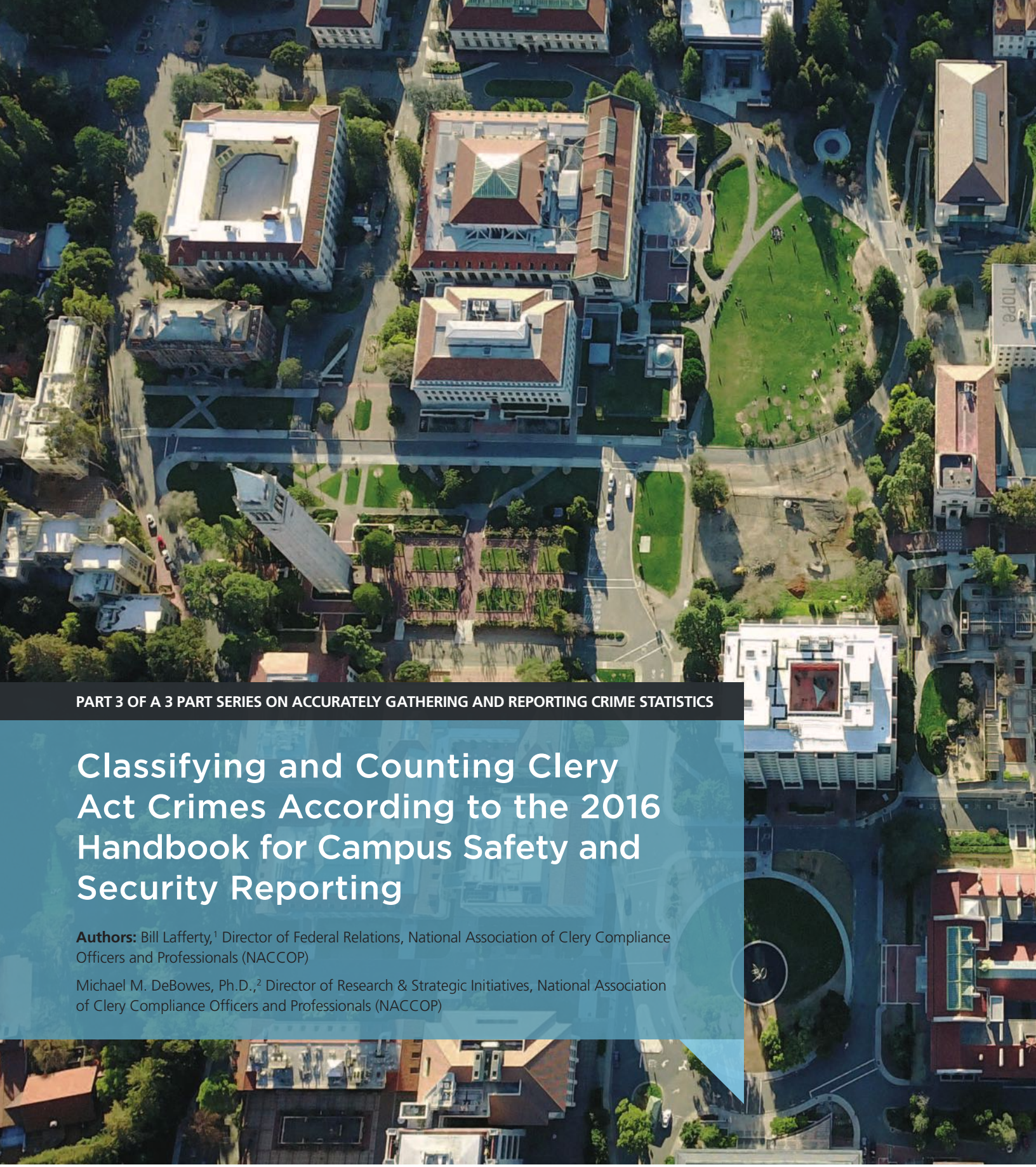

PART 3 OF A 3 PART SERIES ON ACCURATELY GATHERING AND REPORTING CRIME STATISTICS

Classifying and Counting Clery Act Crimes According to the 2016 Handbook for Campus Safety and Security Reporting

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The 2016 Handbook for Campus Safety and Security Reporting (hereafter, the "Handbook") moved the goalposts for classifying and disclosing certain Clery Act crimes. Although the definitions of Clery Act crimes did not change substantively from the previous version of the Handbook (which was published in 2011), the standards, scenarios, and guidance published in the 2016 Handbook undoubtedly affects how reported offenses should be classified and disclosed for Clery Act purposes. The U.S. Department of Education (ED) recognizes that some institutions of higher education (IHEs) may code incidents using State or local definitions and standards for reasons outside of Clery Act reporting; however, they are clear that, to ensure compliance with the Clery Act, IHEs must classify and count incidents using the definitions specified within the Clery Act.[3]

ED announced in the 2016 Handbook that, "although the law states that institutions must use the UCR Program definitions, Clery Act crime reporting does not have to meet all of the other UCR Program standards."[4] In other words, institutions should not assume that a reported offense's classification in the Uniform Crime Reporting (UCR) system will be the same classification for Clery Act purposes in every case. For this reason, NACCOP recommends that report writers be trained on the key components of Clery-reportable crimes to ensure they are collecting and documenting the necessary information for the Clery Compliance Officer (or other professional(s) tasked with assessing the report narratives for crime classification purposes).

We know that our statistics reflect reports of alleged crimes, which may or may not have been independently corroborated or investigated by campus police or public safety (if your institution has such a unit). This is often challenging for anyone outside the Clery Act compliance world to understand. This is a good conversation to have with your IHE's senior leadership and campus community, so they understand that the crimes you are disclosing in your Annual Security Report (ASR) are a compilation of reports of alleged Clery Act crimes that may not have been investigated or adjudicated. The standard for inclusion in the annual statistical disclosure is simple: if a Clery crime is reported to a Campus Security Authority (CSA) and the crime reportedly occurred on or within your Clery Geography, it meets the three part test for inclusion in your annual statistical disclosures.

As we patiently awaited the arrival of the 2016 Handbook, practitioners had high hopes that ED would provide the clarity we needed as it related to the Violence Against Women Act (VAWA) amendments to the Clery Act (hereafter, "VAWA amendments") in terms of the new crime categories and definitions and the proper application of those definitions. We also longed for comprehensible guidance as it related to other components of VAWA; specifically, the provisions regarding primary prevention, ongoing prevention, awareness programs, and procedures for institutional disciplinary action in VAWA cases. VAWA was reauthorized in March of 2013 and IHEs were expected to make a good faith effort to comply with these new requirements until final regulations were published in the Federal Register on October 20, 2014. These regulations took effect July 1, 2015, though no meaningful sub-regulatory guidance was published until June of 2016 when the most recent Handbook was released (approximately 20 months after the final regulations were published).

Unfortunately, ED disappointed in the 2016 Handbook because much of what was contained in the October 20, 2014 Federal Register was reproduced (often verbatim) in the Handbook.[5] Rather than address all areas of ambiguity that remained following the final regulations, ED took the opportunity to modify prior guidance that dramatically altered Clery compliance efforts. While not exhaustive, some of these changes included: revisions to classifying and counting Clery Act crimes, a revised application of the Hierarchy Rule, a new definition of "reasonably contiguous," a bright line standard for determining when to include domestic and international travel locations as temporary Clery Act geography, updated CSA clarifications, and new guidelines for correcting the ASR. Many of these changes have been addressed in prior whitepapers that are part of this series.[6] This whitepaper, the last in the series, will focus on the pertinent changes related to classifying and counting crimes for Clery Act purposes.

THE EVOLVING APPLICATION OF THE HIERARCHY RULE

Prior to publication of the 2016 Handbook, practitioners believed the Hierarchy Rule applied to the Criminal Offenses category (a.k.a. the Primary Crimes) as well as Liquor, Weapon, and Drug Law Violation Arrests or Referrals for Disciplinary Action. This belief was informed by the 2011 Handbook, which indicated "Although arrests and referrals are technically not part of the hierarchy, they are shown [beneath Motor Vehicle Thefts] to illustrate their place in counting crimes. For example, if a student is arrested for Aggravated Assault and a Drug Abuse Violation, disclose only the Aggravated Assault."[7] Clearly, the 2011 Handbook signaled to practitioners that when multiple offenses were involved in a single scenario, and those offenses included arrests and referrals, the arrests and referrals should not be included in the annual statistical disclosure when a more serious criminal offense co-occurred.

However, the 2016 Handbook reimagined this guidance. The 2016 Handbook now establishes four general categories of Clery Act crimes: Criminal Offenses, Hate Crimes, Arrests and Referrals for Disciplinary Action, and VAWA Offenses. The Handbook further directed that statistics must be disclosed separately for each of these four categories and the Hierarchy Rule only applies when counting crimes in the Criminal Offenses category.[8]

Practically speaking, this means when an incident's classification transcends more than one general category, all reported offenses in the incident should be disclosed, subject to the application of the Hierarchy Rule, its exceptions, and the rules for counting arrests and referrals (which generally states that if a person is both arrested and referred for a Clery-reportable Liquor, Drug, or Weapon Law Violation, only the arrest of the person should be included in the crime statistics when the arrest and referral result from the same underlying offense). Therefore, in the previous example where a student was arrested for Aggravated Assault and a Drug Abuse Violation, using the 2016 Handbook guidance, IHEs would count both the Aggravated Assault and the Drug Abuse Violation Arrest (whereas the arrest would not have been reported under previous guidance). To illustrate this concept further, let's assume a student reports that they were raped several weeks ago by an assailant who they have dated on and off for the last several years. The new guidance from ED would require the institution to disclose this report[9] as both a Rape and Dating Violence incident in the annual crime statistics since Rape resides in the Primary Crimes category and Dating Violence resides in the VAWA Offense category.

Additionally, as part of the VAWA amendment to the Clery Act, the application of the Hierarchy Rule under the FBI's Uniform Crime Reporting (UCR) Program was modified to create an exception so that when both a Sex Offense[10] and a Murder are committed in the same incident, both crimes would be counted in the institution's statistics.[11] The net effect of the final regulations is that, when combined with the 2016 Handbook changes and the pre-existing exceptions to the hierarchy rule for Arson offenses and Hate Crimes, there are more crimes that sit outside the hierarchy than within it, as illustrated by Figure 1.

Figure 1: Hierarchy Rule Application

APPLIES TO

Select Criminal Offenses (Primary Crimes):

- Murder & Non-negligent Manslaughter
- Manslaughter by Negligence
- Sexual Assault (Rape, Fondling, Incest, & Statutory Rape, except when one of these offenses occurs in the same incident as a Murder, in which case the Sexual Assault is also reported)
- Robbery
- Aggravated Assault
- Burglary
- Motor Vehicle Theft

DOES NOT APPLY TO

Arson

Hate Crimes

- Reported for all Criminal Offenses, except Manslaughter by Negligence
- Larceny-Theft
- Intimidation
- Simple Assault
- Destruction/Damage/Vandalism of Property

Arrests and Referrals for Disciplinary Action

- Liquor Law Violations
- Drug Law Violations
- Weapon Law Violations

VAWA Offenses

- Domestic Violence
- Dating Violence
- Stalking

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CHANGES IN THE DEFINITIONS OR APPLICATION OF CLERY ACT CRIMES

Sex Offenses

The final implementing regulations to the VAWA amendments revised the definition of Rape that must be used for Clery Act statistical reporting purposes. Previously, institutions were required to use the FBI's National Incident Based Reporting System (NIBRS) definitions to classify Sex Offenses, and those offenses were reported in one of two categories: *Sex Offenses – Forcible* (which included Forcible Rape, Forcible Sodomy, Sexual Assault with an Object, and Forcible Fondling) and *Sex Offenses – Non-forcible* (which included Incest and Statutory Rape). However, the VAWA implementing regulations called for institutions to use the Summary Reporting System (SRS) definition of Rape instead, which essentially collapsed the NIBRS definitions of Forcible Rape, Forcible Sodomy, and Sexual Assault with an Object into a single "Rape" category that expanded the NIBRS definition of Rape (for SRS purposes) to include "for the first time ever… any gender of victim and perpetrator, not just women being raped by men."[12]

Further, the final regulations required institutions to separately disclose statistics for Rape, Fondling, Incest, and Statutory Rape in the annual statistical disclosure (thus abandoning the prior reporting constructs of *Sex Offenses – Forcible and Sex Offenses – Non-forcible).*[13] This change was reflected in the updated "Criminal Offenses Reporting Table" that was incorporated into the 2016 Handbook.[14]

The definitions of Fondling, Incest, and Statutory Rape continue to be defined by the NIBRS Data Collection Guidelines, although the word "non-forcible" was removed from the Clery Act definitions of Incest and Statutory Rape that appear in the 2016 Handbook (the 2011 edition of the Handbook included "non-forcible" in the definitions).[15] [16] Additionally, the 2016 Handbook notes that "while the definitions of Sexual Assault include lack of consent as an element of the offense, for the purposes of including a reported Sexual Assault in Clery Act statistics, no determination as to whether that element has been met is required."[17] The 2011 Handbook did not contain such a statement, but its appearance in the 2016 Handbook is noteworthy, as the Handbook also notes "all Sexual Assaults that are reported to a campus security authority must be included in your Clery Act statistics and also included in your crime log (if you are required to have one), regardless of the issue of consent."[18] Therefore, while the absence or presence of consent is critical to a criminal investigation and/or administrative review, for crime classification purposes, making this determination at the time of the report is not necessary. If a victim reports that consent was not provided to engage in sexual activity, and the other elements of Rape or Fondling are met, then the offense should be disclosed in the applicable crime category (Rape or Fondling). For crime classification purposes, there is no need for the institution to launch an investigation to determine whether consent was present or absent; the reporting of non-consensual sexual penetration or touching of private body parts for sexual gratification is enough to warrant inclusion of the offense in the annual statistical disclosure.

With respect to Fondling, the definition was updated in the 2016 Handbook to mean "the touching of the private body parts of another person for the purpose of sexual gratification without consent of the victim, including instances where the victim is incapable of giving consent because of his or her temporary or permanent mental or physical incapacity."[19] The key concepts of this definition include the "touching of private body parts" (typically limited to the breasts, buttocks, and genital areas) and "for the purposes of sexual gratification." It is necessary to conduct a case-by-case assessment for these types of offenses (as is true for all reports of potential Clery Act crimes, but especially for Fondling offenses where the motivation of the offender can influence the classification). Practitioners will not always be able to determine if the touching was for the purposes of sexual gratification, so the available facts should be evaluated within a reasonableness standard. In this context, it is worth noting that the 2016 Handbook updated a Fondling scenario to read: "A woman is walking on a public sidewalk in front of your campus and a man pinches her buttocks as he runs by her. Include this as one public property Fondling *only if the victim reports that it was sexual in nature.*"[20] The phraseology of "only if the victim reports that it was sexual in nature" is different than the 2011 Handbook (which said to count the offense"... if it's determined that the man's intent was sexual gratification").[21] Therefore, it seems prudent to consider what body part was touched by the offender, what (if anything) is known about the offender's motivation for touching that body part, and how the reporting party or victim characterized the touching.

Manslaughter by Negligence

Earlier, we mentioned the updated "Criminal Offenses Reporting Table" that was incorporated into the 2016 Handbook.[22] That table also illustrates another subtle change that is reflected throughout the 2016 Handbook when referencing a type of Criminal Homicide. Although the final regulations use the phrase "Negligent Manslaughter" in text (at 34 C.F.R. § 668.46(c)(1)(i)(A)(2), the regulations also require institutions to use the definition of Negligent Manslaughter that appears in the regulations as an appendix.[23] In the Appendix, the definition of this crime appears under the label of "Manslaughter by Negligence" and that label has been carried over to the 2016 Handbook each time the concept of Negligent Manslaughter is addressed.

Unfounded Offenses

In perhaps one of the most useful additions to the 2016 Handbook, the Department provided a clarification regarding the very narrow circumstances in which offenses could be unfounded. IHEs are required to disclose the total number of Unfounded crimes across all Clery Act geographic locations and eligible Clery Act crimes as a separate category in their annual crime statistics disclosure within the ASR (one statistic should be reported for each distinct campus of the institution, meaning each campus will report its total number of unfounded reports at that location rather than publishing a single statistic that covers all campuses).[24] The Handbook's treatment of this discussion is fairly comprehensive, but there are some important aspects to highlight here. First, non-sworn personnel cannot unfound a crime report even if they believe they can prove no crime occurred nor was attempted, as unfounding can only be accomplished by sworn or commissioned law enforcement personnel. Additionally, not all Clery Act crime categories are eligible for unfounding. Specifically, the 2016 Handbook advises that neither arrests nor disciplinary referrals can be unfounded.[25] Therefore, institutions should not be unfounding arrests or referrals for disciplinary action for Liquor, Drug, and Weapons Law Violations nor including those types of offenses in their unfounded statistical disclosures.

Aggravated Assaults

The 2016 Handbook also provides new circumstances to consider when assessing assaults that may be classified as aggravated. Specifically, the Handbook cautions practitioners to carefully consider the following factors:

- "The type of weapon used or the use of an object as a weapon;
- The seriousness of the injury; and
- The intent of the assailant to cause serious injury."[26]

This language is not new, but the 2016 Handbook then added language to this third bullet indicating "The intent to cause death or severe bodily harm can arise after the parties to an incident have already engaged in some consensual contact."[27] The Handbook provides two examples to illustrate this point including students wrestling playfully in their residence hall room and friends on opposing teams who are participating in an intramural basketball game. However, subsequent to this " aggressive but consensual 'horseplay,'" the incident turns violent (one of the roommates is placed into a violent headlock that results in a serious internal injury and, in the second example, a member of an opposing team punches a player, resulting in a loss of consciousness). The Handbook invites practitioners to focus more on the *conduct* than the original *context* when a violent altercation ensues. In other words, pay attention to the serious injury that moves beyond consensual "horseplay" and involves an unlawful attack that results in an aggravated injury that compels the offense to be classified as an Aggravated Assault.

Also new to the Handbook is language that practitioners should consider when identifying whether injuries are sufficiently serious to warrant a classification of Aggravated Assault instead of Simple Assault. Specifically, the 2016 Handbook notes that "If an attack results in broken bones, a loss of consciousness, or significant blood loss, or requires medical treatment or hospitalization, such as stiches or casting (regardless of whether or not the victim accepts such assistance), the incident must be classified as an Aggravated Assault."[28] This new language necessitates that practitioners evaluate whether the apparent injuries require more than simple first aid and instead warrant additional medical evaluation or treatment, even if such evaluation or treatment is refused by the victim (as may occur when a victim refuses an ambulance ride to the hospital). Practitioners must carefully consider all available information regarding injuries and what prudent medical evaluation or treatment may be necessary when evaluating the proper classification of assaults.

Further, while the definition of Simple Assault that is used when reporting Hate Crimes distinguishes Simple Assault from Aggravated Assault by excluding from the definition of Simple Assault instances in which a victim suffers "… obvious severe or aggravated bodily injury involving apparent broken bones, loss of teeth, possible internal injury, severe laceration, or loss of consciousness,"[29] the addition of "significant blood loss" when discussing Aggravated Assault raises important questions. Obviously, if a victim loses blood due to a severe laceration resulting from a knife attack, that would qualify the incident as an Aggravated Assault (assuming the victim lived). But what if only personal weapons are used (hands, feet, fists, etc.) and a victim is struck and begins to bleed? Under what circumstances will the blood loss be deemed "significant" enough to qualify the offense as aggravated if there is no other severe laceration, internal injury, loss of consciousness, broken bone, or loss of teeth? Such circumstances may warrant obtaining institution-specific guidance from the Campus Safety and Security Help Desk to determine the proper classification.

Burglary

The concepts associated with classifying Burglaries seem to have become even more convoluted since the publication and distribution of the Handbook. This combined with lessons learned from ED Final Program Review Determination Reports (FPRD) and Help-Desk guidance, there is no wonder why practitioners continue to be bewildered about this particular concept. Burglary is defined as the unlawful entry of a structure to commit a felony or theft.[30] Seems fairly straightforward, but determining unlawful entry can be most challenging; especially as it relates to traditional residence hall rooms. ED cautions us to "carefully evaluate the operative facts of each reported incident to determine if it fits into any subpart of"[31] the Burglary definition. To establish a Burglary, there must be evidence of unlawful entry or trespass, the unlawful entry must occur within a structure (defined as having four walls, a roof and a door), and the intent of the trespasser must be to commit a felony or a theft.[32]

How does an investigator determine unlawful access or trespass if there are no obvious signs of forced entry? Let us examine an unfortunate common scenario of a reported theft from a student's residence hall room. Assume a student reports to the campus police that the student's laptop was stolen over the course of the last two days from the student's bedroom within an apartment-style suite comprised of a common area and two separate bedrooms. The student indicates that they noticed their laptop present in their room the previous afternoon, but when they went to use it the next evening, it was gone. The student believes their roommate's friends may have taken the laptop during a small gathering that occurred the night before they noticed the laptop missing. There is no evidence of forced entry into the apartment or the bedroom from which the laptop was stolen and the victim indicated that the door to their private bedroom was unlocked during this entire time-period as they seldom lock their door.

> *To establish a Burglary, there must be evidence of unlawful entry or trespass, the unlawful entry must occur within a structure (defined as having four walls, a roof and a door), and the intent of the trespasser must be to commit a felony or a theft.*

What should be the next steps in considering the operative facts of this case? The investigator would need to determine the element of trespass. In this sense, a determination whether entry was "achieved by someone other than the tenant (student resident) who has lawful access, or others whom the tenant allows to have free and regular access to the structure."[33] The first obvious person for the investigator to interview would be the roommate. The roommate subsequently denies stealing the laptop and is unable to provide a complete list of all the persons who may have had authorized access to the apartment over those two days. The investigator interviews some of the persons whose names were provided, but is unable to determine who else may have had access to the suite during this event. No one interviewed admits to taking the laptop.

How should the reported theft be classified for Clery Act purposes considering the elements of the crime of Burglary? One can assume, using a reasonable person standard, that whomever accessed the student's room did so with the intent to commit a theft. Since the investigator was unable to determine trespass, should they conclude the proper classification is Larceny-Theft? Since not all persons who had lawful access to the suite were interviewed and therefore not ruled out as suspects, should the investigator leave room for the possibility that an invited guest to the suite may have trespassed into the student's unlocked private room and stole the laptop, during or after their invited presence in the apartment, thereby committing a Burglary? The Handbook would seem to suggest this scenario should be classified as a Burglary, because the investigator was unable to "establish that neither the tenant nor those friends with free and regular access to the room have taken the item, [therefore] unlawful access has occurred."[34] These type of real-world scenarios pose quandaries not addressed by the scenarios in the Handbook, as in all of those scenarios, the crime has been solved and/or we know the intent of the offender. Unfortunately, we rarely have that kind of information when classifying reported thefts from structures.

VAWA Offenses

The newest category of crimes to make an appearance in the 2016 Handbook are the VAWA offenses of Dating Violence, Domestic Violence, and Stalking. These offenses are considered crimes for statistical reporting purposes regardless of whether they are identified as crimes within the jurisdiction of an IHE.[35] Furthermore, the Handbook specifies that IHEs must use the definitions published in the Handbook for incidents of Dating Violence, Domestic Violence, and Stalking.[36] These definitions appear verbatim from the final regulations, although the definitions raise questions and potential inconsistencies that, in large part, went unaddressed in the 2016 Handbook.

A problem with the definition of Domestic Violence that was not addressed by the 2016 Handbook is that the definition refers to "a felony or misdemeanor crime of violence," but the phrase "crime of violence" is not defined within the Handbook for purposes of classifying Domestic Violence offenses. Elsewhere in the Handbook, when discussing the HEOA victim notification disclosure requirement, the Department reifies that for purposes of the HEOA victim notification, institutions should use the definition provided in Section 16 of Title 18 of the United States Code, which defines a crime of violence as:

- "An offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
- Any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."[37]

While ED has indicated at times this definition may be used when classifying potential Domestic Violence incidents, recent guidance on this issue has fluctuated, especially with respect to whether the use of force against a person's property should be regarded as a crime of violence for Domestic Violence classification purposes. Nevertheless, using this definition seems prudent until ED more conclusively provides guidance that directs practitioners how to interpret "crime of violence" in this context.

Another complication presented by the Domestic Violence definition is that of who is "covered" under the definition. For example, the final regulations extend protections not only to current or former spouses who have been a victim of violence, but also to current or former "intimate partners." While the phrase is laudable insofar as it is more inclusive, no guidance whatsoever was provided in the Handbook to help practitioners differentiate between "intimate partners:" as referenced in the Domestic Violence definition and persons who are or have "been in a social relationship of a romantic or intimate nature with the victim,"[38] which describes persons eligible for a Dating Violence classification when the victim of violence has (or had) such a relationship with the offender.

Additionally, the Handbook notes that "To categorize an incident as Domestic Violence, the relationship between the perpetrator and the victim must be more than just two people living together as roommates. The people cohabitating must be current or former spouses or have an intimate relationship."[39] However, this statement is misleading, as even the Help Desk has acknowledged that the definition of Domestic Violence includes crimes of violence committed by "any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred"[40] and, in some jurisdictions, this will include roommates with whom the victim has not cohabitated as spouses or intimate partners.

While instances of Domestic Violence can be challenging to classify, Dating Violence incidents often cause practitioners the most angst. The lack of consistent state standards for determining what constitutes Dating Violence (if the jurisdiction defines "Dating Violence" at all) and the subjective nature of whether persons are in a dating relationship can create confusion and contribute to inconsistencies in its application from one institution to another. However, to be clear, whether a state has defined Dating Violence or not is irrelevant, to an extent, for Clery Act purposes, as institutions must classify offenses according to Federal Clery Act definitions and standards. Dating Violence is not an exception in that regard. However, it remains possible that persons who would ordinarily qualify as being eligible for a Dating Violence classification may also be covered under the domestic or family violence laws of the jurisdiction. In such cases, violence occurring between such persons would be classified as Domestic Violence for Clery Act purposes.[41]

With respect to characterizing the relationship among the parties whose relationship may be appropriate to regard as "dating," ED reminds us to assume persons are in a dating relationship if that is the way the relationship is being characterized at the time of a report.[42] Generalizing or applying unreasonable standards in determining if a dating relationship exists is not consistent with ED's expectations.[43]

The final VAWA offense that is discussed in the 2016 Handbook is Stalking, which is defined in the Handbook the same as it appears in the regulations ("Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for the person's safety or the safety of others; or suffer substantial emotional distress.").[44] Subparts of the definition are also defined, including "course of conduct," "reasonable person," and "substantial emotional distress." One of the interesting aspects of the "course of conduct" definition is the "communicates to or about" phrase, which implies that not only talking to a person may be viewed as contributing to a course of conduct, but so, too, would talking outside their presence wherein they are the subject of discussion. However, the meaning of this phrase has not been clarified in the Handbook. There is also no further clarification in the Handbook regarding what constitutes "substantial emotional distress" beyond the definition in the regulations that is reproduced in the Handbook. Although it is not guidance promulgated or endorsed by ED, practitioners may find it useful to review the Stalking Resource Center's publication entitled *"Responding to Stalking on Campus: Navigating Title IX and the Amendments to the Clery Act."* Signposts from that publication that may signal substantial emotional distress are reproduced in Figure 2.

Figure 2. Substantial Emotional Distress

According to the National Center for Victims of Crime, "substantial emotional distress" could present itself as:

- Difficulty eating or sleeping;
- Anxiety or nervousness;
- Nightmares;
- Increased drug or alcohol use;
- Stomachaches or headaches from the stress of experiencing the Stalking;
- Decreased ability to perform at school/work or to accomplish daily tasks;
- Frustration, irritability, anger, shock, or confusion;
- Feeling "on-guard" all the time/hypervigilance;
- Changing routines;
- Depression.

National Center for Victims of Crime, Stalking Resource Center. "Responding to Stalking on Campus." https://victimsofcrime.org/docs/default-source/src/src-campus-guide.pdf?sfvrsn=2

The Handbook offers some examples of VAWA offenses that provide useful direction for classifying offenses, but there is one glaring omission not addressed by those examples: Can someone who is currently involved in a relationship that is eligible for a dating or domestic violence classification be the victim of Stalking when incidents of interpersonal violence are repeatedly directed at them? It seems reasonable to conclude that repeated incidents of dating violence, for example, might also satisfy a course of conduct for stalking purposes given the affect such conduct would likely have on a victim of such violence. Considering Dating Violence includes sexual or physical abuse or the threat of such abuse and Stalking includes acts where the stalker directly, indirectly or through third parties by any action, method or means follows, surveils, threatens or communicates to or about a person or interferes with their property in a manner that results in substantial emotional distress, it seems reasonable to conclude that persons involved in a dating relationship could Stalk each other. Yet, the Handbook does not address this possibility.

Arrests and Referrals for Disciplinary Action

According to the 2016 Handbook, "the fourth category of crime statistics you must disclose is the number of arrests and number of persons referred for disciplinary action for the following law violations:

1. Weapons: Carrying, Possessing. Etc.
2. Drug Abuse Violations; and
3. Liquor Law Violations."[45]

Since these laws vary widely from state to state (and even among some jurisdictions within states), this requires each IHE to carefully review and assess their jurisdictional laws as it relates to Weapons, Drug Abuse, and Liquor Law Violations. ED has adopted the FBI UCR definitions for this category of crimes and each of these law violations pulls in the applicable State laws and local ordinances that relate to these crimes. There were no substantive changes to the law violation category definitions per se, but nevertheless there are some noteworthy issues to spotlight (beyond the earlier discussion of how these offenses have been written out of the Hierarchy for Clery Act purposes).

For example, in 2011, the Handbook stated: "Referred for disciplinary action is defined as the referral of any person to any official who initiates a disciplinary action of which a record is kept and which may result in the imposition of a sanction."[46] However, the 2016 Handbook states: "Referred for disciplinary action is defined as the referral of any person to any official who initiates a disciplinary action of which a record is established and which may result in the imposition of a sanction."[47]

The words "kept" and "established" seem to be interchangeable on their face, but the change was likely intentional, and the words have separate meanings. The word "kept" may have been viewed by some practitioners to mean that a person who was referred for disciplinary action, but whose record was ultimately purged, may not be required to be included in the annual statistical disclosure. However, by substituting the word "established" in its place, ED reifies their expectation that once a Clery-related record is created, it must be maintained for the requisite duration (i.e., it must be "kept"). Stated differently, being "referred for disciplinary action" actually originates with the creation of a record which must be maintained and is not subject to counting only if an institution elects to keep it. In fact, they must.

> *Referred for disciplinary action is defined as the referral of any person to any official who initiates a disciplinary action of which a record is established and which may result in the imposition of a sanction.*

Another poignant change in the realm of arrests and referrals relates to how institutions should deal with the referral of persons documented for possessing small amounts of marijuana in jurisdictions that have decriminalized such conduct. In 2011, the Handbook stated: "… there are some states in which having a small amount of marijuana is no longer a crime. If a person is given a civil citation for possession under state law, there is no arrest statistic under Clery."[48] Subsequent Help Desk guidance indicated that institutions should nevertheless count this offense as a referral if the person was also referred for disciplinary action.

In 2016, the Handbook was updated to advise institutions not to classify as a Drug Law Violation "Possession of a small amount of marijuana in states that have decriminalized this conduct, meaning that the conduct is no longer a criminal offense."[49] Subsequent guidance from ED has consistently explained that decriminalizing marijuana for Clery Act purposes means that either the conduct has been removed from the crime or penal code in the jurisdiction, or the conduct has been written as an exception to the criminal code. The latter may occur when the prohibited conduct is still published in the crime or penal code but is clearly categorized as a non-criminal, civil violation/offense. While institutions must (under the Drug-Free Schools and Communities Act) continue to prohibit the unlawful possession, sale, and distribution of marijuana (since it remains a Schedule I controlled substance under the Federal Controlled Substances Act), persons referred for possessing a small amount of marijuana in states that have decriminalized this conduct should not be included as Drug Law Violation Referrals in the institution's crime statistics.[50] This change may have resulted in a precipitous decline in Drug Law Violation Referrals at institutions located in jurisdictions that decriminalized marijuana, thus hampering the ability of IHEs to drawing meaningful comparisons across states as it relates to Drug Law Violation Referrals.

CONCLUSION

The task of collecting and classifying crimes for Clery Act purposes can be complicated. Understanding the different rules, definitions, and standards is necessary to ensure consistent application and proper crime classification of reported offenses. In order to reduce this complexity and ensure greater conformity with the laws, regulations and guidance, IHEs need to ensure sufficient training of primary report takers; which not only include campus police and security personnel, but ideally should include residence life professional and student staff, student conflict and conduct management personnel, Title IX professionals, and anyone else who may serve as an intake for incidents, complaints, or reports of alleged crimes (including Human Resource professionals). Training and development, along with establishing a systematic approach to track and document reports for inclusion in the annual crime statistics, is essential to meeting the Clery Act's espoused goals of "mak[ing] campuses safer and enhance[ing] transparency."[51]

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[3]2016 Handbook, 3-3.

[4]Ibid.

[5]For example, ED stated in the final regulations that "We also intend to include guidance on what constitutes 'written simultaneous notification' in the updated Handbook for Campus Safety and Security Reporting" (see U.S. Department of Education, Federal Register / Vol. 79, No. 202 / Monday, October 20, 2014 / Rules and Regulations, 34 CFR Part 668 Violence Against Women Act; Final Rule; 62775, https://www.govinfo.gov/content/pkg/FR-2014-10-20/pdf/2014-24284.pdf [VAWA Final Rule]). However, no such guidance appears in the 2016 Handbook.

[6]See *Gathering Crime Information from All Required Entities* at https://info.stanleycss.com/2018GatheringCrimeInformation.html and *Implications of the 2016 Handbook for Campus Safety and Security Reporting Changes: Impact on Assessing Clery Geography at Institutions of Higher Education* at https://info.stanleycss.com/2018ImplicationsofHandbookforCampusSafetySecurityReportingChanges_WhitePaperLandingPageResponsive.html.

[7]U.S. Department of Education, (2011), The Handbook for Campus Safety and Security Reporting, 54, https://www.naccop.org/cdn/pdfs/ED-Handbook-2011.

pdf [2011 Handbook].

[8]2016 Handbook, 3-2.

[9]Assuming the incident occurred on or within the institution's Clery Geography and was reported to a CSA.

[10]The terms "Sex Offense" and "Sexual Assault" can be used interchangeably when referring to the crimes of Rape, Fondling, Incest, and Statutory Rape that must be disclosed in the annual statistical disclosure.

[11]VAWA Final Rule, 62768.

[12]Susan Carbon. *"An updated definition of rape,"* U.S. Department of Justice Archives, January 6, 2012. Available at: https://www.justice.gov/archives/opa/blog/updated-definition-rape.

[13]VAWA Final Rule, 62752.

[14]See 2016 Handbook, 9-4.

[15]2016 Handbook, 3-3.

[16]We still see many institutions erroneously referencing non-forcible sex offenses in their crime statistics charts. If your institution's Annual Security Report has such a reference, we recommend that you remove it.

[17]Ibid., 3-7. This concept was also addressed in the VAWA Final Rule at 62756.

[18]Ibid.

[19]Ibid., 3-6. The previous definition, per the 2011 Handbook, was "the touching of the private body parts of another person for the purpose of sexual gratification, forcibly and/or against that person's will; or, not forcibly or against the person's will where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental incapacity." The 2011 Handbook relied on the NIBRS definition in effect at the time. The NIBRS User Manual was updated in 2013 and now includes the same definition for Fondling as what appears in the 2016 Handbook. See Criminal Justice Information Services (CJIS) Division, Federal Bureau of Investigation, U.S. Department of Justice, *Criminal Justice Information Services (CJIS) Division Uniform Crime Reporting (UCR) Program National Incident-Based Reporting System (NIBRS) User Manual,* (Version 1.0), (January 2013). While the 2013 NIBRS Handbook is referenced in the VAWA Final Rule, we note that a new version of the NIBRS User Manual was published in 2019, although ED has not yet commented on the effect of this publication, if any, on Clery Act compliance at the time of this whitepaper's publication. The 2019 NIBRS User Manual is accessible at: https://www.fbi.gov/file-repository/ucr/ucr-2019-1-nibrs-user-manual.pdf/view.

[20]2016 Handbook, 3-8.

[21]2011 Handbook, 39.

[22]See 2016 Handbook, 9-4.

[23]Specifically, the appendix is entitled "Appendix A to Subpart D of Part 668 – Crime Definitions in Accordance With the Federal Bureau of Investigation's Uniform Crime Reporting Program" and appears at the end of Subpart D in 34 C.F.R. 668.

[24]2016 Handbook, 3-51 through 3-54.

[25]Ibid., 3-53.

[26]Ibid., 3-12.

[27]Ibid.

[28]Ibid., 3-11.

[29]Ibid., 3-28.

[30]Ibid., 3-13.

[31]Ibid.

[32]Ibid, 3-15 through 3-17.

[33]Ibid, 3-15.

[34]Ibid., 3-14.

[35]This is important to note because many states do not expressly prohibit the crime of "dating violence" in the crime or penal code, but such offenses meeting the Federal Clery Act definition of "Dating Violence" are nevertheless reportable for Clery Act statistical reporting purposes.

[36]2016 Handbook, 3-3.

[37]U.S. Code, Title 18. Crimes and Criminal Procedure § 16. Crime of violence defined.

[38]2016 Handbook 3-36.

[39]Ibid., 3-38.

[40]Ibid.

[41]34 C.F.R. § 668.46(a)(Dating Violence)(ii)(B).

[42]Specifically, ED states "When the reporting party asserts that there was a dating relationship, you should assume that the victim and perpetrator were in a dating relationship to avoid incorrectly omitting incidents." See 2016 Handbook, 3-36.

[43]VAWA Final Rule, 62756.

[44]2016 Handbook, 3-38.

[45]2016 Handbook, 3-24.

[46]2011 Handbook, 66.

[47]2016 Handbook, 3-45.

[48]2011 Handbook, 69.

[49]2016 Handbook, 3-48.

[50]Institutions are strongly encouraged to consult competent legal counsel in their jurisdiction to determine whether the manner of decriminalizing in the jurisdiction comports with ED's current guidance on this point. Seeking conformation from the Help Desk that a state's law, as written and implemented, means that the state has decriminalized marijuana for Clery Act purposes may also be prudent.

[51]U.S. Department of Education, Penn State University Campus Crime Final Program Review Determination (FPRD), November 3, 2016, 108, https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/cleryact/pennstate/PSCF-PRD10327991.pdf.