literature on college men as perpetrators of sexual assault, including acquaintance rape, with particular emphasis on research completed since 1980; proposes an integrated theory of sexual assault; and discusses implications for developing rape prevention programs for men.

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Definition and Incidence of Male Sexual Assault

Sexual assault occurs when one person is sexually intimate with another without the consent of the second party. Sexually assaultive behaviors can be placed on a continuum according to the degree of force or coercion involved. They include behaviors such as ignoring indications that intimacy is not mutual, threatening negative consequences or use of force, or using force to obtain sexual intimacy. Rape is the most extreme form of sexual assault. In most states, rape is defined as penetration without the victim's consent.

Most studies of the frequency of sexual assault among college students indicate that from 25% to 60% of college men have engaged in some form of sexually coercive behavior. In one survey by Rapaport and Burkhart,[3] only 39% of the men sampled denied coercive involvement; 28% admitted to having used a coercive method at least once; and 15% admitted they had forced a woman to have intercourse at least once. Koss and others,[4-6] using data from a large, nationally representative sample of college and university students, found that 25% of the male respondents had been involved in some form of sexual assault since age 14.

Muehlenhard[7-9] has conducted a number of interesting studies that examine the prevalence of sexual assault among college students in relation to a variety of predisposing factors. In one study, 57% of the men admitted to perpetrating sexual assault, with 51% reporting an incident during college. The most frequent means these men employed was simply to ignore their victim when she protested or said "no." Rapaport and Burkhart,[3] in the study cited above, also noted that most incidents of sexual assault perpetrated by college men involved ignoring the victim's protests rather than using violence or overt force. Muehlenhard and Schrag[10] recently provid-

ed an excellent review of the different forms of nonviolent sexual coercion experienced by women.

Koss[4,5] noted that the incidents of sexual assault admitted to by college men are not sufficient to account for all of the victimization experiences reported in her survey. This phenomenon was found to be due to underreporting of perpetrators rather than to actions of a few extremely sexually active men victimizing large numbers of women.

Another behavior noted in the literature is men's reports of engaging in sexual activity against their own wishes. In a recent study, Muehlenhard and Cook[6] found that almost two thirds of the men surveyed had engaged in unwanted intercourse, primarily because of male peer pressure or wanting to be popular. Similar results were obtained in another study in which 14% of the male students reported having been forced to have intercourse against their will, and 17% that they had been pressured to have sexual contact when they did not desire it.[11]

An Integrated Theory of Sexual Assault

Various theoretical models have been proposed to explain the occurrence of sexual assault. A growing number of researchers and theorists have suggested that sexual assault is the result of normal socialization processes that men experience. This sociocultural approach places rape on a continuum of sexually assaultive behaviors without defining rape as a deviant act committed by atypical individuals.[12] A great deal of research supports this model.[3,4,13,14]

Other theoretical models have focused on the personality characteristics and behaviors of the perpetrator and/or the victim, situations in which assaults are more likely to occur, and patterns of misinterpretation and miscommunication about sexual intimacy between women and men. As evidence documenting the importance of all of these variables has accrued, researchers have argued for a multivariate model of sexual assault that considers the relative roles of all the variables. Rapaport and Posey[15(p226)] argued for such a model in their recent review of the literature on sexually coercive college males:

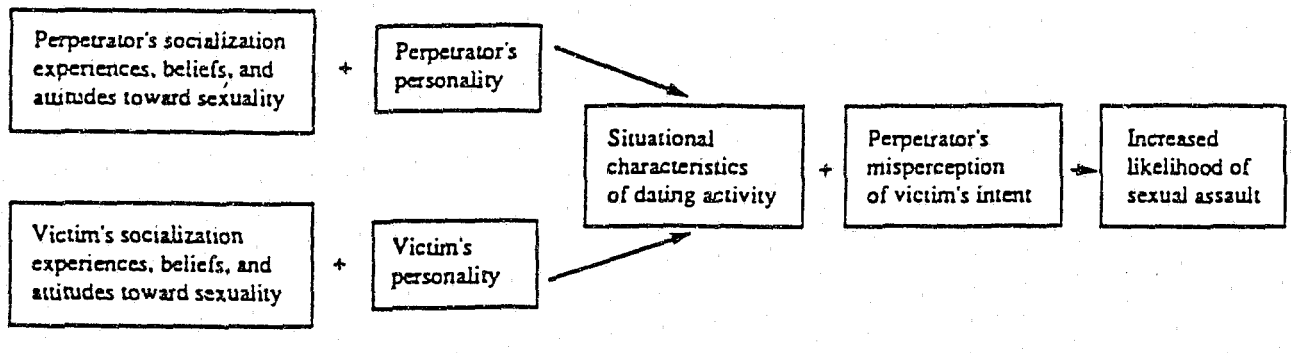
> Rape concepts and rape research should focus on a complex model wherein personality characteristics, situational factors, and socialization all play a role in the development of sexual coerciveness in general and rape in particular.

A multivariate approach can be used to explain differences among men on variables related to the likelihood of committing a sexual assault and can help to identify those with a greater propensity to rape (see Figure 1). Although all components of the model need not be present for a sexual assault to occur, there is evidence that their presence can be used to predict the likelihood of sexual assault.

This model of sexual assault considers the relative influence of perpetrator characteristics, situational variables associated with sexual assault, the degree to which the perpetrator misperceives the sexual intent of his partner, and victim characteristics associated with women's increased risk of victimization. A discussion of risk factors for women's victimization is outside the scope of this review, but readers will find that a considerable literature exists on this topic.[16-18]

Figure 1 illustrates a possible causal relationship between the different factors in the model. The perpetrator's attitudes, beliefs, and socialization experiences define for him conditions in which he would be willing to assault an acquaintance sexually or to believe that assault was justifiable. Other perpetrator characteristics, including personality and early sexual experiences, may create a willingness or greater likelihood of acting on these beliefs and attitudes. Situational variables—what actually happens in the context of a date or social interaction with a female acquaintance—can serve as triggers for the perpetrator, leading him to conclude that continued sexual aggression is justified. His misreading of these situational cues may cause him to mis-

FIGURE 1
An Integrative Model of Sexual Assault and Acquaintance Rape



interpret his partner's sexual intent, incorrectly attributing to her a similar interest in sexual intimacy. For example, a man may be socialized to believe that women do not really mean it when they say "no" to sexual advances. A man who adheres to this belief will probably overlook a negative verbal response to his attempts at sexual intimacy, especially if he is somewhat irresponsible, impulsive, or traditional in his sex role attitudes. The assumption that "no means yes" will then lead him to misperceive his partner's sexual intent.

This model assumes that most college men who commit acquaintance rape and other forms of sexual assault do not define their behavior as such and are, therefore, able to justify their actions to themselves and others. The unwillingness or inability of rapists to label their actions correctly has been documented in a number of studies,[5,19,20] and there is considerable research suggesting that the relationship between predictor variables and the occurrence of sexual assault is much stronger for perpetrators than it is for victims.

Perpetrator Characteristics

Men grow up in an environment that supports the objectification of women and encourages them to behave in ways that are sometimes violent and coercive. Many college men admit, for example, that they would be willing to commit sexual assault under certain conditions. These actions logically follow from men's socialization into traditional gender roles. Such gender socialization experiences, however, are not sufficient to explain the occurrence of sexual assault because many men do not act on these cultural messages. Rape-supportive attitudes and beliefs may create a potential for engaging in sexual assault that is reinforced by personality characteristics and early sexual experiences. Studies that evaluate the role of perpetrator characteristics in predisposing men to condone or engage in sexually aggressive acts are summarized below.

Male socialization. Many theorists have argued that the socialization of American men encourages a complex of attitudes and behaviors that predispose them to dominate and abuse women and other men in a variety of ways. Brannon and David's[21] analysis of the male sex role included the following components: (1) avoid acting in ways that can be seen as feminine ("no sissy stuff"); (2) strive for power, status, and control ("be a big wheel"); (3) act tough and unemotional ("be a sturdy oak"); and (4) be aggressive and take risks ("give 'em hell").

Relationships with women and sexuality, in particular, provide a sphere for the enactment and confirmation of these traditional gender role expectations. Because formation of a gendered and sexual identity is one of the important developmental tasks for young adults,[22] sex role prescriptions may take on particular importance for college men between the ages of 18 and 25 years. Such normative gender roles assign men the role of "aggressor" and women the role of "gatekeeper" with respect to issues of sexual intimacy. O'Neil[23] has referred to the totality of these male sex role behaviors and attitudes as the "masculine mystique."

These authors and others in the academic disciplines of women's studies and men's studies have argued that sex role socialization provides men with permission to commit sexual abuse and creates a cognitive framework that allows them to justify similar behavior among male peers. Men feel pressure from other men to be sexual as a means of confirming their masculinity. In conversations with other men, they frequently emphasize their sexual experiences. These pressures may also result in men's participation in sexual encounters that they later regret.

Attitudes. As a result of their socialization experiences, men may develop attitudes and belief systems that allow them to justify sexual assault or not define it as such. In a number of studies, men who accepted stereotypical myths about rape, held adversarial views about relationships between men and women, condoned violence against women, or held traditional attitudes about sex roles were found to be more tolerant of rape, more blaming of rape victims, and more likely to rape if they could be assured that no one would find out.[7,14] Adherence to these rape-supportive attitudes has also been associated with actual experience as a perpetrator.[7,13,14] Muehlenhard et al, in a frequently cited study, found that men perceived rape to be more justified if the couple went to the man's apartment, if the woman asked the man out, and if the man paid all of the expenses for the date. Although most men adhere to these attitudes to some extent, those men who scored as more traditional in their sex role attitudes were even more likely to view rape as justifiable in these conditions.[24]

Rape-supportive attitudes may take the form of beliefs in rape myths. A rape myth has been defined as "prejudice, stereotyped or false belief about rape, rape victims, and rapists."[25(p26)] These myths can include believing that the victim wanted or deserved to be assaulted, that no harm was done, or that sexual assault never happened.[25] Rape myths have been found to be widely held by men in the general population.[26-28] In one study, the rape myth most frequently associated with sexual assault was men's belief in the "token no" hypothesis, that is, that "no does not mean no."[29] Another belief strongly correlated with sexual assault in this study was men's belief that violence is an acceptable response to women who "lead men on." Belief in such rape myths has been strongly correlated with college men's willingness to justify rape in a number of studies.

The following statement by Steven Box[19(p147)] provides an excellent description of men's socialization into coercive sexuality:

> Masculine sex-role socialization is a cultural precondition of rape because, first, it reduces women in men's minds to the status of sex objects, and second, it instructs men

> to be prepared for strong, even if deceitful, resistence. . . . Thus, in pursuing "normal" sexual relationships, men often find themselves in a situation where a reluctant female has to be overcome, not only because that's what "real men" do, but because that's what "real" women really want. In other words, "normal" and "coercive" sexual encounters become so fused in the masculine mystique that it becomes possible to see rape as not only normal, but even desired by the victim.

Personality characteristics and early sexual experience. The belief that rape perpetrators are psychologically disturbed individuals who differ from more "normal" men has not been supported in most studies, which show that men without evidence of psychological disturbance have been found as likely to commit sexual assault. More recent studies, however, suggest that certain personality characteristics or childhood experiences may act as predisposing factors for sexual aggression without being an indicator of overt psychopathology. Koss and Dinero[6] found that men who perpetrated severe sexual aggression had their first sexual experience at a younger age and reported earlier and more frequent childhood sexual experiences, both forced and voluntary. These men were also characterized by greater hostility toward women. Other researchers have found sexually coercive behavior to be associated with characteristics of irresponsibility, lack of social conscience, values legitimizing aggression against women,[3] and a need for dominance over sexual partners.[13] These results provide support for a developmental sequence of sexual aggression, with early experiences and personality characteristics serving as preconditions of sexual violence in the presence of facilitating environmental conditions.[6]

Situational Risk Factors

The aforementioned predisposing factors exist within the perpetrator as personality characteristics, attitudes, and belief systems about sexuality. They may be triggered by actual situations that are interpreted as justifying sexual intimacy. Thus, another set of risk factors for sexual assault relates to characteristics of the actual dating situation. Situations or characteristics of dates that have been empirically correlated with sexual assault include those associated with men's increased control or dominance (such as date location and activity, who initiates and who pays, and mode of transportation); alcohol and other drug use; the nature of the victim-perpetrator relationship; and peer support or enabling behaviors.

Control and dominance issues. Muehlenhard and Linton[7] reported that men who initiated the date, paid all expenses, and provided transportation were more likely to be sexually aggressive. Engaging in these activities gives men a greater ability to define what happens during a date and reflects the existing disparities in power between men and women within society at large.[1] The phenomenon of "parking" (engaging in intimate behavior in a car or truck), which was strongly correlated with sexual assault in one study,[7] illustrates this dynamic. Parking usually occurs in the man's car in an isolated place, providing him with considerably more control than his date has over what happens.

Alcohol and other drug use. Alcohol or other drug use is frequently associated with sexual assaults on college campuses.[7,30,31] In one study, frequent use of alcohol and other drugs was associated with more serious incidents of sexual assault and was one of the four strongest predictors of rape among college women.[18] Abbey[30] has suggested that use of alcohol increases the chances that sexual intent will be misperceived, can be used to justify sexually aggressive behavior, and can impair men's and women's abilities to communicate their intentions effectively. Other studies have documented that both men and women adhere to a double standard—men are perceived as less responsible and women as more responsible for what happens when one or both parties drink alcohol before a sexual assault.[32] The results of one recent study suggest that unwanted sexual experiences as a result of alcohol use are commonplace for both men and women: approximately 25% of both genders reported having this happen at least once within the past year, and 15% of men and 10% of women more than once.[33]

Victim-perpetrator relationship. Another situational variable is the perpetrator's relationship to the victim. In one study, most incidents of sexual assault in college occurred between men and women who had known each other for at least a year.[7] In another study, 42% of victims had sex with their perpetrator at a later time.[5] These studies contradict the belief that sexual assault commonly occurs among strangers rather than among individuals in a more ongoing relationship.

Close-knit male peer groups and gang rape. Koss and Dinero[6] found a relationship between the degree of sexual assault and the perpetrator's use of violent and degrading pornography or involvement in peer groups that reinforced views of women as highly sexualized objects. Fraternities have often been used as an example of a highly intensive male peer environment that reinforces such rape-supportive attitudes and behaviors. Martin and Hummer[34] advanced this hypothesis in an article on fraternities and campus rape, noting the likelihood of sexual abuse in an environment that promotes narrow, stereotypical conceptions of masculinity, encourages use of alcohol to overcome women's sexual reluctance, and emphasizes violence, force, and competition in relationships.

Most gang rapes that occur in college environments are perpetrated by male members of such groups. In one review of alleged gang rapes by college students since 1980, 22 out of 24 documented cases were perpetrated by members of fraternities or intercollegiate athletic teams.[35] Membership in such groups may "protect a perpetrator from doubts about the propriety of his behavior,"[35(p143)] especially when such groups are associ-

ated with high status and special privileges on campus. Participation in or observation of group sexual assaults may also serve to increase group cohesiveness and resolve doubts about heterosexuality created by close, intimate relationships with other men.

Misperceptions of Sexual Intent

Antonia Abbey and her colleagues have shown that college men and women interpret sexual and nonverbal cues differently, with men typically overestimating women's sexual availability and interest.[36-39] For example, men are more likely than women to perceive male and female stimulus persons as seductive and are more likely to report sexual attraction toward opposite-sex targets.[36] These results were supported in two follow-up studies in which stimulus situations were varied in relation to a wide variety of situational cues, including revealingness of the target's clothing, interpersonal distance, eye contact and touch, and sex composition of the dyad.[37-39] Shotland and Craig,[40] in a related study, found that although both genders make distinctions between "friendly" and "interested" behavior, men have a much lower threshold for the perception of sexual intent. Muehlenhard reported similar results: "No matter who initiated the date, who paid, or where the couple went, men were always more likely than women to interpret the behavior as a sign that women wanted sex."[9(p251)]

FIGURE 2
Factors Associated With Increased Risk of Commiting Sexual Assault

I. Perpetrator Characteristics
  A. Attitudes and Socialization Experiences
    1. Belief in rape myths
    2. Adversarial view of general relations
    3. Traditional gender roles
  B. Personality Characteristics
    1. Hostility toward women
    2. Irresponsibility
    3. Lack of social conscience
    4. Acceptance of violence against women
    5. Need to dominate
  C. Participation in close-knit all-male groups emphasizing I-A and I-B.

II. Situational Risk Factors
  A. Date location and activity
  B. Man initiates and pays
  C. Alcohol and other drug use
  D. Ongoing relationship with victim
  E. Peer group support
  F. Dress
  G. Power differential

III. Misperception of Sexual Intent Based on
  A. Friendliness
  B. Attractiveness
  C. Other situational risk factors (II-A–II-G)

Men who commit a sexual assault have often misperceived their victim's sexual intent. In one study of actual dating experiences, men who perpetrated a sexual assault reported feeling "led on," in part because they perceived their female partners to be dressed more suggestively than usual.[7] Koss reported that men who committed a sexual assault did not define their behavior as rape, placed equal responsibility on their partners for what happened, and said they were willing to engage in similar behavior again. These perpetrators also disagreed with their victims about the extent to which force was used and resisted.[5]

This research points to a considerable gender gap in men's and women's interpretations of heterosexual dating behaviors, a gap that has led some to define cross-gender communication as a form of cross-cultural communication.[41] The studies reviewed here indicate that men are much more willing than are women to interpret a variety of behaviors as indicative of sexual interest, even when the stimuli are very subtle, and especially when they are ambiguous. Men see attributes in women such as friendliness, revealingness of clothing, and attractiveness as seductive when these same behaviors are not perceived this way by women. These differences in the perception of sexual intent set the stage for misunderstanding and misinterpretation in heterosexual dating situations and may result in men's perceiving a green light when none exists.

Implications for Rape Prevention Programming

Recent research suggests that rape is best understood as an extreme on a continuum of sexually assaultive behaviors; that sexual assault is engaged in by many men and may be somewhat normative; and that sexual assault is best understood as occurring in a sociocultural environment that promotes rape-supportive attitudes and socializes men to adhere to them. Many men may report engaging in unwanted sexual activity, in part as a result of peer pressure to be sexually active. The proposed model shown in Figure 1 describes the relationship of the different factors that have been associated with men's likelihood of committing a sexual assault. The components of each factor, including perpetrator characteristics (attitudes, socialization experiences, and personality characteristics), situational risk factors, and variables contributing to the misperception of sexual intent are summarized in Figure 2.

From this review, a number of conclusions can be drawn with respect to the design and development of effective rape prevention programs for men. Such programs should obviously address the different risk factors associated with men's willingness to condone or engage in sexual assault. This may include defining rape and sexual assault, challenging rape myths, understanding male socialization experiences, and encouraging men to confront peers who express adherence to rape-

supportive beliefs. Interventions designed to have an impact on situational contributors to sexual assault, including campus substance abuse patterns and policy, are also indicated by the present review.

Because most of the variables predicting men's likelihood of committing a sexual assault are associated with experiences in all-male environments or with close male peers, efforts to change male attitudes and behavior may be more effective in all-male groups. In fact, rape prevention programs that focus exclusively on women may serve to reinforce attitudes and belief systems that allow men to deny responsibility for the problem. Similarly, coed discussion groups or workshop formats may unintentionally reinforce differences between men and women and adversarial views of male-female relationships that are associated with men's increased proclivity to rape. In contrast, all-male workshops can create a safe environment where men can discuss the attitudes and behaviors that make them potential perpetrators and can be encouraged to take action to stop rape. Peer-facilitated groups that use respected campus leaders as role models may be particularly effective in generating positive peer pressure against rape and for modeling alternatives to traditional male sexist behavior. Such workshop formats can also be used to encourage men who do not adhere to rape-supportive beliefs and attitudes to speak out and have their views represented among the diversity of male viewpoints.

In summary, the causes of sexual assault are complex and incorporate a wide range of experiences, attitudes, and cognitions among men. Rape prevention is clearly a men's issue, and we need prevention programs that draw on relevant research to help men begin a process of self-examination and change.

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Reprinted from the JOURNAL OF AMERICAN COLLEGE HEALTH, published by HELDREF PUBLICATIONS, 1319 Eighteenth St., N.W., Washington, D.C. 20036.

Drugs and Alcohol: Use and Abuse

PERSONS UNDER CERTAIN AGE

Caption editorially modified

§ 34. Sale, delivery or furnishing alcoholic beverages to persons under twenty-one years of age; employment of persons under eighteen years of age

No person shall receive a license or permit under this chapter who is under twenty-one years of age. Whoever makes a sale or delivery of any alcoholic beverages or alcohol to any person under twenty-one years of age, either for his own use or for the use of his parent or any other person, or whoever, being a patron of an establishment licensed under section twelve or fifteen, delivers or procures to be delivered in any public room or area of such establishment if licensed under section twelve, fifteen, nineteen B or nineteen C, or in any area of such establishment if licensed under section fifteen, nineteen B or nineteen C, any such beverages or alcohol to or for use of a person who he knows or has reason to believe to be under twenty-one years of age or whoever procures any such beverages or alcohol for a person under twenty-one years of age in any establishment licensed under section twelve, or procures any such beverage or alcohol for a person under twenty-one years of age who is not his child, ward or spouse in any establishment licensed under said section fifteen, nineteen B or nineteen C shall be punished by a fine of not more than two thousand dollars or by imprisonment for not more than six months, or both. Nothing in this section shall prohibit any person licensed under this chapter from employing any person eighteen years of age or older for the direct handling and selling of alcoholic beverages or alcohol.

Notwithstanding the provisions of clause (14) of section sixty-two of chapter one hundred and forty-nine, any licensee under this chapter may employ a person under the age of eighteen who does not directly handle, sell, mix or serve alcohol or alcoholic beverages.

Added by St.1933, Ex.Sess., c. 376, § 2. Amended by St.1935, c. 440, § 34; St.1936, c. 171; St.1937, c. 424, § 5; St.1943, c. 542, § 15; St.1962, c. 354; St.1972, c. 155, § 2; St.1977, c. 929, § 14; St.1979, c. 15, § 6; St.1980, c. 193; St.1982, c. 97; St.1982, c. 627, § 13; St.1984, c. 312, § 5; St.1988, c. 149.

§ 34A. Persons under twenty-one years; purchase or attempt to purchase alcoholic beverages

Any person under twenty-one years of age who purchases or attempts to purchase alcoholic beverages or alcohol, or makes arrangements with any person to purchase or in any way procure such beverages, or who willfully misrepresents his age, or in any way alters, defaces or otherwise falsifies his identification offered as proof of age, with the intent of purchasing alcoholic beverages, either for his own use or for the use of any other person shall be punished by a fine of three hundred dollars and whoever knowingly makes a false statement as to the age of a person who is under twenty-one years of age in order to procure a sale or delivery of such beverages or alcohol to such person under twenty-one years of age, either for the use of the person under twenty-one years of age or for the use of some other person, and whoever induces a person under twenty-one years of age to make a false statement as to his age in order to procure a sale or delivery of such beverages or alcohol to such person under twenty-one years of age, shall be punished by a fine of three hundred dollars.

The commission shall prepare and distribute to business establishments which sell, serve or otherwise dispense alcohol or alcoholic beverages to the general public, posters to be displayed therein in a conspicuous place. Said posters shall contain a summary and explanation of this section.

Added by St.1935, c. 146. Amended by St.1935, c. 440, § 35; St.1977, c. 859; St.1979, c. 15, § 7; St.1984, c. 312, § 6; St.1988, c. 85.

§ 34B. Liquor purchase identification cards

Any person who shall have attained age twenty-one and does not hold a valid drivers license issued by the registry of motor vehicles, pursuant to section eight of chapter ninety, or a valid drivers license issued by the registry or department of motor vehicles of another state, which contains the photograph of the licensee may apply for a liquor purchase identification card. Such cards shall be issued by the registry of motor vehicles upon the payment of a fee of five dollars, and shall bear the name, signature, date of birth, address and photograph of such person. The commission with the advice and consent of the registrar of motor vehicles shall prescribe rules and regulations governing the uniformity of form of said card and the manner in which an applicant for such a card shall be required to identify himself.

Any licensee, or agent or employee thereof, under this chapter who reasonably relies on such a liquor purchase identification card or motor vehicle license issued pursuant to section eight of chapter ninety, for proof of a person's identity and age shall not suffer any modification, suspension, revocation or cancellation of such license, nor shall he suffer any criminal liability, for delivering or selling alcohol or alcoholic beverages to a person under twenty-one years of age. Any licensee, or agent or employee thereof, under this chapter, who reasonably relies on such a liquor purchase identification card or motor vehicle license issued pursuant to said section eight, for proof of a person's identity and age shall be presumed to have exercised due care in making such delivery or sale of alcohol or alcoholic beverages to a person under twenty-one years of age. Such presumption shall be rebuttable; provided, however, that nothing contained herein shall affect the applicability of section sixty-nine.

Any person who transfers, alters or defaces any such card or license, or who makes, uses, carries, sells or distributes a false identification card or license, or uses the identification card or motor vehicle license of another, or furnishes false information in obtaining such card or license, shall be guilty of a misdemeanor and shall be punished by a fine of not more than two hundred dollars or by imprisonment for not more than three months.

Any person who is discovered by a police officer or special police officer in the act of violating the provisions of this section may be arrested without a warrant by such police officer or special police officer and held in custody, in jail or otherwise, until a complaint is made against him for such offense, which complaint shall be made as soon as practicable and in any case within twenty-four hours, Sundays and legal holidays excepted.

Added by St.1964, c. 735. Amended by St.1967, c. 556; St.1972, c. 155, § 3; St.1979, c. 15, § 8; St.1984, c. 312, § 7; St.1985, c. 340; St.1986, c. 629, § 3; St.1989, c. 322, § 2; St.1989, c. 674.

§ 34C. Persons under twenty-one years of age; operation of motor vehicles containing alcoholic beverages

Whoever, being under twenty-one years of age and unaccompanied by his parent or legal guardian, knowingly transports or carries on his person any alcohol or alcoholic beverages shall be punished by a fine of not more than fifty dollars; provided, however, that this section shall not apply to any person between the age of eighteen and twenty-one who knowingly transports or carries on his person alcohol or alcoholic beverages in the course of his employment. A police officer may arrest without a warrant any person who violates this section. A conviction of a violation of this section shall be reported forthwith to the registrar of motor vehicles by the court if, at the time of the violation, the defendant was operating a motor vehicle upon a public way or a way to which the public had a right of access as invitees or licensees, and said registrar may suspend for not more than three months the license of such person to operate a motor vehicle.

Added by St.1966, c. 317, § 2. Amended by St.1967, c. 377; St.1979, c. 15, § 9; St.1984, c. 312, § 8.

DEANS AND THE DRINKING AGE: POLICY AND PROGRAM IN CONFLICT

Prepared by

Bobbie Knable, Dean of Students, Tufts University
and
Stephen J. Nelson, Director, Connecticut Campus Partnership

Recent years have produced a number of social policy initiatives, and federal and local legislative measures designed to affect the consumption of alcoholic beverages and other drugs by young people, many of whom are college students and in residence on campuses. The major change during the mid- to late-1980's was the raising of the minimum age for purchasing and consuming alcohol to 21 years of age from the previous level of 18 in all New England states and many others around the country. Growing out of this change and the increased efforts to prevent illicit drug use are other federal, state and local governmental actions:

*legislation requiring financial aid recipients to sign a pledge that they will not use drugs

*the Drug Free Schools and Communities Act and its amendments mandating institutional compliance in setting policy and disciplinary actions against violators

*the Drug Free Workplace Act prescribing similar warnings and sanctions directed at employees

*measures governing open containers of alcohol, outdoor public gatherings, use of false identification, etc.

These policies and laws have forced deans, other administrators and faculty to reexamine and revise campus policies on alcohol and other drugs. Having a policy was thought to be the primary issue; finding effective ways both to enforce policy and to deal with the consequences of that enforcement has come to be recognized as equally important--and more difficult.

*campus-wide directives governing or banning kegs and large-scale service of alcohol; limitations on the number of social activities conducted at given times (or at all); wider use of identification procedures for distinguishing age and college/university community membership

*heightened restrictions on fraternity/sorority systems (pledging activities, invitation-only and closed parties, isolating beverage service areas)

*review of protocols for handling significantly intoxicated students, emergency room transports, parental notification

*increased training of residential life staff, counselors, campus security and other student support services staff

*greater reliance on legal counsel for opinion and direction

*increased student ingenuity and counterproductive strategies for bypassing restrictions and policy requirements

*diminished trust and increased cynicism on the part of students toward college/university administrators

Deans of Students and other key student affairs administrators must weigh the costs and benefits of policies designed to achieve sometimes seemingly contradictory goals: to comply with federal and state laws, to educate their constituencies about the effects of alcohol and other drugs and to eliminate abuse, and to protect their institutions from liability.

Access to Records

The Commonwealth of Massachusetts
Executive Office of Public Safety
Criminal History Systems Board
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Boston, Massachusetts 02215
(617) 727-0090
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WILLIAM F. WELD
Governor

THOMAS C. RAPONE
Secretary

THOMAS C. RAF
Chairman

FRANCIS J. CARNE
Executive Direc

The following is a guideline for what is and is not CORI information.

CORI is
records or data in any communicable form, compiled by a criminal justice agency, concerning an identifiable individual, that relates to the nature or disposition of a criminal charge, arrest, pre-trial proceeding, or other judicial proceeding, sentencing, incarceration, rehabilitation or release.
Examples are: arrest reports, fingerprints, photographs, BOP file, log entries (except chronologically compiled daily logs, arrest registers).

The following is not CORI:

Juvenile data; statistical data; evaluative infcrmation; intelligence information; minor offenses (those not punishable by a term of incarceration); information published during a criminal court proceeding; information of the Registry of Motor Vehicles (except that driver history information that refers to a criminal offense).

CORI pertaining to deceased persons is open to the public upon some reasonable proof of death.

CRIMINAL OFFENDER RECORD INFORMATION SYSTEM

(CORI)

I. How is CORI Defined?

Records and Data in any communicable form complied by a criminal justice agency which concern:

(1) An identifiable individual and relate to
(2) Nature of disposition of a:
    a) Criminal charge,
    b) Arrest,
    c) Pre-trial proceeding,
    d) Other judicial proceeding,
    e) Sentencing,
    f) Incarceration,
    g) Rehabilitation, or
    h) Release

Such information shall be restricted to that recorded as the result of the initiation of criminal proceedings or any consequent proceedings related thereto. (This means CORI does not apply at investigative stage.)

Note: CORI does not include evaluative information, statistical and analytical reports and files in which individuals are not directly/indirectly identifiable or intelligence information. (See attachment.)

Note: CORI is applicable to information concerning persons who have attained age 17 and shall not include any information concerning criminal offenses/acts of delinquency committed by a person before age 17, HOWEVER, if person is adjudicated as an adult, information relating to such criminal offense is CORI.

Note: CORI applies only to crimes punishable by incarceration.

(See 803 CMR 2.03)

II. Access Procedures (See also 800 CMR 4.00 Statutory Authorized Access)

803 CMR 3.01

3.01: General Requirements

(1) Any individual or agency requesting certification for access to CORI under the provisions of M.G.L. c. 6. ss. 172(a), (b), or (c), shall apply in writing to the CHSB on the appropriate form provided by the CHSB.

(2) Within a reasonable time of receipt by the CHSB of the application under M.G.L. c. 6. s. 172. and the collection of sufficient data. Legal Counsel shall prepare written recommendation pertaining to each application with reasons for approval or denial of certification.

(3) The members of the CHSB shall meet and consider the applications for certification and recommendations of Legal Counsel on each. A vote of two thirds of the present and voting members shall be required for certification.

(4) No CORI shall be disseminated to any such agency or individual prior to certification by CHSB: unless such person or agency is specifically provided access by statute and referred in these regulations.

3.02: Criminal Justice Agencies: Eligibility for Access

(1) In order to obtain certification as a criminal justice agency pursuant to M.G.L. c. 6. s. 172(a), the agency requesting such certification must show that it conforms to the definition of "Criminal Justice Agency" which appears in M.G.L. c. 6. s. 167 and 803 CMR 2.03.

(2) Only those officials and employees of criminal justice agencies as determined by the administrative heads of such agencies to require CORI for the actual performance of their criminal justice duties shall have access to CORI. Such administrative heads shall maintain for inspection by the CHSB. a list of such authorized employees by position. title. or name.

(3) Consultants and contractors to criminal justice agencies shall complete a written agreement to use CORI only as permitted by M.G.L. c. 6. ss. 167 and 178 and these regulations. Such Agreements of Non-Disclosure shall be held by the criminal justice agency and the CHSB.

(4) A certified criminal justice agency which is a subunit of a non-criminal justice agency shall not disseminate CORI. directly to through any intermediary. to any uncertified official. employee. consultant or contractor of the non-criminal justice agency of which it is a part.

3.03: Non-Criminal Justice Agencies: Eligibility for Access

(1) In order to obtain certification pursuant to M.G.L. c. 6. s. 172(b). a non-criminal justice agency must show that it is required to have access to CORI by statute. "Required to have access by statute" means that there is a specific statutory directive that such individual or agency:

(a) Have access to CORI. or:
(b) Must use CORI in the exercise of its decision making process.

The following shall not constitute sufficient justification for certification under this section:

3.03: continued

1. An administrative or executive directive, in the absence of specific statutory language:
2. A statutory requirement to consider good character, moral character, trustworthiness or similar subjective characteristics.

(2) Consultants and contractors to non-criminal justice agencies shall complete a written agreement to use CORI only as permitted by M.G.L. c. 6, ss. 167-178 and these regulations. Such Agreements of Non-Disclosure shall be held by the criminal justice agency and the CHSB.

(3) A certified non-criminal justice agency which is a subunit of an uncertified non-criminal justice agency shall not disseminate CORI, directly or through any intermediary, to any uncertified official, employee, consultant or contractor of the non-criminal justice agency of which it is a part.

3.04: Public Interest: Eligibility for Access

(1) In order to obtain certification pursuant to M.G.L. c. 6, s. 172(c), an agency, individual or corporation must offer evidence that the public interest in disseminating the requested CORI outweighs the personal privacy interests of the subjects upon which access is sought. Two-thirds of the present and voting members of the CHSB are required both for certification and for the extent of access to be allowed.

(2) Persons who are victims of crime, witnesses to crime, and family members of homicide victims, as defined by M.G.L. c. 258B, shall be certified by the Board upon their application to receive:
(a) CORI information as it relates to the offense in which said victim/witness is involved.
(b) Other information, including but not limited to, evaluative information, which in the agency's discretion is reasonably necessary for the security and well-being of said victim/witness.

3.05: Computer Terminal Access to CORI

Computer terminal access to CORI shall be limited to certified criminal justice agencies, unless such access is otherwise authorized by the CHSB.

3.06: Limitations on Access to CORI

The extent of access to CORI shall be limited to that necessary for the actual performance of the criminal justice duties of criminal justice agencies under M.G.L. c. 6, s. 172(a), to that necessary for the actual performance of the statutory duties of agencies and individuals granted access under M.G.L. c. 6, s. 172(b), and to that necessary for the actual performance of the actions or duties sustaining the public interest as to agencies or individuals granted access under M.G.L. c. 6, s. 172(c). No person may be requested or required to produce a copy of his/her criminal record for any reason.

3.07: Access by Other Than Personal Identifying Information

Except for approved research program or upon written authorization of the CHSB and the head of the agency whose CORI is sought, access to and dissemination of CORI shall be limited to inquiries based on name, fingerprints or other personal identifying characteristics.

3.08: Listing of Dissemination of CORI

Each agency or individual certified by the CHSB shall maintain a listing of CORI disseminated and the agencies or individuals to whom it has disseminated each item of CORI. Such listing shall be on a form prescribed by the CHSB and maintained for at least one year from the date of dissemination. Such listing shall be made available for audit or inspection by the CHSB.

Caption editorially supplied.

Law Review Commentaries

Employment applications: What employers can and cannot ask. Mark E. Schreiber (1979) 64 Mass.L.Rev. 69.

Privacy: A general introduction. Jonathan Brant (1976) 61 Mass.L.Q. 10.

Public records. FIPA and CORI: Privacy and right to know. Jonathan Brant, James H. Barron, Daniel P. Jaffe, John Graceffa and Judith Karp Wallis (1980) 15 Suffolk U.L.Rev. 23.

§ 167. Definitions

The following words shall, whenever used in this section or in sections one hundred and sixty-eight to one hundred seventy-eight, inclusive, have the following meanings unless the context otherwise requires: "Criminal justice agencies", those agencies at all levels of government which perform as their principal function, activities relating to (a) crime prevention, including research or the sponsorship of research; (b) the apprehension, prosecution, adjudication, incarceration, or rehabilitation of criminal offenders; or (c) the collection, storage, dissemination or usage of criminal offender record information.

"Criminal offender record information", records and data in any communicable form compiled by a criminal justice agency which concern an identifiable individual and relate to the nature or disposition of a criminal charge, an arrest, a pre-trial proceeding, other judicial proceedings, sentencing, incarceration, rehabilitation, or release. Such information shall be restricted to that recorded as the result of the initiation of criminal proceedings or any consequent proceedings related thereto.

Criminal offender record information shall not include evaluative information, statistical and analytical reports and files in which individuals are not directly or indirectly identifiable, or intelligence information. Criminal offender record information shall be limited to information concerning persons who have attained the age of seventeen and shall not include any information concerning criminal offenses or acts of delinquency committed by any person before he attained the age of seventeen: provided, however, that if a person under the age of seventeen is adjudicated as an adult, information relating to such criminal offense shall be criminal offender record information. Criminal offender record information shall not include information concerning any offenses which are not punishable by incarceration.

"Evaluative information", records, data, or reports concerning individuals charged with crime and compiled by criminal justice agencies which appraise mental condition, physical condition, extent of social adjustment, rehabilitative progress and the like, and which are primarily used in connection with bail, pre-trial or post-trial release proceedings, sentencing, correctional and rehabilitative planning, probation or parole.

"Intelligence information", records and data compiled by a criminal justice agency for the purpose of criminal investigation, including reports of informants, investigators or other persons, or from any type of surveillance associated with an identifiable individual. Intelligence information shall also include records and data compiled by a criminal justice agency for the purpose of investigating a substantial threat of harm to an individual, or to the order or security of a correctional facility.

"Interstate systems", all agreements, arrangements and systems for the interstate transmission and exchange of criminal offender record information. Such systems shall not include recordkeeping systems in the commonwealth maintained or controlled by any state or local agency, or group of such agencies, even if such agencies receive or have received information through, or otherwise participated or have participated in, systems for the interstate exchange of criminal record information.

"Purge", remove from the criminal offender record information system such that there is no trace of information removed and no indication that said information was removed.

Added by St.1972, c. 805, § 1. Amended by St.1977, c. 691, § 2.

Historical Note

Section 9 of St.1972, c. 805, provided: "This act shall take effect conformably to law, except that any agency, department, institution, or individual which is authorized by statute to receive criminal offender record information or which receives the same at the discretion of the commissioner of probation, on the effective date of this [illegible] notwithstanding any provision of this act to the contrary, until January first, nineteen hundred and seventy-three."

St.1972, c. 805, § 1, adding this section and §§ 168 to 178 of this chapter, was approved July 19, 1972.

St.1977, c. 691, § 2, an emergency act, [illegible]

§ 172. Dissemination of record information; certification; eligibility for access; scope of inquiry; listing; access limited; rules; use of information

Except as otherwise provided in this section and sections one hundred and seventy-three to one hundred and seventy-five, inclusive, criminal offender record information, and where present, evaluative information, shall be disseminated, whether directly or through any intermediary, only to (a) criminal justice agencies; (b) such other agencies and individuals required to have access to such information by statute including United States Armed Forces recruiting offices for the purpose of determining whether a person enlisting has been convicted of a felony as set forth in Title 10, section 504 of the United States Code; to the active or organized militia of the commonwealth for the purpose of determining whether a person enlisting has been convicted of a felony, and (c) any other agencies and individuals where it has been determined that the public interest in disseminating such information to these parties clearly outweighs the interest in security and privacy. The extent of such access shall be limited to that necessary for the actual performance of the criminal justice duties of criminal justice agencies under clause (a); to that necessary for the actual performance of the statutory duties of agencies and individuals granted access under clause (b); and to that necessary for the actual performance of the actions or duties sustaining the public interest as to agencies or individuals granted access under clause (c). Agencies or individuals granted access under clause (c) shall be eligible to receive criminal offender record information obtained through interstate systems if the board determines that such information is necessary for the performance of the actions or duties sustaining the public interest with respect to such agencies or individuals.

The board shall certify those agencies and individuals requesting access to criminal offender record information that qualify for such access under clauses (a) or (b) of this section, and shall specify for each such agency or individual certified, the extent of its access. The board shall make a finding in writing of eligibility, or noneligibility of each such agency or individual which requests such access. No such information shall be disseminated to any agency or individual prior to the board's determination of eligibility, or, in cases in which the board's decision is appealed, prior to the final judgment of a court of competent jurisdiction that such agency or individual is so eligible.

No agency or individual shall have access to criminal offender record information under clause (c), unless the board, by a two-thirds majority of the members present and vot-

M.G.L. c. 6, § 172 Cont

determines and certifies that the public interest in disseminating such information to such party clearly outweighs the interest in security and privacy. The extent of access to such information under clause (c) shall also be determined by such a two-thirds majority vote of the board. Certification for access under clause (c) may be either access to information relating to a specific identifiable individual, or individuals, on a single occasion; or a general grant of access for a specified period of time not to exceed two years. A general grant of access need not relate to a request for access by the party or parties to be certified. Except as otherwise provided in this paragraph the procedure and requirements for certifying agencies and individuals under clause (c) shall be according to the provisions of the preceding paragraphs of this section.

Each agency holding or receiving criminal offender record information shall maintain, for such period as the board shall determine, a listing of the agencies or individuals to which it has released or communicated such information. Such listings, or reasonable samples thereof, may from time to time, be reviewed by the board or the council to determine whether any statutory provisions or regulations have been violated.

Dissemination of criminal offender record information shall, except as provided in this section and for purposes of research programs approved under section one hundred and seventy-four, be permitted only if the inquiry is based upon name, fingerprints, or other personal identifying characteristics. The board shall adopt rules to prevent dissemination of such information where inquiries are based upon categories of offense or data elements other than said characteristics; provided, however, that access by criminal justice agencies to criminal offender record information on the basis of data elements other than personal identifying characteristics, including but not limited to, categories of offense, mode of operation, photographs and physical descriptive data generally, shall be permissible, except as may be limited by the regulations of the board. Except as authorized by this chapter it shall be unlawful to request or require a person to provide a copy of his criminal offender record information. At the time of making any criminal record inquiry pursuant to clause (b) or (c) of the first paragraph of this section, the party certified to receive criminal offender record information shall submit to the board an acknowledgement that such inquiry will be undertaken, signed by the person who is the subject of such inquiry on a form prepared or approved by the board.

Text of sixth and seventh paragraphs effective July 1, 1993

Notwithstanding any other provisions of this section, the following information shall be available to any person upon request: (a) criminal offender record information consisting of conviction data; provided, however, that all requests for such conviction data shall be made to the board; and provided, further, that the board shall disclose only conviction data which it maintains in a standardized format in its automated criminal history file, and (b) information indicating custody status and placement within the correction system; provided, however, that no information shall be disclosed that identifies family members, friends, medical or psychological history, or any other personal information unless such information is directly relevant to such release or custody placement decision, and no information shall be provided if its release would violate any other provisions of state or federal law. The parole board, except as required by section one hundred and thirty of chapter one hundred and twenty-seven, the department of correction, a county correctional authority, or a probation department with the approval of a justice to the appropriate division of the trial court, may, in its discretion, make available a summary, which may include references to evaluative information, concerning a decision to release an individual on a permanent or temporary basis, to deny such release, or to change his custody status.

Information shall be provided or made available pursuant to the preceding paragraph only if the individual named in the request or summary has been convicted of a crime punishable by imprisonment for a term of five years or more, or has been convicted of any crime and sentenced to any term of imprisonment, and at the time of the request: is serving a sentence of probation or incarceration, or is under the custody of the parole board; or having been convicted of a misdemeanor, has been released from all custody or supervision for not more than one year; or having been convicted of a felony, has been released from all custody or supervision for not more than two years; or, having been sentenced to the custody of the department of correction, has finally been discharged

therefrom, either having been denied release on parole or having been returned to penal custody for violation of parole, for not more than three years. In addition to the provisions of the preceding sentence, court records for all criminal cases shall be made available for public inspection for a period of one week following conviction and imposition of sentence.

Any individual or agency, public or private, that receives or obtains criminal offender record information, in violation of the provisions of this statute, whether directly or through any intermediary, shall not collect, store, disseminate, or use such criminal offender record information in any manner or for any purpose. Notwithstanding the provisions of this section, the dissemination of information relative to a person's conviction of automobile law violations as defined by section one of chapter ninety C, or information relative to a person's charge of operating a motor vehicle while under the influence of intoxicating liquor which resulted in his assignment to a driver alcohol program as described in section twenty-four D of chapter ninety, shall not be prohibited where such dissemination is made, directly or indirectly, by the motor vehicle insurance merit rating board established pursuant to section one hundred and eighty-three of chapter six, to an insurance company doing motor vehicle insurance business within the commonwealth, or to such insurance company's agents, independent contractors or insurance policyholders to be used exclusively for motor vehicle insurance purposes. Notwithstanding the provisions of this section or chapter sixty-six A, the following shall be public records: (1) police daily logs, arrest registers, or other similar records compiled chronologically, provided that no alphabetical arrestee, suspect, or similar index is available to the public, directly or indirectly; (2) chronologically maintained court records of public judicial proceedings, provided that no alphabetical or similar index of criminal defendants is available to the public, directly or indirectly; (3) published records of public court or administrative proceedings, and of public judicial administrative or legislative proceedings; and (4) decisions of the parole board as provided in section one hundred and thirty of chapter one hundred and twenty-seven.

Evaluative Information. Records, data or reports concerning identifiable individuals charged with crime and compiled by criminal justice agencies which appraise mental conditions, physical conditions, extent of social adjustment, rehabilitative progress, and the like which are primarily used in connection with bail, pre-trial, or post-trial release proceedings, sentencing, correctional and rehabilitative planning, probation, or parole. Such information is not included in the definition of CORI, but its dissemination is restricted by 803 CMR and M.G.L. c. 6, ss. 172 and 178.

Intelligence Information. Records and data compiled by a criminal justice agency for the purposes of criminal investigations, including reports of informants, investigators, or other persons or any type of surveillance associated with an identifiable individual. Intelligence shall also include records and data compiled by a criminal justice agency for the purposes of investigating a substantial threat to an individual, or to the order or security of a correctional facility. Such information is not included in the definition of CORI.

Juvenile Agencies Which Perform Criminal Justice Functions. Agencies of the juvenile justice system which perform as their principal function criminal justice duties or activities with respect to juveniles shall be deemed criminal justice agencies.

Purge. The removal of CORI so that there is no trace of information removed and no indication that such information was removed.

Regulations. Regulations include the whole or any part of any rule, standard, other requirement of general application and future effect, including the amendment or repeal thereof, adopted by the CHSB to interpret or implement the law enforced or administered by the CHSB but does not include:

(a) an advisory ruling of the CHSB;

(b) procedures concerning the internal management or discipline of the CHSB which do not substantially affect the rights of or the procedures available to the public; or

(c) decisions issued in adjudicatory proceedings.

2.04: CORI Inclusions and Exclusions

(1) Statistical Records and Reports. CORI shall not include statistical data in which individuals are not identified and from which identities are not ascertainable.

(2) Juvenile Data. CORI shall not include information concerning a person who is under the age of seventeen years unless that person is prosecuted criminally pursuant to M.G.L. c. 119, s. 83.

(3) Photographs and Fingerprints. CORI shall include fingerprints, photographs and other identifying data which is recorded as the result of the initiation of a criminal proceeding. CORI shall not include photographs, fingerprints, or other identifying data of an individual used for investigative purposes if the individual is not identified.

(4) Evaluative Information. The access to and utilization of evaluative information, which is not CORI, is governed by 803 CMR. Each criminal justice agency which holds evaluative information shall promulgate regulations governing the access to and dissemination of such information. These regulations shall require:

(a) That any criminal justice agency which generates evaluative information shall make said information available to the individual to whom it refers upon his/her writing within a reasonable period of time unless it falls within certain designed exemptions.

(b) Those exemptions shall be specifically designated in the agency's regulations and shall include only those circumstances where disclosure of the requested evaluative information would:

1. pose a direct and articulable threat to an individual;
2. pose a direct and articulable threat to the security of a correctional facility.

(c) If such a threat is established, it must be outlined in a certificate which shall be kept with the evaluative information.

(d) When an individual requests his/her own evaluative information, the custodial agency shall respond in writing delineating:

2.04: continued

1. the agency's decision to release or withhold the information, in whole or in part; and
2. all sources of origin for all evaluative information generated by said agency.

(e) A person aggrieved by the denial of access to his/her own evaluative information may appeal, in writing, to the CHSB, within 30 days of such denial. The CHSB may designate a three member panel to review said appeals.

(f) The CHSB, a three member panel of the Board, if so designated, or a court of competent jurisdiction pursuant to M.G.L. c. 6, s. 177 may have access to any certificate issued pursuant to 803 CMR.

(5) Authorization for Public Dissemination of CORI.

(a) A criminal justice agency with official responsibility for a pending criminal investigation or prosecution may disseminate CORI that is specifically related to and contemporaneous with an investigation or prosecution;

(b) A criminal justice agency may disseminate CORI that is specifically related to and contemporaneous with the search for or apprehension of any person, or with a disturbance at a penal institution;

(c) A criminal justice agency may confirm to individual members of the public, in response to specific inquiries, statements that an offender currently:

1. resides in a correctional or related facility;
2. is on furlough, parole or probation, or pre-release status;
3. is a participant in a rehabilitation or education program.

(6) Dissemination of CORI During Certain Proceedings. No provision of these regulations shall be construed to prohibit dissemination of criminal offender record information in the course of criminal proceedings, or other proceedings expressly required by a statute to be made public, including published opinions, where such disclosure is limited to that necessary to carry on such proceedings effectively.

(7) Public Records. CORI shall not include public records as defined in M.G.L. c. 4, s. 6 including police daily logs under M.G.L. c. 41, s. 98F.

(8) Certain Published Records. CORI shall not include published records of public court or administrative proceedings, or public judicial, administrative or legislative proceedings.

(9) Exclusion of Minor Offenses. CORI shall not include information concerning offenses that are not punishable by incarceration.

(10) Summons and Subpoena. Nothing in these regulations shall prohibit an agency from disseminating CORI pursuant to a valid subpoena or summons issued by a court or a body or person authorized by law to issue such process.

(11) Restrictions on the access to and dissemination of an individual's CORI terminates upon his/her death. Upon request, with a valid death certificate, criminal justice agencies may release CORI concerning the deceased.

803 CMR 6.00: INDIVIDUAL RIGHTS. NOTIFICATION. INSPECTION

Section

6.01: Notice to Individuals

(1) Upon sentencing of a person following his/her conviction of any crime in the Commonwealth, the person shall be informed by the Probation department on a form provided by the CHSB, that:

(a) he/she will now have a criminal record;

(b) that the public shall have access to this criminal record information, under certain specified conditions;

(c) that the convicted person has certain enumerated rights pertaining to this record information pursuant to M.G.L. c. 6, ss. 167-178.

This from shall be drafted by the Board and provided to probation departments.

(2) The Executive Director of the CHSB shall file an annual report to the Governor of the Commonwealth, filing copies with the Secretary of State, the Clerk of the House Representatives and the Clerk of the Senate. Copies shall also be available at the office of the Criminal History Systems Board, 1010 Commonwealth Avenue, Boston, Massachusetts 02215.

6.02: Release of CORI to Individuals

(1) Each individual shall have the right to inspect and copy CORI relating to him or her in accordance with M.G.L. c. 6, s. 175 and these regulations.

(2) Any individual who is denied the right to inspect or copy CORI relating to him or her may, within 30 days of such denial, petition the CHSB for an order requiring the release of such CORI. The CHSB shall act on such petition within 60 days of receipt.

(3) It is unlawful for a person to request or require another person to provide a copy of his criminal record except as certified by the CHSB or as specifically provided in these regulations.

6.03: Inspection of CORI in Manual Systems

Agencies at which criminal offender records are sought to be inspected shall prescribe reasonable hours and places of inspection, and shall impose such additional restrictions as may be approved by the board, including fingerprinting, as are reasonably necessary both to assure the record's security and to verify the identities of those who seek to inspect them.

6.04: Inspection of CORI in CJIS

CORI maintained in CJIS shall be available for inspection by the individual to whom it refers. Such requests shall be made in writing to the offices of the Criminal History Systems Board at 1010 Commonwealth Avenue, Boston, MA 02215, by providing a self-addressed, stamped envelop, and the following information: subject's full name, date of birth, social security number and parents' full names, including mother's maiden name. The CHSB may designate other sites for in person access to CORI on CJIS. There shall be no fee assessed for this CORI.

6.05: Copies of CORI and Documents Indicating the Absence of a Record

(1) An individual shall have a right to receive, if practicable, a computer print-out or a photocopy of CORI, including personal identifiers, referring to him or her.

(2) If no CORI referring to the requesting individual can be found in the criminal justice agency's files, then such agency shall disclose this fact to the individual in writing if requested.

(3) In order for any individual, other than the individual named in the CORI, to inspect and or copy CORI under this section, all requirements of 803 CMR 6.06 must be met.

(4) An agency holding CORI may impose a reasonable charge for copying services, not to exceed its usual charges to the public for such services, or the actual cost of such copying, whichever is less, except as exempted by 803 CMR 6.04.

(5) An individual may make and retain a written summary or notes of the CORI reviewed and he or she may take with him or her such summary of notes.

6.06: Authorization of Third Parties to Inspect and Copy CORI

(1) An individual named in CORI may give his or her informed written authorization to third parties, including but not limited to attorneys, family members, and persons or agencies furthering the individuals's health or rehabilitation, to inspect and copy CORI pertaining to that individual. A third party so authorized may inspect and copy CORI in accordance with 803 CMR 6.05 by presenting such authorization and satisfactory identification to the agency holding the CORI. Where the individual is unable, due to a physical or mental incapacity, to give such informed written authorization, a criminal justice agency may disseminate CORI necessary for treatment purposes or for notifying families of the physical or mental health of an individual without such authorization. This provision shall not apply to consultants and contractors under 803 CMR 3.02(3).

(2) An attorney authorized as a third party may further designate, in writing, an agent to act on his or her behalf in inspecting or copying an individual's CORI. If such agent is not himself or herself an attorney, the attorney shall provide, in addition a statement indicating that the agent is acting under the attorney's supervision.

(3) All third party authorizations and designations pursuant to 803 CMR 4.06(1) and (2) received by agencies holding CORI shall be retained in the individual's case record.

(4) If the third party is either presently or has been within the last five years a correctional inmate or a parolee, such access shall be permitted only upon approval of the agency holding the CORI.

(5) A third party shall be prohibited from making any further dissemination of such CORI, except to the individual who has given such authorization. Upon disseminating CORI pursuant to this section, criminal justice agencies shall provide authorized parties with written notice of this prohibition and of the statutory penalties for improper dissemination of CORI.

(6) Where a criminal justice agency has reason to suspect the bona fide basis or authenticity of a third party authorization, the agency may refuse to allow the party purportedly authorized to inspect or copy CORI. Such a situation may arise where the agency suspects that the authorization has been coerced, or given for an unlawful purpose. When refusing a request to inspect and copy CORI on this basis, the agency shall notify the individual to whom the CORI pertains of such refusal and of the right to petition the CHSB for review of such refusal.

(7) Agencies shall implement 803 CMR in a manner consistent with the provisions of M.G.L. c. 151, s. 4 restricting an employer's right to condition employment on an applicant being required to disclose certain CORI. Except as

6.06: continued

authorized by M.G.L. c. 6, s. 172 and 803 CMR 3.02-3.04, 803 CMR it shall be unlawful to require or request a person to provide a copy of his/her CORI to any third person, agency, organization or corporation pursuant to M.G.L. c. 6, s. 172 and violations of such are punishable pursuant to M.G.L. c. 6, ss. 68 and 177-178.

6.07: Complaints of Inaccurate, Incomplete or Misleading CORI

(1) If an individual believes his CORI is inaccurate, incomplete or misleading, he shall make a request in writing to the agency having custody or control of the records to modify them. If the agency declines to so act, or if the individual believes the agency's decision to be otherwise unsatisfactory.he/she may in writing request review by the CHSB, upon written proof of the denial of the custodial agency to provide the requested relief.

(2) Whenever an individual brings a complaint to the attention of the Board, the Board shall review said complaint to determine whether a prima facie basis for the complaint has been established. If the Board finds a prima facie basis for the complaint, it shall issue written findings stating such within 60 days of receipt of the written request.

(3) Failure to issue findings shall be deemed a decision of the Board. If the record in question is found to be inaccurate, incomplete or misleading, The CHSB shall order the record to be properly purged, modified or supplemented as required by M.G.L. c. 6, s. 175.

6.08: Complaints of Improper Dissemination, Access to or Maintenance CORI

If an individual believes that CORI referring to him has been improperly maintained or disseminated, he shall record such complaint on a form approved by the CHSB. The form shall include an oath or affirmation signed by the individual, that the exceptions are made in good faith and that they are, to the best of the individual's knowledge and belief, true. The form shall be forwarded to the CHSB.

(1) If a complaint alleges that CORI, evaluative information or juvenile proceedings data has been improperly accessed or disseminated, and such complaint has been filed with the CHSB, the Board may designate a person or committee of persons to hear such complaints.

(2) If the Board, or its designee(s) finds prima facie evidence to support the complaint, it shall give written notice to all parties concerned of the notice of the complaint and set a date for hearing.

(3) At its hearing the Board, or its designee(s) shall provide all parties:
(a) an opportunity to have counsel present:
(b) to present evidence or offer testimony:
(c) present and examine witnesses:
(d) cross-examine witnesses.

(4) Within 60 days of the conclusion of the hearing the Board, or its designee(s) shall issue findings and may
(a) issue orders enforcing the rules and regulations of the CHSB.
(b) impose civil fines of up to and including $500.00 for each willful violation.
(c) refer the case to the District Attorney/Attorney General for prosecution.

6.09: Circulation of Challenged Records

CORI challenged under the provisions of 803 CMR shall be deemed to be accurate, complete and valid until otherwise ordered by the CHSB.

6.10: Audits

All forms, authorizations, statements, and the like required by these regulations shall be maintained by the certified party holding the CORI and be subject to inspection by the CHSB.

REGULATORY AUTHORITY

803 CMR 6.00: M.G.L. c. 6, ss. 168, 172, 174, 175.

THE MASSACHUSETTS PUBLIC RECORDS LAW

The Massachusetts Public Records Law (PRL) provides that any person has an absolute right of access to public information. 1/ This right of access includes the right to inspect, copy or have copies of records provided upon the payment of a reasonable fee. 2/

The Massachusetts General Laws broadly define "public records" to include all documentary materials or data, regardless of physical form or characteristics, which are made or received by any officer or employee of any Massachusetts governmental entity. 3/ As a result, all photographs, papers and electronic storage media of which a governmental employee is the "custodian" constitute "public records." 4/ There are, however, twelve narrowly construed exemptions to this broad definition of "public records." 5/ This article will briefly review the application of these exemptions as well as explore some of the other issues which arise when a request is made for access to government records.

The Request

There are no strict rules which govern the manner in which requests for public information should be made. Requests may be oral or written and may be made in person or through the mail. 6/ A requester is not required to specifically identify a particular record: any request which provides the custodian with a reasonable description of the desired information is sufficient. 7/ A custodian is expected to use his superior knowledge of the records in his custody to assist the requester in obtaining the desired information. 8/

All requests must receive a response as soon as practicable, without unreasonable delay and always within ten days. 9/ The response must be either an offer to provide the requested materials or a written denial. A denial must detail the specific legal basis for withholding the requested materials. 10/ The legal basis must include a citation to the statutory exemption upon which the custodian relies and must also explain why the exemption applies. 11/ A denial must also advise the requester of his right to seek redress through the administrative process provided by the Office of the Supervisor of Public Records. 12/

The mandatory disclosure provision of the PRL only applies to information which is in the custody of a governmental entity at the time the request is received. 13/ Consequently, there is no obligation to create a record for a requester or to honor prospective requests. It should be noted, however, that there is nothing which prohibits a custodian from responding to such requests. 14/

A custodian's role in responding to a request is limited to the responsibilities already described. Inquiries into a requester's status or motivation for seeking information are expressly prohibited. 15/ Consequently, all requests for public records, even if made for a commercial purpose or to assist the requester in a law suit against the holder of the records, must be honored in accordance with the prescriptions of the PRL.

Fees

A custodian is allowed to charge a reasonable fee to recover the costs of complying with a public records request. 16/ The fee must be assessed in accordance with a specific statutory provision or the Public Records Access Regulations (PRAR). 17/ The PRAR provide that, for performing a search for requested records or segregating exempt information from non-exempt information which is contained in a requested record, a custodian may charge a pro-rated fee based on the hourly rate of the lowest paid employee who is capable of performing the task. 18/ "Search time" is limited to the time needed to locate a requested record, pull it from the files, copy it and return it to the files. 19/ "Segregation time" is limited to the time needed to delete exempt items from a requested record. 20/

The Supervisor will presume that the lowest paid employee in an agency is capable of performing "search time." Accordingly, except where exceptional circumstances are present, it is expected that the hourly rate of the lowest paid office employee will be used to calculate "search time." In some circumstances, the lowest paid office employee may not have the knowledge or experience required to segregate the exempt information from the non-exempt information contained in a requested record. Usually, guidance on the application of the relevant exemptions can be provided to the lowest paid employee. In very complex or difficult cases, however, the hourly rate of the lowest paid employee who has the necessary knowledge or experience may be used to determine the fee for "segregation time."

In addition to the labor fees, a twenty cents (20¢) per page copying fee may be assessed for any size photocopy. 21/ When the request is for materials which are not susceptible to ordinary means of reproduction, such as photographs or computer tapes and diskettes, the actual cost of reproduction may be assessed to the requester. 22/ The fee for a computer printout, however, is fifty cents (50¢) per page regardless of the amount of time used to generate the printout. 23/

The Exemptions

The statutory definition of "public records" contains twelve exemptions which provide bases for withholding records in whole or in part. 24/ The exemptions are strictly and narrowly construed. 25/ Where exempt information is intertwined with non-exempt information, the non-exempt portions are subject to disclosure once the exempt portions are deleted. 26/ A review of the appropriate applications of the exemptions follows.

Exemption (a)

Exemption (a), also known as the statutory exemption, provides a basis for withholding from disclosure those documents which are "specifically or by necessary implication exempted from disclosure by statute." 27/ An agency may use the statutory exemption as a basis for withholding requested materials where the language of the statute of exemption relied upon expressly states or necessarily implies the public's right to inspect records under the PRL is restricted. 28/

Essentially, the exemption creates two categories of exempt records: records which are specifically exempted from disclosure; and those which are exempt by necessary implication. 29/ Statutes which specifically exempt a record are those which expressly state that a record either "shall not be a public record," "shall be kept confidential" or "shall not be subject to the disclosure provision of the PRL." 30/ Statutes which exempt records by necessary implication contain language which expressly limits the dissemination of particular records to a defined group of individuals or entities. 31/ A statute will not provide a basis for exemption if it merely lists individuals or entities to whom the records are to be provided; it must expressly limit access to the listed individuals or entities.

Exemption (b)

Exemption (b) applies to those records which are:

> [R]elated solely to internal personnel rules and practices of the government unit, provided however, that such records shall be withheld only to the extent that proper performance of necessary governmental functions requires such withholding. 32/

There are no authoritative Massachusetts decisions interpreting exemption (b). The general purpose of the cognate federal exemption, however, is merely to relieve agencies of the burden of assembling and maintaining for public inspection matters in which the public cannot reasonably be expected to have a legitimate interest. 33/ Materials relating to matters such as personnel's use of parking facilities, regulation of lunch hours and statements of policies concerning sick leave are examples of the types of records to which the exemption applies. 34/

The language of the federal provision is duplicated in the first clause of exemption (b). The second clause of exemption (b), however, contains language which requires a more restrictive application. The addition of the qualifying second clause of exemption (b) evidences a legislative intent to create an exemption which is narrower in scope than the previously enacted, parallel federal exemption. 35/ Therefore, in Massachusetts a record custodian must demonstrate that the proper performance of necessary governmental functions requires the withholding of the requested information for the exemption to apply.

Exemption (c)

Exemption (c), the privacy exemption, is the most frequently invoked exemption. The language of the exemption limits its application to:

> [P]ersonnel and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy. 36/

The privacy exemption contains two distinct and independent clauses, each requiring its own analysis. 37/ The first clause creates a categorical exemption for personnel and medical information which relates to an identifiable individual and is of a "personal nature." 38/ As a general rule, medical information will always be of a sufficiently personal nature to warrant exemption. 39/ Personnel information is generally exempt if it is evaluative in nature. 40/ It should be noted, however, that public employees have a diminished expectation of privacy in matters relating to their public employment. 41/ Consequently, the public will have greater access to personnel information which relates to an individual's public employment than to the same individual's private activities. 42/

The second clause of the privacy exemption applies to requests for records which implicate privacy interests but do not involve personnel and medical records. Its application is limited to "intimate details of a highly personal nature." 43/ Examples of "intimate details of a highly personal nature" include marital status, paternity, substance abuse, government assistance, family disputes and reputation. 44/ Portions of records containing such information are exempt unless there is a paramount public interest in

disclosure. 45/ Therefore, when applying the second clause of the exemption to requested records it is necessary to perform a two-step analysis: first, determine whether the information constitutes an "intimate detail of a highly personal nature"; and second, determine whether the public interest in disclosure outweighs the privacy interest associated with disclosure of the highly personal information. Consequently, the application of the second clause of the exemption can only be determined on a case by case basis.

Exemption (d)

Exemption (d), the deliberative process exemption, provides a limited executive privilege for policy development. It applies to:

> [I]nter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency; but this subclause shall not apply to reasonably completed factual studies or reports on which the development of such policy positions has been or may be based. 46/

The exemption is intended to avoid release of materials which could taint the deliberative process if prematurely disclosed. Therefore, its application is limited to recommendations on legal and policy matters found within an ongoing deliberative process. 47/ Purely factual matters used in the development of government policy are always subject to disclosure. 48/ Factual reports which are reasonably complete and inferences which can be drawn from factual investigations, even if labeled as opinions or conclusions, are not exempt as deliberative or policy making materials. 49/ Therefore, only those portions of materials which possess a deliberative or policy making character and relate to an ongoing deliberative process are exempt from mandatory disclosure.

Exemption (e)

Exemption (e) allows the withholding of "notebooks and other materials prepared by an employee of the commonwealth which are personal to him and not maintained as part of the files of the governmental unit." 50/ The application of exemption (e) is limited to records which are work-related but can be characterized as personal to an employee. Examples of materials which are covered by the exemption include personal reflections on work-related activities and notes created by an employee to assist him in preparing reports for other employees or the files of the governmental entity. Clearly, however, the exemption may not be used to withhold any materials which are shared with other employees or are being maintained as part of the files of a governmental unit. 51/

Exemption (f)

Exemption (f), the investigatory exemption, provides a basis for withholding:

> [I]nvestigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest. 52/

The exemption allows investigative officials to withhold materials which could compromise investigative efforts if disclosed. There is no blanket exemption, however, for records created or maintained by investigative officials. 53/ Therefore, a custodian must demonstrate a prejudice to investigative efforts in order to withhold requested materials. Accordingly, any information relating to an ongoing investigation may be withheld if disclosure could alert suspects to the activities of investigative officials. Also, any confidential investigative techniques may be withheld indefinitely since their disclosure would prejudice future law enforcement efforts. 54/

The exemption is also designed to allow investigative officials to provide an assurance of confidentiality to private citizens so that they will speak openly about matters under investigation. 55/ Accordingly, any details in witness statements which if released create a grave risk of directly or indirectly identifying a private citizen who volunteers as a witness are indefinitely exempt. 56/

Exemption (g)

Exemption (g) is often relied on by custodians as a basis for withholding copyrighted plans and blueprints or product specifications submitted in connection with a bid or proposal. The language of the exemption, however, clearly limits its application to:

> [T]rade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy and upon a promise of confidentiality; but this subclause shall not apply to information submitted as required by law or as a condition of receiving a governmental contract or other benefit. 57/

Each of the six criteria contained in the exemption must be met for it to apply. Consequently, where trade secrets or commercial or financial information are provided to the government in connection with a contract bid or in compliance with a filing requirement the exemption will not allow the withholding of the information. 58/ To be exempt, trade secrets and commercial or financial information must be provided

The exemption applies to any estimation of value of property which involves an expert opinion. 63/ It allows the government to be in the same position in a land deal as any private party. Obviously, parties to a land deal could be at a bargaining disadvantage if required to disclose their appraisals of the subject parcel. The exemption ensures that the government will not be at a bargaining disadvantage by allowing the other party to use the PRL to gain access to an appraisal prior to completion of negotiations or litigation.

Exemption (j)

Exemption (j) allows custodians of firearms records to withhold from disclosure:

> [T]he names and addresses of any persons contained in, or referred to in, any applications for any licenses to carry or possess firearms issued pursuant to chapter one hundred and forty or any firearms identification cards issued pursuant to said chapter one hundred and forty and the names and addresses on sales or transfers of any firearms, rifles, shotguns, or machine guns or ammunition therefor, as defined in said chapter one hundred and forty and the names and addresses on said licenses or cards. 64/

The exemption prevents individuals with devious motives from ascertaining who possesses firearms. It should be noted, however, that the scope of the exemption limits its application to identifying details. 65/ Therefore, once identifying details are deleted, the remaining portions of firearms records are subject to mandatory disclosure.

Exemption (k)

Exemption (k) has been repealed by the Legislature. 66/ It allowed an exemption for "that part of the registration or circulation records of every public library which reveals the identity of a borrower." 67/ The purpose of the exemption was to ensure that people may engage in intellectual pursuits in private. It avoided the chilling effect that publication of an individual's selected readings may present.

Although exemption (k) has been repealed, the Legislature retained the substance of the exemption in another section of the General Laws. 68/ Consequently, this new statute operates through exemption (a) to provide a basis for denying access to library circulation records.

Computer Records

The PRL was drafted at a time when legislators could not have envisioned the impact computers would have on the government's ability to collect, store, compile and disseminate information. 71/ The legal principles embodied in the PRL, however, may be readily transposed into legal principles governing access to information maintained in an automated system.

The statutory definition of "public records" does not distinguish between traditional paper records and records stored in the computer medium. 72/ Rather, it provides that all information made or received by a public entity, regardless of the manner in which it exists, constitutes "public records." Computer cards, tapes or diskettes are all independent public records which are subject to the same requirements of the PRL as are paper records. Therefore, a custodian is obliged to furnish copies of non-exempt portions of computerized information at the cost of reproduction unless otherwise provided by law.

It should be noted, however, that just as a custodian is not required to create a paper record in response to a request for information, a custodian is not required to create a computer record in response to a request for information. Conceptually, a computer is like a large filing cabinet. The "files" in the cabinet consist of any compilations of information contained on a tape or a diskette which can be independently retrieved through the use of existing computer programs. A custodian is only obliged to provide access to the existing "files" of a cabinet. Therefore, a custodian is not required to create a new computer program to provide a requester with computerized information in a desired format. There is, however, an exception to this general rule when the reprogramming is needed to comply with the segregation provision of the law.

For example, suppose a request is made for a computer tape or diskette which contains those portions of a computerized voters list which reveals the identities of all Democrats in a particular ward. The custodian, however, does not have a computer program which allows him to make a copy from his master tape which specifically selects the desired information; to provide the requested information in the desired format requires the creation of a new program. In this situation, the custodian is only obliged to notify the requester that there is no specific record which is responsive to his request. The custodian should also advise the requester of the available formats and let the requester determine which of the existing formats or "files" is best suited for his needs. 73/

It should be noted there is nothing which prevents a custodian from creating a program which will generate requested information in the desired format. In fact, the custodian can benefit from such an arrangement. The requester can be asked to pay for the

creation of the program which, depending on the arrangement, may remain the property of the custodian. 74/ As a result, the custodian is able to add a new program to his library without any expense to the government.

The Supervisor of Public Records

A requester who is denied access to any requested information may petition the Supervisor for a review of the request. The Supervisor will then instruct a staff member, usually a lawyer or a legal intern, to contact the custodian and requester to ascertain the relevant facts and discuss the applicable law. The findings of the investigator are then reported to the Supervisor to assist him in making his decision. The custodian will receive an administrative order if the Supervisor determines that records are being improperly withheld or the proposed fee is excessive. 75/ If the custodian does not comply with the Supervisor's order, the case may be referred to the Department of the Attorney General or appropriate district attorney for enforcement in court. 76/

A custodian may request a formal advisory opinion from the Supervisor at any time. 77/ An advisory opinion will usually be issued within two or three weeks of the Supervisor's receipt of the request. A requester may also seek an informal opinion from the Supervisor's staff at any time. The number to call is (617) 727-2832, between 8:45 a.m. and 5:00 p.m.

THE PUBLIC RECORDS LAW

G.L. Chapter 4, Section 7(26) (1990 ed.):

"Public records" shall mean all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose, unless such materials or data fall within the following exemptions in that they are:

(a) specifically or by necessary implication exempted from disclosure by statute;

(b) related solely to internal personnel rules and practices of the government unit, provided however, that such records shall be withheld only to the extent that proper performance of necessary governmental functions requires such withholding;

(c) personnel and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy;

(d) inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency; but this subclause shall not apply to reasonably completed factual studies or reports on which the development of such policy positions has been or may be based;

(e) notebooks and other materials prepared by an employee of the commonwealth which are personal to him and not maintained as part of the files of the governmental unit;

(f) investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest;

(g) trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy and upon a promise of confidentiality; but this subclause shall not apply to information submitted as required by law or as a condition of receiving a governmental contract or other benefit;

(h) proposals and bids to enter into any contract or agreement until the time for the opening of bids in the case of proposals or bids to be opened publicly, and until the time for the receipt of bids or proposals has expired in all other cases; and inter-agency or intra-agency communications made in connection with an evaluation process for reviewing bids or proposals, prior to a decision to enter into negotiations with or to award a contract to, a particular person.

(i) appraisals of real property acquired or to be acquired until (1) a final agreement is entered into; or (2) any litigation relative to such appraisal has been terminated; or (3) the time within which to commence such litigation has expired.

(j) the names and addresses of any persons contained in, or referred to in, any applications for any licenses to carry or possess firearms issued pursuant to chapter one hundred and forty or any firearms identification cards issued pursuant to said chapter one hundred and forty and the names and addresses on sales or transfers of any firearms, rifles, shotguns, or machine guns or ammunition therefor, as defined in said chapter one hundred and forty and the names and addresses on said licenses or cards.

(l) test questions and answers, scoring keys and sheets, and other examination data used to administer a licensing examination; provided, however, that such materials are used to administer another examination.

(m) contracts for hospital or related health care services between (i) any hospital, clinic or other health care facility operated by a unit of state, county or municipal government and (ii) a health maintenance organization arrangement approved under chapter one hundred and seventy-six I, a non-profit hospital service corporation or medical service corporation organized pursuant to chapter one hundred and seventy-six A and chapter one hundred and seventy-six B, respectively, a health insurance corporation licensed under chapter one hundred and seventy-five or any legal entity that is self insured and provides health care benefits to its employees.

Any person denied access to public records may pursue the remedy provided for in section ten of chapter sixty-six.

G.L. Chapter 66, Section 10 (1990 ed.):

(a) Every person having custody of any public record, as defined in clause twenty-sixth of section seven of chapter four, shall, at reasonable times and without unreasonable delay, permit it, or any segregable portion of a record which is an independent public record, to be inspected and examined by any person, under his supervision, and shall furnish one copy thereof upon payment of a reasonable fee. Every person for whom a search of public records is made shall, at the direction of the person having custody of such records, pay the actual expenses of such search. The following fees shall apply to any public record in the custody of the state police, the capitol police, the Massachusetts Bay Transportation Authority police, the metropolitan district commission police or any municipal police department or fire department: for preparing and mailing a motor vehicle accident report, five dollars for not more than six pages and fifty cents for each additional page; for preparing and mailing a fire insurance report, five dollars for not more than six pages, plus fifty cents for each additional page; for preparing and mailing crime, incident or miscellaneous reports, one dollar per page; for furnishing any public record, in hand, to a person requesting such records, fifty cents per page. A page shall be defined as one side of an eight and one-half inch by eleven inch sheet of paper.

(b) A custodian of a public record shall, within ten days following receipt of a request for inspection or copy of a public record, comply with such request. Such request may be delivered in hand to the office of the custodian or mailed via first class mail. If the custodian refuses or fails to comply with such a request, the person making the request may petition the supervisor of records for a determination whether the record requested is public. Upon the determination by the supervisor of records that the record is public, he shall order the custodian of the public record to comply with the person's request. If the custodian refuses or fails to comply with any such order, the supervisor of records may notify the attorney general or the appropriate district attorney thereof who may take whatever measures he deems necessary to insure compliance with the provisions of this section. The administrative remedy provided by this section shall in no way limit the availability of the administrative remedies provided by the commissioner of administration and finance with respect to any officer or employee of any agency, executive office, department or board; nor shall the administrative remedy provided by this section in any way limit the availability of judicial remedies otherwise available to any person requesting a public record. If a custodian of a public record refuses or fails to comply with the request of any person for inspection or copy of a public record or with an administrative order under this section, the supreme judicial or superior court shall have jurisdiction to order compliance.

(c) In any court proceeding pursuant to paragraph (b) there shall be a presumption that the record sought is public, and the burden shall be upon the custodian to prove with specificity the exemption which applies.

(d) The clerk of every city or town shall post, in a conspicuous place in the city or town hall in the vicinity of the clerk's office, a brief printed statement that any citizen may, at his discretion, obtain copies of certain public records from local officials for a fee as provided for in this chapter.

The commissioner of public safety and his agents, servants, and attorneys including the keeper of the records of the firearms records bureau of said department, or any licensing authority, as defined by chapter one hundred and forty shall not disclose any records divulging or tending to divulge the names and addresses of persons who own or possess firearms, rifles, shotguns, machine guns and ammunition therefor, as defined in said chapter one hundred and forty and names and addresses of persons licensed to carry and/or possess the same to any person, firm, corporation, entity or agency except criminal justice agencies as defined in chapter six and except to the extent such information relates solely to the person making the request and is necessary to the official interests of the entity making the request.

RELATED STATUTES

Section 6 of chapter 1050 of the Acts of 1973:

The provisions of clause twenty-sixth of section seven of chapter four of the General Laws, as amended by section one of this act, shall not be construed to exempt any record which was a public record on the effective date of this act from said clause twenty-sixth.

G.L. Chapter 66, Section 1 (1990 ed.):

The supervisor of records shall adopt regulations pursuant to the provisions of chapter thirty A to implement the provisions of this chapter.

950 CMR: OFFICE OF THE SECRETARY OF THE COMMONWEALTH

950 CMR 32.00: PUBLIC RECORDS ACCESS

Section

32.01: Authority

950 CMR 32.00 is hereby issued by the Supervisor of Public Records under the authority of M.G.L. c. 66, § 1, as most recently amended.

32.02: Scope and Purpose

950 CMR 32.00 shall be construed to ensure the public prompt access to all public records in the custody of state governmental entities and in the custody of governmental entities of political subdivisions of the Commonwealth, and to ensure that disputes regarding access to particular records are resolved expeditiously and fairly.

950 CMR 32.00 shall not limit the availability of other remedies provided by law.

32.03 Definitions

As used in 950 CMR 32.00:

Custodian means the governmental officer or employee who in the normal course of his or her duties has access to or control of public records.

Division means Division of Public Records, Office of the State Secretary.

32.03: Continued:

Governmental Entity means any authority established by the General Court to serve a public purpose, any department, office, commission, committee, council, board, division, bureau, or other agency within the Executive Branch of the Commonwealth, or within a political subdivision of the Commonwealth. It shall not include the legislature and the judiciary.

Public Records means all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the Commonwealth, or of any political subdivision thereof or of any authority established by the General Court to serve a public purpose, unless such materials or data fall within one or more of the exemptions found within M.G.L. c. 4, § 7, (26).

Search time means the time needed to locate, pull from the files, copy, and reshelve or refile a public record. However, it shall not include the time expended to create the original record.

Segregation time means the time used to delete or expurgate data which is exempt under M.G.L. c. 4, § 7, (26) from non-exempt material which is contained in a paper public record.

Supervisor means Supervisor of Public Records.

32.04: General Provisions

(1) *Office address.* All communications shall be addressed or delivered to:

Supervisor of Public Records
Office of the State Secretary
One Ashburton Place, Room 1719
Boston, Massachusetts 02108.

2) *Office hours*. The offices of the Division shall be open from 8:45 a.m. to 5:00 p.m. each weekday except Saturdays, Sundays, and legal holidays.

32.04: continued

(3) *Computation of Time*. Computation of any period of time referred to in 950 CMR 32.00 shall begin with the first day following the action which initiates such period of time. When the last day of the period so computed is a day on which the offices of the Division are closed, the period shall run until the end of the following business day.

32.05: Rights to Access

(1) *Access to Public Records*. A custodian of a public record shall permit all public records within his or her custody to be inspected or copied by any person during regular business hours. In governmental entities which do not have daily business hours, a written notice shall be posted in a conspicuous location listing the name, position, address and telephone number of the person to be contacted to obtain access to public records.

(2) *Promptness of Access*. Every governmental entity shall maintain procedures that will allow at reasonable times and without unreasonable delay access to public records in its custody to all persons requesting public records. Each custodian shall comply with a request as soon as practicable and within ten days.

3) *Requests for Public Records*. Requests for public records may be oral or written. Written requests may be submitted in person or by mail. It is recommended that a record requester make a written request where there is substantial doubt as to whether the records requested are public, or if an appeal pursuant to 950 CMR 32.08(2) is contemplated. A custodian shall not require written requests merely to delay production.

(4) *Description of Requested Records*. Any person seeking access to a public record or any portion thereof shall provide a reasonable description of the requested record to the custodian so that he or she can identify and locate it promptly. A person shall not be required to make a personal inspection of the record prior to receiving a copy of it. A custodian's superior knowledge of the contents of a governmental entity's files shall be used to assist in promptly complying with the request.

5) *Prohibition of Custodial Requests for Backgroud Information*. A custodian may not require the disclosure of the reasons for which a requester seeks access to or a copy of a public record. A custodian shall not require proof of the requester's identity prior to complying with requests for copies of public records.

32.05: Continued

(6) *Copies*. Upon request, a person at his or her election, shall be entitled to receive in hand or by mail one copy of a public record or any desired portion of a public record upon payment of a reasonable fee as determined by 950 CMR 32.06.

32.06 Fees for Copies of Public Records

(1) Except where fees for copies of public records are prescribed by statute, a governmental entity shall charge no more than the following fees for copies of public records:
(a) for photocopies of a public record no more than twenty cents per page;
(b) for copies of public records maintained on microfilm or microfiche no more than twenty-five cents per page;
(c) for requests for non-computerized public records a prorated fee based on the hourly rate of the lowest paid employee capable of performing the task may be assessed for search time and segregation time expenses, as defined by 950 CMR 32.03. In addition, a per page copying fee under 950 CMR 32.06(1)(a) and 950 CMR 32.06(1)(b) may be assessed;
(d) for computer printout copies of public records no more than fifty cents per page;
(e) for a search of computerized records the actual cost incurred from the use of the computer time may be assessed;
f) for copies of public records not susceptible to ordinary means of reproduction, the actual cost incurred in providing a copy may be assessed.

(2) *Estimates*. A custodian shall provide a written, good faith estimate of the applicable copying, search time and segregation time fees to be incurred prior to complying with a public records request where the total costs are estimated to exceed ten dollars.

(3) *Postage*. A custodian may assess the actual cost of postage.

(4) *Inspection of Public Records*. A custodian may not assess a fee for the mere inspection of public records, unless compliance with such request for inspection involves "search time" in which case a fee under 950 CMR 32.06(1)(c) may be assessed.

(5) *Waiver of Fees*. Every custodian, unless otherwise required by law, is encouraged to waive fees where disclosure would benefit the public interest.

32.06: continued

(6) *Street Census Computer Tapes and Mailing Labels - Reproduction Fees for City and Town Committee Chairman*.

Where "street list" data collected under M.G.L. c. 51, §§ 6-7, is compiled on computer tapes:
(a) City or town registrars of voters shall provide, or cause their agents to provide, copies of said computer tapes to the chairman of each city or town committee for a fee of no more than one cent ($0.01) per name, provided that a minimum fee of no more than ninety dollars ($90.00) may be assessed. No fee assessed under 950 CMR 32.06(6)(a) shall exceed seven hundred fifty dollars ($750.00).
(b) City or town registrars of voters shall provide, or cause their agents to provide, sets of mailing labels made from said computer tapes to the chairman of each city or town committee for a fee of no more than two cents ($0.02) per label, provided that a minimum fee of no more than fifty dollars ($50.00) may be assessed.

32.07: Advisory Opinions

On written request of a custodian, the Supervisor may issue an advisory opinion with respect to any question concerning the provisions of M .G. L. c. 4, § 7, (26) or M.G.L. c. 66, § 10. Advisory opinions may also be issued upon the Supervisor's initiative.

32.08: Appeals

1) *Denial by Custodian*. Where a custodian's response to a record request made pursuant to 950 CMR 32.05(3) is that any record or portion of it is not public, the custodian, within ten (10) days of the request for access, shall in writing set forth the reasons for such denial. The denial shall specifically include the exemption or exemptions in the definition of public records upon which the denial is based. When exemption (a) of M .G. L. c. 4, § 7, (26) is relied upon the custodian shall cite the operational statute(s). Failure to make a written response within ten days to any request for access shall be deemed a denial of the request. The custodian shall advise the person denied access of his or her remedies under 950 CMR 32.00 and M. G. L. c. 66, § 10(b).

(2) *Appeal to the Supervisor*. In the event that a person requesting any record in the custody of a governmental entity is denied access, or in the event that there has not been compliance with any provision of 950 CMR 32.00, the requester may appeal to the

32.08: continued

Supervisor within ninety (90) days. Such appeal shall be in writing, and shall include a copy of the letter by which the request was made and, if available, a copy of the letter by which the custodian responded. The Supervisor shall accept an appeal only from a person who had made his or her record request in writing. An oral request, while valid as a public record request pursuant to 950 CMR 32.05(3), may not be the basis of an appeal under 950 CMR 32.08.

(3) *Disposition of Appeals*. The Supervisor shall, within a reasonable time, investigate the circumstances giving rise to an appeal and render a written decision to the parties stating therein the reason or reasons for such decision.

(4) *Presumption*. In all proceedings pursuant to 950 CMR 32.00, there shall be a presumption that the record sought is public.

(5) *Hearings*. The Supervisor may conduct a hearing pursuant to the provisions of 801 CMR 1.00. Said rules shall govern the conduct and procedure of all hearings conducted pursuant to 950 CMR 32.08. Nothing in 950 CMR 32.08 shall limit the Supervisor from employing any administrative means available to resolve summarily any appeal arising under 950 CMR 32.00.

(6) *In-camera Inspections and Submissions of Data*. The Supervisor may require an inspection of the requested record(s) in camera during any investigation or any proceeding initiated pursuant to 950 CMR 32.08. The Supervisor may require the custodian to produce other records and information necessary to reach a determination pursuant to 950 CMR 32.08.

(7) *Custodial Indexing of Records*. The Supervisor may require a custodian to compile an index of the requested records where numerous records or a lengthy record have been requested . Said index shall meet the following requirements:
(a) the index shall be contained in one document, complete in itself;
(b) the index must adequately describe each withheld record or deletion from a released record;
(c) the index must state the exemption or exemptions claimed for each withheld record or each deletion of a record; and,
(d) the descriptions of the withheld material and the exemption or exemptions claimed for the withheld material must be sufficiently specific to permit the Supervisor to make a reasoned judgment as to whether the material is exempt. Nothing in 950 CMR 32.08 shall preclude the Supervisor from employing alternative or supplemental procedures to meet the particular circumstances of each appeal.

32.08: continued

(8) *Conferences*. At any time during the course of any investigation or any proceeding, to the extent practicable, where time, the nature of the investigation or proceeding and the public interest permit, the Supervisor, may order conferences for the purpose of clarifying and simplifying issues and otherwise facilitating or expediting the investigation or proceeding.

32.09: Enforcement of Orders

A custodian shall promptly take such steps as may be necessary to put an order of the Supervisor into effect. The Supervisor may notify the Attorney General or appropriate District Attorney of any failure by a custodian to comply with any order of the Supervisor.

REGULATORY AUTHORITY
950 CMR 32.00: M.G.L. c. 66, § 1

Campus Disciplinary Procedures

Title II: Crime Awareness and Campus Security Act of 1990

I. Begin collecting data August 1, 1991; prepare, publish, and distribute to all current students and employees, and to applicants for enrollment or employment, upon request, beginning September 1, 1992, and annually thereafter:

Statement of current campus *policies* regarding:

- procedures and facilities for students and others to report criminal actions or other emergencies occurring on campus
- the institution's response to these reports
- security and access to campus facilities, including campus residences, and security considerations used in the maintenance of campus facilities
- campus law enforcement, including:
  - ✓ enforcement authority of security personnel
  - ✓ working relationship of security personnel with State and local police agencies
  - ✓ policies which encourage accurate and prompt reporting of all crimes to campus police and appropriate police agencies
- monitoring and recording through local police agencies of criminal activity at off-campus student organizations whose participants are students of the institution (those recognized by the institution, including student organizations with off-campus housing facilities)
- possession, use, and sale of alcoholic beverages and enforcement of State underage drinking laws
- possession, use, and sale of illegal drugs and enforcement of Federal and State drug laws

Description of the type and frequency of *programs*:

- to inform students and employees about campus security procedures and practices, and to encourage students and employees to be responsible for their own security and the security of others
- to inform students and employees about the prevention of crimes
- to provide drug or alcohol abuse education as required under the "drug-free campus requirements" of P.L. 101-226

***Statistics** concerning:**

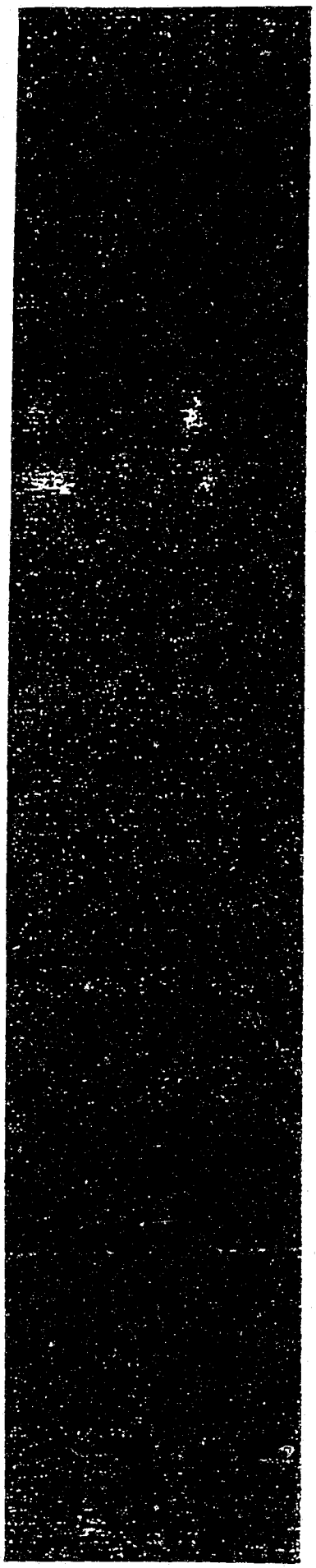
- the occurrence on campus, during the most recent *calendar year*,** and during the 2 *preceding calendar years* *** for which data are available, of criminal offenses reported to campus security authorities or local police agencies, of:
  - ✓ murder
  - ✓ rape
  - ✓ robbery
  - ✓ aggravated assault
  - ✓ burglary
  - ✓ motor vehicle theft

- the number of arrests for the following crimes occurring on campus during the most recent *calendar year**:
  - ✓ liquor law violations
  - ✓ drug abuse violations
  - ✓ weapons possessions

II. To aid in the prevention of similar occurrences, make timely reports to students and employees on crimes considered to be a threat to other students and employees that are reported to campus security authorities or local law police agencies:

- ✓ murder
- ✓ rape
- ✓ robbery
- ✓ aggravated assault
- ✓ burglary
- ✓ motor vehicle theft

* These statistical data must be submitted to the Secretary upon request for a 1995 report to Congress on campus crime statistics.
** Calendar year means August 1 - July 31.
*** For the 1st reporting period *only*, preceding calendar years may be any 12-month periods which do not overlap.



COMPLYING WITH THE CAMPUS SECURITY ACT — 1990

Title II – Crime Awareness and Campus Security

prepared by

National Association of Student Personnel Administrators, Inc.

with the assistance of

American Association of Community & Junior Colleges

American Council on Education

American Association of State Colleges & Universities

Association of American Universities

Council for Advancement & Support of Education

Foley, Hoag & Eliot

International Association of Campus Law Enforcement Administrators

National Association of College & University Attorneys

National Association of College & University Business Officers

National Association of Independent Colleges & Universities

United Educators Insurance Risk Retention Group

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Introduction

In November 1990, the Student Right-to-Know and Campus Security Act *was signed into law (Public Law 101-542). The implications of the law will affect, to some extent, all postsecondary institutions that receive federal financial assistance. More importantly, it will involve the entire campus community, not just the safety and security organization, in responding to crime incidents on campus.*

The U.S. Department of Education will issue two 'Dear Colleague' letters this spring. The department also plans to issue a Notice of Proposed Rule Making in September 1991 and final regulations are expected to be issued in February 1992.

Because of the campus-wide implications and the timelines for compliance, 10 higher education associations convened to prepare a joint advisory on the compliance and record-keeping procedures required.

This paper has been prepared to assist colleges and universities in responding to Title II — Crime Awareness and Campus Security. The information contained in this paper is not intended as legal advice and institutions are encouraged to consult competent counsel.

A representative list of other resources is also included.

The Student Right-to-Know and Campus Security Act represents a legislative "solution" to the perceived problem that some colleges and universities have been less than forthright about the crime risks which exist on campuses. This may be an unfair generalization since many campuses have been engaged in effective campus safety and security programs and have provided information to the FBI's Uniform Crime Reporting (UCR) system or state programs.

The law recognizes institutional autonomy in several important areas. Specifically, institutions are free to, and are encouraged to, establish their own security policies. Effective policies and judgments about the format of the required published security report, interpretation of data, and other institutional background information should be developed within the context of the institution's educational mission, philosophy, and the community environment.

We strongly encourage campuses to establish a campus-wide committee to review their security policies and emergency response procedures in the context of the new legal requirements. Headed by a senior administrator, the team should include representatives from a wide range of campus agencies. For example, many campuses will find it helpful to include representatives from campus safety and security, student affairs, admissions, legal counsel, university relations and public information, personnel, academic/faculty affairs, and student government.

If the campus does not currently use a campus-wide emergency response or management team, we urge institutions to consider forming such a team. Such a team could include representatives from the vice presidents for administration, student affairs, academic affairs, and public information; the director of security; and legal counsel. Both the campus security team and the smaller emergency response team should meet on a regular basis to review procedures and plan for emergency response. The new law imposes an important new requirement for timely notice of campus crimes. This group might be the appropriate one to confer and make judgments about how the campus will provide the required timely notice. (Timely notice is discussed in greater detail on pages 4-6.)

Campuses are urged to continue and enhance further their current safety and security education and awareness programs. In discussing safety awareness and crime prevention programs, the law suggests programs designed to "encourage students and employees to be responsible for their own security and the security of others."

The new law provides colleges and universities with an opportunity to review their campus security procedures and policies. Institutions are cautioned to review the requirements imposed by federal, state, and local laws, and to only promulgate policies and procedures which they are able to enforce.

Making the Law Work for You

The act requires each institution receiving Title IV student aid assistance to prepare and distribute an annual report which sets forth its policies on crime prevention issues and gives statistics on the number of specific crimes (murder, rape, robbery, aggravated assault, burglary, and motor vehicle

theft) which have occurred on campus and the number of arrests on campus for liquor law violations, drug abuse violations, and weapons possessions.

In addition to publishing crime statistics, the act requires colleges and universities to provide timely warnings to the campus community of certain crimes (murder, rape, robbery, aggravated assault, burglary, and motor vehicle theft) reported to campus security or local law enforcement which may be considered a threat to other students and employees.

Compliance Timetable

Effective immediately: Section 203 of the law amends Section 438(b) of the General Education Provisions Act (the Family Educational Rights and Privacy Act [FERPA], commonly referred to as the Buckley Amendment). This section mandates that nothing shall prohibit the alleged victims of violent crimes from knowing the results of campus disciplinary proceedings concerning the alleged perpetrators of those violent crimes. Such disclosure is not required, but administrators should consider the ramifications of either disclosure or nondisclosure of the results.

August 1, 1991: Higher education institutions must begin collecting specified information on campus crime statistics and campus security policies.

September 1, 1991: Institutions are required to make "timely reports to the campus community on crimes (murder, rape, robbery, aggravated assault, burglary, and motor vehicle theft as defined on pages 4 and 5) considered to be a threat to other students and employees and reported to campus security or local law police agencies." The information must be disseminated in a manner that will aid in the prevention of similar occurrences. Colleges and universities may want to review with counsel whether this provision may require additional care under state tort laws.

September 1, 1992, and each year thereafter: The college or university must publish and distribute through publications or mailings an annual report of campus security policies and crime statistics to all current students and employees; provide copies of the annual report to any applicant for enrollment or employment upon request; and, upon request, submit a copy of the annual report to the Secretary of Education. It is expected that the secretary will make this request once between now and 1995, when the secretary will make a report to the congressional education committees.

Definitions

1. How is campus defined?

The law defines a campus to include: "(i) any building or property owned or controlled by the institution of higher education within the same reasonably contiguous geographic area and used by the institution in direct support of, or related to its educational purposes; or (ii) any building or property owned or controlled by student organizations recognized by the institution."

Branch campuses, schools, or divisions that are not within a reasonably contiguous geographic area are considered separate campuses for the reporting requirements.

In most cases, fraternity, sorority, and other organizational housing units will be considered part of the campus regardless of location and ownership. Other areas that may be included are recreation/camp sites, research facilities, teaching hospitals, and foreign campuses.

2. *How are crimes covered by the act defined?*

The law requires institutions to report information about the occurrences of the following crimes: murder, rape, robbery, aggravated assault, burglary, and motor vehicle theft.

While not defined in the law, we suggest that a crime is "reported" when a campus security/police officer investigating an incident determines that a crime has occurred or a local police agency notifies an institution that it has documented a report of a criminal offense which has occurred "on campus" as defined by this act.

For the purposes of the act, the offenses for which statistics must be reported are to be defined in accordance with the FBI's Uniform Crime Reporting (UCR) system, as modified by the Hate Crimes Statistics Act. The law does *not* require colleges and universities to participate in the UCR, only that the data must be compiled in a manner consistent with the UCR.

Definitions of crimes for which occurrences must be reported: *(see note 1)*

- murder: the willful (non-negligent) killing of one human being by another

Note:

1. Definitions are based on the FBI's Uniform Crime Report (UCR).

■ rape: the carnal knowledge of a person forcibly and/or against that person's will, or not forcibly or against that person's will where the victim is incapable of giving consent because of his/her temporary or permanent mental or physical incapacity; or an attempt to commit rape by force or threat of force *(see note 2)*

■ robbery: the taking, or attempting to take, of anything of value under confrontational circumstances from the control, custody, or care of another person or persons by force or threat of force or violence and/or by putting the victim in fear of immediate harm

■ aggravated assault: an unlawful attack by one person upon another wherein the offender uses a weapon or displays it in a threatening manner, or the victim suffers obvious severe or aggravated bodily injury involving apparent broken bones, loss of teeth, possible internal injury, severe laceration, or loss of consciousness. Note that an unsuccessful attempt to commit murder would be classified as an aggravated assault

■ burglary (breaking and entering): the unlawful entry into a building or other structure with the intent to commit a felony or a theft. Note that forced entry is not a required element of the offense, so long as the entry is unlawful (constituting a trespass) it may be accomplished via an unlocked door or window. Included are unsuccessful attempts where force is employed, or where a perpetrator is frightened off while entering an unlocked door or climbing through an open window

■ motor vehicle theft: the theft or attempted theft of a motor vehicle

Institutions must also report the number of *arrests* for the following crimes that occur on campus: liquor law violations, drug abuse violations, and weapons possessions. An "arrest" has occurred when a law enforcement officer has detained an individual with the intention of seeking charges against the person for a specific offense(s) and a record is made of the detention (Tuttle, 1991a).

Definitions of crimes for which arrests must be reported *(see note 1, page 4)*:

■ liquor law violations: violations of laws or ordinances prohibiting the manufacture, sale, purchase, transportation, possession or use of alcoholic beverages (with the exception of "driving under the influence" or "drunkenness")

■ drug abuse violations: violations of laws prohibiting the production, distribution, and/or use of certain controlled substances and the equipment or devices utilized in their preparation or use

■ weapons possessions: violations of laws or ordinances prohibiting the manufacture, sale, purchase, transportation, possession, concealment, or use of firearms, cutting instruments, explosives, incendiary devices, or other deadly weapons.

3. How should students be defined?

While not defined in the law, we are suggesting that students are all persons who are registered during the current semester to take at least one course for credit.

4. How should employees be defined?

While not defined in the law, we are suggesting that employees are full-time and part-time employees of the institution with regularly scheduled hours of employment.

Frequently Asked Questions

1. When should the timely reports on crimes considered a threat to other students and employees be disseminated?

This requirement imposes an important new responsibility for colleges and universities. There is a need to make prompt decisions about when and how to disseminate timely warnings after one of the six specified crimes occurs on campus. Campuses may wish to designate a senior administrator with the ultimate responsibility for this action. The purpose of the reports is to aid in the prevention of similar occurrences. Campuses should, therefore, make a determination about the likelihood of the incident posing a threat to others when choosing an immediate and/or personal notification or a more general warning using bulletin boards, campus news media, flyers, or other announcements/forums.

Note:

2. In the case of rape, we are recommending that the definition used be consistent with the National Incident-Based Reporting System (NIBRS) definition. For a complete discussion of the UCR and NIBRS system and suggestions for record keeping, see Tuttle (1991a).

2. How should the timely reports on crimes considered a threat to other students and employees be disseminated?

In determining how to inform students and employees about incidents, campuses are urged to consider the likelihood that the incident poses a threat to other individuals. Campuses should review and determine the effectiveness of current approaches. The following is a list of possible ways of communicating with the campus community: press releases for campus and local press, radio, television, and other media; special notices through residence hall staff; dining hall/cafeteria table tents; notices included with pay checks; faculty/staff newsletters; posted notices (posters, computer bulletin boards and electronic mail, athletic score boards); or individually addressed correspondence.

It is advisable to document the notification procedures used to alert members of the campus community about incidents.

3. What information is to be included in the annual security report?

Two types of information must be distributed to all current students and employees and upon request to applicants for enrollment or employment. They are: (1) descriptions of policies related to campus security; and (2) statistics concerning specific crimes reported to campus security authorities or local police agencies.

4. What policy information must be collected and disseminated?

Although it is not clear, the law does not seem to require that the entire verbatim text of the covered policies be included in the annual reports, but rather summaries of the following policies:

- procedures and facilities for reporting crimes and other emergencies and the institution's response to those reports, and policies which encourage accurate and prompt reporting of crimes to campus/local police

Examples might include: the availability of campus security, the existence of a network of emergency telephones, publication and promotion of emergency phone numbers, or orientation programs.

- campus facility access and security policies, and security considerations related to maintenance programs

Examples might include: policies governing access to academic buildings, residence halls, fraternities and sororities, and other facilities and the procedure for inspecting campus lighting, shrubbery.

- law enforcement (arrest) authority of campus security personnel, and interagency relationships (including the policy concerning the monitoring and recording by local police of crimes at off-campus student organizations)

Examples might include: does campus security have law enforcement authority? What is the nature of the working relationship between campus security and local law enforcement agencies?

- a statement of policies regarding alcohol and drugs and a description of any drug or alcohol education programs

This section will require the institution to summarize or reference the information already required by the Drug-Free Schools and Communities Act.

- descriptions of "security awareness" and crime prevention programs

This section requires a description of the type and frequency of programs designed to inform students and employees about campus security procedures and practices and to encourage students and employees to be responsible for their own security and the security of others. This description should include reference to the manner in which the campus provides the "timely notice" of violent crimes reported to campus or local police to aid in the prevention of similar occurrences. Institutions are encouraged to specify that such action will depend on the particular circumstances of the crime.

Examples might include: orientation programs, residence hall education programs, campus safety awareness programs, and employee training and handbooks.

5. What statistical information must be collected and disseminated?

Institutions must report, for the most recent calendar year and the two preceding calendar years for which data are available, the number of occurrences on campus of the following criminal offenses reported to campus security authorities or local police agencies: murder, rape, robbery, aggravated assault, burglary, and motor vehicle theft, and the number of arrests for the following crimes that occur on campus: liquor law violations, drug abuse violations, and weapons possessions. (See pages 4 and 5 for definitions of the crimes.)

6. How can campus security personnel collect data on crimes commited outside their jurisdiction?

The greatest difficulty in collecting statistics will arise in circumstances where crimes occur or arrests are made by municipal police at on-campus locations. Accurate reporting will depend on the cooperation of the local police force(s). It is generally recognized that the nature of the relationships between campus security and local law enforcement will vary depending on the nature of the community. For example, it may be very costly and time consuming for a large, urban, metropolitan police department to provide crime report information to the multiple college and university campuses located within its jurisdiction. Campuses should anticipate the difficulties in securing this information and consult with local police about the most effective way to obtain the information. Campuses should make a reasonable effort to secure this information.

7. Who should prepare the annual security report?

This is a policy matter to be determined by the campus administration. Campuses are urged to have the draft report reviewed by the campus emergency response/management team or other campus-wide group to ensure that the information is current, accurate, and presented in a readily understandable format.

8. How should the annual security report be disseminated?

Institutions will prepare, publish, and distribute the required information through appropriate publications or mailings.

The institution has flexibility in determining the publication media, so long as the information required in the annual security report appears in a single special-purpose document or within the same section of a larger publication and the documents are prepared and distributed annually.

9. When should the annual security report be disseminated?

The first report must be disseminated September 1, 1992, and every year thereafter. It is our understanding that the report would cover the 12-month period between August 1 and July 31 of each year. This matter may be clarified by the U.S. Department of Education in one of the 'Dear Colleague' letters or in the final regulations.

10. What are the implications of the federal law on states that have also passed laws which require reporting?

It is important to note that (with the exception of the Massachusetts law which becomes "null and void" upon the implementation of the federal act), the Crime Awareness and Campus Security Act does not supersede state campus crime disclosure laws. Institutions located within the 11 states which have enacted their own reporting requirements face an additional challenge of meeting the frequently conflicting standards of state and federal laws without creating multiple reports or publications.

11. What are the implications for institutions with campuses abroad?

Representatives of the U.S. Department of Education have indicated that foreign campuses may be considered to be a branch campus. They refer to the February 11, 1991, 'Dear Colleague' letter providing additional guidance on similar issues arising under the Drug-Free Schools and Communities Act.

12. How will colleges and universities be asked to certify compliance?

Representatives of the U.S. Department of Education will send two 'Dear Colleague' letters. The first letter has already been sent and the second one should be mailed in late spring. Colleges and universities will receive a new Program Participation Agreement from the Division of Certification and Eligibility in July 1991.

13. Should colleges and universities expect additional changes in the law?

Changes and additions to the law are always possible. Technical amendments have already been approved and new legislation has been introduced which would modify the list of crime statistics which must be included in an institution's annual security report.

Colleges and universities will need to review the legislative changes periodically to ensure compliance.

Other Resources

Note: The publications listed below are available from the publisher or author listed, not the NASPA office.

American Council on Education. (1985). *Achieving Reasonable Campus Security. Self-Regulation Initiatives: Resource Documents for Colleges and Universities* (No. 2). Washington, D.C.: Author.

Bromley, M., & Territo, L. (1990). *College Crime Prevention and Personal Safety Awareness.* Springfield, IL: Charles C. Thomas.

Burling, P. (1991). *Crime on Campus: Analyzing and Managing the Increasing Risk of Institutional Liability.* Washington, D.C.: National Association of College & University Attorneys.

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§ 1232g. Family educational and privacy rights

(a) Conditions for availability of funds to educational agencies or institutions; inspection and review of education records; specific information to be made available; procedure for access to education records; reasonableness of time for such access; hearings; written explanations by parents; definitions

(1)(A) No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, 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. If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material. Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made.

(B) The first sentence of subparagraph (A) shall not operate to make available to students in institutions of postsecondary education the following materials:

(i) financial records of the parents of the student or any information contained therein;

(ii) confidential letters and statements of recommendation, which were placed in the education records prior to January 1, 1975, if such letters or statements are not used for purposes other than those for which they were specifically intended;

(iii) if the student has signed a waiver of the student's right of access under this subsection in accordance with subparagraph (C), confidential recommendations—

(I) respecting admission to any educational agency or institution,

(II) respecting an application for employment, and

(III) respecting the receipt of an honor or honorary recognition.

(C) A student or a person applying for admission may waive his right of access to confidential statements described in clause (iii) of subparagraph (B), except that such waiver shall apply to recommendations only if (i) the student is, upon request, notified of the names of all persons making confidential recommendations and (ii) such recommendations are used solely for the purpose for which they were specifically intended. Such waivers may not be required as a condition for admission to, receipt of financial aid from, or receipt of any other services or benefits from such agency or institution.

(2) No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided an opportunity for a hearing by such agency or institution, in accordance with regulations of the Secretary, to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy or other rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.

(3) For the purposes of this section the term "educational agency or institution" means any public or private agency or institution which is the recipient of funds under any applicable program.

(4)(A) For the purposes of this section, the term "education records" means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which—

(i) contain information directly related to a student; and

(ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

(B) The term "education records" does not include—

(i) 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;

(ii) if the personnel of a law enforcement unit do not have access to education records under subsection (b)(1) of this section, the records and documents of such law enforcement unit which (I) are kept apart from records described in subparagraph (A), (II) are maintained solely for law enforcement purposes, and (III) are not made available to persons other than law enforcement officials of the same jurisdiction;

(iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose; or

(iv) records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.

(5)(A) For the purposes of this section the term "directory information" relating to a student includes the following: the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

(B) Any educational agency or institution making public directory information shall give public notice of the categories of information which it has designated as such information with respect to

each student attending the institution or agency and shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent's prior consent.

(6) For the purposes of this section, the term "student" includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.

(b) Release of education records; parental consent requirement; exceptions; compliance with judicial orders and subpoenas; audit and evaluation of federally-supported education programs; recordkeeping

(1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization, other than to the following—

(A) other school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to have legitimate educational interests;

(B) officials of other schools or school systems in which the student seeks or intends to enroll, upon condition that the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record;

(C) authorized representatives of (i) the Comptroller General of the United States, (ii) the Secretary, (iii) an administrative head of an education agency (as defined in section 1221e–3(c) of this title), or (iv) State educational authorities under the conditions set forth in paragraph (3) of this subsection;

(D) in connection with a student's application for, or receipt of, financial aid;

(E) State and local officials or authorities to whom such information is specifically required to be reported or disclosed pursuant to State statute adopted prior to November 19, 1974;

(F) organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction, if such studies are conducted in such a manner as will not permit the personal identification of students and their parents by persons other than representatives of such organizations and such information will be destroyed when no longer needed for the purpose for which it is conducted;

(G) accrediting organizations in order to carry out their accrediting functions;

(H) parents of a dependent student of such parents, as defined in section 152 of Title 26; and

(I) subject to regulations of the Secretary, in connection with an emergency, appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons.

Nothing in clause (E) of this paragraph shall prevent a State from further limiting the number or type of State or local officials who will continue to have access thereunder.

(2) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection unless—

(A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents, or

(B) such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency.

(3) Nothing contained in this section shall preclude authorized representatives of (A) the Comptroller General of the United States, (B) the Secretary, (C) an administrative head of an education agency or (D) State educational authorities from having access to student or other records which may be necessary in connection with the audit and evaluation of Federally-supported education program, or in connection with the enforcement of the Federal legal requirements which relate to such programs: *Provided*, That except when collection of personally identifiable information is specifically authorized by Federal law, any data collected by such officials shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and such personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, and enforcement of Federal legal requirements.

(4)(A) Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals (other than those specified in paragraph (1)(A) of this subsection), agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information. Such record of access shall be available only to parents, to the school official and his assistants who are responsible for the custody of such records, and to persons or organizations authorized in, and under the conditions of, clauses (A) and (C) of paragraph (1) as a means of auditing the operation of the system.

(B) With respect to this subsection, personal information shall only be transferred to a third party on the condition that such party will not permit any other party to have access to such information without the written consent of the parents of the student.

(5) Nothing in this section shall be construed to prohibit State and local educational officials from having access to student or other records which may be necessary in connection with the audit and evaluation of any federally or State supported education program or in connection with the enforcement of the Federal legal requirements which relate to any such program, subject to the conditions specified in the proviso in paragraph (3).

(c) Surveys or data-gathering activities; regulations

The Secretary shall adopt appropriate regulations to protect the rights of privacy of students and their families in connection with any surveys or data-gathering activities conducted, assisted, or authorized by the Secretary or an administrative head of an education agency. Regulations established under this subsection shall include provisions controlling the use, dissemination, and protection of such data. No survey or data-gathering activities shall be conducted by the Secretary, or an administrative head of an education agency under an applicable program, unless such activities are authorized by law.

(d) Students' rather than parents' permission or consent

For the purposes of this section, whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.

(e) Informing parents or students of rights under this section

No funds shall be made available under any applicable program to any educational agency or institution unless such agency or institution informs the parents of students, or the students, if they are eighteen years of age or older, or are attending an institution of postsecondary education, of the rights accorded them by this section.

(f) Enforcement; termination of assistance

The Secretary, or an administrative head of an education agency, shall take appropriate actions to enforce provisions of this section and to deal with violations of this section, according to the provisions of this chapter, except that action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with the provisions of this section, and he has determined that compliance cannot be secured by voluntary means.

(g) Office and review board; creation; functions

The Secretary shall establish or designate an office and review board within the Department of Education for the purpose of investigating, processing, reviewing, and adjudicating violations of the provisions of this section and complaints which may be filed concerning alleged violations of this section. Except for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices of such Department.

(Pub.L. 90–247, Title IV, § 438, as added Pub.L. 93–380, Title V, § 513(a), Aug. 21, 1974, 88 Stat. 571, and amended Pub.L. 93–568, § 2(a), Dec. 31, 1974, 88 Stat. 1858; Pub.L. 96–46, § 4(c), Aug. 6, 1979, 93 Stat. 342; Pub.L. 96–88, Title III, § 301, Title V, § 507, Oct. 17, 1979, 93 Stat. 677, 692; Pub.L. 99–514, § 2, Oct. 22, 1986, 100 Stat. 2095.)

§ 1. Definitions

As used in this chapter, the following words shall have the following meanings unless the context clearly indicates otherwise:—

"Agency", any agency of the executive branch of the government, including but not limited to any constitutional or other office, executive office, department, division, bureau, board, commission or committee thereof; or any authority created by the general court to serve a public purpose, having either statewide or local jurisdiction.

"Automated personal data system", a personal data system in which personal data is stored, in whole or in part, in a computer or in electronically controlled or accessible files.

"Computer accessible", recorded on magnetic tape, magnetic film, magnetic disc, magnetic drum, punched card, or optically scannable paper or film.

"Criminal justice agency", an agency at any level of government which performs as its principal function activity relating to (a) the apprehension, prosecution, defense, adjudication, incarceration, or rehabilitation of criminal offenders; or (b) the collection, storage, dissemination, or usage of criminal offender record information.

"Data subject", an individual to whom personal data refers. This term shall not include corporations, corporate trusts, partnerships, limited partnerships, trusts or other similar entities.

"Holder", an agency which collects, uses, maintains or disseminates personal data or any person or entity which contracts or has an arrangement with an agency whereby it holds personal data as part or as a result of performing a governmental or public function or purpose. A holder which is not an agency is a holder, and subject to the provisions of this chapter, only with respect to personal data so held under contract or arrangement with an agency.

"Manual personal data system", a personal data system which is not an automated or other electronically accessible or controlled personal data system.

"Personal data", any information concerning an individual which, because of name, identifying number, mark or description can be readily associated with a particular individual; provided, however, that such information is not contained in a public record, as defined in clause Twenty-sixth of section seven of chapter four and shall not include intelligence information, evaluative information or criminal offender record information as defined in section one hundred and sixty-seven of chapter six.

"Personal data system", a system of records containing personal data, which system is organized such that the data are retrievable by use of the identity of the data subject.

Added by St.1975, c. 776, § 1. Amended by St.1976, c. 249, § 1; St.1977, c. 691, § 6.

§ 2. Holders maintaining personal data system; duties

Every holder maintaining personal data shall:—

(a) identify one individual immediately responsible for the personal data system who shall insure that the requirements of this chapter for preventing access to or dissemination of personal data are followed;

(b) inform each of its employees having any responsibility or function in the design, development, operation, or maintenance of the personal data system, or the use of any personal data contained therein, of each safeguard required by this chapter, of each rule and regulation promulgated pursuant to section three which pertains to the operation of the personal data system, and of the civil remedies described in section three B of chapter two hundred and fourteen available to individuals whose rights under chapter sixty-six A are allegedly violated;

(c) not allow any other agency or individual not employed by the holder to have access to personal data unless such access is authorized by statute or regulations which are consistent with the purposes of this chapter or is approved by the data subject whose personal data are sought if the data subject is entitled to access under clause (i). Medical or psychiatric data may be made available to a physician treating a data subject upon the request of said physician, if a medical or psychiatric emergency arises which precludes the data subject's giving approval for the release of such data, but the data subject shall be given notice of such access upon termination of the emergency. A holder shall provide lists of names and addresses of applicants for professional licenses and lists of professional licensees to associations or educational organizations recognized by the appropriate professional licensing or examination board. A holder shall comply with a data subject's request to disseminate his data to a third person if practicable and upon payment, if necessary, of a reasonable fee;

(d) take reasonable precautions to protect personal data from dangers of fire, theft, flood, natural disaster, or other physical threat;

(e) comply with the notice requirements set forth in section sixty-three of chapter thirty;

(f) in the case of data held in automated personal data systems, and to the extent feasible with data held in manual personal data systems, maintain a complete and accurate record of every access to and every use of any personal data by persons or organizations outside of or other than the holder of the data, including the identity of all such persons and organizations which have gained access to the personal data and their intended use of such data and the holder need not record any such access of its employees acting within their official duties;

(g) to the extent that such material is maintained pursuant to this section, make available to a data subject upon his request in a form comprehensible to him, a list of the uses made of his personal data, including the identity of all persons and organizations which have gained access to the data;

(h) maintain personal data with such accuracy, completeness, timeliness, pertinence and relevance as is necessary to assure fair determination of a data subject's qualifications, character, rights, opportunities, or benefits when such determinations are based upon such data;

(i) inform in writing an individual, upon his request, whether he is a data subject, and if so, make such data fully available to him or his authorized representative, upon his request, in a form comprehensible to him, unless doing so is prohibited by this clause or any other statute. A holder may withhold from a data subject for the period hereinafter set forth, information which is currently the subject of an investigation and the disclosure of which would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest, but this sentence is not intended in any way to derogate from any right or power of access the data subject might have under administrative or judicial discovery procedures. Such information may be withheld for the time it takes for the holder to complete its investigation and commence an administrative or judicial proceeding on its basis, or one year from the commencement of the investigation or whichever occurs first. In making any disclosure of information to a data subject pursuant to this chapter the holder may remove personal identifiers relating to a third person, except where such third person is an officer or employee of government acting as such and the data subject is not. No holder shall rely on any exception contained in clause Twenty-sixth of section seven of chapter four to withhold from any data subject personal data otherwise accessible to him under this chapter;

(j) establish procedures that (1) allow each data subject or his duly authorized representative to contest the accuracy, completeness, pertinence, timeliness, relevance or dissemination of his personal data or the denial of access to such data maintained in the personal data system and (2) permit personal data to be corrected or amended when the data subject or his duly authorized representative so requests and there is no disagreement concerning the change to be made or, when there is disagreement with the data subject as to whether a change should be made, assure that the data subject's claim is noted and included as part of the data subject's personal data and included in any subsequent disclosure or dissemination of the disputed data;

(k) maintain procedures to ensure that no personal data are made available in response to a demand for data made by means of compulsory legal process, unless the data subject has been notified of such demand in reasonable time that he may seek to have the process quashed;

(*l*) not collect or maintain more personal data than are reasonably necessary for the performance of the holder's statutory functions.

Added by St.1975, c. 776, § 1. Amended by St.1976, c. 249, § 2; St.1977, c. 691, §§ 7 to 12.

Discipline for Off-Campus Acts

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January 23, 1989

EDUCATION - UNIVERSITY OF MARYLAN - STUDENT DISCIPLINE - UNIVERSIT MAY DISCIPLINE A STUDENT FOR OFF CAMPUS MISCONDUCT DETRIMENTAL T UNIVERSITY INTERESTS, SUBJECT T CONSTITUTIONAL LIMITS

The Honorable Arthur Dorman
The Honorable Timothy F. Maloney
The Honorable Pauline H. Menes
The Honorable James C. Rosapepe

21st District Delegation
210 Lowe Office Building
Annapolis, Maryland 21041-1991

Dear Senator Dorman and Delegates Maloney, Menes, and Rosapepe:

You have requested our opinion concerning the authority of the University of Maryland College Park to discipline its students for misconduct that occurs off the grounds of the campus. You have also inquired about any constitutional constraints on the General Assembly's or the University's exercise of such authority.

In your inquiry, you relate that "the College Park community has been plagued by problems with student vandalism, disorderly conduct, use of fraudulent identification and other unlawful activity" and that this misconduct is usually associated with the presence of "[m]any student residences and fraternity houses ... located off-campus."

As we understand it, the University of Maryland College Park has assumed no authority - nor, correlatively, risked any potential legal liability - over the off-campus, private conduct of individual students or student organizations (including fraternities and sororities). Rather, the University's policy is

OPINION OF THE ATTORNEY GENERAL

Cite as: 74 Opinions of the Attorney General ___ (1989)
[Opinion No. 89-002 (January 23, 1989)]

that jurisdiction over private conduct and activities occurring off-campus should reside in the criminal and civil justice system.[1]

For the reasons stated below, we conclude that a State university or college may discipline a student for off-campus misconduct detrimental to the interests of the institution, subject to the fundamental constitutional safeguards that apply to all disciplinary actions by educational officials.

I

Background

The University of Maryland College Park's student disciplinary rules, set forth in the UMCP Code of Student Conduct, were approved by the Board of Regents pursuant to its statutory authority to provide for the discipline, suspension, expulsion, or reinstatement of any student. See former §13-104(d) of the Education Article ("ED" Article).[2] The Student

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[1] The type of misconduct that you have illustrated might be subject to criminal prosecution by local law enforcement authorities. It might also serve as grounds for civil liability if a victim were to bring a common law tort action. In a letter of advice dated December 3, 1987 to Delegate Menes, Assistant Attorney General James J. Mingle, Chief Counsel for Educational Affairs, described the basis and manner in which the University of Maryland College Park regulates the activities of fraternities and sororities, many of which are housed off campus. Your present inquiry focuses on off-campus misconduct of individual students. So, we perceive no need to reiterate here campus rules governing student organizations, other than to acknowledge that the University's present policy position appears to be based, in part, upon the concern that increased control over the activities of off-campus student organizations could conceivably increase the risk of third-party tort liability.

[2] This citation is to the Code section in effect at the time that UMCP's Code of Student Conduct was approved. The Education Article has since been extensively revised as a result of the General Assembly's enactment of Chapter 246 (Senate Bill 459), Laws of Maryland 1988. Nevertheless, the current statutory authority of the Board of Regents for the University of Maryland System is similar. ED §12-106(d) states:

> "In consultation with the Chancellor and the presidents, the Board may adopt policies providing for:
>
> (1) The discipline, suspension, expulsion, or reinstatement of any student; and
>
> (2) The recognition and conduct of student organizations and athletic programs and activities."

(Continued)

Code begins with the following general description of the University's "inherent authority": "The University reserves the right to take necessary and appropriate action to protect the safety and well-being of the campus community." Student Code §4. The Student Code also sets forth specific types of misconduct that are subject to disciplinary action, potential sanctions for violation of the disciplinary regulations, and guidelines for disciplinary proceedings. Student groups and organizations, as well as individual students, may be charged with violations of the Student Code.

The Code's provisions are to "be read broadly and are not designed to define misconduct in exhaustive terms." Student Code §3. Nevertheless, the current Student Code does not expressly authorize the University to discipline students for off-campus misconduct.[3]

II

Authority to Discipline Off-Campus Misconduct

The United States Supreme Court has repeatedly recognized that a state has comprehensive authority to prescribe and enforce standards of conduct in its public schools and universities, consistent with fundamental constitutional safeguards. See Goss v. Lopez, 419 U.S. 565, 574 (1975); Healy v. James, 408 U.S. 169, 180 (1972); Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 507 (1969). In the school environment, the state's power is not limited to prohibiting lawless actions; it may also prohibit actions which "materially and substantially disrupt the work and discipline of the school." Healy, 408 U.S. at 189.

Furthermore, the transition provisions of the recently enacted law provide that "... all rules and regulations ... guidelines, policies ... associated with the [former] Board of Regents ... shall continue in effect under the [new] Board of Regents ... until completed, withdrawn, cancelled, modified, or otherwise changed pursuant to law." Chapter 246, Section 14. Thus, the UMCP Code of Student Conduct continues in effect until changed by the new Board.

[3] If the University decided to change its policy and impose disciplinary sanctions for off-campus actions, consistent with the limitations described in Part III below, it should amend the Student Code in order to provide specifically for this new basis for discipline.

Many of the earlier student discipline cases were based on a theory that the college authority stood in loco parentis for the physical and moral welfare and mental training of the pupils. The courts upheld public universities' disciplinary actions against students who engaged in immoral conduct off campus, often finding the student unfit for the profession for which he or she was studying.[4] This theory is now largely discredited. See Bradshaw v. Rawlings, 612 F.2d 135, 138-40 (3d Cir. 1979).

More recently, numerous lower federal courts have upheld the right of public universities to discipline students for off-campus misconduct that is detrimental to the interests of the university or to the welfare of its students. The reasoning behind this view of the universities' authority was well-stated by a United States District Court confronted with several major student discipline cases:

> In the field of discipline, scholastic and behavioral, an institution may establish any standards reasonably relevant to the lawful missions, processes, and functions of the institution....
>
> Standards so established may apply to student behavior on and off the campus when relevant to any lawful mission, process, or function of the institution. By such standards of student conduct the institution may prohibit any action or omission which impairs, interferes with, or obstructs the missions, processes and functions of the institution.

General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education, 45 F.R.D. 133, 145 (W.D. Mo. 1968) (en banc).[5] See, e.g., Krasnow v. Virginia Polytechnic Institute and

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[4] See, e.g., Robinson v. University of Miami, 100 So. 2d 442 (Fla. App. 1958) (student enrolled in program leading to a certificate to teach in secondary education dismissed for letter he wrote to a local newspaper dealing with the subject of atheism); White v. Portia Law School, 274 Mass. 162, 174 N.E. 187 (1931) (law school student boasted to classmates that she had used knowledge gained in the classroom to purchase goods with no intention of paying for them); Tanton v. McKenney, 226 Mich. 245, 197 N.W. 510 (1924) (female student in teachers' college dismissed for smoking cigarettes in public and other indiscretions).

[5] In this unusual order, the full District Court for the Eastern District of Missouri set out "a statement of judicial standards of procedure and substance" to achieve uniformity in the student discipline cases then pending in the court. 45 F.R.D. at 135.

State University, 414 F. Supp. 55, 56 (W.D. Va. 1976), aff'd, 551 F.2d 591 (4th Cir. 1977) ("students enrolled in state supported institutions acquire a contractual right for the period of enrollment to attend, subject to compliance with scholastic and behavioral rules of the institution, and to dismissal for violation thereof ...").

Several of the reported cases in which a student has challenged a university's right to impose discipline for off-campus misconduct have involved criminal misconduct. The institution's right to discipline such conduct has been upheld in all such cases, even if the university's rule were held invalid for other constitutional violations. For example, in Krasnow v. Virginia Polytechnic Institute, a student was placed on probation by a state court for unlawful possession of marijuana. The university then disciplined the student for violating a university rule prohibiting the "unlawful use or possession of drugs whether or not on university property." The Court of Appeals for the Fourth Circuit upheld the university's rule and disciplinary action, finding that "the university clearly has the prerogative to determine that any unlawful possession of drugs or criminal conduct on the part of students is detrimental to the university." 551 F.2d at 592.

The United States District Court for the District of Maryland also upheld the dismissal of a pharmacy student from the University of Maryland School of Pharmacy for drug-related offenses. Sohmer v. Kinnard, 535 F. Supp. 50 (D. Md. 1982). The University's disciplinary committee found that the student, while functioning as an extern, had been impaired by the improper use of two prescription drugs and had illegally possessed cocaine. He was dismissed pursuant to a University rule stating that students whose actions are judged to be detrimental to the interests of the University community may be required to withdraw. The court upheld the rule and the dismissal, finding that "the illegal use and possession of narcotic drugs would violate the law and the Code of Ethics of his profession and would therefore be detrimental to the interests of the University." 535 F. Supp. at 54. With respect to the University's interests, the court also noted that:

> The School [of Pharmacy's] reputation and its ability to place students in clinical externships would be seriously jeopardized if the Court intervened and prevented the School from disciplining a student who has admitted that he has used a narcotic drug without a prescription and that he has had cocaine in his possession.

535 F. Supp. at 53. See also Paine v. Board of Regents of the University of Texas System, 355 F. Supp. 199 (W.D. Tex. 1972), aff'd per curiam 474 F.2d 1397 (5th Cir. 1973) (commenting that regents may suspend or expel any student drug or narcotic offender who demonstrably poses a threat to other students, but finding this school regulation unconstitutional on other grounds); Wallace v. Florida A & M University, 433 So. 2d 600 (Fla. App. 1983) (upholding expulsion on ground that student was convicted of crime of intent to distribute cocaine, because student's conduct interfered with the operation of the university and also endangered the health and safety of other students and other members of the academic community).

Courts have also affirmed the authority of public universities to discipline students for types of criminal misconduct other than drug-related offenses. For example, one court upheld a public university's suspension based on a state court finding that the student was in criminal contempt of court. Due v. Florida Agricultural and Mechanical University, 233 F. Supp. 396 (N.D. Fla. 1963). In Due, the court also upheld the university's rule providing that disciplinary action will be taken against students for misconduct while on or off campus, including conviction by university officials, city, county or federal police for violation of civil or criminal laws. In Cornette v. Aldridge, 408 S.W.2d 935 (Tex. Civ. App. 1966), a state court upheld a student's suspension for reckless driving that occurred off campus but that also violated campus rules against "irresponsible behavior" on or off campus.

Courts have applied the same standard to uphold universities' disciplinary action for off-campus misconduct that violated university rules, even though the conduct was not criminal in nature. For example, in Kusnir v. Leach, 64 Pa. Cmwlth. 65, 439 A.2d 223 (1982), a student was suspended for crashing an off campus party, refusing to leave when requested to do so, and engaging in disruptive behavior in violation of the college's rules against behavior like assault, harassment, personal abuse, and trespass. The court upheld the suspension: "Obviously, a college has a vital interest in the character of its students, and may regard off-campus behavior as a reflection of a student's character and his fitness to be a member of the student body." 439 A.2d at 226. In Esteban v. Central Missouri State College, 415 F.2d 1077 (8th Cir. 1969), the suspensions of two students who participated in demonstrations on a public street adjacent to the college campus were upheld as violating a school rule prohibiting mass demonstrations. The Eighth Circuit agreed with "those courts which have held that a school has inherent authority to maintain order and to discipline students....[and] has latitude and discretion in its formulation

of rules and regulations and of general standards of conduct." 415 F.2d at 1088 (citations omitted).[6]

In summary, the case law establishes that it is constitutionally permissible for a public college or university to impose disciplinary sanctions on students for misconduct that occurs off-campus. Any statute or university rule authorizing an institution to sanction such conduct, however, must limit disciplinary actions to misconduct that is detrimental to the institution's interests.

III

Constitutional Limitations on Disciplinary Action

An educational institution may discipline its students for prohibited conduct, whether it occurs on campus or off, "so long as there is no invidious discrimination, no deprival of due process, no abridgement of a right protected in the circumstances, and no capricious, clearly unreasonable or unlawful action employed ..." General Order on Judicial Standards, 45 F.R.D. at 141.[7]

Any disciplinary action by a public university must meet several basic constitutional requirements. First, the action must be based on existing rules or regulations that are reasonably clear, so that students can understand the standards with which their conduct must comply and disciplinarians can enforce them fairly.[8] A rule that fails to meet this standard may be declared void for vagueness under the Fourteenth Amendment

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[6] In numerous other cases, student suspensions and expulsions for participation in protests and demonstrations have been challenged. Virtually all of those cases involve conduct that occurred on campus. See Annotation, 32 A.L.R.3d 864 (1970). Since those cases do not address a public institution's authority to discipline students for off campus misconduct, they are not directly applicable to your question.

[7] As the court pointed out: "It is not a lawful mission, process, or function of an institution to prohibit the exercise of a right guaranteed by the Constitution or a law of the United States to a member of the academic community in the circumstances. Therefore, such prohibitions are not reasonably relevant to any lawful mission, process or function of an institution." 45 F.R.D. at 146.

[8] Many institutions have created written codes of conduct for student behavior, as the University of Maryland College Park has, to insure that students receive sufficient notice of expected behavior.

of the United States Constitution. See Sword v. Fox, 446 F.2d 1091 (4th Cir. 1971) (upholding regulation that "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices"); Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969) (finding rule prohibiting "misconduct" unconstitutionally vague). A public institution's code of conduct must also comply with the constitutional doctrine of overbreadth in any area where it could affect First Amendment speech rights; in those instances, the rule must be narrowly tailored to serve a significant governmental interest. Grayned v. Rockford, 408 U.S. 104, 115 (1972).

A code of student conduct may not arbitrarily discriminate in the range and type of penalties or in the procedural safeguards afforded various classes of offenders. For example, in Paine v. Board of Regents of the University of Texas System, 355 F. Supp. 199 (W.D. Tex. 1972), aff'd per curiam, 474 F.2d 1397 (5th Cir. 1973), the court held that the university's practice of affording all students charged with violating university rules a full hearing, except students who were finally convicted of or placed on probation for a drug offense (who were automatically suspended), violated the Equal Protection Clause of the Fourteenth Amendment. Thus, a public university should follow the same procedures and consider the same penalties for disciplining students for off-campus misconduct as for similar on-campus misconduct. In addition, a university's disciplinary action must meet the constitutional requirements for due process under the Fourteenth Amendment, including notice to the student and an opportunity to be heard that is appropriate to the nature of the case. See, e.g., Goss v. Lopez, 419 U.S. 565 (1975); Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir. 1961).

Finally, disciplinary action for student conduct may not violate specific guarantees of the Bill of Rights of the United States Constitution as made applicable to state institutions by the Fourteenth Amendment. This limitation has been tested most frequently in cases where students contend that a university rule, or the application of a rule, violates the free speech and press clauses of the First Amendment. University rules relating to speech activities may place reasonable limits on the time, place, and manner of protected speech, but not on its content. See, e.g., Papish v. Board of Curators of the University of Missouri, 410 U.S. 667 (1973); Healy v. James, 408 U.S. 169 (1972).

IV

Conclusion

The cases we have reviewed are revealing in several respects. They not only provide ample authority for public universities to regulate off-campus student misconduct - and illustrate the types of misbehavior that have been construed as being "detrimental" to the university's interests (e.g., drug offenses, assault, harassing and disruptive conduct) - but also stipulate the constitutional safeguards that must be afforded. We emphasize, however, that it is a policy judgment for the Board of Regents or the General Assembly whether UMCP or other institutions within the University of Maryland System should be obligated to monitor and discipline off-campus student misconduct or whether the University should continue to defer to the conventional criminal and civil processes. Moreover, should such authority be expanded, discretion should be reserved to campus officials to determine whether specific instances of off-campus misconduct are deemed detrimental to the University's interests so as to warrant disciplinary action, in addition to or in lieu of criminal proceedings.[9]

In summary, it is our opinion that a State college or university may discipline a student for off-campus conduct that impairs the interests of the institution, so long as the student is afforded sufficient procedural protections, is not subject to arbitrary discrimination, and is not disciplined for the exercise of a protected constitutional right.

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[9] The Double Jeopardy Clause of the United States Constitution does not protect students from being subjected to both criminal prosecution and a civil disciplinary proceeding. See e.g., General Order on Judicial Standards, 45 F.R.D. 133, 142 (W.D. Mo. 1968); Paine v. Board of Regents of University of Texas System, 355 F.Supp. 199, 203 (W.D. Tex. 1972), aff'd, 474 F.2d 1397 (5th Cir. 1973). A university may proceed with a disciplinary hearing before the criminal charges are resolved. see Wimmer v. Lehman, 705 F.2d 1402, 1406-07 (4th Cir. 1983). Due process requires that a student facing related criminal charges be allowed counsel at the disciplinary hearing for the limited purpose of advice and consultation, but not necessarily to examine or cross-examine witnesses. 705 F.2d at 1404-05. The student may also be entitled to assert the Fifth Amendment privilege against self-incrimination to exclude his testimony from a subsequent criminal proceeding if the student is required to testify at the disciplinary hearing or if his refusal to testify may be used against him. See e.g., Hart v. Ferris State College, 557 F.Supp. 1379, 1384-85 (W.D. Mich. 1983); Furutani v. Ewigleben, 297 F.Supp. 1163, 1165 (N.D. Cal. 1969).

Very truly yours,

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B:KMI:CEE22

Colleges Report 7,500 Violent Crimes on Their Campuses in First Annual Statements Required Under Federal Law

Those incidents are vastly outnumbered by such property crimes as burglary and car theft

By Douglas Lederman

COLLEGES have reported more than 7,500 incidents of violent crime on their campuses in the first annual security statements required by federal law.

That total included 30 murders, nearly 1,000 rapes, and more than 1,800 robberies. Violent crimes were the exception, however, vastly outnumbered by property crimes such as burglary (32,127) and motor-vehicle theft (8,981).

About 2,400 colleges have supplied *The Chronicle* with the crime statistics they had compiled in response to the Student Right-to-Know and Campus Security Act of 1990. The federal law, which took effect in September, requires every postsecondary institution that receives federal aid to provide students and staff members with a report about crime statistics and policies.

Keeping Track of Campus Crime

- Colleges have reported more than 7,500 incidents of violent crime in the first annual statements required by a federal law: This Page
- Experts say the new law allows colleges to omit categories of offenses that would give a clearer picture of campus crime: A33
- Some college officials expect to spend more on security and the training of campus police officers: This Page
- Crime statistics at more than 2,400 institutions: A34-43

DATA VARY WIDELY

In a nationwide survey, *The Chronicle* found that most colleges had complied with the new law in some form, either by publishing special crime reports or by including the security information in an existing publication, such as the student handbook.

But officials at several dozen institutions said they had not published the information by the September deadline. They said they either knew nothing about the law or had been confused about what the law required. Even among the colleges that provided statistics, the data varied so widely that it was difficult to compare one campus with another.

Some of the confusion stemmed from the fact that the federal government has yet to issue final guidelines on how to fulfill the terms of the law. Because of conflicting instructions issued by the government at various points in the process, some institutions reported crimes by calendar year, and others by academic year.

The legislation itself provides little context for interpreting the data.

It does not distinguish between big colleges and small, for instance, or between urban campuses and rural ones. It also does not compare the incidence of crime at a college with that of the surrounding community, which studies show is generally higher.

COMPARISONS ARE DIFFICULT

Furthermore, campus experts say that crime is more likely to be reported at colleges with respected security forces and aggressive outreach programs for victims—factors the law does not account for.

"While people have a right to know what's going on on campus, they need to be educated that the raw numbers do not tell the whole story," says Leslie A. Scoville, assistant vice-president for public safety at Rutgers University. "I don't think you're ever going to be able to compare apples to apples."

Despite her reservations, Ms. Scoville agrees with most campus-security officers and other legal experts that the law's advantages far outweigh its drawbacks. (For further discussion of the data's limitations see story on Page A33.) The law has done a great service, they say, by informing the public and by forcing colleges that might have avoided the crime issue to confront the need to secure their campuses.

"The chief value of this law and the reporting to American society is that it's compelling university administrators to look very seriously at the crime problem," says Michael Clay Smith, a professor of criminal justice at the University of Southern Mississippi. "That's because the reporting law turns it into a marketing issue for colleges."

Adds Max L. Bromley, associate director of security at the University of South Florida: "For too long, there's been a black hole of misinformation or of information not being readily available. To have an informed customer is the most important thing we can do."

For decades, colleges were viewed as a sanctuary from crime, as well as from many other problems plaguing society. Hence, many colleges paid little attention to security measures and generally ignored the crime issue.

But in recent years, incidents of violent crime on campus have begun to pierce the mythical veil of invulnerability. One incident, the murder in 1986 of Jeanne Clery, a sophomore at Lehigh University, prompted a vigorous lobbying campaign that helped establish the Campus Security Act.

The law, which was signed by President Bush in November 1990, required colleges to make a crime report generally available on the campus, and to provide it upon request to prospective students and employees. Besides crime statistics, the report was designed to detail a college's policies and procedures for preventing crime.

ELABORATE BROCHURES PUBLISHED

Judging from *The Chronicle*'s survey, compliance with the law has varied greatly. Bigger and richer institutions tend to have done the most, often developing elaborate brochures stuffed with information and distributing them to everyone on the campus. Other colleges have published the crime statistics in a campus newsletter or made a letter containing the data available to those who asked for it.

Even though the Education Department sent several letters to all colleges informing them of the law, officials at some institutions said *The Chronicle*'s request for the statistics was the first they had heard of it.

"It was interesting to get calls as recently as a month ago saying, 'Do you know something about some federal law?' " says Douglas Tuttle, director of public safety at the University of Delaware and chair of government relations for the International Association of Campus Law Enforcement Administrators. "All I could

Law May Push Colleges to Spend More Money on Security and Campus-Police Training

Samson, a German Shepherd, is used to patrol the campus of the University of Maryland–Baltimore County. "We use him as a deterrent," a university official says.

By Michele N-K Collison

BALTIMORE

A PHYSICIAN abducted at gunpoint in a parking lot at the Johns Hopkins Hospital was attacked and left for dead in the trunk of his car last February. He was eventually rescued.

Two months later, a Johns Hopkins University medical student walking to a class was beaten and raped in an abandoned parking lot.

Before this academic year, the two incidents would have hit the newspaper headlines and television news for a few days and disappeared. Under a new federal law, however, the two felonies will remain part of the crime statistics that prospective students will see before enrolling in Johns Hopkins for the next three years.

Beginning last September, Johns Hopkins and 3,500 other colleges were required under the Student Right-to-Know and Campus Security Act of 1990 to publish annual reports about crime on their campuses. Police chiefs at some Baltimore-area colleges say they gave crime statistics to students and members of their faculties and staffs before the new law required

say was, 'Well, yeah, I sure do.' I'm not sure quite how to explain that phenomenon."

Before the law took effect, many college officials feared that the disclosure of crime statistics would bring bad publicity and scare away prospective students.

While some institutions say they have indeed been bruised by news stories that compared their campuses unfavorably with their peers', most campus law-enforcement officials say the law has been more of a boon than a burden.

A GOOD STORY TO TELL

"Certainly there is some reluctance and some risk, particularly at those campuses that haven't published this information before," says Dave Stormer, assistant vice-president for safety and environmental services at Pennsylvania State University. "But I think they'll see that people become less reluctant to talk about crime. The numbers are there, they're published, so just talk about it."

Mr. Stormer is one of many campus officials who argue that colleges have a very good story to tell about crime. Separate studies by him and Mr. Bromley of South Florida show that significantly less crime occurs on campuses than in the communities around them. While the law does not require colleges to publish comparative information of that nature, campus-safety experts encourage colleges to provide it to parents and prospective employees.

"We as university officials ought to seize this opportunity to show the positive programs that we have to make our campuses safe," says David Nichols, director of public safety at Jacksonville State University.

Mr. Stormer agrees that despite the heightened attention to crime issues, campuses may be no more dangerous than they used to be. While cleaning out some files recently, he says, he found a crime report for Penn State's main campus from 1972. It showed 1,032 "Part I" crimes, which include murder, rape, robbery, aggravated assault, burglary, larceny theft, motor-vehicle theft, and arson.

For last year, Mr. Stormer says, the university reported 1,018.

"I'm not sure we have a crime wave on campuses," he says. ■

them to do so. But the practical effect of the law, they say, has been to increase public scrutiny of crime on campuses and force colleges to spend more money on security and training for university-police officers. That is true even at colleges that have not experienced the sort of violent crime that plagued Hopkins' east Baltimore campus last year.

REGULAR COMPLAINTS

"Parents and students think universities have a more definable sense of responsibility for safety than the rest of society," says Reese L. Boyd, chief of police at Morgan State University. "Parents are concerned not only with how many Ph.D.'s you have, but how much crime is on your campus."

At Johns Hopkins, faculty and staff members and students had regularly complained about lax security at the east Baltimore campus, which is located in one of this city's most dangerous neighborhoods. After the violent crimes of last spring, officials stepped up security at the medical institutions, including the hiring of 10 off-duty city policemen to patrol the property. The president of the university also ap-

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'THEY ASKED THE WRONG QUESTIONS'

Experts Say Disclosure Law Allows Colleges to Omit Categories That Could Give Clearer Picture of Crime

A NEW FEDERAL LAW that requires colleges to publish data about crime on their campuses has unleashed a blizzard of statistics.

But are the data meaningful? That depends on what you're looking for, campus-safety experts say.

If you merely want to know how much crime was committed at a given college or university, then that institution's crime report will help—as long as officials compiled the data the right way.

But it won't provide a complete picture, most campus-safety officials say, because the federal law omits the single largest category of campus crime: larceny thefts.

The crime statistics required by the Student Right-to-Know and Campus Security Act of 1990 are even less helpful if you're seeking to gauge how safe one college is compared with another, most people familiar with the law agree.

SIZE AND LOCATION

The raw numbers fail to take into account such things as a college's size, its location, whether or not it has on-campus housing, and whether it has an aggressive program for fighting crime and helping victims.

All of those things, college security officials say, can greatly influence the rate of crime.

A 20,000-student university reporting five aggravated assaults and three rapes, for instance, may be much safer than a 1,000-student college with two assaults and one rape. But without the information about enrollment—which the law does not require—a parent or student may see only the raw crime numbers.

Other factors may be even less obvious. Security officials generally agree that students and others are more likely to report a crime when their college has dynamic programs for reaching out to the victims—of sexual assaults, for instance—and a security force that inspires confidence.

Rutgers University, for example, has established a "sensitive crimes" unit to deal with emotionally charged incidents such as bias crimes and, like many universities, has extensive support services for victims of rape.

'UNINFORMED OPINION'

The hope, says Leslie A. Scoville, assistant vice-president for public safety at Rutgers, is that a rape counselor might persuade a victim who is reluctant to approach the police to report the crime.

"Say you're a parent of a teen-age daughter, comparing two schools," Ms. Scoville says. "You look at one that has no incidents of rape reported, and one that has 15 incidents of rape, and the uninformed opinion may be to send her to the one with none.

"But it may be that college doesn't have any kind of outreach program—so it may have just as many rapes, but the victims don't know where to go."

At the University of South Dakota, reports of rapes increased from zero in 1990-91 to seven in 1991-92, after the university introduced a new rape-crisis team in September 1991.

"We are confident that these figures do not represent more-aggressive student behavior," says Jean Morrow, interim dean of students at South Dakota. "The numbers are a sign to us that we are succeeding in bringing unacceptable behavior into an arena in which we can deal with it."

LARCENIES NOT INCLUDED

College security officers cite several other problems with the requirements of the disclosure law.

Mentioned most often is its failure to include a category for larcenies or thefts. Those minor incidents of thievery, according to Dave Stormer, assistant vice-president for safety and environmental services at Pennsylvania State University, account for more than 75 per cent of all crimes committed on college campuses. Leaving them out greatly underestimates the extent of campus crime.

> **"The numbers are a sign to us that we are succeeding in bringing unacceptable behavior into an arena in which we can deal with it."**

"A lot of folks will agree that they asked the wrong questions," says Michael Callahan, director of campus safety at Bentley College and president of the Massachusetts Association of College and University Public Safety Directors. "Yes, it's important to know if there's murder on the campus, but that's not the problem that most of us have. Our problems are vandalism, thefts, fire alarms."

David Nichols, director of public safety at Jacksonville State University, believes lawmakers also erred by allowing colleges and universities to reveal only the number of people arrested by the police for violating liquor, drug, and weapons laws, rather than the number of incidents reported to campus officials.

That allows colleges that deal with such incidents administratively or through a campus judicial system to avoid listing them in their crime reports.

"A college may have dozens of liquor-law violations, which won't be reflected if the dean of students handles them all," Mr. Nichols says. "That violates the spirit and the intention of the act."

Those familiar with the law also warn that without any oversight or regulation, the statistics are only as accurate—and as forthright—as the people who compile them. *The Chronicle* found only a few examples of institutions that had failed to follow the correct procedures—Fitchburg State College, for example, which listed no rapes for 1991-92 in the formal portion of its crime report, but acknowledged elsewhere on the form that four date rapes had been reported.

College administrators hope federal officials will heed their advice and make some of the suggested changes. They are heartened, they say, by evidence that the Education Department, in its forthcoming regulations, will adopt changes in the definition of sexual assault, in standards about whether counselors and residence-hall advisers must report crimes, and in requirements about how, and to whom, colleges must distribute their crime reports.

A GENERAL GUIDE

Despite all of their warnings, college officials acknowledge that the statistics are useful, even more for themselves than for their constituents.

Students and parents should use the statistics as a general guide, college officials say. Good numbers may ease the fears of a prospective student, and bad numbers may raise a red flag.

But in all cases, security experts warn, students should look beyond the numbers, and find out what colleges are doing about crime.

"If you're trying to make an informed comparison, the place you should look is at the policies and procedures related to campus safety," says Douglas Tuttle, director of public safety at the University of Delaware.

"If parents have questions, they should be calling the public-safety division or the dean of students," says Ms. Scoville of Rutgers.

Colleges should also use their own numbers as a guide, says Max L. Bromley, associate director of public safety at the University of South Florida.

"In these tough budget times, it's going to be helpful for focusing on solutions," he says. "If an institution experiences a large number of property crimes, like thefts from dorm rooms, it should think about increasing manpower on the beat or things like better locks. The numbers can point the way."

'A VERY GRAVE MISTAKE'

For all of their reservations about the new law, campus-safety officials say colleges would be foolish to skirt its requirements.

"Purposeful underreporting, if an institution is thinking about that, would be a very grave mistake," Mr. Bromley says. "There is simply nothing to be gained by covering up, and a heck of a lot to lose."

Says Michael Clay Smith, a professor of criminal justice at the University of Southern Mississippi: "A lot of college administrators are worried that their institutions are going to look bad. Well, that may be, but we just have to hew to the line, and let the chips fall where they may."

Colleges should worry less about how they compare with other colleges, says Mr. Smith, and more about steps they can take to improve their own performance. "They aren't competing against each other, they're competing against themselves," he says. "They can affect crime rates by adding security measures." —DOUGLAS LEDERMAN

U. of Maryland's Robert Nielsen: "Anyone would think we had a big problem here with four rapes in one year. But two of those rapes happened two years ago."

Law May Push Colleges to Spend More Money on Security and Campus-Police Training

Continued From Page A33

pointed a committee to make recommendations to improve security.

"We were not doing as good a job as we should have in keeping the building, grounds, and perimeter secure," says John D. Stobo, director of the department of medicine at the Johns Hopkins Hospital and chairman of the special committee.

University officials overhauled the $7-million security operation. "We're stepping up security because the increasing crime is taking away from Hopkins's ability to attract the best people," says Bill McLean, director of security for the Johns Hopkins Medical Institutions, which include the hospital and the medical school.

The university plans to hire a security czar who will supervise police operations at the campus and new guards who have gone through police-academy–style training. The university police have already improved lighting in the garages and increased the frequency of shuttles between the hospital and its satellite parking lots.

Hopkins is not alone in beefing up its security measures in response to the heightened awareness about campus crime. Many colleges in this city are using the same prevention strategies: escort services, emergency telephones, improved lighting, and computerized card-entry systems in many newer buildings and dormitories.

POLICE DOGS ON SOME CAMPUSES

Universities are creating programs to catch the attention of students and make them more aware of crime.

Morgan State created a Crime Prevention Council made up of faculty members, staff members, and students, who go over the previous month's crime statistics and recommend strategies and solutions.

The University of Maryland–Baltimore County and Towson State University have additional weapons against crime on their campuses—police dogs named Max and Samson. Towson has had Max, a German Shepherd, for a year. Baltimore County has had a German Shepherd for eight years, Rocky, who died, and Samson for the past three years. "We basically use him as a deterrent to criminal activi[illegible]," says Robert Nielsen, director of public

Continued on Following Page

Law May Push Colleges to Spend More on Security

Continued From Preceding Page

safety at Maryland – Baltimore County. "We hope people who come to commit crimes will think twice when they see Samson."

Samson has also been used to search for drugs in residence halls, as well as for bombs. Mr. Nielsen lent Samson to the University of Maryland at College Park three years ago for the investigation of a rape. Samson successfully tracked a suspect from the scene of the crime to a fraternity house.

Initially, the president of the University of Maryland–Baltimore County was concerned about negative reaction to the police dog, especially from minority students. But Mr. Nielsen says students love Samson: "They stop to pet him on campus. The dog even gets Christmas cards."

REACHING OUT TO POLICE

Colleges here are also paying greater attention to their security forces. For years, most state universities in Maryland have had their own police departments with sworn police officers, who attend the same police academies that city and state police officers do.

Now, however, the institutions are increasingly reaching out to local police departments to recruit new chiefs. When the director of security on Johns Hopkins's undergraduate campus in north Baltimore retired after 17 years, the university recruited Ron Mullen, the deputy police commissioner in the Baltimore City Police Department.

"It shows the university's commitment to providing a high level of security," Mr. Mullen says. "Times have changed in 17 years. The world is a lot more dangerous."

FINDING FAULT

Like their colleagues across the country, university-police officers in Baltimore find fault with the federal Student Right-to-Know Act. It asks them to report only a small proportion of the crimes that occur on campuses, they say, leaving out such things as property destruction, arson, and disorderly conduct. More important, they say, the law does not require institutions to report minor thefts or larcenies, which, along with alcohol-related incidents, account for most of the crime.

Others say some statistics need to be clarified in the reports. The report for Maryland–Baltimore County, for instance, lists four rapes in 1991. "Anyone looking at those numbers would think we had a big problem here with four rapes in one year," says Mr. Nielsen of UMBC. "But two of those rapes happened two years ago and were just reported in 1991."

Other institutions not only publish crime statistics for their campuses but also for the neighborhood where the campus is located. "This is where students live and where the shops are," says Mr. Mullen of Johns Hopkins. "They ought to know what goes on in their neighborhood."

Despite all their attention to security, university police said there is little they can do about human nature. They speak in exasperation of countless hours spent training escort drivers, only to see students walking across a campus in the dark; and of sophisticated alarm systems that can be disarmed in minutes.

"We installed alarms that would sound if doors were propped open," says Steven J. Murphy, director of university police at Towson State. "Students banged the alarm system out of the wall a month into the semester."

In 1991, leaving ajar a dormitory door at Towson had disastrous consequences: A rapist was able to enter the building. Access to the elevator that goes to the dorm rooms is controlled by a key. But some students let the intruder step into the elevator with them. The assailant then wandered from door to door until he found an unlocked room, and raped a female student. "I don't want anyone to be raped at gunpoint for the message to get across," Mr. Murphy says.

While nearly everyone applauds the heightened emphasis on security, some hope that it doesn't mean that colleges will build walls around their campuses.

"Let's do some security but let's work with neighborhoods so we can stabilize them," says Betty Robinson, a graduate student at Hopkins. "Let's do something to build the neighborhood so we don't have so much to worry about." ■