MANDATORY TRANSCRIPT NOTATIONS FOR CRIMES OF VIOLENCE ON CAMPUS:

SCARLET LETTER OR SAVING GRACE?

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CONTENTS

INTRODUCTION

> "*Ah, but . . . let her cover the mark as she will, the pang of it will be always in her heart.*"[1]

The story of Hester Prynne and her scarlet letter famously delved into the psychological and social complexities of sexuality in a Puritan society. The story began with the town publicly marking Hester with a

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1. NATHANIEL HAWTHORNE, THE SCARLET LETTER 60 (Cynthia Brantley Johnson ed., Simon & Schuster 2004) (1850).

scarlet "A" for the crime of adultery.[2] This mark was intended to permanently remind Hester, and those around her, that she was immoral and unclean.[3]

Today, female students on college and university campuses across the country face unacceptably high rates of sexual violence. According to a 2016 Department of Justice report, more than one in five women will be sexually assaulted by graduation.[4] Many of these women will be marked by society with their own "scarlet letter," facing blame for the acts of violence committed against them.[5] Recognizing that it could no longer stand by while young, female students increasingly became sexual prey, New York passed the "Implementation by Colleges and Universities of Sexual Assault, Dating Violence, Domestic Violence and Stalking Prevention and Response Policies and Procedures" Act ("Act").[6] This law strengthens and expands on existing federal law and Department of Education recommendations by standardizing how all New York public and private institutions address the procedure, education, and reports of sexual and interpersonal violence. It strengthens a school's ability to fairly adjudicate charges, which in turn protects the rights of both survivors[7] and accused students. In the frenzy following the Act's passage, many analyses focused on the shift to an affirmative consent standard, with little attention paid to the adoption of mandatory transcript notations (MTNs). Under the Act, students found responsible for certain crimes of violence, or who withdraw from campus while charges are pending, shall receive a formal notation on their academic transcript.

Although there are many obstacles facing schools as they address

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2. *See id.* at 68.

3. *See id.*

4. The definition of sexually assaulted includes sexual assault, sexual battery, and rape. CHRISTOPHER KREBS ET AL., BUREAU OF JUSTICE STATISTICS, NCJ 249545, CAMPUS CLIMATE SURVEY VALIDATION STUDY: FINAL TECHNICAL REPORT 69, 76 (2016) [hereinafter 2016 CAMPUS CLIMATE STUDY].

5. *See* Petula Dvorak, *Stop Blaming Victims for Sexual Assaults on Campus*, WASH. POST (Feb. 24, 2014), https://www.washingtonpost.com/local/stop-blaming-victims-for-sexual-assaults-on-campus/2014/02/24/b88efb1e-9d8f-11e3-9ba6-800d1192d08b_story.html; Emily Yoffe, *College Women: Stop Getting Drunk*, SLATE (Oct. 15, 2013, 11:55 PM), http://www.slate.com/articles/double_x/doublex/2013/10/sexual_assault_and_drinking_teach_women_the_connection.html.

6. *See generally* N.Y. EDUC. LAW §§ 6439–6448 (McKinney 2016) (explaining that victim's rights are protected by the standardization of procedures, education, and reports of sexual violence by New York public and private institutions).

7. The term "survivor" is often preferred over the term "victim" due to psychological and sociological implications of each term's historical usage. Therefore, this Note will use the term survivor throughout. *See* THOMAS L. UNDERWOOD & CHRISTINE EDMUNDS, VICTIM ASSISTANCE: EXPLORING INDIVIDUAL PRACTICE, ORGANIZATIONAL POLICY, AND SOCIETAL RESPONSES 6–7 (2003).

campus sexual violence, two specific hurdles involve the easy transfer of students who (1) were charged with, but have not yet been found responsible for crimes of sexual or interpersonal violence, or (2) were charged with and found responsible for crimes of sexual or interpersonal violence.[8] Both issues are related, but the first issue involves a loophole in the process whereupon offenders can escape pending charges by withdrawing before schools are able to make a final determination.[9] After withdrawing, the student is often free to apply elsewhere, and without the previous school's formal determination, subsequent schools will often be left unaware of the applicant's prior sexually violent misconduct.[10] This loophole is a way for offenders to slip away with little to no formal consequences for their misconduct. Although a transfer removes the problem from one campus, the offender is enabled to continue victimizing students on a new campus.

The dangers of these transfers are exemplified by the case of Jesse L. Matthew.[11] In 2002, Matthew was a football player at Liberty University when a female student reported that Matthew sexually assaulted her.[12] Just one week after the survivor testified against Matthew in a disciplinary proceeding, he left campus and transferred to Christopher Newport University (CNU).[13] Because Matthew transferred before Liberty University made a final determination, CNU was unaware of the allegations at the time Matthew submitted his transfer

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8. *Id.* For example, Christopher Newport University was unaware of complaints against Jesse L. Matthew when they admitted him as a transfer. Shanlon Wu, *Identifying Campus Sexual Predators*, HUFFINGTON POST: BLOG, http://www.huffingtonpost.com/shanlon-wu/identifying-campus-sexual-predators_b_6032928.html (last updated Dec. 24, 2014).

9. Tyler Kingkade, *How Colleges Let Sexual Predators Slip Away to Other Schools*, HUFFINGTON POST, http://www.huffingtonpost.com/2014/10/23/college-rape-transfer_n_6030770.html (last updated Oct. 23, 2014).

10. *See* Nick Anderson, *Colleges Often Reluctant to Expel for Sexual Violence—with U-Va. A Prime Example*, WASH. POST (Dec. 15, 2014), https://www.washingtonpost.com/local/education/colleges-often-reluctant-to-expel-for-sexual-violence—with-u-va-a-prime-example/2014/12/15/307c5648-7b4e-11e4-b821-503cc7efed9e_story.html. A campus changed a student's dismissal, after a finding of responsibility, to a withdrawal, knowing that it would increase the student's chances of acceptance at another school. *Id.* The change to a withdrawal removed the finding of responsibility from the student's disciplinary file. *Id.*

11. Shanlon Wu, *Were UVA Student Hannah Graham and Virginia Tech Student Morgan Harrington Victims of a Serial Campus Rapist?*, HUFFINGTON POST: BLOG (Dec. 9, 2014, 7:15 PM), http://www.huffingtonpost.com/shanlon-wu/hannah-graham-morgan-harrington-cases_b_5919108.html.

12. *See* Mary Pat Flaherty, *What Colleges Shared About U-Va. Suspect, Then Accused of Sexual Assault, Is Murky*, WASH. POST (Oct. 11, 2014), https://www.washingtonpost.com/local/crime/what-colleges-shared-about-u-va-suspect-then-accused-of-sexual-assault-is-murky/2014/10/11/9db7234c-4d6c-11e4-aa5e-7153e466a02d_story.html; *Identifying Campus Sexual Predators*, *supra* note 8.

13. Flaherty, *supra* note 12; Wu, *supra* note 11.

application.[14] Just one year after the sexual assault complaint at Liberty University, CNU received a new complaint of sexual assault by its own female student.[15] Over ten years later, Matthew is now serving three life sentences for the rape, assault, and attempted murder of a woman, and recently plead guilty to the rape and murder of University of Virginia student Hannah Graham and Virginia Tech student Morgan Harrington.[16] Matthew showed a pattern of violence against women on campus, but because he was easily able to move between schools without a single mark on his record, he had the freedom to continue his violent behavior in new environments.

MTNs are a critical tool in this fight because sexually violent individuals often reoffend.[17] These "serial rapists"—like Jesse Matthew—cannot be allowed to easily transfer between schools as if their misconduct never happened. An MTN can do the most good in preventing sexual violence by operating as a hurdle between the offender and a new school. Although the new schools are not required to deny admission to a student with an MTN,[18] the notation encourages a school to stop and take a closer look. At a minimum, this closer look provides a school with the opportunity to view a more complete picture of student applicants, allowing them to identify and screen out sexually violent applicants. No one tactic will eliminate sexual violence on campus, but MTNs are an important step forward.

The goal of this Note is to shed light on how MTNs increase communication and transparency among schools, and thereby prevent documented, sexually violent students from re-offending on a new campus. Part I provides the current landscape of sexual violence on campus as it pertains to female students. An unacceptable proportion of female students will be attacked by their fellow students, yet only a handful of perpetrators are ever charged, prosecuted, or held responsible for these heinous acts of violence.[19] Part II introduces New York's attempt to address the campus sexual assault epidemic, with a focused analysis of MTNs. In Part II, the analysis will focus on (1) how a student

14. *See Identifying Campus Sexual Predators*, *supra* note 8.

15. Wu, *supra* note 11.

16. Gary Robertson, *Suspect in Virginia Students' Murders Pleads Guilty to All Charges*, HUFFINGTON POST (Mar. 2, 2016, 5:21 PM), http://www.huffingtonpost.com/entry/suspect-in-virginia-students-murders-pleads-guilty-to-all-charges_us_56d76346e4b0000de4034ca3.

17. *See* David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73, 80 (2002).

18. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 314 (1978) ("[A] university must have wide discretion in making the sensitive judgments as to who should be admitted.").

19. *See infra* Part I.

receives an MTN, (2) how an MTN can be removed, and (3) the consequences of varying MTN removal policies across New York.

Part III describes the pattern of offenders that exploit a loophole in the process by transferring to a new school, essentially avoiding formal consequences. Transcripts notations actively work to prevent offenders from exploiting this loophole by providing receiving schools with a warning.[20] This warning, though only one piece, plays an important role in the fight against the campus sexual violence epidemic.

I. THE CAMPUS SEXUAL ASSAULT EPIDEMIC

Over the past decade, multiple studies analyzed the prevalence of sexual assault on college campuses, and one conclusion rang clear: females students are assaulted and raped by fellow students at an alarming rate.[21] In January 2016, the Bureau of Justice Statistics released the latest comprehensive study of nine undergraduate institutions ("2016 Study").[22] This study addressed recent criticisms of the reliability of campus sexual assault statistics by adopting an "incident-based approach."[23] This approach required survey respondents to identify separate occurrences of victimization, and answer specific questions about the type of unwanted sexual contact that occurred, the tactic used by the offender, the location of the incident, offender characteristics, drug and alcohol use, help-seeking behavior, and disclosure experience.[24] This approach combats the specific "one in five" criticisms that complain the numbers are improperly inflated through the use of projections rather than actual incident reports, or that the numbers are unreliable because they fail to explicitly confine the definitions of what constitutes sexual assault, sexual battery, or rape.[25]

As such, the 2016 Study breaks down the definition of a completed sexual assault into different categories based on the type of conduct and circumstances surrounding "one or more incidents of unwanted sexual contact."[26] The three categories are (1) sexual assault, (2) sexual battery, and (3) rape.[27] The survey definition of rape required an unconsented penetrative act—oral sex, anal sex, sexual intercourse, or sexual

20. *See infra* Section III.B.

21. *See, e.g.*, 2016 CAMPUS CLIMATE STUDY, *supra* note 4, at 73.

22. *See id.* at 3.

23. *Id.* at 89.

24. *Id.*

25. Cory Schoonmaker, Note, *An "F" in Due Process: How Colleges Fail When Handling Sexual Assault*, 66 SYRACUSE L. REV. 213, 222–24 (2016).

26. 2016 CAMPUS CLIMATE STUDY, *supra* note 4, at 69.

27. *Id.*

penetration with a finger or object.[28] The survey definition of sexual battery required an unconsented, forced touching of a sexual nature without a penetrative act.[29] If an "incident of unwanted sexual contact" did not meet the definitional requirements of sexual battery or rape, the act was defined as a sexual assault.[30]

Across all campuses, the rate of completed sexual assaults since entering college ranged "from 12 . . . percent to 38 percent . . . , with a cross-school average rate of 21 percent."[31] In the 2014–2015 academic year alone, the cross-school average for completed sexual assaults was 10.3%, with 5.6% experiencing one incident, 3.1% experiencing two incidents, and 1.6% experiencing three or more incidents.[32] Of the women that reported a completed sexual assault, 31.6% involved acts that constituted rape[33] and 57.9% involved acts that constituted sexual battery.[34] As such, 89.5% of all completed sexual assaults reported by respondents were described with enough detail to meet the definitions of sexual battery and rape, meaning that 18.8% of all college females may experience unwanted sexual acts. Even if the remaining 10.5% of completed sexual assaults are not defined sufficiently to qualify as sexual battery or rape, they still must include an "incident of unwanted sexual contact."

Critics fear that the "one in five" number misleads people into thinking that one in five college women are raped, but such criticism fails to understand that all acts of sexual violence have harmful effects on survivors.[35] To myopically view rape, sexual battery, and sexual assault independently, would be to miss the point that female students carry the burden of being preyed upon. Each one of those one-in-five women—no matter the type of violence perpetrated against them—will be forced by their attacker to cope with the emotional and physical aftermath of sexual violence. Recognizing that all types of sexual violence have harmful effects is the first step toward addressing the greater problem.

The 2016 Study also addressed tactics used by offenders and the

28. *Id.*
29. *Id.*
30. *Id.*
31. 2016 CAMPUS CLIMATE STUDY, *supra* note 4, at 73.
32. *Id.* at 85 fig.14.
33. *Id.* at 90 fig.18. The 2016 Study showed 36.7% experienced unwanted oral sex, 10.3% experienced unwanted anal sex, 58.7% experienced unwanted sexual intercourse, and 54% experienced unwanted sexual penetration with a finger or object. *Id.* at 91 fig.19.
34. *Id.* at E-27 tbl.E-30.
35. *See, e.g.*, Schoonmaker, *supra* note 25, at 224.

circumstances surrounding the offense.[36] Nearly 25% of survey respondents stated they were incapacitated, and thus unable to provide consent to or stop the violent act, 23.7% of survey respondents indicated that physical force was used against them, and 4.9% of survey respondents indicated that the offender made threats of violence against them or someone they cared about.[37]

Some of the most striking statistics to come out of the study involved respondents' reporting experiences. Although the majority of incidents of rape and sexual battery were disclosed to a roommate, friend, or family member,[38] a mere 4.3% of sexual battery incidents and 12.5% of rapes were formally reported to law enforcement, school officials, or a rape crisis center.[39] Survey respondents were further asked to consider six statements and indicate if any or all influenced their decision to not report an incident of sexual violence.[40] The most common response was that the survey respondent did not think her sexual battery or rape was serious enough to report, or did not want any action taken.[41] The second and third most common responses were even more troubling. Almost half of the students felt that "other people might think that what happened was at least partly her fault or that she might get in trouble for some reason," and were worried that "either the person who did this to her or other people might find out and do something to get back at her."[42] These responses show that many feared being branded with a pseudo-scarlet letter by their peers. These women, having already gone through the physical harm of sexual violence, now bore an emotional scarlet letter for the rest of their

36. 2016 CAMPUS CLIMATE STUDY, *supra* note 4, at 92, 93 fig.20.

37. *Id.*

38. *Id.* at 107. Across all schools, 64% of rapes and 68% of sexual batteries were disclosed to a roommate, friend, or family member. *Id.*

39. *Id.*

40. 2016 CAMPUS CLIMATE STUDY, *supra* note 4, at 111. For each agency to which the survey respondent did not report an incident of sexual assault, the individual was asked whether each of the following six factors were a reason for not reporting the incident:

> (1) The student did not know how to contact the group; (2) The student was concerned that the group would not keep his/her situation confidential; (3) The student was concerned that the group would treat him/her poorly, not respond effectively, or not take any action; (4) The student did not need assistance, did not think the incident was serious enough to report, or did not want any action taken; (5) The student felt that other people might think that what happened was at least partly his/her fault or that he/she might get in trouble for some reason; (6) The student was worried that either the person who did this to him/her or other people might find out and do something to get back at him/her.

Id.

41. *Id.* at 111. The study indicated that an adjustment for future studies would be to separate this category into two separate factors. *Id.* at 113.

42. *Id.*

lives.

According to the National Center for Education Statistics, roughly 11.7 million women were enrolled in American colleges and universities in the Fall of 2016.[43] Applying the statistics above to the overall population, of those 11.7 million women, it is possible that over two million female students were or will be the target of sexual violence before they graduate. Two million is too many. An "epidemic" is defined as "affecting or tending to affect a disproportionately large number of individuals within a population, community, or region at the same time."[44] Putting the two together, these numbers indicate a sexual violence epidemic on college campuses.

Female students are under attack, and yet many respondents in the survey did not report because they still felt that formal reporting would result in further victimization. This further victimization can manifest itself in many different ways.[45] According to the survey, 30.7% of rape survivors indicated that the incident impacted their schoolwork or grades, and 22.9% said that the incident "caused problems with family members."[46] Moreover, 21.7% of rape survivors thought about taking some time off from school, transferring, or dropping out, and 8.4% dropped classes or changed their schedules.[47] Sexual violence on campus affects the emotional, physical, and educational well-being of students, and often times many women are the ones forced to make changes to their lives to avoid further interactions with their attackers.

Other studies addressed the epidemic from the perspective of the attacker. In 2002, David Lisak released *Repeat Rape and Multiple Offending Among Undetected Rapists* ("Lisak Study"), wherein he analyzed a survey of male students in an attempt to gain the offender's perspective.[48] The Lisak Study showed that a relatively small group of men accounted for a disproportionately high percentage of the cumulative acts committed.[49] Since its publication, many have criticized some of the Lisak Study's conclusions.[50] Important among those criticisms is the

43. *Back to School Statistics*, NAT'L CTR. FOR EDUC. STAT., http://nces.ed.gov/fastfacts/display.asp?id=372 (last visited Dec. 26, 2016).

44. *Epidemic*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/epidemic (last visited Dec. 26, 2016).

45. 2016 CAMPUS CLIMATE STUDY, *supra* note 4, at 113. An average of 79% found the incident to be "upsetting or very upsetting." *Id.*

46. *Id.*

47. *Id.* at E-77 tbl.E-60.

48. *See* Lisak & Miller, *supra* note 17, at 76.

49. *Id.* at 80.

50. *See generally* Kevin M. Swartout et al., *Trajectory Analysis of the Campus Serial Rapist Assumption*, 169 JAMA PEDIATRICS 1148, 1149 (2015) (noting the limitations of the

notion that no one factor is the sole cause of high rates of sexual violence on campus.[51] In fact, studies have shown that a larger percentage of men are committing acts of sexual violence, not just a small group of serial rapists.[52] Regardless of the proportions, the Lisak Study's proposed solutions to the problem still add value to the conversation. Specifically, Lisak urged that campuses must focus on identifying and removing offenders from campuses to prevent further physical and emotional harm to students.[53]

One of the echoing issues of sexual violence concerns the fact that historically, women are not believed by formal authorities when they come forward to report.[54] According to the Rape, Abuse, and Incest National Network (RAINN), among the broader population, only 6.3% of rapists are arrested, 1.3% are referred to a prosecutor, and 0.6% will ever serve prison time.[55] Rates of false reporting for rape are in line with provably false reports for most other crimes—two to ten percent.[56] Even though rates of false reports for rape are aligned with other crimes, critics place a greater lens of scrutiny upon women who come forward with

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Lisak Study's design).

51. *Id.* at 1153.

52. *Id.*

53. *See* Lisak & Miller, *supra* note 17, at 81.

54. Danielle Campoamor, *What Happens When We Don't Believe Rape Victims*, HUFFINGTON POST: BLOG (July 9, 2015, 4:37 PM), http://www.huffingtonpost.com/danielle-campoamor/what-happens-when-we-dont_b_7756268.html.

55. *The Criminal Justice System: Statistics*, RAINN, https://www.rainn.org/get-information/statistics/reporting-rates (last visited Dec. 26, 2016).

56. David Lisak et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 1318, 1321–23 (2010). Estimates of the rate of false reports vary widely, with some researchers concluding that the rate is thirty to forty percent or higher. Jan Jordan, *Beyond Belief? Police, Rape and Women's Credibility*, 4 CRIM. JUST. 29, 35 (2004); Eugene J. Kanin, *False Rape Allegations*, 23 ARCHIVES SEXUAL BEHAV. 81, 84 (1994); Philip Rumney, *False Allegations of Rape*, 65 CAMBRIDGE L. J. 128, 141 (2006). Other researchers found that the rate is two percent or lower. SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN & RAPE 387 (1975); LIZ KELLY ET AL., LONDON METRO. UNIV., HOME OFFICE RESEARCH STUDY 293, A GAP OR A CHASM?: ATTRITION IN REPORTED RAPE CASES 47 (2005). Those who work in the field of sexual violence are continually asked to comment on the number of reports of rape that are false. Kimberly A. Lonsway, *Trying to Move the Elephant in the Living Room: Responding to the Challenge of False Rape Reports*, 16 VIOLENCE AGAINST WOMEN 1356, 1356 (2010). Recent research findings from studies that use appropriate research designs suggest that the rate of false allegations is low and concluded that "there is simply no way to claim that 'the statistics are all over the map.'" *Id.* at 1358. The statistics are actually now in a very small corner of the map. *Id.* Further, the more methodologically rigorous research finds that "the percentage of false reports ranges from two percent to eight percent." Kimberly A. Lonsway et al., *False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault*, 3 AM. PROSECUTORS RES. INST. 2 (2009).

reports of rape and assault.[57] Putting this all together, the forecast is bleak and daunting for a woman who wishes to bring her attacker to justice.

Although the path was daunting, and many felt the pursuit of justice to be fruitless, strong public messaging campaigns[58] and more comprehensive analyses of this epidemic[59] created a change in public rhetoric. In May 2015, college football's Southeastern Conference (SEC) instated a new rule barring schools from signing any athlete disciplined for serious misconduct at another college.[60] The rule came soon after a high profile case wherein Georgia University dismissed defensive lineman Jonathan Taylor after his arrest on domestic violence charges, only to be quickly signed by Alabama.[61] Soon after signing, Alabama dismissed Taylor for another domestic violence charge.[62] The actions of the SEC may only affect just one athletic conference; however, its leadership on the issue may encourage other conferences to adopt similar policies.

At the state level, New York's Act nudges schools in the right direction. Although the Act does not go as far as the SEC rule by prohibiting transfer, it comprehensively addresses the issues by reinforcing and expanding on procedures found in Title IX of the Education Amendments of 1972 and the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act.[63]

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57. *See Jon Krakauer from the University at Albany*, LIVESTREAM (Feb. 23, 2016), https://livestream.com/hvccstreaming/Krakauer022316.

58. *See At Alma Mater, Biden Tells College Students to Intervene to Prevent Campus Sexual Assaults*, ASSOCIATED PRESS BIG STORY (Nov. 12, 2015, 9:14 PM), http://bigstory.ap.org/article/3c1b264afd774599ba6f1c78055627b4/biden-tells-college-students-intervene-prevent-assault; Katie Rogers, *Vice President Joe Biden Takes the Stage, Lady Gaga Performs*, N.Y. TIMES (Feb. 28, 2016, 11:30 PM), http://www.nytimes.com/live/academy-awards-2016/lady/.

59. *See generally* 2016 CAMPUS CLIMATE STUDY, *supra* note 4, at ES-7 (studying the sexual victimization of undergraduate students across nine schools); Lisak & Miller, *supra* note 17, at 80–81 (surveying 1882 students in four separate studies conducted between 1991 and 1998).

60. The new rule defines "serious misconduct" as including "sexual assault, domestic violence or other forms of sexual violence." *See* John Zenor, *SEC Moves Ahead Alone on Tougher Transfer Rules*, ASSOCIATED PRESS NCAA COLLEGE FOOTBALL (July 16, 2015, 2:31 PM), http://collegefootball.ap.org/article/sec-moves-ahead-alone-tougher-transfer-rules.

61. *Id.*

62. *Id.*

63. N.Y. EDUC. LAW §§ 6440–6449 (McKinney 2016). The law reinforces Title IX and Clery Act by (1) emphasizing the importance of the Title IX Coordinator, (2) requiring compliance with reporting and climate assessments schedules, (3) explicitly mandating student rights during judicial proceedings, and (4) clarifying what mandatory disclosures and resources must and can be made available to reporting students. The law goes beyond Title IX and the Clery Act by (1) shifting to an affirmative consent standard, (2) mandating drug and alcohol amnesty to those reporting or witnessing sexual violence, (3) creating a Student

The Act breaks down into ten substantive provisions to be adopted by every private and public school within New York State.[64] Initially, most analyses focused on the shift to a standardized affirmative consent definition.[65] This shift will have significant impacts on how schools adjudicate sexual misconduct on campus, and further analysis will be critical in the years ahead. In the meantime, for students found responsible for crimes of sexual violence, there is an important new procedural aspect that needs immediate attention: mandatory transcript notations. Below, this Note forges on where others stopped, delving into the reasons why a student receives a transcript notation, how notations are removed, and how they serve an important role in the prevention of sexual violence on campus.

II. MANDATORY TRANSCRIPT NOTATIONS UNDER THE ACT

Traditionally, most institutions did not include notations for disciplinary infractions on academic transcripts,[66] in fact, the American Association of College Registrars and Admissions Officers (AACRAO) officially discouraged schools from doing so for the past two decades.[67] The rationale being that "[i]n almost all disciplinary matters, detailed supporting information is not included on the transcript, thus making the notation non-specific and potentially punitive."[68]

Bill of Rights for both reporting students and respondents, and (4) requiring at least one level of appeal before a panel. *See* Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (2012); Student Right-To-Know and Campus Security (Clery) Act, 20 U.S.C. § 1092(f) (Supp. II 2014).

64. The provisions are as follows: section 6440 is "General Provisions," section 6441 is "Affirmative consent to sexual activity," section 6442 is "Policy for alcohol and/or drug use amnesty," section 6443 is "Students' bill of rights," section 6444 is "Response to reports," section 6445 is "Campus climate assessments," section 6446 is Options for confidential disclosure," section 6447 is "Student onboarding and ongoing education," section 6448 is "Privacy in legal challenges," and section 6449 is "Reporting aggregate data to the department." EDUC. §§ 6440–6449.

65. *Id.* § 6441 ("Affirmative consent is a knowing, voluntary, and mutual decision among all participants to engage in sexual activity. Consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity. Silence or lack of resistance, in and of itself, does not demonstrate consent. The definition of consent does not vary based upon a participant's sex, sexual orientation, gender identity, or gender expression.").

66. Nearly ninety-five percent decline to do so. Paul Fain, *Registrars: Transcripts Can Cite Disciplinary Actions*, INSIDE HIGHER ED. (Feb. 24, 2016), https://www.insidehighered.com/quicktakes/2016/02/24/registrars-transcripts-can-cite-disciplinary-actions.

67. *Colleges Take a Step Toward Including Sexual Assault Punishments on Transcripts*, AM. ASS'N COLLEGIATE REGISTRARS & ADMISSIONS OFFICERS (Feb. 25, 2016), http://www.aacrao.org/resources/resources-detail-view/colleges-take-a-step-toward-including-sexual-assault-punishments-on-transcripts.

68. *FERPA: Noting Student Misconduct on Transcripts*, AM. ASS'N COLLEGIATE

Although the AACRAO maintained its recommendation for decades, it recently shifted the official recommendation from "Not recommended" to "Optional" in response to the rise of violence on campus.[69] The change comes on the heels of growing demands for transparency between a school that suspends or expels a student for sexually violent misconduct and the subsequent schools considering the student for transfer.[70] In 2014 and 2015, the Association of Title IX Administrators and the National Behavioral Intervention Team Association released statements urging schools to note sexual misconduct on official transcripts, stating it was "critical to the receiving institution's ability to ascertain threats to the educational environment in a timely fashion."[71] In passing the Act, New York became the second state in the United States to adopt this recommendation.[72]

For this Note, section 6444(6) of New York Education Law—the section of the Act requiring mandatory transcript notations—breaks down into four substantive areas, hereafter described as Parts I–IV. Part

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REGISTRARS & ADMISSIONS OFFICERS (Nov. 18, 2014), http://www.aacrao.org/handouts/handouts-detail-view/ferpa—noting-student-misconduct-on-transcripts. Campus adjudications are considered "non-punitive" in the eyes of the law. This is an important distinction because some have challenged campus adjudications as a violation of prohibition on double jeopardy. Courts hold that campus adjudications are non-punitive as they are essentially a determination on whether a student is a fit within the educational mission at the school, and this important decision must be left to the school. *See* 2 WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION 1167 (5th ed. 2013); State v. Sterling, 685 A.2d 432, 434 (Me. 1996) (holding a criminal proceeding that took place after the withdrawal of an athletic scholarship did not trigger a double jeopardy defense because although the sanction in each forum was for the same conduct and the non-criminal sanction and criminal prosecution were imposed in separate proceedings, the withdrawal of the scholarship was not punitive because it was a privilege and could be revoked for valid reasons); City of Oshkosh v. Winkler, 557 N.W.2d 464, 468 (Wis. Ct. App. 1996) (holding that because the campus conduct code was designed to maintain order on campus, a subsequent criminal proceeding did not trigger a double jeopardy defense because campus disciplinary sanctions are not punitive).

69. *Recording Disciplinary Annotations on Transcripts*, AM. ASS'N COLLEGIATE REGISTRARS & ADMISSIONS OFFICERS (Dec. 15, 2015), http://www.aacrao.org/resources/resources-detail-view/recording-disciplinary-annotations-on-transcripts.

70. *Id.*

71. *See* GREGORY ELLIOTT & PEGGY SCOTT, NAT'L BEHAVIORAL INTERVENTION TEAM ASS'N, NABITA POSITION STATEMENT ON NOTATION OF EXPULSION AND SUSPENSION ON COLLEGE AND UNIVERSITY TRANSCRIPTS 2 (2014), https://nabita.org/wordpress/wp-content/uploads/2013/03/2014-06-11-NaBITA-TOW-NaBITA-Position-Statement-Transcript-Notation.pdf; Tyler Kingkade, *Students Punished for Sexual Assault Should Have Transcripts Marked, Title IX Group Says*, HUFFINGTON POST (Sept. 24, 2015, 4:17 PM), http://www.huffingtonpost.com/entry/sexual-assault-transcripts-atixa_us_560420d0e4b0fde8b0d18d42.

72. Virginia was the first state to pass legislation requiring transcript notations. VA. CODE ANN. § 23.1-806 (Repl. vol. 2016); *see also* Jake New, *Requiring a Red Flag*, INSIDE HIGHER ED (July 10, 2015), https://www.insidehighered.com/news/2015/07/10/states-requiring-colleges- =note-sexual-assault-responsibility-student-transcripts/.

I outlines the specific crimes of violence that will result in a transcript notation.[73] Part II encompasses the two prongs of an institutional mandate: (1) suspensions and dismissals for crimes of violence shall be noted on the student's academic transcript,[74] and (2) a notation shall be made when a student withdraws when charges are pending against them for crimes of violence and the student declines to participate in the school's judicial conduct proceeding.[75]

Part III serves three important functions: (1) it requires schools to create and publish policies for the receipt and removal of transcript notations, (2) it prevents the removal of a transcript notation prior to one year after the completion of a suspension, and (3) it makes transcript notations for dismissals permanent.[76] Finally, Part IV provides automatic relief from a transcript notation, but only when a school vacates a finding of responsibility.[77]

A. Receiving a Transcript Notation

When a school adjudicates students for charges of sexual misconduct, a student will either be found "responsible" or "not responsible" by a preponderance of the evidence.[78] When a student is found "responsible," schools generally can impose a wide range of sanctions upon the offender.[79] Regarding charges of sexual violence, the sanction often includes some form of suspension or the complete

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73. N.Y. EDUC. LAW § 6444(6) (McKinney 2016) ("For crimes of violence, including, but not limited to sexual violence, defined as crimes that meet the reporting requirements pursuant to the federal Clery Act established in 20 U.S.C. §§ 1092(f)(1)(F)(i)(I)–(VIII).").

74. *Id.* ("[I]nstitutions shall make a notation on the transcript of students found responsible after a conduct process that they were 'suspended after a finding of responsibility for a code of conduct violation' or 'expelled after a finding of responsibility for a code of conduct violation.'").

75. *Id.* ("For the respondent who withdraws from the institution while such conduct charges are pending, and declines to complete the disciplinary process, institutions shall make a notation on the transcript of such students that they 'withdrew with conduct charges pending.'").

76. *Id.* ("Each institution shall publish a policy on transcript notations and appeals seeking removal of a transcript notation for a suspension, provided that such notation shall not be removed prior to one year after conclusion of the suspension, while notations for expulsion shall not be removed.").

77. *Id.* ("If a finding of responsibility is vacated for any reason, any such transcript notation shall be removed.").

78. *See* EDUC. § 6444(5)(c)(ii), (6).

79. For common sanctions, see OFFICE OF STUDENT CONDUCT, N.Y. UNIV., UNIVERSITY STUDENT CONDUCT PROCEDURES 5–6 (2016), http://www.nyu.edu/content/dam/nyu/studentAffairs/documents/studentCommunityStandards/OSC_PROCEDURES_2016-08-23.pdf; and *Common Charges*, CORNELL U. OFF. JUD. ADMIN., http://judicialadministrator.cornell.edu/common-offenses/ (last visited Dec. 26, 2016).

dismissal from campus.[80] When a school sanctions a student with a suspension, the transcript will read as follows: "suspended after a finding of responsibility for a code of conduct violation."[81] For a dismissed student, the transcript will read as follows: "expelled after a finding of responsibility for a code of conduct violation."[82]

1. Qualifying Crimes of Violence

Under Part I, the "crimes of violence" that will result in a transcript notation mirror the first eight reportable offenses under the Clery Act. Jeanne Clery was a female student at Lehigh University who was "tortured, raped, and murdered" by a fellow student.[83] In the investigation that followed this tragedy, the Clery family learned that "over thirty violent offenses" occurred at Lehigh University "over the previous three academic years."[84] The Clery family felt that the failure to disclose these offenses lulled parents and students into a sense of safety on campus.[85] With the money received in a settlement with the university, the Clery family successfully lobbied Congress to pass the Clery Act which requires the public disclosure of crimes of violence on campus.[86]

Under the Clery Act, "crimes considered to be a threat to other students and employees" must be timely disclosed to the public.[87] The Clery Act identifies four categories of offenses that threaten the safety of students on campus: (1) criminal offenses;[88] (2) reportable arrests;[89] (3) hate crimes;[90] and (4) incidents of domestic violence, dating violence, and

80. *See* N.Y. UNIV., REPORTING, INVESTIGATING, AND RESOLVING SEXUAL MISCONDUCT, RELATIONSHIP VIOLENCE, AND STALKING—COMPLAINTS AGAINST STUDENTS 10 (2016) [hereinafter N.Y.U. POLICY], http://www.nyu.edu/content/dam/nyu/studentAffairs/documents/studentCommunityStandards/Sexual%20Misconduct%20-%20Procedures%20for%20Student%20Respondent%202016-10-13.pdf; *Common Charges*, *supra* note 79.

81. EDUC. § 6444(6).

82. *Id.*

83. Laura L. Dunn, *Addressing Sexual Violence in Higher Education: Ensuring Compliance with the Clery Act, Title IX and VAWA*, 15 GEO. J. GENDER & L. 563, 565 (2014).

84. *Id.*

85. *Id.*

86. *See id.*; *see also* Clery Act, 20 U.S.C. § 1092(f) (Supp. II 2014).

87. 20 U.S.C. § 1092(f)(3).

88. *Id.* § 1092(f)(1)(F)(i)(I)–(VIII) (listing the following criminal offenses: murder; sex offenses, forcible or nonforcible; robbery; aggravated assault; burglary; motor vehicle theft; manslaughter; and arson).

89. *Id.* § 1092(f)(1)(F)(i)(IX) (listing the following reportable arrests: liquor law violations, drug-related violations, and weapons possession).

90. *Id.* § 1092(f)(1)(F)(ii). Campuses must report the following crimes if the survivor is "intentionally selected because of the actual or perceived race, gender, religion, sexual orientation, ethnicity, or disability of the victim": larceny-theft; simple assault; intimidation; the destruction, damage, or vandalism of property; and other crimes involving bodily injury.

stalking.[91] One major flaw in the Clery Act, however, is that if an offender commits more than one reportable offense during an incident, the school is only required to disclose the most serious of the qualifying offenses based on the Hierarchy Rule from the Federal Bureau of Investigation's *Uniform Crime Reporting Handbook*.[92] Under the Hierarchy Rule, if a student was robbed at an off-campus party and the offender also committed a sexual offense against her, so long as the act did not constitute rape, the school would only be required to disclose that a robbery took place. Thus, Clery reporting is likely under-representative of the actual state of violence on campus, sexual or otherwise.

Although the Clery Act requires reporting for a wide range of offenses, New York's Act narrows the scope of notation-qualifying offenses to Clery-reportable criminal offenses.[93] Specifically, to fall under the notation mandate of the Act, a student must be found responsible for murder; forcible or nonforcible sex offenses; robbery; aggravated assault; burglary; motor vehicle theft; manslaughter; or arson."[94] A "forcible sex offense" is any sexual act against another person without the other person's consent, including sexual intercourse; sodomy; vaginal, anal, or oral copulation; vaginal or anal rape with a foreign object; or sexual battery.[95] The first four forcible sex offenses require penetration, no matter how slight.[96] "Nonforcible sex offenses" are incest and statutory rape, which are unlawful even if the parties consent.[97]

Id.

91. 20 U.S.C. § 1092(f)(1)(F)(iii).

92. FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTING HANDBOOK 10 (2004). The Hierarchy Rule lists offenses in descending order of severity as follows: (1) Criminal Homicide; (2) Forcible Rape; (3) Robbery; (4) Aggravated Assault; (5) Burglary; (6) Larceny-theft (except motor vehicle theft); (7) Motor Vehicle Theft; (8) Arson; (9) Other Assaults; (10) Forgery and Counterfeiting; (11) Fraud; (12) Embezzlement; (13) Stolen Property: Buying, Receiving, Possessing; (14) Vandalism; (15) Weapons: Carrying, Possessing, etc.; (16) Prostitution and Commercialized Vice; (17) Sex Offenses; (18) Drug Abuse Violations; (19) Gambling; (20) Offenses Against the Family and Children; (21) Driving Under the Influence; (22) Liquor Laws; (23) Drunkenness; (24) Disorderly Conduct; (25) Vagrancy; (26) All Other Offenses; (27) Suspicion; (28) Curfew and Loitering Laws—(Persons under 18); (29) Runaways—(Persons under 18). *Id.* at 8.

93. N.Y. EDUC. LAW § 6444(6) (McKinney 2016).

94. *See* 20 U.S.C. § 1092(f)(1)(F)(i)(I)–(VIII).

95. 2016 CAMPUS CLIMATE STUDY, *supra* note 4, at ES-4 ("Sexual battery [is] defined as any unwanted and nonconsensual sexual contact that involved forced touching of a sexual nature, not involving penetration.").

96. *Id.*

97. Dunn, *supra* note 83, at 567 n.24.

2. Why the Act Omitted Certain Clery-Reportable Sexual Offenses

The Act omits three Clery-reportable crimes of sexual violence from the list of Clery-qualifying acts: (1) domestic violence, (2) dating violence, and (3) stalking.[98] Article 129-B of the Education Law is entitled "Implementation by Colleges and Universities of *Sexual Assault, Dating Violence, Domestic Violence and Stalking* Prevention and Response Policies and Procedures," yet MTNs do not apply to three of four categories emphasized therein. This inconsistency demands attention.

The exclusion of domestic violence, dating violence, and stalking creates a hierarchy of offenses within the law. By excluding them from eligibility, the Act prevents subsequent parties from easily ascertaining the sexually violent history of a student. Recall Jonathan Taylor, the star football player that Georgia dismissed because of his arrest for domestic violence.[99] He was quickly signed by Alabama, but again faced additional charges of domestic violence after transferring.[100] Individuals found responsible or guilty for domestic violence, dating violence, and stalking still pose an ongoing threat to students on and off campus.

There are two possible reasons for excluding these three crimes. First, by narrowing the scope of MTN-qualifying crimes, the notation sends a stronger message about students who receive one. Compared to the qualifying criminal offenses, incidents of domestic violence, dating violence, and stalking are comparatively easier to prove.[101] In other words, for domestic violence and stalking, a student need only show a pattern of behavior that would cause a reasonable person to feel fear.[102] A student accused of these three crimes need not ever physically harm someone to be found responsible. By limiting notations to the most

98. *See* 20 U.S.C. § 1092(f)(1)(F)(iii); EDUC. § 6444(6).

99. *See* Zenor, *supra* note 60.

100. *Id.*

101. *Domestic Violence*, U.S. DEP'T JUST., http://www.justice.gov/ovw/domestic-violence (last updated Oct. 31, 2016). To be found responsible for domestic violence, the evidence need only show a pattern of repeated and unwanted attention, harassment, contact, or any other course of conduct directed at a specific person that would cause a reasonable person to feel fear. *Id.* Similarly, for dating violence, the evidence need only show "a pattern of coercive control that one person uses over someone with whom they are in an intimate relationship." *Dating Violence*, U.S. DEP'T JUST., http://www.justice.gov/ovw/dating-violence (last updated Feb. 1, 2016). Finally, for stalking, the evidence need only show "a pattern of repeated and unwanted attention, harassment, contact, or any other course of conduct directed at a specific person that would cause a reasonable person to feel fear." *Stalking*, U.S. DEP'T JUST., https://www.justice.gov/ovw/stalking (last updated Jan. 6, 2016).

102. *Domestic Violence*, *supra* note 101; *Stalking*, *supra* note 101.

severe, physically violent offenses, an MTN sends a strong message about the past violent misconduct of a student.

Further, an academic transcript notation does not include supporting information about the underlying offense;[103] thus, receiving schools would not be able to distinguish between students that committed varying degrees of violent crimes without further inquiry. By excluding these three offenses, schools will know that the student committed one of a small number of physically violent offenses. This prevents schools from guessing or making assumptions about the severity of an underlying offense. A school can always inquire into the student's disciplinary record, but as will be discussed later in this Note, this inquiry may be limited by privacy laws.[104]

Second, by limiting the scope, the Act prevents an unfair association between individuals that commit relatively lower level offenses and those that commit relatively severe, physically violent offenses such as rape and murder.[105] Although it is important to recognize that each offense often has lasting effects on survivors, it is also important to delineate the severity of each, ensuring that adjudicated outcomes map appropriately to their respective crimes.

If consequences are disproportionately severe compared to the offense, it may affect a survivor's willingness to report. Academics periodically analyze how personal relationships between survivors and their abusers affect the willingness to report abuse.[106] A prominent

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103. *See* EDUC. § 6444(6). There is no requirement under the Act to provide subsequent schools with supporting documentation from the disciplinary hearing for the finding of responsibility or pending charges. *See generally id.* (discussing notation requirements). Subsequent schools must rely on other statutes to gain access to such information. *See infra* Section III.B.

104. *See infra* Section III.B.

105. When comparing the severity of sexual crimes, this Note defers to the Hierarchy Rule. *See* U.S. DEP'T JUST., *supra* note 92, at 19–26 (discussing Hierarchy Rule). Therein, Criminal Homicide and Forcible Rape are the two most severe crimes, ranked one and two respectively. *See id.* Other forms of sexual assault fall under "Aggravated Assault" or "Other Assaults." *See id.* Tragically enough, a rape committed against a male by definition does not qualify as a "Forcible Rape" and therefore is lumped into the category of "Sex Offenses" which includes Adultery and Fornication, Seduction, Buggery, Sodomy or crime against nature, Incest, Indecent Exposure, Indecent Liberties, Statutory Rape (no force). *See id.*

106. *See, e.g.*, Sarah M. Buel, *Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct*, 26 HARV. WOMEN'S L.J. 217, 222 (2003) [hereinafter Buel, *Effective Assistance*] (explaining victims of domestic violence hesitation to report the abuse); Sarah M. Buel, *Fifty Obstacles to Leaving, a.k.a., Why Abuse Victims Stay*, COLO. LAW., Oct. 1999, at 19, 19 [hereinafter Buel, *Fifty Obstacles*] (demonstrating the difficulty of leaving an abusive relationship); *see also* Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1498–99 (2008) (indicating that victims of

scholar in the area, Sarah Buel, had the following to offer: "Lawyers and scholars must recognize the continuum of agency and victimhood; doing nothing or taking sufficient steps to protect oneself are not two discrete categories into which battered women can be classified."[107] In saying this, Buel points to the myriad factors that affect a woman's decision to report abuse; thus, a survivor's decision not to report does not mean that abuse did not occur nor that the survivor is not taking steps to protect herself. Many survivors fear the ramifications—financial, emotional, physical, and social—of ending a relationship with her abuser.[108]

Setting aside stalking, crimes of domestic violence and dating violence require a close personal relationship between the survivor and their attacker.[109] The psychological hurdles to reporting for these two crimes are complex because the survivor often maintains a close relationship with her attacker.[110] If a survivor sees that reporting the crime to a school will lead to harsh sanctions, it is possible that fewer students will report to protect their spouse or partner.

However, even taking these two possible rationales into account, the omission of these three offenses calls into question the real purpose of MTNs. Were they meant as a deterrent, a warning, or a punishment? First, if an MTN was meant as a deterrent, it makes little sense that three Clery-reportable offenses specifically called out in the title of the law, would be omitted. There are well-documented, long-lasting harms that are caused by domestic violence, dating violence, and stalking.[111]

Second, at a minimum, an MTN serves the purpose of putting receiving institutions on notice of the past violent misconduct of a transferring applicant. Here, New York legislators felt it was not necessary for subsequent institutions to know about these three crimes, even though they have lasting, damaging effects on survivors.[112] This hierarchy of offenses is incongruous with the important purpose of the Act: the prevention of sexual assault, domestic violence, dating violence, and stalking on campus. If the omission was made to prevent an unfair association between higher and lower levels of severity, legislators could

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domestic abuse have difficulty leaving an abusive relationship).

107. *See* Buel, *Effective Assistance*, *supra* note 106, at 224–25.

108. *See generally id.* (demonstrating the many factors that dissuade victims of domestic violence from reporting the abuse).

109. *See* sources cited *supra* note 101.

110. *See generally* Buel, *Fifty Obstacles*, *supra* note 106, at 19–26 (listing fifty obstacles victims of domestic violence may face in leaving abusive relationships).

111. Isabelle Ouellet-Morin et al., *Intimate Partner Violence and New-Onset Depression: A Longitudinal Study of Women's Childhood and Adult Histories of Abuse*, 32 DEPRESSION & ANXIETY 316, 317 (2015).

112. *See id.* at 319–20.

have easily drafted tiered statutory language for transcripts. The law already adopts this tiered approach by differentiating between MTNs received for suspensions and dismissals.[113]

Finally, the omission shows distrust for the procedural safeguards of campus adjudication.[114] Because domestic violence, dating violence, and stalking have damaging effects on female students,[115] it cannot simply be a matter of differentiating severity. MTNs will have real-world consequences for students that receive them,[116] making it all the more important to ensure the fair adjudication of charges. As stated above, a student need not ever commit a physical act of violence to be found responsible for the three omitted offenses. If the process for finding a student liable was robust, providing all required due process and fairness, society should feel confident that the evidence supports a finding of responsibility. However, many do not have full trust in the campus adjudication process, and fear for the future of those accused of crimes of sexual violence.[117] To those who fear for the accused, an MTN is a scarlet letter, permanently punishing individuals properly or improperly found responsible.[118]

Although this omission raises some questions about the purposes and effects of MTNs, these notations are an important step in the right direction. An MTN puts information about students with sexual misconduct on their records in the hands of schools, which in turn better enables those schools to make informed decisions about admission. More informed decisions will hopefully translate into safer campus environments because persons with documented, sexually violent histories will be screened from campus. These outcomes are only effective if an MTN consistently and reliably attaches to the academic

113. *See* N.Y. EDUC. LAW § 6444(6) (McKinney 2016).

114. Barclay Sutton Hendrix, Note, *A Feather on One Side, a Brick on the Other: Tilting the Scale Against Males Accused of Sexual Assault in Campus Disciplinary Proceedings*, 47 GA. L. REV. 591, 598–99 (2013).

115. *See* Ouellet-Morin, *supra* note 111, at 319–20.

116. *Cf. Transfer Student Requirements*, OR. ST. U., http://oregonstate.edu/admissions/main/transfer-student-requirements (last visited Dec. 26, 2016) (banning expulsions but not suspensions). A notation will likely have effects on a students' chances of admission, and some schools, like Oregon State University, will prohibit acceptance. *Id.*; *see also* EDUC. § 6444(6).

117. *See generally* Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 80 (2013) (arguing that colleges and universities should not handle sexual assault allegations).

118. Susan Svrluga & Aaron C. Davis, *'Scarlet Letter' Would Mark Transcripts of College Students Convicted of Assault*, WASH. POST (July 14, 2015), https://www.washingtonpost.com/local/dc-politics/scarlet-letter-would-mark-transcripts-of-college-students-convicted-of-assault/2015/07/14/abec2fea-2a41-11e5-a250-42bd812efc09_story.html.

records of transferring students fairly found responsible for a crime of violence. Thus, it is important to delve into procedures for the removal of an MTN, because schools may make assumptions about a student who does or who does not have an MTN without further investigation.

B. Removing a Transcript Notation

Under Part IV of the Act, a student may seek to have an MTN removed from an academic transcript.[119] While MTNs for dismissals are permanent, the Act requires schools to adopt their own policies regarding the removal of a notation resulting from a suspension.[120] For MTNs received for withdrawing while charges were pending, the law does not require schools to adopt policies for notation removal.[121] Thus, this part of the Note only addresses (1) procedures for relief from an MTN resulting from a suspension or a dismissal, and (2) the consequences of widely inconsistent transcript notation removal policies across New York.

1. Procedural Relief from an MTN

The two notations that will be focused on in this section are (1) MTNs received as a result of a suspension and (2) MTNs received as a result of a dismissal. First, notations on an academic transcript resulting from a suspension will read as follows: "suspended after a finding of responsibility for a code of conduct violation."[122] For suspensions, the Act requires each school to create a transcript notation removal policy.[123] The only legal constraint on these policies is that suspension notations "shall not be removed prior to one year after conclusion of the

119. EDUC. § 6444(4)(f).

120. *Id.*

121. *See generally id.* § 6444(4)(f) (requiring notations for determinations, not incomplete investigations). Some schools adopted polices saying that such notations are permanent. *See* UNIV. AT ALBANY, STATE UNIV. N.Y., TRANSCRIPT NOTATION PROCEDURES IN SEXUAL MISCONDUCT CASES RESULTING IN SUSPENSION OR DISMISSAL [hereinafter UNIV. AT ALBANY PROCEDURE], http://www.albany.edu/studentconduct/assets/Transcript_Notation_Procedures_in_Sexual_Misconduct_Cases_resulting_in_Suspension_or_Dismissal.pdf ("Transcript notations indicating a dismissal or withdrawal with conduct charges pending will not be removed."). Other schools treat such notations as permanent unless the violations are "disposed." COLL. AT CORTLAND, STATE UNIV. N.Y., CODE OF STUDENT CONDUCT & RELATED POLICIES 27 [hereinafter COLLEGE AT CORTLAND POLICY], http://www2.cortland.edu/dotAsset/3c5e12eb-6a88-448b-9a7a-47105a01acc6.pdf ("At the request of the student, arrangements can be made to dispose of the violations during his or her separation. If not, appropriate action will be taken upon the student's return to SUNY Cortland. The notation will remain on the transcript until appropriate disposition of the violation has been made.").

122. EDUC. § 6444(6).

123. *Id.*

suspension."[124] As will be discussed in Section II.B.2 of this Note, by providing only minimal constraints on school policies, there are broadly inconsistent practices across New York, diminishing the potential power of MTNs.[125]

Second, notations resulting from dismissals will read as follows: "expelled after a finding of responsibility for a code of conduct violation."[126] Unlike with suspension notations, these "shall not be removed," ensuring consistent availability of information across the state.[127] However, Part IV acts as a safety valve for this permanent prohibition on removal by requiring the automatic removal of either notation if a school vacates a finding of responsibility.[128]

Although Part IV provides a necessary safety valve, it is silent regarding the question of how, or by whom, a finding of responsibility can be vacated. In some cases, a student will participate in both the campus adjudication and a criminal action.[129] It is not uncommon that a student can be found responsible at the school, but acquitted in the criminal action.[130] However, a criminal acquittal does not automatically trigger the removal of a transcript notation under the Act. The burden of proof at the criminal trial is higher than the one used in a campus adjudication, meaning that it is not improper for opposite outcomes.[131] For dismissals where a finding of responsibility is not vacated, a student—at both private and public New York schools—would be required to bring an Article 78 proceeding to have the notation removed.[132]

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124. *Id.*

125. *See infra* Section II.B.2.

126. EDUC. § 6444(6).

127. *Id.*

128. *Id.*

129. *See* Tyler Kingkade, *Why Details of a High-Profile Montana Campus Rape Case Are Still a Mystery*, HUFFINGTON POST (Jan. 26, 2016, 6:02 PM), http://www.huffingtonpost.com/entry/jon-krakauer-ferpa-montana_us_56a13dece4b0d8cc109930e8.

130. *See id.*

131. Campuses use a preponderance of the evidence standard and criminal proceedings use a "beyond a reasonable doubt standard." *See* Lavinia M. Weizel, Note, *The Process that is Due: Preponderance of the Evidence as the Standard of Proof for University Adjudications of Student-on-Student Sexual Assault Complaints*, 53 B.C. L. REV. 1613, 1632 (2012).

132. N.Y. C.P.L.R. § 7803(3) (McKinney 2008). "It is undisputed that the actions of a private university against a student are subject to Article 78 review and that the courts will intervene if the disciplinary dismissal of a student is arbitrary." Attallah v. N.Y. Coll. of Osteopathic Med., 94 F. Supp. 3d 448, 455 (E.D.N.Y. 2015) (quoting Harris v. Tr. of Columbia Univ., 470 N.Y.S.2d 368, 370 (App. Div. 1983), *rev'd on other grounds*, 468 N.E.2d 54 (N.Y. 1984)); *see also* Grillo v. N.Y.C. Transit Auth., 291 F.3d 231, 234 (2d Cir. 2002) ("[W]here, as here, a party sues the state and its officials and employees for the arbitrary and random deprivation of a property or liberty interest, 'an Article 78 proceeding is a

The crux of an Article 78 proceeding is to determine "whether [the school] 'substantially adhered to its own published rules and guidelines' and whether the determinations [were] based on 'a rational interpretation of the relevant evidence.'"[133] In other words, an Article 78 proceeding's justiciability is limited to whether an institution's finding of responsibility for a code of conduct violation was supported by substantial evidence.[134] Therefore, under this standard of review, so long as the school provided more than a "mere scintilla" of evidence supporting the adjudicated outcome, the finding of responsibility will not be disturbed.[135]

2. The Consequences of Inconsistent Notation Removal Policies Across New York

Across New York, institutions drafted widely varying policies regarding procedural relief from a transcript notation resulting from a suspension. The policies fall into four general categories: (1) policies that closely mirror the Act's statutory language,[136] (2) policies that lightly expand on the statutory language,[137] (3) policies that adopt significant procedural steps before removal can take place, if at all,[138] and (4) policies that simply prohibit removal.[139]

Under the first category, some schools adopted policies that closely mirror statutory language, providing little clarity on the process of removal. At Purchase College, "[a] student may appeal to the vice president for student affairs, in writing, for removal of a notation that the student was suspended, no earlier than one year after the end date of the suspension."[140] This policy provides no additional guidance for a student

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perfectly adequate postdeprivation remedy.'" (quoting Hellenic Am. Neighborhood Action Comm. v. City of New York, 101 F.3d 877, 881 (2d Cir. 1996))).

133. Kickertz v. N.Y. Univ., 952 N.Y.S.2d 147, 153 (App. Div. 2012) (quoting Katz v. Bd. of Regents, 924 N.Y.S.2d 210 (App. Div. 2011)), *aff'd as modified*, 29 N.E.3d 893 (N.Y. 2015).

134. Lampert v. State Univ. of N.Y. at Albany, 984 N.Y.S.2d 234, 235 (App. Div. 2014) (citing N.Y. C.P.L.R § 7803); *see also* Pell v. Bd. of Educ., 313 N.E.2d 321, 325 (N.Y. 1974).

135. Consol. Edison Co. v. NLRB, 305 U.S. 197, 229 (1938); *Pell*, 313 N.E.2d at 325.

136. *See Purchase College Transcript Notation Policy*, PURCHASE C. [hereinafter *Purchase College Policy*], http://www.purchase.edu/svpr/transcriptnotations.aspx (last visited Dec. 26, 2016).

137. COLLEGE AT CORTLAND POLICY, *supra* note 121, at 27.

138. SYRACUSE UNIV., STUDENT CONDUCT SYSTEM HANDBOOK 2015–2016, at 36–37 (2015) [hereinafter SYRACUSE HANDBOOK], https://issuu.com/syracuseosrr/docs/student_conduct_system_handbook_fin.

139. *Cf. Policies & Forms*, CORNELL U. OFF. JUD. ADMIN., http://judicialadministrator.cornell.edu/policies-and-forms/ (last visited Dec. 26, 2016).

140. *Purchase College Policy*, *supra* note 136.

seeking removal. It lists no standard by which the determination will be made, no requirements of the written request, nor does it provide a timeline for the Vice President of Student Affairs' review process. This vague policy leaves all of the power in the hands of the school.

Under the second category, some schools adopted policies that comply with the statutory requirements, but add some light additions that clarify and expand on the Act. At the State University of New York, College at Cortland, the policy reads as follows:

> For suspensions related to crimes of violence, hazing or other serious violations, the notation will permanently remain on the transcript. For others, the notation will remain on the academic transcript at least for the period of suspension plus one year. At that time, the student may petition to have the notation removed. The Vice President for Student Affairs may have the notation restored if the individual becomes involved in any disciplinary incident on campus or in any criminal action in connection with the College.[141]

Cortland's policy can be interpreted in two ways. First, for suspensions related to "crimes of violence" or "serious violations," the notation will be permanent; however, the policy does not define what constitutes a crime of violence or serious violation. This could mean that all notations received under the Act will be permanent because they are "crimes of violence" as defined under the Clery Act, or simply that they are "serious violations." Due to the failure in defining what violations will qualify, there may be some instances where an offense will not be permanent. In these instances, a student may request the removal of the notation one year after the completion of the suspension.[142] This policy also takes the Act one step further by allowing the Vice President of Student Affairs to restore a transcript notation if the student re-offends.[143]

Other schools adopted a policy that made some additions to the minimums of the Act. At the University of Albany, "[t]ranscript notations indicating a suspension will be removed seven years after the conclusion of the suspension."[144] At New York University,

> [i]f the Adjudicator's decision provides for a transcript notation, a Respondent may request that such notation be removed, provided that he/she has met any applicable requirements listed in the Adjudicator's decision prior to making a request. However, a transcript notation reflecting a suspension cannot be removed until one year after the

141. *See* COLLEGE AT CORTLAND POLICY, *supra* note 121, at 27.
142. *Id.*
143. *Id.*
144. UNIV. AT ALBANY PROCEDURE, *supra* note 121.

conclusion of the suspension.[145]

Both add light additions, but will result in different outcomes for similarly situated offenders.

In a different approach, Syracuse University's policy provides a detailed appeals process for students considering an appeal of their MTN. Not only must the student wait one year before applying, but they must complete all readmission or other sanction requirements, and be free of any further conduct violations by the time of their appeal.[146] Further, in their written request for relief, they must provide (1) "a brief description of the incident and sanction imposed," (2) a reflection on their actions and how they impacted others, (3) "an account of[] decision-making and behavior since the incident," and (4) an explanation as to why the MTN should be removed.[147] If a student's request is successfully granted, the notation is not simply wiped away, it is changed to "Administrative Withdrawal—University Initiated."[148] This approach adds significant conditions on notation removal, but it also attempts to educate the offender about the severity and effects of their behavior in the process.

Under the fourth category, some institutions, such as Cornell University, completely prohibit the removal of a transcript notation for any reason.[149] From the onset, the policy refers to an MTN as a "permanent transcript notation," drawing no distinction between a finding of responsibility that results in suspension and one that results in dismissal.[150] Further clarifying the policy, it goes on to say that "[t]hese notations are permanent and may not be appealed."[151] This means that to have the notation removed, a student will have to initiate an Article 78 proceeding against the school.[152]

These widely varying policies show that there is more than one way to address the removal of notations, but these varying policies create a major issue. By allowing each school to determine how to handle appeals, subsequent schools will not always get the information necessary to make an informed decision. Had the law simply stated that MTNs for suspension were permanent, a receiving institution could be confident that a transferring applicant without an MTN had never been found

145. N.Y.U. POLICY, *supra* note 80, at 10.
146. *See* SYRACUSE HANDBOOK, *supra* note 138, at 37.
147. *Id.*
148. *Id.*
149. *See Policies & Forms*, *supra* note 139.
150. *Id.*
151. *Id.*
152. *See* Attallah v. N.Y. Coll. of Osteopathic Med., 94 F. Supp. 3d 448, 455 (E.D.N.Y. 2015).

responsible for a qualifying crime in the State of New York. If MTNs are meant to place receiving institutions on notice of the violent misconduct of a student, there must be consistent application of notations across the state. This is crucial because only in about one third of campus adjudications are students dismissed from campus after a finding of responsibility for sexual and interpersonal violence.[153] When only one third of the notations are required to be permanent, the inconsistent removal of notations can have lasting effects.

III. HOW MTNS CLOSE THE DANGEROUS LOOPHOLE OF QUIET TRANSFERS

A. The Pattern of Offender Transfers

Across the nation, there is a pattern of dangerous students transferring between schools when faced with charges of sexual violence. This pattern manifests in two ways: (1) a student voluntarily withdraws from school when faced with charges of sexual misconduct, or (2) a school actively encourages a student to withdraw.[154] In both cases, students take advantage of a "loophole" wherein they can avoid almost all formal consequences at the school, and due to the fact that statistically few women report rapes to the police, a transferring student may even escape all formal consequences.[155] When a student voluntarily withdraws, the student's academic transcript will not indicate what precipitated the withdrawal.[156] Due to this, a receiving school will often be unaware that the student faced charges of sexual violence unless they specifically inquire.

Under the first manifestation of the loophole, students withdraw prior to a final adjudication hoping to quietly transfer schools without having to endure the sanctions against them.[157] The second manifestation

153. Tyler Kingkade, *Fewer Than One-Third of Campus Sexual Assault Cases Result in Expulsion*, HUFFINGTON POST (Sept. 29, 2014, 8:59 AM), http://www.huffingtonpost.com/2014/09/29/campus-sexual-assault_n_5888742.html.

154. *See* Anderson, *supra* note 10; Collin Binkley et al., *Students Easily Transfer After Violent Offenses*, COLUMBUS DISPATCH (Nov. 24, 2014, 8:05 AM), http://www.dispatch.com/content/stories/local/2014/11/24/hidden-on-campus.html.

155. *See Policies and Procedures*, CORNELL U. COURSES STUDY, http://courses.cornell.edu/content.php?catoid=12&navoid=2089 (last visited Dec. 26, 2016) (describing Cornell's withdrawal and leave policies); *Withdrawal from College Policy*, PLATTSBURGH [hereinafter *College at Plattsburgh Policy*], http://web.plattsburgh.edu/offices/academic/provost/withdrawalpolicy.php (last visited Dec. 26, 2016) (describing SUNY Plattsburgh's withdrawal and leave policies).

156. *College at Plattsburgh Policy*, *supra* note 155.

157. *See* Binkley et al., *supra* note 154; *see also* Wu, *supra* note 11.

of the loophole is more troubling. Some schools actively encourage a student to voluntarily withdraw, or they will negotiate an offer to remove a finding of responsibility from the student's record if the student agrees to voluntarily withdraw.[158] In 2013, a male student at Virginia Wesleyan College (VWC) was found responsible and dismissed for engaging in sexual activity with a female student against her will.[159] A few months after the dismissal, the school "softened the punishment" by allowing the dismissal to be reclassified as a withdrawal.[160] VWC stated that the reclassification was made to "assist him in seeking further studies."[161]

This second manifestation shows a critical flaw in the way schools think about sexual violence prevention. VWC intentionally removed the notation from the student's record because it knew that the notation would hinder his opportunities elsewhere.[162] In order to make that conclusion, VWC knew that other schools will often screen out students with sexually violent backgrounds in an effort to ensure the ongoing safety for their own campuses. VWC's decision illustrates the dangerous idea that once a violent student is removed from campus, that campus's job is done. However, schools must recognize that covering up sexual violence in this way will only relocate the violence behavior, not eliminate it.

B. How MTNs Disrupt the Loophole

The loophole results in two major issues: (1) some students can simply withdraw from school and never face the charges lodged against them, and (2) if an uninformed school admits a student for transfer, that student has the freedom to continue his or her violent behavior in a new location. MTNs take on these issues and can disrupt the dangerous pattern of offend and easily transfer.

Addressing the first issue, although students may still be able to withdraw while charges are pending, under the Act, they will not be able to do so without leaving a lasting mark on their record.[163] This fact alone has the possibility to discourage withdrawal, encouraging students to stay on campus to vigorously defend themselves, but the passage of time and research are necessary before any definitive correlation can be drawn. Addressing the second issue, if a student withdraws with pending

158. *See* Anderson, *supra* note 10.
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. N.Y. EDUC. LAW § 6444(6) (McKinney 2016).

charges, or is found responsible, the notation acts as a warning sign to subsequent institutions.[164] Without some kind of notation, subsequent schools have no reason to assume that any particular applicant previously engaged in sexual misconduct, absent a criminal record or specific inquiry into a student's disciplinary record.

Across the country, schools are starting to see that transfer students with histories of sexual violence pose a threat to campus safety.[165] At Oregon State University, the school adopted a policy of automatically declining admission for students with code of conduct violations that resulted in ineligibility for readmission.[166] For many other schools, a blanket prohibition may feel too extreme. For schools unwilling to make such a concrete rule, an MTN will at least encourage the office of admissions to take a closer look.

When an office of admissions looks at the transcript of a student with an MTN, the statutory language does not contain descriptive information regarding the underlying violation.[167] Because the qualifying acts that result in an MTN can vary from arson to rape to motor vehicle theft, receiving schools interested in the underlying offense must inquire with the previous school.[168] There is no federal or New York State law preventing schools from sharing basic information, but there is also no law that compels them to share the information.[169]

The difficulty lies where a school wants to acquire specific information about an underlying disciplinary violation. Under the Family Education Rights and Privacy Act ("FERPA"), an institution must treat disciplinary records as part of the education record.[170] Such records cannot be disclosed without signed consent from the student unless the following conditions are met: the student must be (1) officially adjudicated (2) as having violated the student code of conduct for a (3)

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164. *See id.*; *see also Students Punished for Sexual Assault Should Have Transcripts Marked, Title IX Group Says*, *supra* note 71.

165. *See* Wu, *supra*, note 11 (discussing Jesse Mathew case); Zenor, *supra*, note 60 (discussing Jonathan Taylor case).

166. Mark Floyd, *OSU Adopts Stricter Student Transfer Admissions Policy to Address Sexual Violence, Campus Safety*, OR. ST. U. (Nov. 30, 2015), http://oregonstate.edu/ua/ncs/archives/2015/nov/osu-adopts-stricter-student-transfer-admissions-policy-address-sexual-violence-cam.

167. *See generally* EDUC. § 6444(6) (discussing notations' content under the law).

168. Tyler Kingkade, *Lawmakers Consider How to Address Sexual Assault Offenders Transferring Colleges*, HUFFINGTON POST (Dec. 10, 2014, 3:42 PM), http://www.huffingtonpost.com/2014/12/10/sexual-assault-transferring_n_6297176.html.

169. *Id.*

170. United States v. Miami Univ., 294 F.3d 797, 802–03 (6th Cir. 2002).

crime of violence or non-forcible sex offense.[171] However, if a student withdraws from campus prior to a final determination, and the action is no longer pending, no disclosure can happen except in emergency situations.[172]

Providing schools with information about applicants is the first step at combatting the proffered theory from the Lisak Study: that unidentified repeat offenders are an ongoing threat to the safety of students on campus. Not only does it help schools identify possible threats, but it may also put them on the hook for knowingly admitting violent students to campus. In *Ross v. University of Tulsa*, a female student sued the University of Tulsa (TU) for negligence based on the fact that her attacker, Patrick Swilling, Jr., was previously charged and investigated for sexual violence at his previous school.[173] The court discussed the possible bases for a negligence claim, stating, "Oklahoma law requires analysis of three factors in determining whether TU owed . . . [a] duty: (1) TU's control over Swilling; (2) TU's actual or constructive knowledge of the risks he posed; and (3) the foreseeability of Ross's alleged rape."[174] Relevant here, the court found that the knowledge that TU *actually* had was "not sufficient to provide notice that Swilling posed a 'substantial risk' to other students."[175] Under the Act, a future court may consider an MTN to be sufficient notice of a substantial risk to other students because MTNs only attach to a small group of violent offenses.[176] In this way, MTNs will play a critical role in encouraging schools to stop and take a closer look at the history of applicants with MTNs, not only to limit their only liability in future lawsuits, but to also limit the number of unidentified repeat offenders who transfer schools to find new hunting grounds.

CONCLUSION

Schools across New York occupy a critical role in the fight against sexual violence on campus. The Act creates consistency and reinforces procedures that are foundational to the fair adjudication of violent acts on campus. Especially progressive among the new provisions, MTNs increase transparency between schools that have identified dangerous

171. 34 C.F.R. § 99.31(a)(14)(i)(A)–(B) (2016).

172. *Id.* An emergency situation is one wherein an "educational agency or institution determines that there is an articulable and significant threat to the health or safety of a student or other individuals." 34 C.F.R. § 99.36(c) (2016).

173. 180 F. Supp. 3d 951, 974 (N.D. Okla. 2016).

174. *Id.* at 975.

175. *Id.* at 976.

176. *See* Clery Act, 20 U.S.C. § 1092(f)(1)(F)(i)(I)–(IX) (Supp. II 2014); N.Y. EDUC. LAW § 6446(6) (McKinney 2016).

offenders. This increased transparency allows schools to make informed decisions about admissions, enabling them to better ensure a safer campus for at-risk female student populations. Further, MTNs may play an important role in future negligence litigation against schools that admit students with a history of violent misconduct. Due to this, it will hopefully be an additional motivation for schools to take a closer look at transferring applicants.

In sum, MTNs play an important role in communication between schools that are trying to protect their female students from violent misconduct. Schools can no longer operate as silos where they only take steps to protect their own students. Rather, they must work together to *prevent* sexual violence on all campuses through better training, programs, and communication. Although some may consider the notation to be a "scarlet letter"—a stain on the reputation of accused students—in reality, the notation is a saving grace in the fight to prevent sexual violence from spreading across campuses. No one program or policy alone will fix this, but MTNs are a critical step in the right direction.