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## RESTORATIVE JUSTICE AND CAMPUS SEXUAL MISCONDUCT

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## INTRODUCTION

Sexual assault and other sexual misconduct<sup>1</sup> remain a significant problem on university<sup>2</sup> campuses, and one that schools often fail to adequately address. Universities too often fail to respond to sexual misconduct in a way that gives appropriate weight to the victim's experience.<sup>3</sup> Campus disciplinary procedures can be confusing and unsupportive of the victims and can result in minimal consequences for the party found responsible.<sup>4</sup> As a result, many victims feel as though the university disciplinary system does not truly listen to their stories, meet their needs, and take seriously the harm that sexual misconduct causes.<sup>5</sup>

Congress and state legislatures have responded to these criticisms with laws regulating schools' disciplinary proceedings for sexual misconduct.<sup>6</sup> Title IX of the Education Amendments of 1972 (Title IX), for example, requires schools responding to sexual misconduct accusations to adopt procedures that are more supportive of victims. Yet Title IX and other regulatory responses face their own critiques. For some, Title IX does not go far enough; schools are too easily able

1. Schools and laws define sexual assault differently and often distinguish between sexual assault and other forms of unwanted sexual touching. I use the term "sexual misconduct" to include a variety of unwanted sexual behaviors, including but not limited to sexual assault.

2. Throughout the Article, I use the term "university" to refer to all institutions of higher education, whether they are universities, freestanding graduate schools, or colleges.

3. See generally CTR. FOR PUB. INTEGRITY, SEXUAL ASSAULT ON CAMPUS: A FRUSTRATING SEARCH FOR JUSTICE (2010) [hereinafter SEXUAL ASSAULT ON CAMPUS]; Deborah L. Brake, *The Trouble with "Bureaucracy"*, 7 CALIF. L. REV. ONLINE 66, 69 (2016); Nancy Chi Cantalupo, "Decriminalizing" Campus Institutional Responses to Peer Sexual Violence, 38 J. C. & U. L. 481, 486-90 (2012) [hereinafter Cantalupo, "Decriminalizing"].

4. See *infra* Section II.

5. See *infra* Section II. The gendered pronouns of the English language make it difficult to write about sexual misconduct—or anything else—in a gender-neutral way. Sexual assault can be committed upon a person of any gender and be committed by a person of any gender. Using gendered language contributes to the minimization of sexual misconduct perpetrated against boys and men and in same-sex relationships. I attempt to use gender-neutral language when possible; when it is not possible, I use the female pronoun to describe victims of sexual assault and the male pronoun to describe responsible parties. I do this because sexual assault of this dynamic is more prevalent (or at least more widely reported in surveys) than other dynamics. See NAT'L CTR. FOR INJURY PREVENTION AND CONTROL, CTRS. FOR DISEASE CONTROL AND PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY 17-19, 24 (2010) [hereinafter CDC SURVEY]. The research and stories about campus sexual misconduct that I cite are also overwhelmingly about male perpetrators and female victims. See, e.g., Nancy Chi Cantalupo, *Masculinity & Title IX: Bullying and Sexual Harassment of Boys in the American Liberal State*, 73 MD. L. REV. 887 (2014) [hereinafter Cantalupo, *Masculinity & Title IX*].

6. See *infra* Section II.

to ignore its mandates.<sup>7</sup> Others argue that federal and state regulations establish an unjust and unwieldy bureaucracy that prioritizes victims' comfort over fairness to the accused.<sup>8</sup> Many critics contend that universities are inappropriately assuming a pseudo-criminal justice role for which they lack the resources and expertise.<sup>9</sup>

In order to improve university responses to sexual assault, we need to leverage university strengths—and realistically expand their capacities—to meet students' needs. Schools' institutional mandate is primarily educational: to provide the opportunity for students to learn and become responsible and ethical members of society. Disciplinary procedures for sexual assault are necessary for schools to meet their institutional goals of ensuring a safe and supportive educational environment, and traditional disciplinary procedures that involve fact-finding and judgments of responsibility provide necessary means to that end. Yet, if we truly care about sexual misconduct and ensuring a safe and just learning environment for students, we cannot ignore that schools' institutional capacity to engage in fact-finding is limited. Alternative methods of disciplinary proceedings cannot solve this problem, but they can at least deliver an additional means to ameliorate it. Perhaps more importantly, alternative processes can provide new and vital approaches to meet student needs and support schools' mandates in ways that traditional disciplinary procedures cannot.

Restorative justice processes offer campus sexual misconduct victims and responsible parties a promising alternative to traditional disciplinary processes. Restorative justice has been used extensively in the juvenile justice system. It has also been used as an alternative to traditional adversarial criminal justice processes.<sup>10</sup> While several universities have integrated it into their disciplinary procedures, they have yet to do so for incidents of sexual misconduct.<sup>11</sup> In this Article, I argue that restorative justice allows universities to leverage their

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7. See *infra* Section II.

8. See *infra* Section II.

9. See *infra* Section II.

10. See JOHN BRAITHWAITE, *RESTORATIVE JUSTICE AND RESPONSIVE REGULATION* 57, 87, 111 (2002); Janis F. Bremer, *Essay: Juveniles Who Engage in Sexually Harming Behavior—A Restorative Justice System*, 32 WM. MITCHELL L. REV. 1085, 1086 (2006) (discussing project in Minnesota); Jennifer L. Kerrigan, "It's Not World Peace, but..." *Restorative Justice: Analysis of Recidivism Rates in Campbell Law School's Juvenile Justice Project*, 30 CAMPBELL L. REV. 339, 2008 (2008) (discussing its use in North Carolina); Kathleen Daly, *Mind the Gap: Restorative Justice in Theory and Practice*, in *RESTORATIVE JUSTICE AND CRIMINAL JUSTICE: COMPETING OR RECONCILABLE PARADIGMS?* 219, 220 (Andrew von Hirsch et. al. eds., 2003) [hereinafter *RESTORATIVE JUSTICE AND CRIMINAL JUSTICE*]; Leena Kurki, *Evaluating Restorative Justice Practices*, in *RESTORATIVE JUSTICE AND CRIMINAL JUSTICE*, *supra*, at 293, 298–301; Mara Schiff, *Models, Challenges, and the Promise of Restorative Conferencing Strategies*, in *RESTORATIVE JUSTICE AND CRIMINAL JUSTICE*, *supra*, at 315, 318, 318–20; Paul Tullis, *Can Forgiveness Play a Role in Criminal Justice?*, N.Y. TIMES, Jan. 4, 2013, at MM28; Arlène Gaudreault, *The Limits of Restorative Justice* (2005), [http://www.victimweek.gc.ca/symp-colloque/past-passe/2009/presentation/pdfs/restorative\\_justice.pdf](http://www.victimweek.gc.ca/symp-colloque/past-passe/2009/presentation/pdfs/restorative_justice.pdf) [<http://perma.cc/7AZW-WHU7>].

11. See Mary P. Koss et al., *Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance*, 15 TRAUMA, VIOLENCE & ABUSE 242, 254 (2014).

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strengths and avoid some of the pitfalls inherent in employing a quasi-criminal justice system that they are ill-suited to manage.

There is ample scholarship on campus sexual assault and on restorative justice but surprisingly little analysis on using the former to address the latter.<sup>12</sup> In this Article, I hope to provide a deeper, more expansive look at the implications for schools, students, and the criminal justice system in the event that universities implement restorative justice processes for campus sexual assault. I argue that restorative justice and universities may be uniquely suited to each other; using restorative justice may resolve many problems in the traditional campus disciplinary system, and the university setting may avoid several complications that restorative justice raises in the criminal justice system. At the same time, however, the university environment also provides unique challenges that can undermine the benefits of restorative justice. We should take seriously both the promises and perils of using restorative justice to address campus sexual assault.

While there is no one definition or method of restorative justice, its processes generally bring together victims, responsible parties,<sup>13</sup> and other harmed parties (including community representatives) to explore the harm done by the offense and collectively determine how best to repair it.<sup>14</sup> It is undertaken voluntarily by both the responsible party and the victim where the responsible party admits to wrongdoing. Restorative justice provides both parties a more active role than the traditional adversarial process. It provides a victim with the opportunity to tell her story, describe to the responsible party the full impact of the harmful behavior, and shape the consequences that the responsible party will face. The responsible party has the opportunity to accept full responsibility for his actions, listen to the victim and other harmed parties discuss the

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12. Donna Coker's recent work explores the potential for interplay between restorative justice and campus sexual assault. *See, e.g.,* Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 *TEX. TECH L. REV.* 147 (2016). Coker argues for a response to campus sexual assault that uses less of what she terms "crime logic"—which adopts principles and narratives common in criminal justice—and more public health approaches combined with an intersectional antisubordination perspective. *See id.* at 150, 155–61. This Article provides a deeper exploration of the implications of using restorative justice to accomplish this and other goals. It provides a more robust analysis of the legal and practical considerations of restorative justice on campuses and its interaction with concurrent criminal justice procedures than other previous work. *See, e.g.,* DAVID R. KARP ET AL., *CAMPUS PRISM: A REPORT ON PROMOTING RESTORATIVE INITIATIVES FOR SEXUAL MISCONDUCT ON COLLEGE CAMPUSES* (2016); Koss et al., *supra* note 11, at 253 (imagining a hypothetical campus restorative justice process for sexual misconduct, and analyzing its compliance with Title IX requirements); Tamara Rice Lave, *Campus Sexual Assault Adjudication: Why Universities Should Reject the Dear Colleague Letter*, 64 *U. KAN. L. REV.* 915, 948–52 (2016).

13. University codes of conduct often prohibit noncriminal behavior; therefore a student whose sexual conduct has violated a university code is not necessarily guilty of a criminal offense. *See infra* notes 42–46 and accompanying text. For the purposes of this Article, I use the term "responsible party" to refer to the individual in the process who has committed the wrongful act rather than "defendant" or "offender," as it makes clear that an individual can be a responsible party regardless of whether they have committed a criminal offense or have been arrested. *Cf.* Koss et al., *supra* note 11, at 245.

14. *See infra* Part IV.A.

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consequences of his actions, and collaborate with all stakeholders to determine how he can repair the harm he has caused and become a responsible and positive member of the community.

While restorative justice cannot replace all adversarial disciplinary proceedings, it can provide an alternative to the quasi-criminal disciplinary proceedings that schools are often ill-suited to handle. It speaks to university goals of educating students, responding to student needs, and strengthening the campus community. It is uniquely responsive to victim needs because it gives them a stronger voice and more power to shape the process's outcome. It can also help universities and the student body account for the institutional environment that may be furthering sexual assault. Restorative justice processes can include and leverage community institutions, such as the fraternity system and student athletics, in understanding their role in sexual misconduct and can create solutions to prevent it.

I choose to focus on restorative justice's promise and perils for sexual misconduct—as opposed to other types of misconduct—because of the critical need for this particular analysis. Many of the issues this Article raises will no doubt apply to other areas of student misconduct. Yet this Article limits its analysis to the ramifications of restorative justice for sexual misconduct for several reasons. Campus sexual misconduct continues unabated at an alarming rate. Administrative and legislative responses have been met with significant criticism, both from those who believe they go too far and those concerned they do too little. Universities require more and better means to address the needs of sexual misconduct victims and the accused. Restorative justice can provide a vital tool in addressing these concerns.

Restorative justice is increasingly common on campuses, yet schools have shied from using these processes in the context of sexual misconduct. An analysis of restorative justice and campus sexual misconduct is therefore critical because those responsible for spearheading sexual assault disciplinary procedures have heretofore overlooked or rejected restorative justice processes. Schools that wish to use informal processes also have little guidance from the Department of Education on how to integrate them.<sup>15</sup> To the extent that schools should embrace restorative justice processes, we must explore what this means for sexual misconduct specifically.

Restorative justice and university disciplinary systems may be uniquely suited to each other's strengths and weaknesses. Because university disciplinary systems are noncriminal, they avoid many (although not all) of the concerns that restorative justice raises in the criminal justice system. Restorative justice's focus on rehabilitation is well suited to a university environment, which has the goal not of punishment but rather of generating responsible and reflective students. Concerns that restorative justice will yield softer penalties are less troubling in the context of university discipline, which is by its nature civil and does not seek to incapacitate individuals. Restorative justice can also help universities better respond to future instances of sexual assault.

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15. Coker, *supra* note 12, at 150.

Yet these same attributes of the university may also create significant obstacles. Because university proceedings are civil, restorative justice processes may take place before or concurrent with criminal proceedings. The prospect of criminal proceedings may deter a responsible party from accepting responsibility. Universities may be able to work with prosecutors' offices to ensure that those who complete the program successfully do not face prosecution or cannot have their statements from the proceedings used against them in criminal prosecution. But such agreements raise their own problems, even if victims initially agree to them. They can also have unintended repercussions for the criminal justice system, including exacerbating racial disparities in the prosecution of sexual assault.

Restorative justice processes also enhance the prospect of discrimination and coercion. Such processes have, in the past, unwittingly reflected and enforced power imbalances.<sup>16</sup> These concerns have been particularly salient where processes concern gender-based violence within closed communities—like sexual assault in universities.<sup>17</sup> Universities must ensure that they do not unduly pressure either victims or the accused to accept a restorative justice process or agree to a reparation plan.

Restorative justice processes must also take more seriously the problem of racial bias during proceedings. Students of color have had markedly different experiences with restorative justice processes than white students.<sup>18</sup> In particular, they report less satisfaction with the degree to which they were able to voice their perspectives and with the processes as a whole.<sup>19</sup> Very little research has been conducted into why these disparities exist and how to address them. Expanding restorative justices to sexual misconduct—an issue with a history of racial injustice—must explore and seek to remedy these racial disparities.

The Article ends with cautious optimism. The promise of restorative justice for campus sexual assault proceedings can only be realized if we take seriously its corresponding perils. Universities should move forward in developing these programs. But they must remain mindful of the questions and concerns they raise. Schools must invest in the resources and hire experts in restorative justice to rise to this challenge.

## I. SEXUAL ASSAULT IN HIGHER EDUCATION

The prevalence of sexual assault on university campuses is hardly a secret.<sup>20</sup>

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16. See *infra* Part IV.C.2–3 for an explanation of these imbalances and the concerns they create.

17. See *id.*

18. See *infra* Part IV.C.3 for a discussion of the role of racial bias in restorative justice.

19. See *id.*

20. Deborah Tuerkheimer, *Rape on and off Campus*, 65 EMORY L.J. 1, 6 (2015). This is not to say that university attendance increases the chance of sexual assault. Women of the same age who do not attend university may face more sexual assault. Women of color are underrepresented in higher education yet are at a far greater risk of being sexually assaulted. See KATE HARDING, *ASKING FOR IT: THE ALARMING RISE OF RAPE CULTURE—AND WHAT WE CAN DO ABOUT IT* xii (2015). There is

The issue has found a prominent place in scholarship, news coverage, documentary filmmaking, and politics.<sup>21</sup> The extent of the problem is subject to debate, in large part based on conflicting studies and differing definitions of sexual assault. The National Institute of Justice's widely cited Campus Sexual Assault Study found that nearly one in seven university women surveyed experienced some form of unwanted sexual penetration.<sup>22</sup> When the question included any form of unwanted sexual contact—such as forced kissing or unwanted groping—studies found numbers closer to one in five or one in four female university students and one in twenty male university students.<sup>23</sup>

Students who experience sexual assault and other forms of sexual misconduct often find the school's response apathetic or hostile.<sup>24</sup> Victims of sexual misconduct face substantial institutional barriers to reporting the incident.<sup>25</sup> Proceedings provide little transparency or support for the victim to

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likely no singular explanation for why the problem of sexual assault on campuses receives more attention than off-campus assault. Much of it may be attributed to the trust in, and the legal obligations of, universities to provide safe spaces for students to study and live. See Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1996–97 (2016). This trust is betrayed by institutionalized ignorance or indifference to sexual assault. There may also simply be more—or easier—opportunities to create policy interventions in the context of universities and for universities to address sexual assault in this age group by providing legal obligations. It would be naïve, however, to ignore the fact that women who attend university are disproportionately white and of means, which may contribute to the political will to address the issue.

21. See Tuerkheimer, *supra* note 20, at 6–14; Janet Halley, *The Move to Affirmative Consent*, SIGNS (Nov. 10, 2015), <http://signsjournal.org/currentsaffirmative-consent/halley/> [<http://perma.cc/9GL3-KKVL>]; Jake New, *The 'Yes Means Yes' World*, INSIDE HIGHER ED (Oct. 17, 2014), <http://www.insidehighered.com/news/2014/10/17/colleges-across-country-adopting-affirmative-consent-sexual-assault-policies> [<http://perma.cc/UDK8-5RH8>] [hereinafter New, *Yes Means Yes*]; *The Hunting Ground* (CNN Films 2015); Memorandum from Pres. Barack Obama to the Heads of Exec. Dep'ts & Agencies, Establishing a White House Task Force to Protect Students from Sexual Assault (Jan. 22, 2014, 2:40 PM), <http://obamawhitehouse.archives.gov/the-press-office/2014/01/22/memorandum-establishing-white-house-task-force-protect-students-sexual-a> [<http://perma.cc/A9D9-E4ST>]; Tanya Somanader, *President Obama Launches the "It's On Us" Campaign to End Sexual Assault on Campus*, WHITE HOUSE BLOG (Sept. 19, 2014), <http://obamawhitehouse.archives.gov/blog/2014/09/19/president-obama-launches-its-us-campaign-end-sexual-assault-campus> [<http://perma.cc/PQ3M-U7GU>].

22. See Christopher Krebs & Christine Lindquist, *Setting the Record Straight on '1 in 5'*, TIME (Dec. 15, 2014), <http://time.com/3633903/campus-rape-1-in-5-sexual-assault-setting-record-straight/> [<http://perma.cc/257D-J6W6>].

23. See *id.*; DAVID CANTOR ET AL., REPORT OF THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT xiii (2015), <http://www.upenn.edu/ir/surveys/AAU/Report%20and%20Tables%20on%20AAU%20Campus%20Climate%20Survey.pdf> [<http://perma.cc/V2SP-825F>] (stating that over one in five women, one in twenty men have experienced unwanted sexual contact); Alan M. Gross et al., *An Examination of Sexual Violence Against University Women*, 12 VIOLENCE AGAINST WOMEN 288, 288 (2006) (explaining that twenty-seven percent of university women have experienced some form of unwanted sexual contact.); Nat'l Violence Res. Ctr., *Campus Sexual Assault* (2015), [http://www.nsvrc.org/sites/default/files/publications\\_nsvrc\\_factsheet\\_media\\_packet\\_campus-sexual-assault.pdf](http://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media_packet_campus-sexual-assault.pdf) [<http://perma.cc/U4DB-DARS>].

24. See Kristin Jones, *Barriers Curb Reporting on Campus Sexual Assault*, in SEXUAL ASSAULT ON CAMPUS, *supra* note 3, at 31, 31; Brake, *supra* note 3, at 69; Cantalupo, "Decriminalizing", *supra* note 3, at 486–90.

25. See JONES, *supra* note 24, at 31–45.

navigate the system and present evidence.<sup>26</sup> Schools sometimes handle the complaints by informally confronting the accused individual or pressuring the parties to resolve the issue in mediation.<sup>27</sup>

Federal and state legislators have passed several laws aimed at improving university responses to unwanted sexual contact. These laws regulate not only how schools report incidents of sexual assault but also their responses to these incidents.<sup>28</sup> Perhaps most notable are the requirements of Title IX, which prohibits discrimination based on sex in education programs receiving federal financial assistance—a category broad enough to include not only public but also nearly every private university.<sup>29</sup> Schools must have effective policies—including grievance procedures—to respond to peer sexual harassment that creates a hostile environment.

Title IX requires schools to enact policies and grievance procedures to respond to sexual violence. The Office of Civil Rights of the Department of Education's (OCR) 2011 Dear Colleague Letter provides guidance on Title IX requirements that specifically addressed sexual violence.<sup>30</sup> It calls for schools to

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26. See Cantalupo, "Decriminalizing", *supra* note 3, at 486–87 (describing how rape myths influence universities' administration of disciplinary procedures); Bill Buzenberg, *A Litany of Barriers... A Culture of Secrecy*, in *SEXUAL ASSAULT ON CAMPUS*, *supra* note 3, at 7, 7–8; JONES, *supra* note 24, at 33, 37–38; Kristen Lombardi, *Sexual Assault on Campus Shrouded in Secrecy* [hereinafter Lombardi, *Sexual Assault*], in *SEXUAL ASSAULT ON CAMPUS*, *supra* note 3, at 14, 14–30;

27. See Lombardi, *Sexual Assault*, *supra* note 26, at 28–30.

28. The Violence Against Women Act amended the Clery Act to require schools to report incidents of sex offenses, domestic violence, and dating violence. Violence Against Women Reauthorization Act of 2013, 20 U.S.C. § 1092(f)(1)(F)(iii) (2013). For discussion of how broadly these requirements may be interpreted, see Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 892–96 (2016).

29. See 20 U.S.C. § 1681 (2012); Letter from Russlyn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., Office for Civil Rights, to Colleagues 1 (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<http://perma.cc/TU3B-AZYP>] [hereinafter Dear Colleague Letter]; U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 1 (2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<http://perma.cc/KMT4-28NM>]. Title IX applies to any school—public or private—that benefits from its students' receipt of federal financial aid, and thus the statute appertains to nearly every university in the country. See Gersen & Suk, *supra* note 28, at 907, 907 n.119 (citing Lavinia M. Weizel, Note, *The Process that Is Due: Preponderance of the Evidence as the Standard of Proof for University Adjudication of Student-on-Student Sexual Assault Complaints*, 53 B.C. L. REV. 1613, 1615, 1615 n.11 (2012)). Title IX authorizes the Office of Civil Rights of the Department of Education (OCR) to enforce Title IX "by issuing rules, regulations, or orders of general applicability," and, if necessary, by terminating or refusing to grant federal assistance if a school does not comply. 20 U.S.C. § 1682 (2012); Anderson, *supra* note 20, at 1972 (quoting 20 U.S.C. § 1682). Students can also bring a private right of action alleging that the school acted with deliberate indifference in the face of actual knowledge of an incident of sexual violence. Sex discrimination prohibited by Title IX includes both the school's direct actions against a student and the school's conduct with regard to peer-on-peer sexual harassment. See Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,036 (Mar. 13, 1997); *Davis v. Monroe Cty. Bd. of Edu.*, 526 U.S. 629, 649–51 (1999); Anderson, *supra* note 20, at 1971; Gersen & Suk, *supra* note 28, at 898–99.

30. The Dear Colleague Letter made clear that Title IX requirements pertaining to sexual harassment included sexual violence, which it defined as "physical sexual acts perpetrated against a



take “immediate and effective steps to end sexual harassment and sexual violence.”<sup>31</sup> Among these required steps is the provision of “equitable grievance procedures.”<sup>32</sup> The OCR interprets Title IX as requiring “[a]dequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence.”<sup>33</sup> The Dear Colleague Letter also requires schools to use the “preponderance of the evidence” standard in their investigations, to provide complainants with a “prompt and equitable resolution” to their complaints, and to employ Title IX coordinators to ensure compliance with the law’s requirements.<sup>34</sup>

The Violence Against Women Act (VAWA) creates additional requirements for school disciplinary procedures in cases of alleged sexual assault, dating violence, domestic violence, and stalking.<sup>35</sup> Schools must employ a “prompt, fair, and impartial process.”<sup>36</sup> VAWA sets forth more specific requirements meant to increase fairness and transparency, including that the proceeding is “transparent to the accuser and accused,” and that the university provides “timely notice” of meetings at which the parties may be present and “timely and equal access” to all parties “to any information that will be used during informal and formal disciplinary meetings and hearings.”<sup>37</sup> Proceedings must also be conducted by “officials who do not have a conflict of interest or bias for or against the accuser or accused.”<sup>38</sup>

States have followed suit with their own requirements for schools that receive public money. California, for example, requires schools not only to comply with federal requirements in investigating sexual violence but also to use an “affirmative consent standard” in determining whether parties gave consent to sexual activity.<sup>39</sup> Under this standard, sexual consent must be an “affirmative, conscious, and voluntary agreement to engage in sexual activity” that cannot be established by lack of protest or resistance, or by silence.<sup>40</sup> Nearly 1,400 schools have adopted some form of the affirmative consent standard.<sup>41</sup>

University disciplinary proceedings share traits with criminal proceedings but are nonetheless quite distinct. They often concern allegations of conduct that is criminal in nature, such as sexual assault, and they may involve a fact-finding

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person’s will or where a person is incapable of giving consent due to the victim’s use of drugs or alcohol”; among the acts of sexual violence, it included “rape, sexual assault, sexual battery, and sexual coercion.” Dear Colleague Letter, *supra* note 29, at 1–2.

31. *See id.* at 2.

32. *See id.* at 10.

33. *See* Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. at 12,044; *see also* Anderson, *supra* note 20, at 1972.

34. *See* Dear Colleague Letter, *supra* note 29, at 10, 11.

35. Violence Against Women Reauthorization Act of 2013, 34 C.F.R. § 668 (2017).

36. 34 C.F.R. § 668.46(k)(1)–(2).

37. *See* § 668.46(k)(2).

38. *See id.*

39. *See* CA. EDUC. CODE § 67386(a)(1) (West 2016).

40. *See id.*

41. *See* Anderson, *supra* note 20, at 1980.

process to determine whether the accused committed the violation.<sup>42</sup> Yet university proceedings are civil in nature; the dispute is between private parties and is resolved by the school, not the criminal justice system. As such, they may encompass conduct that is not criminal. New York's requirement that schools use an affirmative consent standard, for example, creates a far more expansive definition of sexual assault than New York's criminal law.<sup>43</sup> A code of conduct that straddles the criminal and noncriminal is hardly unusual; universities have always had robust codes that regulate both conduct that is criminal (such as hazing, threats, and assaults) and noncriminal (such as academic dishonesty, misuse of university computer resources, and premarital sex).<sup>44</sup>

As a result, university disciplinary procedures regarding unwanted sexual conduct are investigative systems that have "the flavor of criminal tribunals" but not the substance.<sup>45</sup> Students may be accused of misconduct that would ordinarily be grounds for criminal conviction, yet because they have been accused of misconduct in a university disciplinary proceeding, they are not required to submit to the criminal justice system. Instead, they may end the process by withdrawing from the university. This choice is not without consequences, but it must still be distinguished from a criminal action, where the responsible party cannot opt out of the criminal justice system. Perhaps most strikingly, the consequences of a finding of responsibility do not approach the punishment and stigma of a criminal conviction. Students found responsible in a university disciplinary proceeding will never be imprisoned, have a criminal record, lose their right to vote, nor will they ever be forced to register as a sex offender. Because of these distinctions, procedural protections for parties—particularly the accused—are more meager than in the criminal system.<sup>46</sup>

University responses to sexual assault and legislation addressing these responses have faced criticism for doing both too little and too much. Corey Rayburn Yung's research found that schools continue to undercount incidents of sexual assault and only make substantial efforts to address the problem when they face government auditing and scrutiny.<sup>47</sup> Nancy Chi Cantalupo argues that

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42. See Gersen & Suk, *supra* note 28, at 906–07.

43. See *infra* Part IV.C.1

44. See, e.g., Rutgers Univ., *Revised Student Code of Conduct Part VII* (2015), <http://slwordpress.rutgers.edu/studentconduct/wpcontent/uploads/sites/46/2016/03/October2015UCSC.pdf> [<http://perma.cc/8FC4-QWFH>] (prohibiting academic dishonesty and unauthorized use of computers); Univ. of Notre Dame, *Standards of Conduct* (2017), <http://dulac.nd.edu/community-standards/standards/> [<http://perma.cc/MP7W-EL9B>] (prohibiting nonmarital sexual activity).

45. See Gersen & Suk, *supra* note 28, at 906–07.

46. See *id.* at 907; see also Anderson, *supra* note 20, at 1984–90. Students at public schools have the right to a hearing before the decision is made to expel them, but they are not entitled to a full hearing with the right to counsel, to confront and cross-examine witnesses, or to call witnesses of their own. See *Goss v. Lopez*, 419 U.S. 565, 582–83 (1970); *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 155–57 (5th Cir. 1961); see also Cantalupo, "Decriminalizing", *supra* note 3, at 512–13. Students at private schools are primarily protected by contract law. See *id.* at 514.

47. Corey Rayburn Yung, *Is Relying on Title IX a Mistake?*, 64 U. KAN. L. REV. 891, 899–900 (2016); Corey Rayburn Yung, *Concealing Campus Sexual Assault: An Empirical Examination*, 21 PSYCHOL., PUB. POL'Y & L. 1, 4–6 (2015).

Title IX creates incentives for schools to “bury their heads in the sand” with regard to peer sexual violence.<sup>48</sup> An investigation by the Center for Public Integrity concluded that schools often ignore Title IX requirements when responding to student accusations.<sup>49</sup> Disciplinary procedures are routinely dismissive of sexual assault accusations and often provide few consequences for those found responsible.<sup>50</sup> Title IX may also give schools incentive to find for whichever party is more likely to file a successful lawsuit if the finding is not in their favor, which most often may be the accused party.<sup>51</sup>

Others counter that regulation of sexual misconduct disciplinary proceedings protects victims at the expense of fairness to the accused. Accused individuals, for example, often have no access to legal representation or ability to question their accuser.<sup>52</sup> Some legal scholars and commentators criticize the preponderance of the evidence standard as too lax for the severity of a finding of sexual assault, particularly when combined with schools’ modest procedural protections for the accused.<sup>53</sup> They also take issue with the adoption of the affirmative consent standard, arguing that the standard is vague, overinclusive, and bears little relationship to how most people engage in sex.<sup>54</sup>

An overarching criticism is that relying on school disciplinary processes will move sexual misconduct out of the criminal justice system and into institutions

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48. Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 206, 224–51 (2011) [hereinafter Cantalupo, *Burying Our Heads*].

49. See generally SEXUAL ASSAULT ON CAMPUS, *supra* note 3.

50. Lave, *supra* note 12, at 915; Yung, *Is Relying on Title IX a Mistake?*, *supra* note 47, at 891–93; Kristin Lombardi, *A Lack of Consequences for Sexual Assault* [hereinafter Lombardi, *A Lack of Consequences*], in SEXUAL ASSAULT ON CAMPUS, *supra* note 3, at 55, 55–68.

51. Yung, *Is Relying on Title IX a Mistake?*, *supra* note 47, at 902.

52. See Nancy Gertner, *Complicated Process*, 125 YALE L.J. F. 442, 444–48 (2016); Open Letter from Members of the Penn Law School Faculty 4 (Feb. 18, 2015), <http://media.philly.com/documents/OpenLetter.pdf> [<http://perma.cc/8L4U-UJ6J>] [hereinafter Penn Letter]; Joseph Cohn, *Campus Is a Poor Court for Students Facing Sexual Misconduct Charges*, CHRON. HIGHER EDUC., (Oct. 1, 2012), <http://www.chronicle.com/article/Campus-Is-a-Poor-Court-for/134770/> [<http://perma.cc/EUA3-7AM8>]; see also Anderson, *supra* note 20, at 1985 (outlining critiques); Jed Rubenfeld, *Mishandling Rape*, N.Y. TIMES (Nov. 15, 2014), [http://www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html?\\_r=0](http://www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html?_r=0) [<http://perma.cc/X7LX-4NQY>]; Emily Yoffe, *The College Rape Overcorrection*, SLATE (Dec. 7, 2014), [http://www.slate.com/articles/double\\_x/doublex/2014/12/college\\_rape\\_campus\\_sexual\\_assault\\_is\\_a\\_serious\\_problem\\_but\\_the\\_efforts.html](http://www.slate.com/articles/double_x/doublex/2014/12/college_rape_campus_sexual_assault_is_a_serious_problem_but_the_efforts.html) [<http://perma.cc/L7CC-345G>]. Others counter that these issues are not unique to sexual assault—students accused of cheating or hazing would face the same procedures and limited rights. Anderson, *supra* note 20, at 1985–87.

53. See Gertner, *supra* note 52, at 444; Cohn, *supra* note 52; Rubenfeld, *supra* note 52; Yoffe, *supra* note 52; see also Anderson, *supra* note 20, at 1985.

54. See Gertner, *supra* note 52, at 448; Aya Gruber, *Anti-Rape Culture*, 64 U. KAN. L. REV. 1027, 1037–39 (2016); Aya Gruber, *Rape Law Revisited*, 13 OHIO ST. J. CRIM. L. 279, 289–93 (2016); Yoffe, *supra* note 52; Robert Carle, *How Affirmative Consent Laws Criminalize Everyone*, FEDERALIST (Mar. 30, 2015), <http://thefederalist.com/2015/03/30/how-affirmative-consent-laws-criminalize-everyone/> [<http://perma.cc/4Y6K-XQP7>]; Rubenfeld, *supra* note 52; see also Kimberly Kessler Ferzan, *Consent and Culpability*, 13 OHIO ST. J. CRIM. L. 397, 397 (2016) (discussing affirmative consent in the context of criminal law).

that lack the capacity to fairly and effectively handle accusations.<sup>55</sup> According to this argument, universities should adhere to their role as educators because they lack the investigatory and adjudicatory expertise of judges, prosecutors, and police.<sup>56</sup> Schools also lack the resources to produce evidence. Unlike police and criminal court systems, universities have no forensic laboratories to analyze physical evidence and no power to subpoena records or witnesses.<sup>57</sup> Critics argue that increasing universities' responsibility to investigate and adjudicate sexual misconduct forces them into a role to which they are poorly suited.<sup>58</sup>

It is inaccurate, however, to paint sexual misconduct proceedings as a zero-sum choice between a competent criminal justice system and an incompetent school disciplinary system.<sup>59</sup> Critics are correct that increased reliance on university disciplinary proceedings can decrease the extent to which students approach the criminal justice system, and this shift has costs.<sup>60</sup> Yet schools must respond to the misconduct of their students, especially where such misconduct may also constitute a criminal offense.<sup>61</sup> It would be absurd to say that universities should take no action to respond to a student stealing from, hazing, or attacking another student or committing vandalism. School codes should prohibit all such actions, and schools should respond to violations of their codes; universities have adjudicated such misconduct for decades.<sup>62</sup>

The issue is therefore not whether schools should handle accusations of sexual assault, but how they should improve their responses. Schools have a history of responding particularly poorly to incidents of sexual misconduct. One solution to this is to reduce the adversarial and adjudicatory nature of sexual assault disciplinary proceedings in certain circumstances. Part IV.B argues that restorative justice provides a promising supplement for school responses to sexual misconduct. It can respond directly to the needs of victims and responsible parties in ways that traditional disciplinary proceedings cannot. Moreover, it is particularly suited to the goals of university disciplinary proceedings, which seek to protect, educate, and rehabilitate rather than merely

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55. See Penn Letter, *supra* note 52, at 3–5; Rubinfeld, *supra* note 52; Cohn, *supra* note 52; see also Anderson, *supra* note 20, at 1994–95 (describing arguments against university disciplinary proceedings).

56. See Penn Letter, *supra* note 52, at 3–5; Rubinfeld, *supra* note 52; Cohn, *supra* note 52; see also Anderson, *supra* note 20, at 1994–95.

57. See Anderson, *supra* note 20, at 1994; Cantalupo, “Decriminalizing”, *supra* note 3, at 517; Lombardi, *A Lack of Consequences*, *supra* note 50, at 59–60.

58. See Anderson, *supra* note 20, at 1994–95 (describing arguments); Lombardi, *A Lack of Consequences*, *supra* note 50, at 59–60; Penn Letter, *supra* note 52, at 3–5; Rubinfeld, *supra* note 52; Cohn, *supra* note 52.

59. See Anderson, *supra* note 20, at 1995.

60. See *infra* Part IV.C.4.

61. See Anderson, *supra* note 20, at 1996–97; Suzanne B. Goldberg, *Is There Really a Sex Bureaucracy?*, 7 CALIF. L. REV. ONLINE 107, 109–11 (2016) (describing how university policies and disciplinary procedures police a wide variety of student conduct).

62. See DAVID R. KARP, *THE LITTLE BOOK OF RESTORATIVE JUSTICE FOR COLLEGES AND UNIVERSITIES* 3–5 (2015) (discussing campus disciplinary proceedings for a student’s off-campus act of theft); Anderson, *supra* note 20, at 1996–97; Goldberg, *supra* note 61, at 109–11.

punish. Part IV.C argues, however, that the very attributes that make university disciplinary proceedings well suited to restorative justice may also create substantial drawbacks that schools must seriously consider if they undertake restorative justice processes for sexual misconduct.

## II. THE RESTORATIVE JUSTICE APPROACH

Restorative justice has no single definition or framework, but rather acts as a shorthand for a variety of approaches.<sup>63</sup> It brings together and gives voice to multiple stakeholders in the aftermath of an offense, requires the responsible party to accept responsibility for the harm he caused, and uses collective decision making to determine how to restore the victim and community and to prevent the offense from reoccurring.<sup>64</sup> Restorative justice brings together all parties with a stake in a particular offense to resolve collectively how to deal with the offense's aftermath and implications for the future.<sup>65</sup> Restorative justice scholar David Karp describes it as a

collaborative decision-making process that includes victims, offenders, and others who are seeking to hold offenders accountable by having them (a) accept and acknowledge responsibility for their offenses, (b) to the best of their ability, repair the harm they caused to victims and communities, and (c) work to reduce the risk of reoffense by building positive social ties to the community.<sup>66</sup>

A restorative justice process is only undertaken when the responsible party admits fault and is prepared to accept responsibility.<sup>67</sup> It therefore does not entail the procedures and deliberation for determining fault, such as the presentation and weighing of evidence.<sup>68</sup> Nor is it an adversarial proceeding in which fault is in dispute.<sup>69</sup> Because the determination of guilt is not an issue, restorative justice processes involve fewer procedural safeguards than a criminal

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63. See BRAITHWAITE, *supra* note 10, at 3–8; HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 26–27 (2015).

64. ZEHR, *supra* note 63, at 47–52; C. Quince Hopkins, *Tempering Idealism with Realism: Using Restorative Justice Processes to Promote Acceptance of Responsibility in Cases of Intimate Partner Violence*, 35 HARV. J. L. & GENDER 311, 315 (2012) [hereinafter Hopkins, *Tempering Idealism*]; Koss et al., *supra* note 11, at 246–47; JUSTINE DARLING, *RESTORATIVE JUSTICE IN HIGHER EDUCATION: A COMPILATION OF FORMATS AND BEST PRACTICES* 3 (2011). These concepts draw from practices of indigenous cultures such as the Maori of New Zealand, various first nations tribes in the United States, and the Mayan people of Guatemala. See Darling, *supra*; see also ZEHR, *supra* note 63, at 19–20; Hopkins, *Tempering Idealism, supra*, at 333.

65. BRAITHWAITE, *supra* note 10, at 11; Antony Duff, *Restoration and Retribution*, in *RESTORATIVE JUSTICE AND CRIMINAL JUSTICE*, *supra* note 10, at 43, 44.

66. See KARP, *supra* note 62, at 4. These definitions raise as many questions as they answer. Those seeking to implement restorative justice must determine, for example, which parties constitute stakeholders, what shape the process should take, and what restoration looks like.

67. See Koss et al., *supra* note 11, at 246; Stephen P. Garvey, *Restorative Justice, Punishment, and Atonement*, 2003 UTAH L. REV. 303, 312 (2003); Cara Suvall, *Restorative Justice in Schools: Learning from Jena High School*, 44 HARV. C.R.-C.L. L. REV. 547, 558 (2009).

68. See V.C. Geeraets, *Fictions of Restorative Justice*, 10 CRIM. L. & PHIL. 265, 268 (2016).

69. See *id.*

trial.<sup>70</sup>

Restorative justice is also defined by its concern with the multiple impacts of wrongdoing and the power it gives to the affected parties.<sup>71</sup> The process allows the victim to express how the wrongdoing has affected her.<sup>72</sup> It also provides opportunities for the friends and family of the victim and the perpetrator, as well as representatives of the community, to express to the perpetrator how his actions have harmed them.<sup>73</sup> The process grants these harmed individuals—as well as the responsible party—roles in a collaborative process to agree on the consequences the responsible party will face.<sup>74</sup> This stands in stark contrast to a traditional criminal justice processes, in which a judge determines a defendant's sentence after an adversarial process between the prosecution and defense.

The responsible party's consequences also differ significantly from the traditional criminal justice system—in part because of restorative justice's distinctive goals. Criminal justice is a system of punishment, informed by theories of punishment such as retributivism and utilitarianism.<sup>75</sup> Retributivists justify punishment based on the culpability of the punished, whereas utilitarians justify punishment based on its net benefits, including its ability to meet goals such as deterrence and protection.<sup>76</sup> In contrast, restorative justice focuses on repairing the harm caused to stakeholders such as victims, their friends and families, and the community.<sup>77</sup> The responsible party's consequences are based not on his desert but rather what the parties agree is the best means to repair the harm done.<sup>78</sup> In addition to restoring the affected individuals, the consequences should also strengthen the community norm that was violated and emphasize

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70. See *id.*; Kurki, *supra* note 10, at 307.

71. See ZEHR, *supra* note 63, at 36–38; Hopkins, *Tempering Idealism*, *supra* note 64, at 315.

72. See Koss et al., *supra* note 11, at 247; Heather Strang & Lawrence B. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15, 27, 35 (2003).

73. See BRAITHWAITE, *supra* note 10, at 10–11; Bremer, *supra* note 10, at 1089; Garvey, *supra* note 67, at 312; Koss et al., *supra* note 11, at 247; Suvall, *supra* note 67, at 557–58.

74. See BRAITHWAITE, *supra* note 10, at 12; Bremer, *supra* note 10, at 1091.

75. See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 1, 15–16, 83–84 (1843), as reprinted in JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 32–33 (6th ed. 2012); Ken Greenwalt, *Punishment*, in ENCYCLOPEDIA OF CRIME AND JUSTICE 1282, 1282–84 (Joshua Dressler ed., 2d ed. 2002), as reprinted in DRESSLER, *supra*, at 30–32.

76. See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 10 (1789) (discussing utilitarianism); LARRY ALEXANDER & KIMBERLY KESSLER FERZAN WITH STEPHEN J. MORSE, CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW 298, 300–02 (2009); R.A. DUFF, ANSWERING FOR CRIME 168–71 (2007); Andrew D. Leipold, *Race-Based Jury Nullification: Rebuttal (Part A)*, 30 J. MARSHALL L. REV. 923, 923–26 (1997), as reprinted in DRESSLER, *supra* note 75, at 29–38; Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609, 656 (1984) [hereinafter Robinson, *Imputed Criminal Liability*].

77. See DARLING, *supra* note 64, at 3; Hopkins, *Tempering Idealism*, *supra* note 64, at 334–35; Suvall, *supra* note 67, at 548, 557–58.

78. See Bremer, *supra* note 10, at 1091 (noting that consequences may be harsh and punitive or mild). This raises significant retributivist concerns about disproportionate punishment. Proponents of restorative justice respond with limitations such as the requirement that the agreed-upon outcome must not subject the responsible party to humiliation for humiliation's sake.

condemnation of the violation.<sup>79</sup>

The word “restorative” does not imply that the process will restore parties to their lives before the responsible party’s actions.<sup>80</sup> This may be impossible, especially in the event of serious harms.<sup>81</sup> It may also be undesirable, as it might mean a responsible party’s return to the attitudes and actions that led to his harmful behavior, or the victim’s return to an abusive relationship.<sup>82</sup> Rather than a return to the status quo, restorative justice seeks to transform—to build new identities, healthier relationships, and stronger communities.<sup>83</sup>

To this end, restorative justice analyzes offenses as the product of deeper systemic issues rather than an isolated act of an individual. Restorative justice processes encourage all parties to consider the responsible party’s experiences that led up to the violation and how to prevent recidivism by supporting the responsible party’s reintegration into the community.<sup>84</sup> They also allow parties to contemplate the underlying systemic issues that must be addressed to understand the offense’s cause and decrease future occurrences.<sup>85</sup> This approach stands in contrast to the traditional U.S. criminal justice system, which focuses on the responsible party’s individual choices and often ignores the broader context that led to those choices.<sup>86</sup>

Restorative justice processes can take place at different phases of the process.<sup>87</sup> These include conferencing or sentencing circles in which a victim and responsible party, their friends and family, and community representatives collaborate to share their experiences and determine an appropriate sentence for a responsible party who is pleading guilty.<sup>88</sup> Victim-responsible party mediation, in contrast, does not bring in the community, but rather is limited to the victim and responsible party.<sup>89</sup> It uses trained mediators to help the parties develop a reparative plan, though reaching an agreement is often secondary to the goals of communication and emotional healing.<sup>90</sup> In other circumstances, restorative justice processes may occur later, such as at post-incarceration conferences between convicted responsible parties and victims of sexual violence.<sup>91</sup>

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79. See Koss et al., *supra* note 11, at 253; Suvall, *supra* note 67, at 548.

80. See ZEHR, *supra* note 63, at 14–15.

81. See *id.*

82. See *id.*

83. See *id.*

84. See Koss et al., *supra* note 11, at 253; Suvall, *supra* note 67, at 548, 557–58.

85. See DARLING, *supra* note 64, at 3.

86. See *id.*

87. See ZEHR, *supra* note 63, at 56–73; Hopkins, *Tempering Idealism*, *supra* note 64, at 332–33; Kurki, *supra* note 10, at 294–303.

88. See Garvey, *supra* note 67, at 312–13; Koss et al., *supra* note 11, at 247–48; Kurki, *supra* note 10, at 297, 303.

89. See Kurki, *supra* note 10, at 294–95.

90. See *id.* at 295.

91. See Kathy Elton & Michell M. Roybal, *Restoration, A Component of Justice*, 2003 UTAH L. REV. 43, 53–54 (2003); C. Quince Hopkins, *The Devil Is in the Details: Constitutional and Other Legal Challenges Facing Restorative Justice Responses to Sexual Assault Cases*, 50 CRIM. L. BULL. ART 1

Restorative justice may also encompass “circles of support” for perpetrators returning to the community.<sup>92</sup> None of these processes are appropriate for every case; moreover, processes for determining criminal sentences require backup systems if they fail to meet their goals.<sup>93</sup>

Restorative justice is used in many circumstances, albeit rarely in the context of serious crimes. It is most commonly used in the juvenile justice system.<sup>94</sup> Among adult offenders, community conferences and victim-responsible party mediation are generally limited to low-level offenses, including driving while intoxicated, property offenses, drug offenses, less serious violent offenses, and child welfare offenses.<sup>95</sup> Only in rare cases has restorative justice been used in more serious or violent offenses.<sup>96</sup> Restorative justice experts and advocates, however, argue that it may be even more useful in serious offenses if used appropriately.<sup>97</sup>

Restorative justice is also permeating the disciplinary processes of educational institutions. Elementary and high schools have begun looking to restorative justice based on evidence that the dominant paradigm of excluding offending students exacerbates disciplinary problems.<sup>98</sup> Universities have also begun to use restorative justice in campus disciplinary procedures, albeit overwhelmingly for less serious violations of the school’s code of conduct, such as alcohol-related violations.<sup>99</sup>

Despite restorative justice’s expanding role, the criminal justice system has rarely employed restorative justice to address sexual misconduct. Restorative justice has only very rarely been employed in the context of sexual assault where responsible parties are adults.<sup>100</sup> Similarly, despite the increased role of restorative justice in campus disciplinary procedures, none or few of these programs have formally integrated sexual misconduct into their policies and procedures.<sup>101</sup>

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(2014) [hereinafter Hopkins, *The Devil Is in the Details*]; Koss et al., *supra* note 11, at 248..

92. See Koss et al., *supra* note 11, at 247.

93. See Garvey, *supra* note 67, at 315–16.

94. See generally Bremer, *supra* note 10; Kerrigan, *supra* note 10; Hopkins, *Tempering Idealism*, *supra* note 64, at 346; see also DALY, *supra* note 10, at 220; Kurki, *supra* note 10, at 298–301.

95. See BRAITHWAITE, *supra* note 10, at 57, 87, 111; Kurki, *supra* note 10, at 301; Schiff, *supra* note 10, at 318, 319–20; Tullis, *supra* note 10.

96. See Tullis, *supra* note 10.

97. See, e.g., ZEHR, *supra* note 63, at 38–39.

98. See Suvall, *supra* note 67, at 547, 549–50, 552–53.

99. David R. Karp & Casey Sacks, *Student Conduct, Restorative Justice, and Student Development: Findings from the STARR Project: A Student Accountability and Restorative Research Project*, 17 CONTEMP. JUST. REV. 1, 12 (2014).

100. See Mary P. Koss, *The RESTORE Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcomes*, 29 J. INTERPERSONAL VIOLENCE 1623, 1625 (2013).

101. See Koss et al., *supra* note 11, at 254.



### III. THE PROMISE AND PERIL OF RESTORATIVE JUSTICE FOR CAMPUS SEXUAL MISCONDUCT

#### A. *Distinguishing Campus Disciplinary Proceedings from Criminal Justice*

Campus disciplinary proceedings differ from the criminal justice system in several ways that affect the implementation of restorative justice processes. Perhaps most importantly, campus disciplinary proceedings are civil in nature, not criminal. They punish infractions on the school's disciplinary code, which is created by the institution and agreed to by individuals who choose to enroll in that institution.<sup>102</sup> The criminal justice system, in contrast, punishes for offenses that are created by the legislature and are binding upon all individuals within the jurisdiction.<sup>103</sup> If an individual violates the university's code, he or she is only subject to civil discipline, and only to the extent that the individual chooses to remain enrolled in the university.<sup>104</sup> Criminal law does not just discipline—it punishes, and its punishment is meted out by the state to represent the moral condemnation of society.<sup>105</sup> This punishment can be severe. It can result in imprisonment, probation, significant fines, mandatory lifelong registration, and the loss of voting rights. Unlike university proceedings, individuals cannot opt out of the criminal justice system.

Evaluating campus disciplinary proceedings therefore requires us to ask different questions than a similar analysis of the criminal justice system. Because campus proceedings are not criminal in nature, we need not begin with the foundational criminal law inquiry of “what should be punished?” (and the corollary, “why do we punish?”).<sup>106</sup> Instead, we can ask different foundational questions about the goals of the institution and of its disciplinary process in order to determine how best to achieve these goals.

The goals of university disciplinary proceedings certainly overlap with those of the criminal justice system. Campus disciplinary proceedings determine student responsibility and discipline only those responsible, echoing criminal law's concern with desert. They may also work to deter the responsible student and others from engaging in future misconduct. The consequences of misconduct—such as requiring sensitivity training or counseling—may rehabilitate the responsible party.

Yet the goals of campus disciplinary proceedings also differ substantially from those of the criminal justice system. This is not merely because campus systems are civil rather than criminal, but also because of the environment in which this civil system takes place: an institution for higher education.

Universities' primary goal is to educate their students and, in doing so, prepare them to become informed, responsible, and ethical members of

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102. See Lombardi, *A Lack of Consequences*, *supra* note 50, at 59.

103. Henry M. Hart Jr., *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 402–06 (1958), as reprinted in DRESSLER, *supra* note 75, at 1–7.

104. See Lombardi, *A Lack of Consequences*, *supra* note 50, at 60–61.

105. DRESSLER, *supra* note 75, at 1–7.

106. *Id.*

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society.<sup>107</sup> Universities may differ in how they think this is best accomplished and may diverge in the principles that guide their goals. But whatever the principles that guide their execution, universities are regularly and appropriately committed to instilling honesty, empathy, integrity, and responsibility in their students. It is therefore appropriate for campus codes of conduct and disciplinary proceedings to reflect these goals.

Part III.B argues that these attributes of campus disciplinary proceedings—as well as attributes of sexual assault and other sexual misconduct—are uniquely suited to a restorative justice approach. They avoid many of the criticisms prompted by restorative justice in the context of the criminal justice system and provide an environment that is in many ways ideally suited to restorative justice principles and procedures. Part III.C cautions that specific attributes of campus disciplinary procedures may create unique obstacles for the efficacy and fairness of restorative justice.

*B. The Promise of Restorative Justice for Campus Sexual Assault*

Restorative justice provides a promising framework for campus disciplinary proceedings related to sexual misconduct. The active involvement of the victim and responsible party in understanding the harm and shaping an appropriate response provides significant benefits to all parties, benefits lacking in traditional campus disciplinary processes. It can also strengthen community norms against sexual misconduct and leverage community actors to prevent future violations.

A university provides a compatible environment for restorative justice. The noncriminal nature of these disciplinary proceedings alleviates many concerns that plague the application of restorative justice in criminal proceedings. The goals of campus disciplinary procedures align closely with the goals of restorative justice—to restore and protect victims, educate and rehabilitate those who violate the rules, and strengthen norms that support the code.<sup>108</sup> These goals are particularly important in the context of sexual assault and other sexual misconduct, where campus social norms may excuse and encourage the behavior.

1. Restorative Justice Provides Benefits Lacking in Traditional University Disciplinary Proceedings

*a. Restorative Justice Provides Significant Benefits to Victims*

Victims' needs are far more complex than mere retribution. What a victim often desires is the opportunity to be heard about her experience, an acknowledgment of wrongdoing by the accused, a commitment to preventing future violations by the responsible party and university, and support from the

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107. See Goldberg, *supra* note 61, at 112–13, 120–21 (discussing educational mission of universities and how “schools choose to guide their students toward mutually respectful interpersonal conduct in many realms”).

108. See Anderson, *supra* note 20, at 1996–97, 1998 (discussing school goals of providing educational opportunity and transmitting knowledge, which require a safe learning environment).

university and community.<sup>109</sup> Andrea Parrot, an expert on campus acquaintance rape, notes that many victims of sexual assault “do not even attempt to have the assailant arrested; but they would like him to know that what he did was wrong, so that perhaps he will not repeat that type of behavior with others.”<sup>110</sup> Psychological studies of trauma demonstrate that talking about the harms she has experienced and hearing a public admission of responsibility and remorse can promote a victim’s recovery.<sup>111</sup> This is particularly important in the context of sexual misconduct, which is surrounded by a “norm of silence” that can further trauma.<sup>112</sup>

Traditional campus disciplinary procedures often fail to meet these needs. The victim’s participation may be limited to answering a factfinder’s questions about the incident.<sup>113</sup> She often lacks the opportunity to express fully her experience and to confront the responsible party with how his actions affected her.<sup>114</sup> Family and friends who support the victim may not have the opportunity to speak.<sup>115</sup> The traditional disciplinary process also affords the victim little, if any, role in determining the consequences that the responsible party faces.<sup>116</sup>

Restorative justice provides victims of sexual misconduct with a more powerful voice than traditional campus disciplinary processes.<sup>117</sup> Restorative

109. See Hopkins, *Tempering Idealism*, *supra* note 64, at 321–27.

110. Andrea Parrot, *Recommendations for College Policies and Procedures to Deal with Acquaintance Rape*, in *ACQUAINTANCE RAPE: THE HIDDEN CRIME* 368, 369 (Andrea Parrot & Larie Bechhofer eds., 1991); see also Hopkins, *Tempering Idealism*, *supra* note 64, at 321–27.

111. See Hopkins, *Tempering Idealism*, *supra* note 64, at 321–27.

112. See *id.* at 325.

113. See Lombardi, *Sexual Assault*, *supra* note 26, at 19–20; Penn Letter, *supra* note 52, at 3–5 (noting that students are not allowed to present statements, seek production of evidence, or confront witnesses).

114. See Lombardi, *Sexual Assault*, *supra* note 26, at 19–20; see also Penn Letter, *supra* note 52, at 3–5 (discussing lack of right to confront witnesses). The OCR does not require students be provided a full adversary hearing, but it does require that students “have equal opportunity to present relevant witnesses and other evidence.” Dear Colleague Letter, *supra* note 29, at 11. Schools could fulfill these requirements by limiting both the victim and responsible party’s abilities to present evidence and witnesses and question the opposing party’s witness.

115. See Lombardi, *A Lack of Consequences*, *supra* note 50, at 55–68.

116. Michaela Cross, *How Campus Rape Victims Get Hurt by the Laws that Are Supposed to Protect Them*, VICE (June 6, 2016), [http://www.vice.com/en\\_us/article/how-campus-rape-victims-get-hurt-by-the-laws-that-supposed-to-protect-them-title-ix](http://www.vice.com/en_us/article/how-campus-rape-victims-get-hurt-by-the-laws-that-supposed-to-protect-them-title-ix) [<http://perma.cc/N94B-CKED>]; Lombardi, *Sexual Assault*, *supra* note 26, at 19–23.

117. The power that restorative justice provides to victims can also encourage them to report sexual assault and other sexual misconduct. Sexual misconduct is vastly underreported. Victims are particularly unlikely to report sexual assault when they know the responsible party. This is in part because reporting often takes the process out of the victim’s hands. Compared to traditional campus disciplinary procedures, restorative processes allow victims to retain a significant degree of control over the process and the consequences the responsible party faces. According to Emily Renda, the former chair of the Sexual Assault Leadership Council and a sexual assault survivor, survivors often hesitate to report the incident because they fear strict punishment for the assaulter. See Jake New, *Expulsion Presumed*, INSIDE HIGHER ED (June 27, 2014), <http://www.insidehighered.com/news/2014/06/27/should-expulsion-be-default-discipline-policy> students-accused-sexual-assault [<http://perma.cc/B38B-QDFE>] [hereinafter New, *Expulsion*

justice provides a victim the opportunity to fully explain how the responsible party's action or actions affected her.<sup>118</sup> Moreover, it provides victims with direct involvement in shaping the consequences that a responsible party faces.<sup>119</sup>

Meeting these needs can be incredibly beneficial to a victim of sexual assault and other sexual misconduct. Arizona's RESTORE project—which studied a rare use of restorative justice in the context of sex crimes—surveyed participants about their reasons for choosing restorative justice and their experiences with it. Victims that participated in conferencing with the responsible party placed high value on explaining how the offense affected them, making the responsible party accountable for his actions, ensuring the defendant does not reoffend, and “tak[ing] back [their] power.”<sup>120</sup> They demonstrated a high level of satisfaction with the process, reporting that they felt safe, listened to, treated with respect, and supported during the conference.<sup>121</sup> They also uniformly agreed with the statement: “I did not feel blamed.”<sup>122</sup> All but one of the victims who participated in the conference agreed or strongly agreed that it was a success, and all strongly agreed that they would recommend the program.<sup>123</sup>

Restorative justice processes may also reduce a victim's generalized fear of victimization. This is a particularly salient concern for sexual assault, which often causes a victim trauma and reduces her ability to trust others.<sup>124</sup> In the university setting, victims often express trepidation at attending the same school as the responsible party or his friends and supporters. Restorative justice does not merely provide the victim with a supportive process, but also gives her the opportunity to confront both the responsible party and his supporters, as well as the ability to shape the reparation plan. This provides all parties the opportunity to explore the circumstances that led to the responsible party committing the offense and to address those circumstances directly.<sup>125</sup> For example, a responsible party who committed sexual assault may identify social cues in his upbringing or in the culture of his circle of friends that encouraged him to ignore signs of the victim's nonconsent. Exploring these circumstances—particularly in

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*Presumed*]. In what may seem counterintuitive, many victims may prefer a process that affords them power to tailor *less* severe and punitive consequences.

118. See ZEHR, *supra* note 63, at 22–23; Kurki, *supra* note 10, at 295 (noting the importance of victims' ability to express their feelings).

119. See Koss et al., *supra* note 11, at 247; see also ZEHR, *supra* note 63, at 22–23; Paul H. Robinson, *The Virtues of Restorative Processes, the Vices of “Restorative Justice”*, 2003 UTAH L. REV. 375, 376–77 [hereinafter Robinson, *The Virtues of Restorative Justice*].

120. See Koss, *supra* note 100, at 1643, tbl.3.

121. See *id.* at 1645 tbl.4, 1646 tbl.5.

122. See *id.* at 1646 tbl.5.

123. See *id.* at 1646 tbl.5., 1648 tbl.6.

124. See CDC SURVEY, *supra* note 5, at 1, 7 (discussing the psychological problems associated with sexual assault); Lynn Hecht Schafran, *Rape Is a Major Public Health Issue*, 86 AM. J. PUB. HEALTH 15, 15–16 (1996) (discussing the ways in which rape may impair a victim's ability to trust others).

125. See KARP, *supra* note 62, at 9; Robinson, *The Virtues of Restorative Justice*, *supra* note 119, at 376–77; Elton & Roybal, *supra* note 91, at 52.

the presence of the responsible party's friends and supporters—may provide an important tool in reducing the likelihood of reoffending. It can humanize the responsible party in the eyes of the victim, which can reduce victim fear.<sup>126</sup>

*b. Restorative Justice Provides Significant Benefits to Responsible Parties*

Traditional disciplinary proceedings allow responsible parties at best a passive role in taking responsibility for their actions. Traditional adversarial systems encourage responsible parties to deny or to minimize their culpability in order to avoid a finding of guilt or minimize their punishment.<sup>127</sup> Where responsible parties plead guilty or are found guilty by a jury, an adversarial system encourages them to take mere passive, rather than active, accountability.<sup>128</sup> Responsible parties usually never meet with and hear the perspectives of those they have wronged. They, too, have little role in shaping the consequences they face.

Restorative justice requires responsible parties to take a far more active role in accepting responsibility.<sup>129</sup> The perpetrator must hear a recounting of how his actions have affected the victim as well as other participants such as the victim's family and friends, the responsible party's family and friends, and members of the community. The process requires the responsible party to experience a full accounting of the impact of his actions, what some scholars deem "active accountability."<sup>130</sup>

Active accountability provides several benefits. Perhaps most obvious is that it helps the responsible party truly understand the wrongfulness of his action and the harm he has caused.<sup>131</sup> It also provides the responsible party the opportunity to express remorse in a way that adversarial processes do not—indeed, such processes often discourage the acceptance of responsibility.<sup>132</sup> While some responsible parties will doubtless have no interest in this benefit, others may embrace it. Several defendants in the RESTORE project chose the

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126. See KARP, *supra* note 62, at 9; Robinson, *The Virtues of Restorative Justice*, *supra* note 119, at 376; Elton & Roybal, *supra* note 91, at 52.

127. See Angela P. Harris, *Beyond the Monster Factory: Gender Violence, Race, and the Liberatory Potential of Restorative Justice*, 25 BERKELEY J. GENDER L. & JUST. 199, 200 (2010); Susan J. Szmania & Daniel E. Magis, *Finding the Right Time and Place: A Case Study Comparison of the Expression of Offender Remorse in Traditional Justice and Restorative Justice Contexts*, 89 MARQUETTE L. REV. 335 *passim* (2005); Hopkins, *Tempering Idealism*, *supra* note 64, at 313, 316–17, 320, 328 (noting that nonadmission of guilt is the norm in the criminal justice system, which discourages defendants from taking responsibility).

128. See KARP, *supra* note 62, at 10–11; Karp & Sacks, *supra* note 99, at 5.

129. See KARP, *supra* note 62, at 10–11.

130. See *id.* at 11–12; BRAITHWAITE, *supra* note 10, at 129; Garvey, *supra* note 67, at 314–15; Karp & Sacks, *supra* note 99, at 5.

131. See BRAITHWAITE, *supra* note 10, at 129; KARP, *supra* note 62, at 11–12; Garvey, *supra* note 67, at 314–15; Elton & Roybal, *supra* note 91, at 52.

132. See Szmania & Mangis, *supra* note 127 *passim* (noting that adversarial process limits ability for defendants to accept responsibility and show remorse, and restorative justice may allow better opportunity); Hopkins, *Tempering Idealism*, *supra* note 64, at 313, 316–17, 320 (stating that the criminal justice process disincentivizes acceptance of responsibility).

restorative justice process because they felt it afforded them a greater opportunity to take “direct responsibility for making things right” and to apologize to the victim.<sup>133</sup>

Active responsibility furthers the educational goals of the university’s disciplinary process.<sup>134</sup> It helps the responsible party understand and internalize the norms and principles that inform the rule, gives them a voice in determining how to rectify the harm that they caused and prevent it from occurring again, and pushes them to develop competence in listening to others’ perspectives, expressing remorse, and repairing fractured relationships.<sup>135</sup> These benefits are especially salient for disciplinary procedures that address sexual misconduct. I have written in more depth elsewhere about how social norms about sex and gender roles can prevent individuals from perceiving signs of nonconsent.<sup>136</sup> This not only makes sexual assault more likely, but also may make perpetrators less culpable; many simply may be unaware of the risk the other party is not consenting.<sup>137</sup> Those who are culpable simply may not understand the wrongfulness of their actions. Restorative justice helps break this cycle in ways that traditional disciplinary processes—where the responsible party passively accepts judgment—do not. It can educate the responsible party and all participants to understand consent and its importance.

It may also provide increased deterrence.<sup>138</sup> Responsible parties are more deterred from reoffending where they accept responsibility and perceive the consequences they face as legitimate.<sup>139</sup> Because a responsible party must hear the perspectives of those he harmed, he must not only acknowledge his guilt, but also experience a full accounting of the impact of his actions.<sup>140</sup> Understanding and accepting responsibility for this harm provides a “moral education” that can help prevent reoffending.<sup>141</sup>

Restorative justice may also prevent recidivism in that it determines the responsible party’s consequences. Unlike a trial or ordinary guilty plea, restorative justice involves the responsible party in determining the consequences of his actions, increasing his investment in the consequences he faces.<sup>142</sup> It is also more likely to integrate into these consequences means to

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133. See Koss, *supra* note 100, at 1642.

134. See KARP, *supra* note 62, at 8; Suvall, *supra* note 67, at 566; Karp & Sacks, *supra* note 99, at 5; Lombardi, *A Lack of Consequences*, *supra* note 50, at 59–60 (noting that disciplinary proceedings have educational goals).

135. See KARP, *supra* note 61, at 11–14; Karp & Sacks, *supra* note 99, at 4–6.

136. See Margo Kaplan, *Rape Beyond Crime*, 66 DUKE L.J. 1045, 1062–78 (2017).

137. See *id.*

138. See Garvey, *supra* note 67, at 314–15; Elton & Roybal, *supra* note 91, at 52. It may also provide an increased deterrent effect if the perpetrator finds it uncomfortable to discuss his wrongdoing with the victim, other affected parties, and with participants such as his own family and friends. Robinson, *The Virtues of Restorative Justice*, *supra* note 119, at 375.

139. See BRAITHWAITE, *supra* note 10, at 81–82; Suvall, *supra* note 67, at 559.

140. See Garvey, *supra* note 67, at 314–15.

141. See *id.*; see also Elton & Roybal, *supra* note 91, at 52.

142. See ZEHR, *supra* note 63, at 23–25; KARP, *supra* note 62, at 20–23.

support the responsible party and help prevent recidivism.<sup>143</sup> Restorative justice can rehabilitate the student's social ties to the campus community, reducing his risk of future misconduct.<sup>144</sup> It can create a reparation plan that focuses on reintegrating the responsible student and reducing his risk of reoffending.<sup>145</sup> Students who feel a strong sense of membership in the campus community are more likely to abide by the community standards.<sup>146</sup>

c. *Community Involvement Is Critical to Resolving the Problem of Campus Sexual Misconduct*

Sexual misconduct does not occur in a vacuum. It is cultivated by norms and policies that encourage rape myths and frame sex as something aggressive men win from women offering token resistance.<sup>147</sup> These norms flourish in campus culture, within university organizations such as fraternities, and in university athletics.<sup>148</sup> University policies can encourage these attitudes by minimizing the harms of rape, protecting students responsible for sexual misconduct, or using disciplinary procedures that punish victims who come forward. Several schools, for example, allow athletics departments to oversee accusations against student athletes or punish women who report their rapes for violations of university rules against alcohol consumption and sex.<sup>149</sup>

143. See Koss, *supra* note 100, at 1625; Robinson, *The Virtues of Restorative Justice*, *supra* note 119, at 375; Elton & Roybal, *supra* note 91, at 52.

144. See Karp & Sacks, *supra* note 99, at 6.

145. See Suvall, *supra* note 67, at 567.

146. Karp & Sacks, *supra* note 99, at 6.

147. See AM. COLL. HEALTH ASS'N, SHIFTING THE PARADIGM: PRIMARY PREVENTION OF SEXUAL VIOLENCE 10 (2007) [hereinafter SHIFTING THE PARADIGM]; Katharine K. Baker, *Why Rape Should Not (Always) Be a Crime*, 100 MINN. L. REV. 221, 230, 247 (2015) [hereinafter Baker, *Why Rape Should Not*]; Kaplan, *supra* note 136, at 1062–78; Jill Filipovic, *Offensive Feminism: The Conservative Gender Norms that Perpetuate Rape Culture, and How Feminists Can Fight Back*, in YES MEANS YES: VISIONS OF FEMALE SEXUAL POWER AND A WORLD WITHOUT RAPE 13, 19–20 (Jaclyn Friedman & Jessica Valenti eds., 2008); Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 631 (2009); Catharine MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 YALE L.J. 2038, 2055–57 (2016); TRANSFORMING A RAPE CULTURE 5–7 (Emilie Buchwald et al. eds., 2005).

148. A. Ayres Boswell & Joan Z. Spade, *Fraternities and Collegiate Rape Culture: Why Are Some Fraternities More Dangerous Places for Women?*, 10 GENDER & SOC'Y 133 *passim* (1996); Cantalupo, *Masculinity & Title IX*, *supra* note 5, at 923–32; Todd W. Crosset et al., *Male Student-Athletes and Violence Against Women: A Survey of Campus Judicial Affairs Offices*, in DEVIANCE AND DEVIANTS: AN ANTHOLOGY 239, 240–41 (Richard Tewksbury & Patricia Gagné eds., 2000); MacKinnon, *supra* note 147, at 2055–57; Anita M. Moorman & Barbara Osbourne, *Are Institutions of Higher Education Failing to Protect Students?: An Analysis of Title IX's Sexual Violence Protections and College Athletics*, 26 MARQ. SPORTS L. REV. 545, 551–52 (2016); Michael Kimmel, *A Recipe for Sexual Assault*, ATLANTIC (Aug. 24, 2015), <http://www.theatlantic.com/education/archive/2015/08/what-makes-a-campus-rape-prone/402065/> [<http://perma.cc/48R8-QRGP>].

149. U.S. SENATE SUBCOMMITTEE ON FINANCIAL AND CONTRACTING OVERSIGHT, SEXUAL VIOLENCE ON CAMPUS 2 (2014); Jake New, *'You Called Me a Liar'*, INSIDE HIGHER ED (Sept. 9, 2016), <http://www.insidehighered.com/news/2016/09/09/student-writes-online-essay-accusing-u-richmond-mishandling-her-sexual-assault> [<http://perma.cc/B9GC-LDU7>] [hereinafter New, *'You Called Me a Liar'*]; B. David Ridpath, *The Attitude Toward Sexual and Athlete Violence in University*

Restorative justice addresses the broader determinants of sexual assault by involving friends, family, and community members. It requires the responsible party to engage with the community and listen to it and allows the community the opportunity to be heard.<sup>150</sup> The responsible party must consider the full impact of his actions on the many participants. But just as importantly, it permits the process to examine the multiple *causes* of the violation. Rather than consider the misconduct as an isolated incident perpetrated by an individual, restorative justice processes take into account the context in which the violation occurs and the underlying factors that led to the responsible party's behavior. This ranges from the responsible party's decision-making process to the school's environmental and structural factors that encourage sexual misconduct.<sup>151</sup> Through this process, participants can examine how these factors encourage sexual misconduct and how best to address them.

On a more micro level, those who support the responsible party can consider their role in his misconduct and how to prevent it in the future. A simple and obvious means of doing this is to commit to helping prevent the responsible party and others from offending in the future.<sup>152</sup> Beyond that, however, they can acknowledge their role in the offense and become important resources for preventing offenses from recurring.<sup>153</sup> This strategy of engaging "soft targets" is particularly useful where several actors have the ability to encourage or prevent future violations.<sup>154</sup> It may, therefore, be especially valuable to engage fraternities and sororities, as well as athletic teams and departments.<sup>155</sup> Rather than simply assessing the conduct of individual members,

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*Sports Must Change*, FORBES (Sept. 9, 2016), <http://www.forbes.com/sites/bdavidridpath/2016/09/15/the-attitude-toward-sexual-and-athlete-violence-in-university-sports-must-change/#7ed31cb4451d> [<http://perma.cc/R9WG-NQSP>]. Brigham Young University investigated women who reported being raped for honor code violations. If the sex was deemed consensual, the women would be found in violation of the school's honor code. The school only recently promised to change this practice after it received national attention. L.V. Anderson, *BYU Says It Will No Longer Punish Rape Victims for Violating School's Honor Code*, SLATE (Oct. 26, 2016), [http://www.slate.com/blogs/xx\\_factor/2016/10/26/byu\\_says\\_it\\_will\\_no\\_longer\\_punish\\_rape\\_victims\\_for\\_violating\\_the\\_school.html](http://www.slate.com/blogs/xx_factor/2016/10/26/byu_says_it_will_no_longer_punish_rape_victims_for_violating_the_school.html) [<http://perma.cc/T58L-XJBV>]; Whitney Evans, *Brigham Young Students Claim University Punished Rape Victims for Reporting*, NPR (Apr. 27, 2016), <http://www.npr.org/2016/04/27/475923583/brigham-young-students-claim-university-punished-rape-victims-for-reporting> [<http://perma.cc/MNP2-Q2RN>]; Jack Healy, *At Bringham Young, a Cost in Reporting a Rape*, N.Y. TIMES (Apr. 26, 2016), [http://www.nytimes.com/2016/04/27/us/rape-victims-brigham-young-university-honor-code-suspensions.html?\\_r=0](http://www.nytimes.com/2016/04/27/us/rape-victims-brigham-young-university-honor-code-suspensions.html?_r=0) [<http://perma.cc/785M-W2L9>]. Students have reported similar practices at other schools, such as Baylor University. *E.g.*, Emma Sarron Webster, *Baylor University Punished Sexual Assault Victims for Drinking*, TEEN VOGUE (Aug. 1, 2016), <http://www.teenvogue.com/story/baylor-university-silenced-rape-sexual-assault-victims> [<http://perma.cc/R2LL-RYBN>].

150. See Suvall, *supra* note 67, at 559–60.

151. ZEHR, *supra* note 63, at 28; Suvall, *supra* note 67, at 560–61.

152. See, e.g., BRAITHWAITE, *supra* note 10, at 110–11.

153. See *id.*; ZEHR, *supra* note 63, at 28. For example, in past drunk driving conferences, friends of the responsible party agreed to sign designated driver agreements and bar staff signed pledges to call taxis for the responsible party. BRAITHWAITE, *supra* note 10, at 110–11.

154. BRAITHWAITE, *supra* note 10, at 110–13.

155. See Boswell & Spade, *supra* note 148, at 136; Ridpath, *supra* note 149.



the restorative justice process can leverage these organizations as resources to prevent further offenses. Such efforts may include an honest accounting of how the culture and practices of these organizations encourage sexual assault as well as a commitment to strategies to minimize offending, such as employing regular trainings to prevent sexual assault, implementing a system of guarding rooms during fraternity parties, and designating sober individuals to ensure that intoxicated individuals arrive home safely.

Restorative justice programs can also engage with the broader university community and administration to consider how the school's policies and environment contribute to sexual assault and other sexual misconduct.<sup>156</sup> It may also, over time, provide the university with valuable qualitative data on the prevalence and causes of sexual assault. While schools may take sexual assault seriously in the abstract, they rarely believe sexual assault constitutes a problem on their campus. A recent survey of university presidents found that thirty-two percent believed that sexual assault was prevalent at U.S. universities, but only twenty-two percent believed it was widespread on their own campus.<sup>157</sup> Restorative justice can engage the administration as well as provide notice and evidence of the changes needed to prevent sexual assault.

Engaging schools as a whole to look for underlying causes is more successful at preventing misconduct than tackling incidents individually. Studies of conflict prevention in K–12 schools, for example, have demonstrated limited success when they dealt with isolated incidents.<sup>158</sup> Conflict prevention strategies are far more successful when implemented as part of a “whole-school” approach.<sup>159</sup> This approach links incidents of conflict to a larger program that seeks to change school culture, and in particular, cultural norms that encourage or allow bullying.<sup>160</sup> Incidents of misconduct therefore serve “as a resource to affirm the disapproval of bullying in the culture of the school.”<sup>161</sup>

The restorative justice process can serve a similar role in affirming a culture that respects sexual autonomy and rejects norms that encourage sexual misconduct. Strengthening these norms may have an even more powerful deterrent effect than the threat of sanction.<sup>162</sup> Participants' involvement in a process that allows all voices to be heard and uses consensus to shape consequences may also increase the students' perception of the system's moral credibility and legitimacy, which in turn can reduce the likelihood that students will violate sexual misconduct rules.<sup>163</sup>

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156. See Suvall, *supra* note 67, at 561–62.

157. Scott Jaschik & Doug Lederman, Co-Editors, Inside Higher Ed, The 2015 Inside Higher Ed Survey of College & University Presidents, Webinar 11 (2015) (on file with author).

158. See BRAITHWAITE, *supra* note 10, at 59–60.

159. *Id.* at 60, 67.

160. *Id.*

161. *Id.* at 60.

162. Robinson, *The Virtues of Restorative Justice*, *supra* note 119, at 375–77.

163. *Id.* at 376–77.

d. *Restorative Justice Processes Can Help Address Criticisms of Broader Sexual Misconduct Codes*

University codes of conduct commonly prohibit noncriminal behavior, including noncriminal sexual behavior.<sup>164</sup> A school's definition of sexual assault or sexual misconduct may be broader than its jurisdiction's criminal code. In New York, for example, state schools are required to use an affirmative consent standard in their definition of sexual assault. Specifically, the State University of New York (SUNY) schools' code requires that consensual sex is the result of "a knowing, voluntary, and mutual decision among all participants to engage in sexual activity."<sup>165</sup> It explains that affirmative 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.<sup>166</sup>

In contrast, the New York criminal code's definition of rape is far narrower. Where the victim's capacity to consent is not in question, rape requires either force or, for third degree rape, that the victim "clearly expressed that he or she did not consent to engage in such act, and a reasonable person in the actor's situation would have understood such person's words and acts as an expression of lack of consent to such act under all the circumstances."<sup>167</sup>

Because of these different standards, a student who violates SUNY's code may not be guilty of a criminal offense. For example, Jamie and Avery may be kissing and fondling each other. Avery does not want to have intercourse but freezes when Jamie proceeds. Jamie believes that Avery wants to have intercourse because Avery does not say no or push Jamie away. Jamie would not be convicted for rape unless a jury found beyond a reasonable doubt that Avery "clearly expressed" a lack of consent to engage in intercourse.<sup>168</sup> It would be easier to demonstrate that Jamie may have violated SUNY's code because the intercourse was not "a knowing, voluntary, and mutual decision" by both participants, and Avery's freezing did not "create clear permission regarding willingness to engage in the sexual activity."<sup>169</sup>

Restorative justice may be particularly useful where students have engaged in sexual conduct that, like the above hypothetical, violates university rules but nonetheless falls outside the ambit of the criminal law. In the "Jamie and Avery"

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164. Anderson, *supra* note 20, at 1997–98 (discussing noncriminal violations that schools adjudicate). See *supra* note 149 for examples of noncriminal honor code violations.

165. STATE UNIVERSITY OF NEW YORK SEXUAL VIOLENCE PREVENTION WORKGROUP, DEFINITION OF AFFIRMATIVE CONSENT, <http://system.suny.edu/sexual-violence-prevention-workgroup/policies/affirmative-consent/> [<http://perma.cc/MG8W-FKHS>] [hereinafter SUNY DEFINITION].

166. *Id.*

167. N.Y. PENAL LAW § 130.05 (McKinney 2013).

168. *See id.*

169. SUNY DEFINITION, *supra* note 165.

hypothetical, Jamie believed that Avery wanted to have sex, but failed to obtain “clear permission” from Avery, violating the university’s affirmative consent standard. In these circumstances, however, Jamie may have honestly believed that Avery desired intercourse and may not have even perceived the risk that Avery did not. In such circumstances, while Jamie did not obtain clear permission, he may have nonetheless only been negligent as to Avery’s lack of desire to engage in intercourse.<sup>170</sup> A negligent actor is less culpable than an individual who is aware or even reckless (aware of a substantial and unjustifiable risk) as to his partner’s lack of consent.<sup>171</sup>

A restorative justice approach provides a more educational and less punitive method of holding Jamie accountable. This educational approach is particularly useful where—as with affirmative consent—the student is merely negligent or the standard is vague. Where a standard is vague and does not reflect common sexual norms, a student may honestly not understand the wrongfulness of his behavior. Restorative justice gives the victim a voice to help the responsible party understand the harmfulness of his behavior. Together, parties can reach a reparation plan that is truly restorative rather than merely punitive. This process raises fewer concerns about unduly harsh sanctions for students who are less blameworthy.

2. The Compatibility of University Disciplinary Systems and Restorative Justice Processes

a. *Restorative Justice is a Good Fit for the Goals of University Discipline*

Many criticisms levelled at restorative justice are far less applicable to university disciplinary hearings, which have neither the consequences nor weight of a criminal conviction. Retributivist concerns that criminal justice should focus on punishment in accordance with desert rather than restoration are in large part driven by the unique nature of criminal convictions.<sup>172</sup> Setting aside whether these criticisms of restorative justice are valid, they are simply far less concerning in the context of institutional disciplinary proceedings. University disciplinary proceedings are noncriminal and nonpunitive. Theories of punishment simply cannot, and should not, inform university disciplinary proceedings as they do criminal justice.

Restorative justice is a good fit for university discipline because of the specific ways its goals differ from criminal justice. A university’s goals include educating individuals and creating and sustaining a community that encourages students to become responsible, ethical, and educated members of society. Restorative justice offers an approach that focuses on educating responsible parties on the wrongful nature and impact of their actions and strengthening

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170. See Ferzan, *supra* note 54, at 434; Kaplan, *supra* note 136, at 1076.

171. See Ferzan, *supra* note 54, at 424–27, 434; Kaplan, *supra* note 136, at 1076.

172. See DRESSLER, *supra* note 75, at 1–7; KARP, *supra* note 62, at 12–13; Suvall, *supra* note 67, at 562.

community norms against the behavior.<sup>173</sup>

This approach may play a particularly important role in addressing sexual misconduct in higher education. Social norms and rape myths normalize and perpetuate sexual misconduct.<sup>174</sup> Sexual misconduct is not merely the isolated act of an individual, but also the result of a culture that fosters male sexual aggression and violence against women.<sup>175</sup> Rape culture perpetuates “the attitude that men are entitled to anything from women, as they are people and [women] are the designated sex class.”<sup>176</sup> It discourages individuals from perceiving signs of nonconsent and encourages men to perceive a woman’s resistance as insincere.<sup>177</sup> The persistence of rape culture on university campuses and its link to the sexual assault of women by men are well documented.<sup>178</sup>

These norms not only encourage sexual assault but also thwart responses to it. In *Rape Beyond Crime*, I argued that these social norms make prosecution difficult because of their influence over factfinders’ interpretation of the facts and law; indeed, they may have a stronger role in jury outcomes than the jurisdiction’s legal standard.<sup>179</sup> These norms also are likely to thwart the effectiveness of adversarial university disciplinary procedures by discouraging factfinders from finding the accused party responsible for a violation, particularly in the context of acquaintance rape.<sup>180</sup>

Restorative justice approaches address these concerns in several ways. Providing the option of a restorative justice process may encourage responsible

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173. See DARLING, *supra* note 64, at 3; KARP, *supra* note 62, at 4; Suvall, *supra* note 67, at 561–62, 566.

174. See NICOLA GAVEY, JUST SEX?: THE CULTURAL SCAFFOLDING OF RAPE 35 (2005); Kaplan, *supra* note 136, at 1098; Elizabeth Lopatto, *Rape Culture Is a Public Health Issue*, FORBES (May 24, 2014), <http://www.forbes.com/sites/elizabethlopatto/2014/05/24/rape-culture-is-a-public-health-issue/#13cc0c2ac7c1> [<http://perma.cc/7MDJ-TS2E>]; see also Filipovic, *supra* note 147, at 18–19 (arguing that society sees sex as something that men “do” to women); Tracy N. Hipp et al., *Justifying Sexual Assault: Anonymous Perpetrators Speak Out Online*, PSYCHOL. VIOLENCE 5–6 (2015), <http://dx.doi.org/10.1037/a0039998> [<http://perma.cc/55WU-6A46>] (describing attitudes and social scripts that contribute to rape).

175. See GAVEY, *supra* note 174, at 35; HARDING, *supra* note 20, *passim*; SHIFTING THE PARADIGM, *supra* note 147, at 7, 10; TRANSFORMING A RAPE CULTURE, *supra* note 147, at xi; Dan Subotnik, “Hands Off”: Sex, Feminism, Affirmative Consent, and the Law of Foreplay, 16 S. CAL. REV. L. & SOC. JUST. 249, 252 (2007) (discussing the concept of “rape culture”); Emily Suran, *Title IX and Social Media: Going Beyond the Law*, 21 MICH. J. GENDER & L. 273, 277–78 (2014) (discussing the history of the term “rape culture”); Joyce E. Williams, *Rape Culture*, in 8 THE BLACKWELL ENCYCLOPEDIA OF SOCIOLOGY 3783, 3783 (George Ritzer ed., 2007).

176. Lopatto, *supra*, note 174; see also Filipovic, *supra* note 147, at 18–19 (arguing that society sees sex as something that men “do” to women); Hipp et al., *supra* note 174, at 5 (describing attitudes that lead to rape, including the view of women as objects that exist for sexual gratification); *id.* at 6 (describing sexual scripts that contribute to victim blaming and the objectification of and hostility toward women as components of “what some describe as rape culture”).

177. See Kaplan, *supra* note 136, at 1066.

178. See Katharine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663, 666–79 (1999) [hereinafter Baker, *Sex, Rape, and Shame*]; Boswell & Spade, *supra* note 148, at 133–34.

179. See Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance-Rape Cases*, 158 U. PA. L. REV. 729, 781–82 (2010); Kaplan, *supra* note 136, at 1087.

180. See Parrot, *supra* note 110, at 369–70.

parties to admit fault. A responsible party may prefer the possibility of being involved in a process that gives him a more active role in determining the outcome, particularly when the other option is an adversarial process that could result in harsher sanctions. The opportunity to hear the victim's perspective and understand his own wrongdoing may also appeal to many responsible parties.<sup>181</sup> This is particularly true for responsible parties who are legitimately remorseful for the harm they caused but are encouraged to take a defensive stance in a more adversarial process.

A restorative justice process can also strengthen community norms against sexual misconduct more effectively than an adversarial system. It serves a more potent educational function because it provides parties—in particular the victim and the community—the ability to share their experiences and perspectives. Providing this forum educates not only the responsible party, but also his supporters (and, depending on how public the forum, the broader community) about the content of sexual misconduct rules and the harmful effects of their violation.<sup>182</sup> The restorative justice process may also strengthen community norms against sexual misconduct through the reparations process, which may require the responsible party to make a public apology or to use their experience to educate others about sexual misconduct and the social norms that encourage it.<sup>183</sup> In these ways, the restorative justice process can educate the campus community about misconduct rules, thereby strengthening norms against sexual misconduct.<sup>184</sup>

*b. Less Severe and More Rehabilitative Consequences Are Appropriate to University Disciplinary Procedures*

Concerns about the nature of reparation plans are also less troublesome in a university setting than in the criminal justice system. Reparation plans often eschew imprisonment favored by the traditional criminal justice process. Instead, they are more likely to employ forms of restoration such as community service, apology, or financial reparations. Some scholars criticize restorative justice's less severe consequences, particularly if they result in punishment that is disproportionate to the offense.<sup>185</sup> Retributivism, the dominant theory of

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181. See Koss, *supra* note 11, at 20.

182. See Suvall, *supra* note 67, at 566.

183. See Baker, *Sex, Rape, and Shame*, *supra* note 178, at 699–700. Baker's important work discusses the effect of social norms on rape and its implications for university disciplinary proceedings. She suggests shaming sanctions to change social norms. It is important, however, to distinguish her analysis from a restorative approach. *Sex, Rape, and Shame* assumes an adversarial system of university discipline, and her discussion does not include the active involvement of the responsible party in creating a plan for restoration. See *id.* at 698–702. She also advocates “demeaning sanctions,” which are inconsistent with the principles of restorative justice. See *id.* at 701; BRAITHWAITE, *supra* note 10, at 12–16 (noting that restorative justice's principles prohibit a reparation plan that is degrading).

184. See Karp & Sacks, *supra* note 99, at 6–7 (noting that students are more likely to follow rules when they understand them); Suvall, *supra* note 67, at 559–60.

185. See BRAITHWAITE, *supra* note 10, at 125–30; Duff, *supra* note 65, at 57; Garvey, *supra* note

criminal justice in the United States, allots punishment in accordance with desert.<sup>186</sup> While a restorative justice process may certainly consider a responsible party's desert, it is not, in theory, limited by notions of desert.<sup>187</sup> Instead, restorative justice theory limits punishment to what is mandated by law and that which is not cruel and degrading.<sup>188</sup> This could allow perpetrators to receive far more or far less punishment than they deserve. This criticism stands even if the victim agrees to lax consequences, as the criminal justice system speaks on behalf of a harm and wrong to society, not just the victim.<sup>189</sup>

Yet these less severe consequences are appropriate for university disciplinary proceedings. University disciplinary proceedings are, by nature, far less severe than the criminal justice process. University codes are not criminal

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67, at 307–08; Robinson, *The Virtues of Restorative Justice*, *supra* note 119, at 386.

186. See Elton & Roybal, *supra* note 91, at 47–48.

187. See BRAITHWAITE, *supra* note 10, at 16. The potential conflicts between restorative justice and retributivism may in part be attributed to their differing premises. Retributivism is a theory of punishment; restorative justice is not. *Id.* at 5–6; see also Bremer, *supra* note 10, at 1089 (describing restorative justice as an alternative to a retributive system). Restorative justice is focused on remediation and requires a responsible party to make amends in accordance with the outcome of the process. KARP, *supra* note 62, at 13–14; Bremer, *supra* note 10, at 1089; Elton & Roybal, *supra* note 91, at 50; Garvey, *supra* note 67, at 307. It is unconcerned with the responsible party's suffering. KARP, *supra* note 62, at 13–14; ZEHR, *supra* note 63, at 30–32; Bremer, *supra* note 10, at 1089; Elton & Roybal, *supra* note 91, at 50; Garvey, *supra* note 67, at 307. *But see* Duff, *supra* note 65, at 49. Some restorative justice scholars do not even consider the burden that a responsible party suffers in making restitution as punishment, but rather as incidental to the goal of restoring the victim. KARP, *supra* note 62, at 13 (noting that the goal is to repair the damage, not to cause suffering—which should be avoided if possible); Duff, *supra* note 65, at 49; Garvey, *supra* note 67, at 307–08. Retributivism, in contrast, is concerned with punishment and what circumstances justify the suffering of punishment. KARP, *supra* note 62, at 13–14; Bremer, *supra* note 10, at 1089; Elton & Roybal, *supra* note 91, at 50; Garvey, *supra* note 67, at 307. Some of these concerns may be alleviated by adopting retributivism as a limiting principle for restorative justice processes. This would permit parties to agree to consequences that are proportionate to the responsible party's deservingness. Duff, *supra* note 65, at 57 (arguing that reparation should not be disproportionate in its severity to the seriousness of the crime); Robinson, *The Virtues of Restorative Justice*, *supra* note 119, at 386 (arguing that restorative justice should only be used for serious crimes if it employs equally serious sentences). In Canada, for example, restorative justice processes are limited by statutory requirements that sentences “must be proportionate to the gravity of the offence and the degree of responsibility of the offender.” Julian V. Roberts & Kent Roach, *Restorative Justice in Canada: From Sentencing Circles to Sentencing Principles*, in RESTORATIVE JUSTICE AND CRIMINAL JUSTICE, *supra* note 10, at 237, 237. The extent to which such limitations are compatible with restorative justice principles is subject to debate. Forcing participants to provide a minimum punishment may thwart the goal of empowering participants and encouraging forgiveness.

Meanwhile, criminal justice scholars debate the extent to which punishment is at all consistent with restorative justice. Stephen Garvey, for example, writes that restorative justice necessarily punishes responsible parties less than they deserve because it does not punish them at all; he argues that because participants agree to endure the suffering inherent in the outcome, restorative justice provides atonement but not suffering. Garvey, *supra* note 67, at 311–16. Antony Duff disagrees, arguing that punishment be self-imposed and that restorative justice provides a type of “secular penance” that is not only consistent with, but can form an important part of, retributive punishment. Duff, *supra* note 65, at 53–55.

188. BRAITHWAITE, *supra* note 10, at 12.

189. DRESSLER, *supra* note 75, at 1–7.

law—they are institutional rules that students have agreed to follow. Universities discipline students who violate this code in order to educate their students, respond to and protect those hurt by violations, cultivate an environment conducive to education, and maintain their institutional principles.<sup>190</sup> Therefore, university disciplinary procedures are, by design, more rehabilitative and educational than punitive.<sup>191</sup> A reparation plan that seeks to restore the victim and rehabilitate the responsible party rather than punish him is well suited to the university system, especially when the plan is agreed upon by all participants in the restorative process.

Disproportionate consequences may still raise valid concerns in the university disciplinary process, but are less alarming in an institutional setting than they would be in the criminal justice system. A restorative plan that is grossly disproportionate to the violation raises concerns about whether the student is being unfairly targeted. Disproportionate consequences—whether excessively severe or light—can also undermine the legitimacy of the disciplinary system. But such disproportionate consequences are potentially *less* likely where all parties must agree to the consequences than in traditional disciplinary processes, where the consequences are determined by the institution alone.

The restorative justice process responds to the unique needs of each victim and responsible party by giving them an active role in determining the appropriate consequences. The traditional system of determining student responsibility is often unresponsive to victim concerns about disproportionately light or severe consequences in the context of sexual assault. Many victims feel that the perpetrators face too few consequences, and that the process does not appropriately consider the victims' safety and experiences.<sup>192</sup> Other victims are uncomfortable with strictly "punitive" sanctioning and harsh sanctions such as expulsion.<sup>193</sup> A study of campus disciplinary procedures across several universities demonstrated that responsible parties felt a higher level of satisfaction with restorative justice outcomes than with traditional campus disciplinary procedures.<sup>194</sup> Victims of sexual assault who used restorative justice in the criminal justice system also expressed high levels of satisfaction with redress plans; in Arizona's RESTORE project, all victims who were present for the restorative justice conference believed that the redress plan was fair (with sixty percent "strongly agree[ing]" it was fair) and eighty-three percent believed that "justice was done."<sup>195</sup>

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190. Anderson, *supra* note 20, at 1996–98 (noting that the school disciplinary system has different goals than the criminal justice system, notably to provide educational opportunity, to protect students, and ensure a safe learning environment).

191. Lombardi, *A Lack of Consequences*, *supra* note 50, at 59–60.

192. See, e.g., Christina Cauterucci, *Accused Rapist Found Culpable by Majority of Two Panels Still Plays Stanford Football*, SLATE (Dec. 30, 2016, 1:36 PM), [http://www.slate.com/blogs/xx\\_factor/2016/12/30/accused\\_rapist\\_found\\_culpable\\_by\\_majority\\_of\\_two\\_panels\\_still\\_plays\\_stanford.html](http://www.slate.com/blogs/xx_factor/2016/12/30/accused_rapist_found_culpable_by_majority_of_two_panels_still_plays_stanford.html) [<http://perma.cc/KC43-SR2N>].

193. See New, *Expulsion Presumed*, *supra* note 117.

194. Karp & Sacks, *supra* note 99, at 14.

195. Koss, *supra* note 100, at 1646, 1648 tbls.5 & 6. Victims who were not present for the

c. *Campus Processes Raise Fewer Concerns About Coercion*

Sexual misconduct proceedings should not use restorative justice processes without the voluntary agreement of the victim and the responsible party. In a criminal justice setting, responsible parties charged with sexual assault face a stark choice between either restorative justice or the traditional criminal justice system, which often involves a guilty plea or trial. This dire choice prompts some critics to argue that the decision to undergo restorative justice is never truly voluntary.<sup>196</sup> Richard Delgado argues that responsible parties are inherently ill-informed when they make their choice at such an early stage in the proceedings.<sup>197</sup> V.C. Geeraets contends that responsible parties' decisions are necessarily coerced by the prospect of trial.<sup>198</sup>

Criticisms about the voluntary nature of the process are less salient in the university disciplinary context than they are in the criminal justice context.<sup>199</sup> University disciplinary procedures do not constrain a responsible party's choice in the same manner. An individual who does not choose the restorative justice process faces an institutional disciplinary review, not a criminal trial. In the alternative, the individual has the option to leave the university and thereby nullify its power to discipline him, a choice unavailable to an individual charged with a crime.

C. *The Perils of Restorative Justice for Campus Sexual Assault*

While restorative justice processes can provide unique benefits in sexual assault proceedings, they also raise unique concerns. The civil nature of university proceedings creates the possibility of concurrent or potential criminal proceedings. Responsible parties will undoubtedly think twice about participating in restorative justice proceedings if their statements could be used against them in criminal proceedings, although, as I explain below, I am unconvinced that there is a satisfactory solution to this problem. Restorative justice proceedings also may be compromised by coercion and racial bias. These influences are particularly problematic for restorative justice, which requires victims and responsible parties to place significant trust in a fair and open process with few procedural protections.

1. *The Implications of Concurrent or Potential Criminal Charges*

A potential or concurrent criminal charge against the responsible party may

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conference but rather acted through a surrogate had slightly lower levels of satisfaction; sixty-seven percent agreed that the redress plan was fair. *Id.* at 1646 tbl.5. Victim participation in the conference may therefore be vital in ensuring a reparation plan that satisfies all parties.

196. Geeraets, *supra* note 68, at 269–70.

197. Richard Delgado, *Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice*, 52 STAN. L. REV. 751, 758–71 (2000); *see also* Geeraets, *supra* note 68, at 269–70; Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 235–36 (2003).

198. Geeraets, *supra* note 68, at 269–70.

199. These criticisms are limited to the criminal justice system. *See id.* at 266.



undermine the effectiveness of restorative justice for university disciplinary proceedings. Restorative justice processes are intended to resolve all matters between the victim and responsible party so that they can move forward.<sup>200</sup> A subsequent criminal trial—or the threat thereof—could undermine this goal. It could also prevent the open and honest discussion necessary for a responsible party’s active accountability. Although university disciplinary proceedings are confidential, they may nonetheless be admissible in a criminal trial.<sup>201</sup> A responsible party may be unwilling to participate in restorative justice processes if his statements could be used against him in a criminal trial.<sup>202</sup> If he does participate, he may tailor his accounting of the events to avoid criminal liability, subverting the goals of the restorative justice process.

Restorative justice programs in the criminal context have faced similar concerns with regard to future civil suits.<sup>203</sup> Victims of criminal offenses might be able to pursue a civil lawsuit against the perpetrator.<sup>204</sup> A defendant’s statements

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200. See Hopkins, *Devil Is in the Details*, *supra* note 91, at § IV.B.

201. University rules regarding confidentiality are not binding on the court system and thus would not in themselves prevent the admissibility of statements made during school disciplinary proceedings. While federal law provides confidentiality protections for university disciplinary proceedings, prosecutors could use one of several exceptions to this rule to enter into evidence statements made during a restorative justice disciplinary proceeding. Schools may disclose, without the responsible party’s permission, the final determinations of a disciplinary proceeding if the student is an alleged perpetrator of a crime of violence or non-forcible sex offense and has committed a violation of the institution’s rules or policies. 34 C.F.R. § 99.31(14) (2017). If prosecutors wanted to provide evidence of specific statements made during a disciplinary proceeding, they could obtain records of the proceeding or testimony about the responsible party’s statements through a court order or subpoena.

Some jurisdictions also privilege statements made during mediation. Jurisdictions differ in who may assert the privilege, exceptions to the privilege, what types of mediation are covered (such as court-mandated or private), and whether the privilege is qualified or absolute. Shawn P. Davisson, *Balancing the Scales of “Confidential” Justice: Civil Mediation Privileges in the Criminal Arena—Indispensable, Impracticable, or Merely Unconstitutional?*, 38 MCGEORGE L. REV. 679, 698 (2007). Some courts and legislatures have also provided explicit exceptions to allow use in criminal proceedings. See *id.* at 608–708. It is not clear, however, that university disciplinary proceedings would even qualify as “mediation.” Restorative justice and sexual assault expert Mary P. Koss argues that restorative justice is not mediation, as mediation involves a process in which both parties come together to resolve a dispute rather than where one party admits fault and seeks to restore the other. Mary P. Koss & Elise C. Lopez, *VAWA After the Party: Implementing Proposed Guidelines on Campus Sexual Assault Resolution*, 18 CUNY L. REV. F. 4, 7–8 (2014). Restorative justice expert Howard Zehr makes a similar distinction. See ZEHR, *supra* note 63, at 15–16. Duff distinguishes restorative justice from civil mediation, but categorizes it as a type of “criminal mediation” when used in the criminal justice system. See Duff, *supra* note 65, at 49–56. Restorative justice in campus disciplinary proceedings seems to fall outside of Duff’s categories: their process and purpose mirror that of criminal mediation, yet they are done in a civil context without the same weight and consequences. It is therefore not clear whether privilege rules regarding mediation apply to restorative justice.

Finally, while the statements are made outside of court, they likely fall within the party declarant exception to the hearsay rule, which allows the prosecution to use a responsible party’s out-of-court statements against him. FED. R. EVID. 801(d).

202. See Koss et al., *supra* note 11, at 253; Suvall, *supra* note 67, at 565.

203. See Hopkins, *Devil is in the Details*, *supra* note 91, § IV.B.

204. See *id.*

could therefore undermine his defense to any future civil claim. The RESTORE project, which used restorative justice for sexual offenses, resolved this issue by requiring victims to waive their rights to civil action against the defendant as a condition of participation.<sup>205</sup> This waiver only applied if the restorative justice process was successfully concluded, allowing a victim to retain her right to initiate a civil suit if she or the responsible party withdrew from the process or if the responsible party failed to complete the reparation plan.<sup>206</sup>

Restorative justice processes at the university level are unlikely to resolve this issue so easily. A waiver cannot eliminate the possibility of a criminal trial because the decision to pursue criminal charges is at the discretion of the prosecutor's office, not the victim.<sup>207</sup> A university would be unwise to ask a victim to refuse to cooperate with the prosecutor's office; such an agreement would raise significant ethical and legal issues and may violate laws against witness tampering.<sup>208</sup> Universities would most likely need to work directly with the prosecutor's office to resolve issues raised by the possibility of criminal charges. A relationship with the prosecutor's office could allow case-by-case agreements not to prosecute, to pursue lesser charges, or to recommend lenient sentencing if the responsible party satisfactorily completes the school's restorative justice process.<sup>209</sup>

Such an agreement would impose costs on the victim, particularly if a prosecutor agreed not to pursue charges. Unless the victim freely and voluntarily supported the agreement, it would severely curtail her ability to seek justice and could undermine her faith and trust in the disciplinary proceedings.<sup>210</sup> But even a victim who initially supports such an agreement may change her mind during the restorative justice process. A victim may realize after conferencing with the responsible party that he is more culpable than she initially believed or may be

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205. *Id.* RESTORE was also able to ensure confidentiality of parties' statements during the process in part because it obtained a federal certificate of confidentiality as part of CDC-funded research. *Id.* § II.C.

206. *Id.* § IV.B. The waiver also did not apply to third parties, such as a landlord or employer. *Id.*

207. See Cantalupo, "Decriminalizing", *supra* note 3, at 498 (noting that the victim is not a party to criminal proceedings on par with the state and the defendant, and her interests are therefore not at the center of a criminal proceeding). A victim could, however, waive her right to a subsequent civil trial, just as participants in RESTORE did. Responsible parties would also have to waive their right to raise a statute of limitations defense to civil suit if the restorative justice process was unsuccessful. See Hopkins, *Devil Is in the Details*, *supra* note 91, §§ I.A.6, I.A.7.

208. See William Hubbard, *Civil Settlement During Rape Prosecutions*, 66 U. CHI. L. REV. 1231, 1242-50 (1999); see also Aviva Orenstein, *Special Issues Raised by Rape Trials*, 76 FORDHAM L. REV. 1585, 1607 (2007).

209. Such an agreement could raise potential issues regarding an offense's statute of limitations and the responsible party's right to a speedy trial and to avoid pre-indictment delay because of the time-consuming process of preparing and executing a restorative justice process in the university and subsequently monitoring the responsible party's fulfillment of his obligations. These issues can likely be resolved with waivers, however. See Hopkins, *Devil is in the Details*, *supra* note 91, § I.

210. Lombardi, *Sexual Assault*, *supra* note 26, at 29-30 (discussing how a student felt hampered in pursuing criminal charges by the conditions of the school's mediation process and its confidentiality agreement).

unpersuaded that he truly accepts responsibility and is remorseful for his actions.<sup>211</sup> If the victim changes her mind during the process, she could withdraw or refuse any reparation plan, which would potentially force the disciplinary proceedings out of the restorative justice process and nullify any agreement with the prosecutor. A victim who changes her mind after the restorative justice process is completed, however, would have little recourse in the criminal justice system.

Universities could, in the alternative, form an agreement with prosecutors that will exclude parties' statements from use in a criminal trial. A memorandum of understanding, for example, could allow the school and prosecutor's office to negotiate the terms under which statements would be privileged.<sup>212</sup> Yet such agreements might indirectly undermine the restorative justice process in other ways. A responsible party who subsequently testifies in a criminal trial may contradict his earlier statements in the restorative justice process or simply avoid testifying. Either of these actions can signal to all stakeholders that the responsible party no longer accepts responsibility for his actions or that perhaps he never did. This turnabout could understandably cause the victim and other participants to feel betrayed by the process and would undermine the legitimacy and efficacy of the restorative justice program.

Universities could try to avoid these concerns by limiting restorative justice to university code violations that are noncriminal in nature.<sup>213</sup> As discussed above in Part IV.B.1.d, many university codes prohibit sexual misconduct that is not criminal. In such circumstances, responsible parties using restorative justice would not face the prospect of criminal charges and therefore could participate more openly without fear of future prosecution. Victims would not sacrifice their ability to pursue criminal charges where no crime occurred.

Unfortunately, it is not so easy to determine whether a campus violation also violates criminal law. Criminal law—and rape law in particular—uses standards that require jury interpretation. Several states require the prosecutor to prove that the defendant's actions constitute “force” or “forcible compulsion.”<sup>214</sup> A prosecution for New York's offense of “rape in the third degree” may require a jury to consider whether the victim “clearly expressed” nonconsent and whether a reasonable person would have understood the victim's actions to express nonconsent.<sup>215</sup> In California, a jury may need to determine whether a responsible party's actions constitute “a direct or implied threat of force, violence, danger, or retribution” and whether this threat was “sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which otherwise would not have been performed, or acquiesce in an act to

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211. See, e.g., Koss, *supra* note 100, at 1652 (noting that RESTORE project victims often felt that the responsible parties' apologies were insincere).

212. Coker, *supra* note 12, at 202–04; Koss et al., *supra* note 11, at 253.

213. Koss et al., *supra* note 11, at 254.

214. See, e.g., CAL. PENAL CODE § 261(a)(2) (West 2017); 720 ILL. COMP. STAT. ANN. 5/11-1.20 (West 2017); N.Y. PENAL LAW § 130.05(2)(a) (McKinney 2017); 18 PA. CONS. STAT. § 3121 (2017).

215. N.Y. PENAL LAW § 130.05(2)(d).

which one otherwise would not have submitted.”<sup>216</sup> Universities are in a poor position to determine whether a responsible party’s actions fall within these definitions. This is particularly true prior to the restorative justice conferencing, which may bring forth additional facts that could affect the responsible party’s criminal liability.

Restorative justice processes must therefore seriously consider how to balance the responsible party’s incentives with the victim’s ability to explore all options for justice. A responsible party may be unlikely to pursue a restorative justice option if there is a possibility his participation can be used against him in a criminal trial. Working with the prosecutor’s office to reduce this likelihood could provide an important incentive for participation. But these incentives would come at a cost to victims, particularly those who change their minds about pursuing criminal justice.

## 2. University Proceedings Raise Their Own Coercion Issues

While university disciplinary proceedings cannot threaten the same consequences as the criminal justice system, they raise their own coercion issues. These consequences arise from the university system’s comparative lack of procedural protections, the young age of many students, and the power imbalance between students and university administration. As a result, both the victim and responsible party may face coercion to enter the restorative justice process and to accept a reparation plan with which they do not agree.

Unlike responsible parties charged with a crime, students accused of school violations have no right to an attorney.<sup>217</sup> Consequently, they may be making the decision of whether to undergo the restorative justice process without advice of counsel. This is in sharp contrast to the RESTORE project, in which those charged with sex offenses were afforded an attorney before deciding whether to undertake the restorative justice process.<sup>218</sup> Students may also be less likely to understand the consequences of their decision due to their youth. The South Australia Juvenile Justice Project found that youth participating often felt they had no right to refuse participation in restorative justice or felt pressure to participate and did not understand what the process would entail.<sup>219</sup>

Responsible parties may also feel coerced to accept responsibility and a reparation plan by the prospect of harsher consequences. This is particularly true where the violation may also result in criminal charges. In such cases, universities may introduce the possibility of an agreement with the prosecutor that the responsible party will not face criminal charges or will face leniency in the criminal justice system if he completes the restorative justice process. A responsible party may accept responsibility and undergo the restorative justice

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216. CAL. PENAL CODE § 261(b).

217. Anderson, *supra* note 20, at 1985. The OCR only requires that students be provided equal access to an attorney. Dear Colleague Letter, *supra* note 29, at 12; Penn Letter, *supra* note 52, at 3–5 (arguing students involved in process should have access to an attorney).

218. See Koss, *supra* note 100, at 1627.

219. See Daly, *supra* note 10, at 222–23, 227–29.

process out of fear of prison time rather than a desire to accept responsibility and make amends. This not only undermines the voluntary nature of restorative justice, but may also result in accused parties accepting responsibility for violations they did not actually commit.<sup>220</sup>

Power imbalances may also allow universities to pressure victims into the restorative justice process. A university is a system of power and privilege that can exert coercion like any such system.<sup>221</sup> Universities often marginalize victims of sexual assault, and they may similarly pressure victims to undertake the restorative justice process and accept a reparation plan tailored to meet the university's needs rather than the victim's needs. Such a plan may, for example, allow a star athlete to continue playing, keep the university's reputation intact, and promote the appearance that the university restorative justice disciplinary procedures are more successful than they are.

It is not unprecedented for those in power to use the restorative justice process to oppress victims rather than give them a voice. In some indigenous communities, for example, processes similar to restorative justice have allowed male elders to maintain control over the process and use it to oppress female victims of sexual assault.<sup>222</sup> Schools may also use restorative justice processes to pressure victims into accepting apologies they do not wish to hear or that do not meet their needs.<sup>223</sup> Victims should not be asked to accept "sham reparation" that forces them to act as mere props to which responsible parties can demonstrate token remorse.<sup>224</sup>

### 3. Restorative Justice May Reflect and Exacerbate Racial Disparities

Restorative justice may systematically disfavor individuals of color, who are in general more likely to face harsh penalties both in the criminal justice system and in school disciplinary procedures. Racial minorities may feel disproportionate pressure to participate in restorative justice programs regardless of whether they are truly responsible because they otherwise would likely face harsh penalties—harsher than those of their white counterparts. Conversely, restorative justice may be more frequently provided to white responsible parties as a way of providing them more favorable consequences.

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220. See Lombardi, *A Lack of Consequences*, *supra* note 50, at 62–63 (describing a university pressuring a student accused of sexual assault to accept responsibility and a light penalty in the context of a traditional disciplinary proceedings).

221. See Harris, *supra* note 127, at 213 (describing the difficulty of implementing restorative justice in various coercive systems).

222. BRAITHWAITE, *supra* note 10, at 68–69; Robert Weisberg, *Restorative Justice and the Danger of "Community"*, 2003 UTAH L. REV. 343, 371 (2003).

223. Weisberg, *supra* note 222, at 358; *see also* Koss, *supra* note 100, at 1651–52 (explaining that almost one third of sexual assault survivors disagreed about whether they chose to participate in a restorative justice program in order to receive an apology).

224. BRAITHWAITE, *supra* note 10, at 47–49. It is possible that many individuals may try to game the system. Although victims in the RESTORE project reported satisfaction with the program overall, many felt that responsible parties were insincere and did not truly accept responsibility. Koss, *supra* note 100, at 1652.

Either possibility would result in a dual system of discipline that disfavors individuals of color.

Individuals of color face harsher penalties for misconduct than similarly situated whites. African Americans are more likely to be targeted by the criminal justice system, charged with more severe offenses for the same conduct, and given harsher sentences for similar offenses.<sup>225</sup> Student disciplinary procedures demonstrate similar results; in K–12 schools, for example, African American students disproportionately face harsh penalties for violations of school rules.<sup>226</sup>

Students of color may feel coerced into entering restorative justice programs because they would otherwise face harsher penalties. This may be particularly true if as discussed above, prosecutors' offices agree to forgo prosecution, pursue lesser charges, or recommend lenient sentencing if the student satisfies the process. Such students may feel pressure to admit responsibility where they are not truly responsible in order to avoid harsh penalties or criminal prosecution. White students, in contrast, may choose to take their chances with the traditional disciplinary processes with the confidence that they are less likely to be found responsible for a violation.

Students of color may also face a less friendly restorative justice process and more burdensome restoration plans than white students. Restorative processes and their outcomes are subject to the idiosyncrasies of the participants, who are not immune to racial bias.<sup>227</sup> Such disparities are evidenced by the STARR project, a recent systematic study of restorative justice in university disciplinary proceedings.<sup>228</sup> Overall, the study found highly positive results for restorative justice.<sup>229</sup> Yet it also revealed that white students reap more benefits from

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225. AM. CIVIL LIBERTIES UNION, RACIAL DISPARITIES IN SENTENCING 1–3, 8 (Oct. 27, 2014), [http://www.aclu.org/sites/default/files/assets/141027\\_iachr\\_racial\\_disparities\\_aclu\\_submission\\_0.pdf](http://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf) [<http://perma.cc/488M-83BS>]; CTR. FOR HEALTH AND JUSTICE, FACTS ON JUSTICE: MINORITY POPULATIONS INCARCERATED AT DISPROPORTIONATELY HIGH RATES; DISPARITIES INFLUENCED BY SENTENCING AND DRUG POLICIES (Nov. 2010), <http://www.centerforhealthandjustice.org/foj%2011-10.pdf> [<http://perma.cc/6PFW-G85P>]; THE SENTENCING PROJECT, BLACK LIVES MATTER: ELIMINATING RACIAL INEQUITY IN THE CRIMINAL JUSTICE SYSTEM 10–13 (2015), <http://www.sentencingproject.org/publications/black-lives-matter-eliminating-racial-inequity-in-the-criminal-justice-system/> [<http://perma.cc/D822-KGUU>] [hereinafter BLACK LIVES MATTER]; THE SENTENCING PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 2–8 (2016), <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/> [<http://perma.cc/FM7W-UM75>] [hereinafter THE COLOR OF JUSTICE].

226. EDWARD J. SMITH & SHAUN R. HARPER, UNIV. OF PENN. CTR. FOR STUDY OF RACE AND EQUITY IN EDUC., DISPROPORTIONATE IMPACT OF K-12 SCHOOL SUSPENSION AND EXPULSION ON BLACK STUDENTS IN SOUTHERN STATES 1 (2015), [http://www.gse.upenn.edu/equity/sites/gse.upenn.edu/equity/files/publications/Smith\\_Harper\\_Report.pdf](http://www.gse.upenn.edu/equity/sites/gse.upenn.edu/equity/files/publications/Smith_Harper_Report.pdf) [<http://perma.cc/7GKP-EJNA>]; U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, DATA SNAPSHOT: SCHOOL DISCIPLINE 1–3 (2014), <http://ocrdata.ed.gov/Downloads/CRDC-School-Discipline-Snapshot.pdf> [<http://perma.cc/UFX9-P2K6>]; Pamela Fenning & Jennifer Rose, *Overrepresentation of African American Students in Exclusionary Discipline*, 42 URB. EDUC. 536, 539–40 (2007).

227. See Kurki, *supra* note 10, at 307; Robinson, *The Virtues of Restorative Justice*, *supra* note 119, at 381–82.

228. Karp & Sacks, *supra* note 99, at 1, 16.

229. *Id.* at 14–17.

restorative justice processes than students of color. In particular, being white is associated with a responsible party's increased ability to participate meaningfully and express himself in university restorative justice processes.<sup>230</sup> Whiteness is also associated with a greater opportunity to take responsibility and apologize.<sup>231</sup> Perhaps unsurprisingly, white students reported higher levels of procedural fairness and satisfaction with the process and outcome than students of color.<sup>232</sup>

Racial bias may also create disparities by systematically *excluding* responsible parties of color from restorative justice processes. Restorative justice focuses on the rehabilitation and reintegration of the responsible party and is therefore less likely to rely on severe and exclusionary measures, such as suspension or expulsion, than traditional disciplinary consequences.<sup>233</sup> It offers more favorable terms to responsible parties and means for them to avoid harsher sanctions. Restorative justice processes may perpetuate racial disparities in school discipline and criminal justice by creating a dual system of discipline: a kinder, gentler restorative justice process for white parties and a harsher, more punitive system for individuals of color. This dual system would echo a common refrain in sentencing for sexual assault and other offenses—that white men have more to lose from harsh sanctions than others and therefore should be given more lenient consequences.<sup>234</sup>

This sentiment was perhaps most starkly exemplified by the case of Brock Turner, a white Stanford student athlete convicted of three counts of felony sexual assault for raping an unconscious woman in 2015.<sup>235</sup> Judge Aaron Persky deviated from the mandatory minimum sentence of two years and sentenced Turner to probation and six months in county jail,<sup>236</sup> of which he served three before release.<sup>237</sup> The Judge argued that the deviation was justified by the particularly severe consequences that prison would have for Turner as an individual.<sup>238</sup> In making his determination, Judge Persky cited character letters submitted on behalf of Turner as demonstrating that the conviction had “a huge

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230. *See id.* at 11, 16.

231. *See id.*

232. *See id.*

233. Suvall, *supra* note 67, at 547, 549–50, 564.

234. Anderson, *supra* note 20, at 1992–94.

235. *See* Nick Anderson & Susan Svrluga, *In Stanford Sexual Assault Case, Probation Officer Recommended “Moderate” Jail Term*, WASH. POST (June 10, 2016), [http://www.washingtonpost.com/news/grade-point/wp/2016/06/10/probation-officers-report-for-brock-turners-sentencing/?utm\\_term=.ef8412ccfdeb](http://www.washingtonpost.com/news/grade-point/wp/2016/06/10/probation-officers-report-for-brock-turners-sentencing/?utm_term=.ef8412ccfdeb) [<http://perma.cc/42BJ-B3NE>].

236. *See* Sam Levin, *Stanford Sexual Assault: Read the Full Text of the Judge’s Controversial Decision*, GUARDIAN (June 14, 2016), <http://www.theguardian.com/us-news/2016/jun/14/stanford-sexual-assault-read-sentence-judge-aaron-persky> [<http://perma.cc/W9SP-GAYF>] [hereinafter Levin, *Stanford Sexual Assault*].

237. Travis M. Andrews, *Ex-Stanford Swimmer Brock Turner Leaves Jail Friday but Controversy Still Rages*, WASH. POST (Aug. 30, 2016), [http://www.washingtonpost.com/news/morning-mix/wp/2016/08/30/former-stanford-swimmer-brock-turner-leaves-jail-friday-after-serving-half-his-sexual-assault-sentence/?utm\\_term=.da38425e0ff1](http://www.washingtonpost.com/news/morning-mix/wp/2016/08/30/former-stanford-swimmer-brock-turner-leaves-jail-friday-after-serving-half-his-sexual-assault-sentence/?utm_term=.da38425e0ff1) [<http://perma.cc/6MF4-F44T>].

238. *See id.*

collateral consequence” for Turner.<sup>239</sup> These letters included one from Turner’s father arguing Turner had already suffered significantly for “20 minutes of action” because he would no longer achieve the life he dreamed, was not “his happy go lucky self,” and was so upset that he could no longer enjoy eating steak.<sup>240</sup> Judge Persky also cited Turner’s statement as demonstrating remorse, though Turner’s letter at no point acknowledged that he sexually violated the victim, and instead focused on his alcohol consumption and the problem of “promiscuity.”<sup>241</sup>

The Turner sentence stands in stark contrast to Judge Persky’s sentence of Raul Ramirez, a Latino immigrant who was convicted of a similar offense months after Turner.<sup>242</sup> Ramirez, like Turner, had digitally penetrated a woman without her consent.<sup>243</sup> Like Turner, Ramirez had no criminal record.<sup>244</sup> Unlike Turner, however, Ramirez accepted responsibility for his actions, admitted his offense almost immediately, and expressed remorse to the police.<sup>245</sup> Ramirez pleaded guilty and Judge Persky, who handled the plea negotiations, sentenced him to three years in state prison.<sup>246</sup>

The Turner and Ramirez cases provide a snapshot of the ways in which privilege can influence the consequences responsible parties face. Turner received a far lighter sentence despite his failure to accept responsibility and, in large part, because the Judge was sympathetic as to how imprisonment would influence Turner’s life. Judge Persky seemed to have no such concerns for Ramirez. The Judge seemed to perceive Turner, a white Stanford student and promising athlete, as having more to lose from prison than a Salvadoran immigrant.

University restorative justice proceedings could perpetuate this divide if they are disproportionately available to white and other privileged parties. This would create a dual system in which minority students are subject to the traditional disciplinary system, while white students have access to restorative justice programs offering softer penalties. The limited data on restorative justice in sexual assault cases provides evidence of this disparity. Defendants who identified as Caucasian were disproportionately represented in the RESTORE

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239. *Id.*

240. Michael E. Miller, “A Steep Price to Pay for 20 Minutes of Action”: Dad Defends Stanford Sex Offender, WASH. POST (June 6, 2016), [http://www.washingtonpost.com/news/morning-mix/wp/2016/06/06/a-steep-price-to-pay-for-20-minutes-of-action-dad-defends-stanford-sex-offender/?utm\\_term=.f97b738c297c](http://www.washingtonpost.com/news/morning-mix/wp/2016/06/06/a-steep-price-to-pay-for-20-minutes-of-action-dad-defends-stanford-sex-offender/?utm_term=.f97b738c297c) [<http://perma.cc/AE62-G79C>].

241. Sam Levin & Julia Carrie Wong, Brock Turner’s Statement Blames Sexual Assault on Stanford “Party Culture”, GUARDIAN (June 7, 2016), <http://www.theguardian.com/us-news/2016/jun/07/brock-turner-statement-stanford-rape-case-campus-culture> [<http://perma.cc/USK5-WMWA>]; see also Levin, *Stanford Sexual Assault*, *supra* note 236; Miller, *supra* note 239.

242. Sam Levin, *Stanford Trial Judge Overseeing Much Harsher Sentence for Similar Assault Case*, GUARDIAN (June 27, 2016), <http://www.theguardian.com/us-news/2016/jun/27/stanford-sexual-assault-trial-judge-persky> [<http://perma.cc/K9Z4-XRLU>].

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*



project's cases compared to their proportion of police reports, and African Americans and Hispanics were disproportionately underrepresented.<sup>247</sup> This disparity was not mere self-selection, as the racial disparities were also present in the initial prosecutor referrals to the program before either victims or responsible parties were offered the choice to participate. White responsible parties comprised 33% of the police reports, yet represented 54% of prosecutor referrals to the project and 77% of cases in the RESTORE project.<sup>248</sup> In contrast, African Americans comprised 25% of police reports and yet represented only 9% of prosecutor referrals and 9% of cases; Hispanics comprised 42% of police reports, 25% of referrals, and 14% of cases.<sup>249</sup>

There is no reason to assume that university disciplinary proceedings would be immune to bias in determining which disciplinary proceedings are appropriate for restorative justice. As with project RESTORE, the selection and vetting process might favor white responsible parties. Where students of color are provided the option of the restorative justice process, university administration might inadvertently discourage their participation through verbal or nonverbal communication.<sup>250</sup>

It is vital for universities to consider—and extensively research—how restorative justice programs should contend with these power dynamics and biases.<sup>251</sup> Reviews of best practices for restorative justice in university settings offer little account for the experiences of students of color, how to shape restorative justice processes to respond to these experiences, and the necessary training to ensure that administrators do not perpetuate racial biases.<sup>252</sup> Data must include racial information and actively monitor racial disparities in whom is offered restorative justice processes, who participates in them, the treatment and satisfaction of the victim and responsible party, and the restorative plan.

#### 4. Restorative Justice May Reduce Criminal Prosecution of Sexual Assault

Victims of sexual assault in universities often choose to pursue university discipline as a substitute—rather than as a supplement—for criminal prosecution.<sup>253</sup> Many victims prefer not to report sexual offenses committed upon them to police because they fear they will not be believed or taken seriously.<sup>254</sup> Others may simply not want to undergo the often traumatic process

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247. Koss, *supra* note 100, at 1650.

248. *Id.*

249. *Id.*

250. *See id.*

251. *See* Marlenee Lizbeth Blas Pedreal, *Restorative Justice Programs in Higher Education*, 35 VT. CONNECTION 38, 42 (2014).

252. *See id.* at 43.

253. *See* Rubinfeld, *supra* note 52.

254. *See* Claire Gordon, *Why College Rape Victims Don't Go to the Police*, AL-JAZEERA AM. (May 19, 2014), <http://america.aljazeera.com/watch/shows/america-tonight/articles/2014/5/19/why-college-rapevictimsdonatgotothepolice.html> [<http://perma.cc/8M38-PHG6>].

that criminal justice entails.<sup>255</sup> For these individuals, university proceedings may provide a safer and more supportive environment than the criminal justice system.

Restorative justice may increase the degree to which university proceedings supplant prosecution. As discussed above, prosecutors may decide not to prosecute, to pursue lesser charges, or to recommend more lenient sentencing because of an agreement with the responsible party, victim, and university that encourages the responsible party to take advantage of the restorative justice process. Prosecutors may also simply decline to prosecute or provide a favorable plea bargain due to the success of the restorative justice process.<sup>256</sup> Victims who are satisfied with the restorative justice disciplinary proceeding may determine that they do not wish to pursue criminal charges, making prosecution far less likely.

There are benefits to leaning more heavily on university disciplinary proceedings, as opposed to the criminal justice system—particularly if those proceedings increasingly consist of restorative justice processes. As discussed above, restorative justice can benefit victims and responsible parties in ways that the criminal justice system cannot. Among these benefits are the voice and power it provides victims, as well as the opportunity it gives responsible parties to understand the harm they have caused and take active responsibility for it. Victims who prefer the restorative justice process should have the opportunity to use it, and university disciplinary proceedings may provide them with a particularly suitable environment for it.

Victims who prefer using university disciplinary proceedings may also have good reason. The criminal justice system is notorious for failing to take seriously accusations of rape, particularly of acquaintance rape.<sup>257</sup> These offenses are the least likely to be investigated and prosecuted.<sup>258</sup> This may be in part because of the difficulty in obtaining a conviction.<sup>259</sup> It is likely also in part because of police attitudes that such offenses are simply not particularly serious.<sup>260</sup> A New York

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255. See Parrot, *supra* note 110, at 369 (noting that going to the police often compounds a rape victim's trauma rather than reduces it); Anderson, *supra* note 20, at 1959–62; Koss, *supra* note 100, at 1642, 1653; Gordon, *supra* note 253.

256. See, e.g., KARP, *supra* note 62, at 6.

257. Anderson, *supra* note 20, at 1999; see also SUSAN BROWNMILLER, *AGAINST OUR WILL* 351–52 (1975) (stating that police are more likely to consider stranger rapes founded than they are acquaintance rapes).

258. See Baker, *Why Rape Should Not*, *supra* note 147, at 235–36 (discussing the difficulty of proving nonconsensual sex between acquaintances); David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1251–52 (1997); David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73, 73 (2002); Cassia Spohn & David Holleran, *Prosecuting Sexual Assault: A Comparison of Charging Decisions in Sexual Assault Cases Involving Strangers, Acquaintances, and Intimate Partners*, 18 JUST. Q. 651, 682 (2001).

259. See Baker, *Why Rape Should Not*, *supra* note 147, at 235–36 (describing difficulties in prosecuting acquaintance rape); Spohn & Holleran, *supra* note 257, at 682 (same).

260. See Anderson, *supra* note 20, at 1959–62; Cantalupo, “Decriminalizing”, *supra* note 3, at 485 (describing victim reluctance to approach legal authorities because of their fear that they will be

Police Department captain recently provided a striking example of this attitude at a community meeting in which he attempted to assuage the public's concerns about a sixty-two percent increase in sexual assaults in the neighborhood.<sup>261</sup> Captain Peter Rose argued that the majority of these rapes were "not total-abomination rapes where strangers are being dragged off the streets."<sup>262</sup> He noted that

[s]ome of them were Tinder, some of them were hookup sites, some of them [sic] were actually coworkers. It's not a trend that we're too worried about because out of 13 [sex attacks], only two were true stranger rapes. . . .

If there's a true stranger rape, a random guy picks up a stranger off the street, those are the troubling ones.<sup>263</sup>

For many sexual assault victims, the criminal justice system can be traumatic.<sup>264</sup> If the police do take their accusations seriously and the prosecutor pursues charges, the victim may need to testify during trial. She may be subject to a cross-examination that calls into question her credibility or blames her sexual assault on her own actions, resulting in what feels to many like a second victimization.<sup>265</sup> Given a victim's potential treatment and small likelihood of success in the criminal justice system, it might be wise to look to university proceedings for accountability.

Leaning on university proceedings at the expense of the criminal justice system, however, may also create substantial problems. The effort necessary to create a safe and effective restorative justice process for sexual assault must be taken seriously in any program that supplants criminal proceedings. Universities must also consider the parameters for vetting sexual misconduct cases that are appropriate for restorative justice. This will raise particularly difficult questions in the context of sexual misconduct, which may involve criminal behavior and significant trauma for the victim. In many circumstances, restorative justice may simply be inappropriate, such as where the responsible party poses a danger to the community or where the responsible party's acceptance of responsibility seems dubious. For example, in the RESTORE project, cases were vetted by

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treated with hostility and disbelief and that the perpetrator will not face consequences); Gordon, *supra* note 253.

261. See Gwynne Hogan, *Sex Attacks up 62 Percent in Greenpoint as Most Cases Remain Unsolved*, DNAINFO (Jan. 6, 2017, 8:21 AM), <http://www.dnainfo.com/new-york/2017/01/06/greenpoint/rapes-nypd-arrest> [<http://perma.cc/VP3H-QJS2>]; Christina Cauterucci, *NYPD Captain: Majority of Rapes Are "Not Total Abomination Rapes" Committed by Strangers*, SLATE: XX FACTOR (Jan. 6, 2017, 5:43 PM), [http://www.slate.com/blogs/xx\\_factor/2017/01/06/nypd\\_captain\\_majority\\_of\\_rapes\\_are\\_not\\_total\\_abomination\\_rapes\\_committed.html](http://www.slate.com/blogs/xx_factor/2017/01/06/nypd_captain_majority_of_rapes_are_not_total_abomination_rapes_committed.html) [<http://perma.cc/E47G-HFWT>].

262. Hogan, *supra* note 260; *see also* Cauterucci, *supra* note 260.

263. Hogan, *supra* note 260 (alternation in original).

264. See Elton & Roybal, *supra* note 91, at 45, 50–51 (comparing criminal justice and restorative justice systems, and concluding that restorative justice system is more humane for a variety of reasons); Parrot, *supra* note 110, at 369 (stating that going to the police often compounds rather than reduces a rape victim's trauma).

265. See Elton & Roybal, *supra* note 91, at 45; Koss, *supra* note 100, at 1653.

independent providers to exclude responsible parties with certain psychological characteristics or whose records made them “unsuitable for a community-based program.”<sup>266</sup> Universities do not have access to this type of expertise. Taking restorative justice seriously would likely require schools to use independent providers to help them vet cases for restorative justice processes where sexual misconduct is involved.

This type of investment might be unlikely given schools’ dubious response to sexual misconduct in the past. Universities might be unwilling to hire consultants or full-time staff that would create and implement appropriate formal processes for vetting. In schools where restorative justice is used, they may fail to seriously consider its propriety in each individual case or they may lack the safeguards and expertise to ensure fairness to the parties. Schools may, for example, use the process as an excuse to provide a star athlete a mere slap on the wrist.<sup>267</sup> It may allow responsible parties to abuse the process and offer a token apology in return for lighter consequences.

Increased reliance on the university disciplinary proceedings instead of criminal justice may also exacerbate problems in the criminal justice system. In particular, it might increase the degree to which police and prosecutors are dismissive of acquaintance rape. If students increasingly prefer to use the university system over the criminal justice system, this may reinforce the view that acquaintance rape is not truly a serious offense—or an offense at all. Police and prosecutors may come to view acquaintance rape as primarily a disciplinary issue for schools to handle internally.

Increasing the extent to which university disciplinary proceedings supplant prosecution may also increase racial disparities in prosecution. Compared to whites, African Americans and Latinos are currently overrepresented in the criminal justice system.<sup>268</sup> They are also more likely to receive harsher sentences for the same offenses.<sup>269</sup> These same communities of color are underrepresented in higher education compared to white students, making young people who are white more likely to have access to university disciplinary proceedings, and to restorative justice in particular, than young people of color.<sup>270</sup> If restorative justice proceedings increase the degree to which students can avoid prosecution, then they may also increase the degree to which young people who are white can avoid prosecution and imprisonment in comparison to young people of color. If

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266. Koss, *supra* note 100, at 1627.

267. See Ridpath, *supra* note 149 (discussing how schools protect athletes from consequences of sexual assault).

268. AM. CIVIL LIBERTIES UNION, *supra* note 225, at 1–3, 8; CTR. FOR HEALTH AND JUSTICE, *supra* note 225; BLACK LIVES MATTER, *supra* note 225, at 10–13; THE COLOR OF JUSTICE, *supra* note 225, at 2–8.

269. AM. CIVIL LIBERTIES UNION, *supra* note 225, at 1–3, 8; CTR. FOR HEALTH AND JUSTICE, *supra* note 225; BLACK LIVES MATTER, *supra* note 225, at 10–13; THE COLOR OF JUSTICE, *supra* note 225, at 2–8.

270. See generally YOUNG M. KIM, MINORITIES IN HIGHER EDUCATION: TWENTY-FOURTH STATUS REPORT (Bryan Cook & Gailda Davis eds., Supp. 2011), [http://diversity.ucsc.edu/resources/images/ace\\_report.pdf](http://diversity.ucsc.edu/resources/images/ace_report.pdf); Tuerkheimer, *supra* note 20, at 5.

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prosecutors provide favorable terms to students who complete their restorative justice programs, terms such as lesser charges or lighter sentences, then white individuals will disproportionately have access to these favorable terms. Restorative justice proceedings in universities may therefore increase the criminal justice system's troubling racial disparities.

#### CONCLUSION

It is no easy task to create fair and effective restorative justice programs. Schools considering implementing a program for sexual misconduct violations must consider restorative justice's unique costs and benefits in the context of university disciplinary procedures. More importantly, they must also consider how using restorative justice for sexual misconduct shapes these costs and benefits.

Additional research is vital to meeting these challenges. Currently, there is no empirical data on restorative justice in university disciplinary proceedings that concern sexual assault. This is not surprising, given that researchers have found no such programs. But there is also a paucity of data on sexual assault and restorative justice, and significant gaps in research on restorative justice in other types of university disciplinary proceedings.<sup>271</sup> The RESTORE and STARR projects provide exceptions to these findings, but they still leave many questions unasked or in need of further research.<sup>272</sup>

Schools will also need to invest significantly in developing the expertise to administer these programs. The challenge of creating a fair and effective restorative justice program is beyond the expertise required for the role of Title IX administrator. It requires the involvement of individuals with training specifically in both restorative justice and sexual misconduct. It will also require these individuals to forge alliances with all stakeholders—from victim advocates and sexual assault centers to athletic departments and fraternities.

Restorative justice offers a promising tool to improve university disciplinary proceedings for sexual assault. Scholars and practitioners should take seriously both its potential and its perils. Poorly administered programs can exacerbate the harm of sexual assault, perpetuate biases and discrimination, and leave all stakeholders worse off.<sup>273</sup> If undertaken with the appropriate investment and commitment, however, restorative justice processes can significantly improve outcomes for victims, responsible parties, and the university community.

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271. See Karp & Sacks, *supra* note 99, at 2–3; Koss, *supra* note 100, at 1625–26.

272. It is not yet clear, for example, what makes restorative justice effective in preventing responsible parties from reoffending. BRAITHWAITE, *supra* note 10, at 61.

273. See BRAITHWAITE, *supra* note 10, at 47.