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## The Devil Is in the Details: Exploring Restorative Justice as an Option for Campus Sexual Assault Responses under Title IX

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**The Devil Is in the Details: Exploring Restorative Justice as an Option for Campus Sexual Assault Responses under Title IX**

# THE DEVIL IS IN THE DETAILS: EXPLORING RESTORATIVE JUSTICE AS AN OPTION FOR CAMPUS SEXUAL ASSAULT RESPONSES UNDER TITLE IX

AMY B. CYPHERT<sup>†</sup>

## ABSTRACT

On September 9, 2017, Secretary of Education Betsy DeVos formally rescinded a piece of Obama-era Title IX Guidance, a “Dear Colleague Letter” that had shaped colleges’ and universities’ responses to sexual violence on campus for over six years. In the Interim Guidance and Proposed Regulations that followed, Secretary DeVos made clear that schools could now consider using restorative justice practices—wherein offenders take responsibility for the harm they have caused and survivors are active in crafting the plan to help remediate that harm—in responding to sexual assault. This Article examines the history of Title IX, tracing it from the original language through the Obama-era guidance to Secretary DeVos’s recent actions. It also examines what restorative justice is, why schools’ use of it for claims of on-campus sexual harassment is so controversial, why survivors might prefer it to more traditional investigations or criminal complaints, and why it has perhaps surprising support from many feminists and progressive activists. Because the devil is in the details for a program like this, this Article also outlines what the critical elements of a successful program would look like, including the centrality of informed consent from survivors and the need for restorative justice to be just one of several remedies that survivors can choose from. One major obstacle to implementing a restorative justice program on campus is the possibility that statements made by offenders—including admissions of sexual assault—could be used against them at a later civil or criminal trial. This Article therefore proposes a new evidentiary rule designed to exclude those statements. Recognizing this as a move many policy makers would be hesitant to embrace for a variety of reasons, this Article also examines similar exclusionary rules—including medical apology laws, truth and reconciliation commis-

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sions, and statements made during Queen for a Day proffer sessions—to provide a historical and philosophical basis for such a rule. It also considers the practice of restricted reporting of sexual assault in the military to demonstrate another instance where policy makers decided the goal of providing survivor-directed services outweighed the goal of prosecuting all cases of sexual assault. Because restorative justice is only on the table in the first place if a survivor is interested in pursuing it, the evidentiary rule proposed here would help to provide another option to campus sexual assault survivors, an option that may provide benefits to their communities as well.

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#### INTRODUCTION

A young woman is raped her freshman year of college. As she explores the campus disciplinary proceedings available on her small campus in the northwest, she concludes that a standard disciplinary proceeding, one where she would have had to testify in detail about what happened to her, would be retraumatizing.<sup>1</sup> She feels that the traditional, trial-like disciplinary hearing, which was the only option formally available at her school at the time, is “kind of that blind rage of like an eye-for-an-eye type thing.”<sup>2</sup> She concluded that would not ultimately be fulfilling for her.<sup>3</sup> Instead, the young woman works with an advisor on her

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1. Tovia Smith, *After Assault, Some Campuses Focus on Healing over Punishment*, NPR: ALL THINGS CONSIDERED (July 25, 2017, 4:30 PM), <https://www.npr.org/2017/07/25/539334346>. The young woman asked that her name not be used in the NPR story. *Id.*

2. *Id.*

3. *Id.*

campus, seeking an alternative that helps her to heal and helps her rapist to learn and grow as well—a “restorative justice” option.<sup>4</sup> “What I really, really wanted was for him to step up to the plate and take responsibility, and to be active in teaching others about this experience.”<sup>5</sup> He gives her a “heartfelt, unequivocal apology,” and the two work together, producing a video aimed at educating others about sexual assault.<sup>6</sup> They even tour local schools, presenting to fraternity brothers and high school students.<sup>7</sup> She ultimately concludes that working with her rapist and sharing her story in this way was “really therapeutic”—“because those deep, dark secrets that you hold, the more people you show them to, the more light you shed on them, the lighter they become.”<sup>8</sup>

The young woman’s story is remarkable in many ways, especially so because an advisor at her school was formally willing to work with her on a restorative justice option for a sexual assault. In the past, many universities have shied away from that option for fear of running afoul of Department of Education Title IX guidance.<sup>9</sup> However, in light of Secretary Betsy DeVos’s recent decision to rescind that guidance,<sup>10</sup> and the promulgation of new proposed Title IV regulations,<sup>11</sup> the time is ripe to reexamine the use of restorative justice practices in campus sexual assault proceedings and to confront a major remaining obstacles to its use—the potential use of statements made in restorative justice conferences at a later civil or criminal trial.

This Article begins by examining the history of Title IX—the statute that governs colleges’ and universities’ responses to sexual harassment and sexual assault on their campuses. Initially thought of as a law that mandated gender parity in admissions and athletics, the scope of Title IX has grown through both Supreme Court decisions and Department of Education agency guidance.<sup>12</sup> That guidance included a 2011

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4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *See infra* Section I.A (explaining how language in an Obama Administration-era guidance document forbidding colleges from using mediation to resolve Title IX complaints chilled colleges and universities from using restorative justice practices as well).

10. Press Release, U.S. Dep’t of Educ., Department of Education Issues New Interim Guidance on Campus Sexual Misconduct (Sept. 22, 2017), <https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct>.

11. Press Release, U.S. Dep’t of Educ., Secretary DeVos: Proposed Title IX Rule Provides Clarity for Schools, Support for Survivors, and Due Process Rights for All (Nov. 16, 2018), <https://www.ed.gov/news/press-releases/secretary-devos-proposed-title-ix-rule-provides-clarity-schools-support-survivors-and-due-process-rights-all>.

12. *See, e.g.*, Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 173 (2005) (holding that retaliation against a person who complained of sex discrimination is encompassed by Title IX’s private cause of action); Davis *ex rel.* LaShonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 630–31 (1999) (determining that schools in receipt of federal funds may be liable for student-on-student harassment); Capistrano Unified Sch. Dist., U.S. Dep’t of Educ., No. 89-33-CR (Apr. 30, 1992) (finding that Title IX covers retaliation claims with a state administrative agency).

“Dear Colleague Letter” written to colleges and universities from the Department of Education’s Office for Civil Rights (OCR) under the Obama Administration.<sup>13</sup> Critics argued that this guidance expanded the scope of the definition of sexual assault and also the specifics of the response that universities should have by mandating certain requirements for investigations and hearings.<sup>14</sup> Some heralded the move as a sign that colleges would finally have to take seriously sexual violence on campus.<sup>15</sup> However, others attacked the guidance on a variety of fronts, alleging that the Dear Colleague Letter’s requirements did too little to protect the due process rights of the accused and, in application, unfairly targeted students of color.<sup>16</sup> That letter also explicitly precluded the use of “mediation” in campus sexual assault proceedings, a restriction that chilled many universities from using restorative justice practices—despite the fact that restorative justice is distinct from mediation.<sup>17</sup> Whatever the ultimate wisdom of that Dear Colleague Letter, its tenure was short, and Secretary DeVos’s September 9, 2017 rescission of that guidance provoked commendation and controversy, much like the Dear Colleague Letter itself.<sup>18</sup>

In Part II, the Article turns to restorative justice, attempting to pin down and define a practice that does not lend itself to easy definition. The Part examines what restorative justice conferencing for sexual assault may look like on a college campus, noting best practices and existing research. It also addresses several critiques of its use on college campuses, including fears that: (1) such a move would signal to campuses that they can take sexual assault less seriously; (2) dangerous criminals would remain on campus; and (3) survivors may feel pressured into choosing restorative justice practices when they actually do not want them. The Part concludes by detailing some of the reasons survivors, especially those on college campuses, may prefer restorative justice approaches to other programs on campus or to the criminal justice system.

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13. Letter from Russlynn Ali, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., to Colleague 2–3 (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [hereinafter 2011 Dear Colleague Letter].

14. See *infra* notes 52–65 and accompanying text.

15. See Ramya Sekaran, Note, *The Preponderance of the Evidence Standard and Realizing Title IX’s Promise: An Educational Environment Free from Sexual Violence*, 19 GEO. J. GENDER & L. 643, 644–45, 647 (2018).

16. Kathryn Joyce, *The Takedown of Title IX*, N.Y. TIMES MAG. (Dec. 15, 2017), <https://www.nytimes.com/2017/12/05/magazine/the-takedown-of-title-ix.html>.

17. Donna K. Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 TEX. TECH L. REV. 147, 199–200 (2016) (explaining the various ways that restorative justice is distinct from mediation, including that restorative justice conferencing “requires that the person who is accused of causing harm admit to his or her conduct and take responsibility for repairing the harm as a precondition to participation,” whereas mediation does not presume harm).

18. See Jennifer Medina & Emma G. Fitzsimmons, *‘An Attack on Students’ Rights’: Reactions to Betsy DeVos’s New Rules on Sexual Assault*, N.Y. TIMES (Aug. 30, 2018), <https://www.nytimes.com/2018/08/30/us/devos-college-sexual-assault.html>.

In Part III, the Article turns to a key problem that must be addressed for restorative justice practices to be used effectively on college campuses: how to prevent the use of statements made in restorative justice conferences from being admitted into evidence at a later civil or criminal proceeding. A nationwide exclusionary rule would avoid the problems of each university having to work out an ad hoc agreement with each local prosecutor. However, such a rule would no doubt face an uphill battle. Legislators, wary of looking as though they are soft on crime and especially on sexual violence, might balk at the idea of passing legislation that prevented an admission of guilt from being entered into evidence. Accordingly, this Part first examines four analogous situations—medical apology laws, the South African Truth and Reconciliation Commission, so-called “Queen for a Day” proffer sessions, and restricted reports of sexual assault in the military—to establish a philosophical and historical basis for the adoption of such a rule. It then looks to Federal Rules of Evidence 408 and 410 as models for specific language, providing an example exclusionary rule for statements made during restorative justice conferences could be. Although the idea of excluding earlier admissions of sexual assault at a criminal trial may sound initially shocking, there are ample corollaries to such a rule and many reasons that survivors may actually prefer such a rule. Ultimately, because restorative justice is only on the table if the sexual assault survivor is interested in pursuing it, the exclusionary rule proposed here is one that only comes into play if the survivor sets it in motion.

### I. TITLE IX

When Congress amended Title IX to include the Higher Education Act of 1965, it is doubtful that anyone believed that the amendment would someday be the definitive federal statute governing universities’ responses to peer-on-peer sexual assault and harassment. Passed as part of the Education Amendments of 1972, Title IX never mentions the words “sexual harassment” or “sexual assault,” instead, merely providing that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>19</sup> Title IX’s original impact was largely limited to improving parity for women in college admissions, and in collegiate athletic participation and funding<sup>20</sup>—it was known as “the law that forbade schools to banish women’s sports teams to the parking lot while men got

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19. Title IX of The Education Amendments of 1972, 20 U.S.C. § 1681(a) (2018).

20. See Anne D. Byrne, Case Note and Comment, *School District Liability Under Title IX for Sexual Abuse of a Student by a Teacher: Why Has the Supreme Court Allowed Schools to Put Their Heads in the Sand?* Gebser v. Lago Vista Independent School District, 118 S.Ct. 1989 (1998), 22 HAMLINE L. REV. 587, 604 (1999) (“The history of the Act reveals that the initial focus of Title IX was on gender inequities in admissions processes as well as academic and extracurricular programs.”).

the fields.”<sup>21</sup> Indeed, it took nearly ten years after Title IX’s passage before courts held that (1) there was even a private right of action under Title IX,<sup>22</sup> and (2) that sexual harassment constituted actionable discrimination under Title IX in the first place.<sup>23</sup> In 1992, twenty years after Title IX’s passage, the Supreme Court concluded that monetary damages were available to litigants under Title IX<sup>24</sup>—a ruling that naturally increased the number of claims brought under it.<sup>25</sup>

Each of the three preceding decisions—the *Cannon v. University of Chicago*,<sup>26</sup> *Alexander v. Yale University*,<sup>27</sup> and *Franklin v. Gwinnett County Schools*<sup>28</sup> cases—involved allegations that an *employee* of a school district had sexually harassed or otherwise discriminated against a student.<sup>29</sup> However, a landmark 1999 decision from the Supreme Court would expand Title IX’s reach dramatically, and pave the way for the “modern era” of Title IX enforcement. In *Davis ex rel. LaShonda D. v. Monroe County Board of Education*,<sup>30</sup> the Court, in an opinion authored by Justice O’Connor, held that students could recover damages from a school district when they had been sexually harassed *by another student* if: (1) the school had “act[ed] with deliberate indifference to known acts of harassment in its programs or activities,” and (2) if the harassment at issue was “so severe, pervasive, and objectively offensive that it effectively bar[red] the victim’s access to an educational opportunity or benefit.”<sup>31</sup>

As Justice O’Connor noted in her *Davis* opinion, this recognition of peer-on-peer sexual harassment as the basis for a Title IX claim formally

21. Joyce, *supra* note 16.

22. See *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704, 709 (1979) (holding that the Act had been created in part because Congress “wanted to provide individual citizens effective protection against [discriminatory] practices”).

23. *Alexander v. Yale Univ.*, 631 F.2d 178, 180 (2d Cir. 1980); see also Keri Smith, Comment, *Title IX and Sexual Violence on College Campuses: The Need for Uniform On-Campus Reporting, Investigation, and Disciplinary Procedures*, 35 ST. LOUIS U. PUB. L. REV. 157, 162 (2015) (noting that “*Alexander v. Yale* was the first case that upheld charges of sexual harassment under Title IX . . . . While the plaintiffs did not win their case, the court did hold for the first time that sexual harassment constituted discrimination under Title IX.”).

24. *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 65–66, 76 (1992) (concluding that damages were available to private litigants under Title IX because the Court “presume[s] the availability of all appropriate remedies unless Congress has expressly indicated otherwise”).

25. See Alison Renfrew, Comment, *The Building Blocks of Reform: Strengthening Office of Civil Rights to Achieve Title IX’s Objectives*, 117 PENN ST. L. REV. 563, 570 (2012) (“As a result of the Cannon and Franklin decisions, private litigation has flourished and has become an important Title IX enforcement tool.”).

26. 441 U.S. 677.

27. 631 F.2d 178.

28. 503 U.S. 60.

29. The *Cannon* decision involved an allegation that the plaintiff had been discriminated against in medical school admissions because she was a woman, 441 U.S. at 680; the *Alexander* decision involved allegations of sexual harassment of students by faculty and administrators, 631 F.2d at 180–81; and the *Franklin* decision involved an allegation of sexual harassment and abuse by a student of a coach-teacher, 503 U.S. at 63.

30. 526 U.S. 629 (1999).

31. *Id.* at 632–33.



codified guidance that the Department of Education's OCR had issued two years prior under President Bill Clinton.<sup>32</sup> The OCR first provided formal guidance to schools about sexual harassment prevention under Title IX in 1997,<sup>33</sup> requiring that schools have a grievance process for reporting sexual harassment and warning that schools that fail to respond to a hostile environment "permit[] an atmosphere of sexual discrimination to permeate the educational program and results in discrimination prohibited by Title IX."<sup>34</sup>

In response to *Davis* and other subsequent Supreme Court decisions, the OCR updated this sexual harassment guidance in 2001, reiterating that "[o]ne of the fundamental aims of both the 1997 guidance and the revised guidance has been to emphasize that, in addressing allegations of sexual harassment, the good judgment and common sense of teachers and school administrators are important elements of a response that meets the requirements of Title IX."<sup>35</sup> While the Revised Sexual Harassment Guidance largely affirmed the earlier Guidance and existing Supreme Court precedent,<sup>36</sup> sweeping changes were on the horizon.

#### A. The 2011 Dear Colleague Letter

On April 4, 2011, the same day that President Obama formally announced he was running for a second term, Vice President Joe Biden, along with Secretary of Education Arne Duncan, announced an expansive addition to the existing Title IX guidance—a key issue for the Obama Administration.<sup>37</sup> "We are the first [A]dministration to make it

32. *See id.* at 646–48. Congress has delegated to the OCR the enforcement of Title IX, and the office independently investigates alleged Title IX violations and provides written compliance guidance for schools. *See* Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 484 (requiring what was then known as the Department of Health, Education, and Welfare (HEW) to issue regulations implementing Title IX with respect to education programs). "[I]n 1979, Congress divided HEW into the U.S. Department of Education and U.S. Department of Health and Human Services as part of the Department of Education Organization Act of 1979 . . . . As a result of the division, the Department of Education's Office for Civil Rights was charged with enforcing the provisions of Title IX." Renfrew, *supra* note 25, at 569 n.53.

33. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,034 (Mar. 13, 1997).

34. *Id.* at 12,039–40 ("[A] school's failure to respond to the existence of a hostile environment within its own programs or activities permits an atmosphere of sexual discrimination to permeate the educational program and results in discrimination prohibited by Title IX. Conversely, if, upon notice of hostile environment harassment, a school takes immediate and appropriate steps to remedy the hostile environment, the school has avoided violating Title IX. Thus, Title IX does not make a school responsible for the actions of harassing students, but rather for its own discrimination in failing to remedy it once the school has notice.").

35. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES: TITLE IX, at ii–iv (2001).

36. *Id.* at i, iv.

37. Press Release, U.S. Dep't of Educ., Vice President Biden Announces New Administration Effort to Help Nation's Schools Address Sexual Violence (Apr. 4, 2011), <https://www.ed.gov/news/press-releases/vice-president-biden-announces-new-administration-effort-help-nations-schools-ad>. Some commentators have charged that the timing of this announcement was no coincidence, and that the new guidance was promulgated just in time to fire up President

clear that sexual assault is not just a crime, it can be a violation of a woman's civil rights," Vice President Biden said during a speech at the University of New Hampshire.<sup>38</sup> In a nineteen-page Dear Colleague Letter signed by Assistant Secretary for Civil Rights Russlyn Ali, the OCR instructed schools to use a relatively broad definition of "sexual harassment" in fulfilling their duties under Title IX: "unwelcome conduct of a sexual nature" that "includes unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature."<sup>39</sup> Although it purportedly did not create any new laws or legal obligations,<sup>40</sup> the 2011 Dear Colleague Letter provided schools with the most specific and detailed guidance to date, spelling out for schools exactly how they should undertake certain duties under Title IX.<sup>41</sup> For example, it (1) mandated that schools use a "preponderance of the evidence standard" when weighing whether sexual harassment had occurred;<sup>42</sup> (2) "strongly discourage[d] schools from allowing the parties personally to question or cross-examine each other during the hearing";<sup>43</sup> (3) mandated that universities conclude their investigations within a "reasonably prompt" time frame, which the OCR suggested is generally under sixty days;<sup>44</sup> and (4) required schools that allowed appeals to permit either party to appeal (a move some have decried as "double jeopardy," as it allowed for an appeal of a finding that a respondent was not responsible).<sup>45</sup> Critically, the 2011 Dear Colleague Letter also forbade the use of

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Obama's base in advance of his reelection campaign. See KC Johnson & Stuart Taylor, Opinion, *The Path to Obama's 'Dear Colleague' Letter*, WASH. POST, (Jan. 31, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/31/the-path-to-obamas-dear-colleague-letter> ("[T]he Democratic defeat in the 2010 midterm elections focused Obama's attention on how identity politics could rally his base . . . . So the administration took high-profile positions in favor of marriage for same-sex couples, permitting 'dreamers' to remain in the United States and mandating contraceptive coverage in Obamacare. The 'Dear Colleague' letter, which appealed to feminists and campus activists, reflected this broader campaign agenda . . . .").

38. Max Larkin, *The Obama Administration Remade Sexual Assault Enforcement on Campus. Could Trump Unmake It?*, WBUR (Nov. 25, 2016, 9:13 AM), <http://www.wbur.org/edify/2016/11/25/title-ix-obama-trump>.

39. 2011 Dear Colleague Letter, *supra* note 13, at 3, 19.

40. *Id.* at 1 n.1 ("This letter does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations."). Indeed, in response to queries from a Senator, the OCR would later concede that the 2011 Dear Colleague Letter did not have the "force and effect of law." See Letter from Catherine Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to Senator James Lankford (Feb. 17, 2016), <https://web.archive.org/web/20180122081147/http://www.chronicle.com/items/biz/pdf/DEPT.%20of%20EDUCATION%20RESPONSE%20TO%20LANKFORD%20LETTER%202-17-16.pdf>.

41. See generally 2011 Dear Colleague Letter, *supra* note 13, at 3–14 (discussing schools' specific procedures and obligations).

42. *Id.* at 11.

43. *Id.* at 12.

44. *Id.* ("Based on OCR experience, a typical investigation takes approximately 60 calendar days following receipt of the complaint.").

45. *Id.* See also Wendy Kaminer, *What's Wrong with the Violence Against Women Act*, ATLANTIC (Mar. 19, 2012), <https://www.theatlantic.com/national/archive/2012/03/whats-wrong-with-the-violence-against-women-act/254678> ("Moreover, if an accused student is not found guilty, even under this very low standard of proof, his or her accuser may be afforded a right to appeal (under section 304) exposing the accused to double jeopardy.").

mediation, even on a voluntary basis where all parties agreed, to resolve complaints of sexual assault brought under Title IX.<sup>46</sup> In 2016, at the request of a Republican Senator, the OCR conceded that the 2011 Dear Colleague Letter did not have the “force and effect of law.”<sup>47</sup> However, many universities nonetheless perceived it that way and acted accordingly, pointing out that the OCR “use[d] the letter to determine which colleges are in violation of Title IX and to threaten the federal funding of those that don’t follow every suggestion.”<sup>48</sup>

Many heralded the investigative framework outlined and required by the 2011 Dear Colleague Letter as an attempt to confront the problem of sexual assault on college campuses—a very real problem<sup>49</sup> that had long been overlooked.<sup>50</sup> As two activists put it, “[w]e read that letter and knew, for the first time, that our government took seriously our civil right to an education free from sexual violence—and would demand our schools do so, too.”<sup>51</sup> However, many challenged and attacked the 2011 Dear Colleague Letter on a variety of fronts, including alleging that (1) it constituted impermissible rulemaking in violation of the Administrative Procedure Act’s notice-and-comment requirements;<sup>52</sup> (2) it provided

46. See 2011 Dear Colleague Letter, *supra* note 13, at 8 (noting that although mediation could be used for certain sexual harassment complaints, provided the complainant was not required to work with the alleged harasser, “in cases involving allegations of sexual assault, mediation is not appropriate even on a voluntary basis. OCR recommends that recipients clarify in their grievance procedures that mediation will not be used to resolve sexual assault complaints.”).

47. See *supra* note 40.

48. Jake New, *Must vs. Should: Colleges Say the Department of Education’s Guidance on Campus Sexual Assault Is Vague and Inconsistent*, INSIDE HIGHER ED (Feb. 25, 2016), <https://www.insidehighered.com/news/2016/02/25/colleges-frustrated-lack-clarification-title-ix-guidance>.

49. A 2015 survey commissioned by the Association of American Universities found nearly 11.7% of women surveyed had “nonconsensual sexual contact by physical force, threats of physical force, or incapacitation since they enrolled at their university.” DAVID CANTOR ET AL., ASS’N. OF AM. UNIVS., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT, at viii (2015). Only six in ten respondents believed that their campus would take seriously a report of a sexual assault. *Id.* at 38.

50. Nancy Gertner, *Sex, Lies and Justice*, AM. PROSPECT (Jan. 12, 2015), <http://prospect.org/article/sex-lies-and-justice> (noting that prior to the 2011 Dear Colleague Letter, “Title IX was dormant and largely ignored. The enforcer, the federal government, had been a paper tiger. Universities were not reporting, much less dealing with, either sexual harassment or explicit sexual violence.”).

51. Dana Bolger & Alexandra Brodsky, *Betsy DeVos’s Title IX Interpretation Is an Attack on Sexual Assault Survivors*, WASH. POST (Sept. 8, 2017), <https://www.washingtonpost.com/news/posteverything/wp/2017/09/08/betsy-devoss-title-ix-interpretation-is-an-attack-on-sexual-assault-survivors>.

52. See, e.g., Lance Toron Houston, *Title IX Sexual Assault Investigations in Public Institutions of Higher Education: Constitutional Due Process Implications of the Evidentiary Standard Set Forth in the Department of Education’s 2011 Dear Colleague Letter*, 34 HOFSTRA LAB. & EMP. L.J. 321, 334–35 (2017) (“Clearly, the U.S. DOE, a federal agency, failed to follow the APA. The DOE instead invited public comment to its newly announced agency interpretation after its April 4, 2011 Dear Colleague publication. This action, in direct opposition to the APA, relegates the preponderance of the evidence standard *mandated* in the April 4, 2011 Dear Colleague Letter and the procedure with which it was promulgated as a non-legislative, non-notice and comment (interpretive) rule, meaning without binding legal effect. This type of agency action in violation of the APA’s notice and comment requirements has been recognized by the courts in all its various iterations and has been consistently reversed.” (footnotes omitted)).

inadequate due process to the accused;<sup>53</sup> (3) it chilled free speech rights on campus;<sup>54</sup> (4) it led to systems that unfairly targeted students of color;<sup>55</sup> (5) the requirement of a Title IX coordinator and other requirements imposed too many financial costs on colleges and universities;<sup>56</sup> and (6) it failed to protect faculty members' academic freedom.<sup>57</sup> Critics even contended that it led to a deepening bureaucratization of sex, termed a "bureaucratic sex creep."<sup>58</sup> Two members of the U.S. Commission on Civil Rights were so unsettled by it that they urged Congress to oppose an increase to the Department of Education's budget, arguing the 2011

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53. See, e.g., Wendy Kaminer, *Sexual Harassment and the Loneliness of the Civil Libertarian Feminist*, ATLANTIC (Apr. 6, 2011), <https://www.theatlantic.com/national/archive/2011/04/sexual-harassment-and-the-loneliness-of-the-civil-libertarian-feminist/236887> ("Campus investigations and hearings involving harassment or rape charges are notoriously devoid of concern for the rights of students accused; 'kangaroo courts' are common, and OCR's letter seems unlikely to remedy them . . . . Students may be represented by counsel in disciplinary proceedings, at the discretion of the school, but counsel is not required, even when students risk being found guilty of sexual assaults (felonies pursuant to state penal laws) under permissive standards of proof used in civil cases, standards mandated by OCR.").

54. FIRE: *New Federal Regulations Limit Due Process, Free Speech Rights on Campus*, FIRE (May 5, 2011), <https://www.thefire.org/fire-new-federal-regulations-limit-due-process-free-speech-rights-on-campus> (criticizing the OCR for "failing to explicitly remind colleges and universities of the importance of protecting students' right to free expression" in the 2011 Dear Colleague Letter, something that the OCR had previously done in prior letters, "making it clear that universities must protect student speech rights and emphasizing that there need be no tension, under OCR regulations, between addressing sexual harassment and ensuring freedom of expression").

55. Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. F. 103, 106–10 (2015) (discussing the historical context of race with respect to allegations of sexual assault as well as the 2011 Dear Colleague Letter and other OCR guidance and noting that "[c]ase after Harvard case that has come to my attention, including several in which I have played some advocacy or adjudication role, has involved black male respondents, but the institution cannot 'know' this because it has not been thought important enough to monitor for racial bias"); see also Emily Yoffe, *The Question of Race in Campus Sexual Assault Cases*, ATLANTIC (Sept. 11, 2017), <https://www.theatlantic.com/education/archive/2017/09/the-question-of-race-in-campus-sexual-assault-cases/539361> (describing a lack of formal statistics on the racial backgrounds of students accused of sexual assault and presenting anecdotes from a variety of sources that suggest "vast overrepresent[ation]" of black men amongst those accused of campus sexual assault: "[A]s the definition of sexual assault used by colleges has become broader and blurrier, it certainly seems possible that unconscious biases might tip some women toward viewing a regretted encounter with a man of a different race as an assault. And as the standards for proving assault have been lowered, it seems likely that those same biases, coupled with the lack of resources common among minority students on campus, might systematically disadvantage men of color in adjudication, whether or not the encounter was interracial.").

56. One expert estimated that "the cost of lawyers, counselors, information campaigns and training to fight sexual misconduct ranges from \$25,000 a year at a small college to \$500,000 and up at larger or wealthier institutions." Anemona Hartocollis, *Colleges Spending Millions to Deal with Sexual Misconduct Complaints*, N.Y. TIMES (Mar. 29, 2016), <https://www.nytimes.com/2016/03/30/us/colleges-beef-up-bureaucracies-to-deal-with-sexual-misconduct.html>.

57. Peter Schmidt, *AAUP Slams Education Dept. and Colleges over Title IX Enforcement*, CHRON. HIGHER EDUC. (Mar. 24, 2016), <https://www.chronicle.com/article/AAUP-Slams-Education-Dept-and/235816> ("In failing to include 'any statements or warnings about the need to protect academic freedom and free speech in sexual-harassment cases,' the [report by the American Association of University Professors] says, the 2011 letter has prompted colleges to treat as suspect speech that contains sexual references of any kind, including academic discussions of sex and sexuality." (quoting AM. ASSOC. OF UNIV. PROFESSORS, THE HISTORY, USES, AND ABUSES OF TITLE X, at 77 (2016), <https://www.aaup.org/file/TitleIXreport.pdf>)).

58. Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 884–85 (2016).

Dear Colleague Letter was an especially egregious example of the OCR showing “disregard for the rule of law.”<sup>59</sup> The coalition opposing the 2011 Dear Colleague Letter made for some strange bedfellows—ACLU officials<sup>60</sup> and feminists<sup>61</sup> made arguments that resonated with a conservative Republican Senator,<sup>62</sup> while conservative columnist George Will approvingly cited<sup>63</sup> the arguments made by law professors from Harvard<sup>64</sup> and the University of Pennsylvania.<sup>65</sup>

### B. Rescission by the Trump Administration

Ultimately, the 2011 Dear Colleague Letter’s tenure was relatively short. On September 7, 2017, Secretary of Education Betsy DeVos gave a speech calling the current state of Title IX enforcement in colleges and universities a “failed system imposing policy by political letter,” and proclaimed that the “era of ‘rule by letter’ is over.”<sup>66</sup> In that same speech, she announced that the Department would engage in a formal notice-and-comment process to produce guidance to replace the earlier Obama-era guidance on Title IX, including the 2011 Dear Colleague Letter.<sup>67</sup> Although she didn’t mention the 2011 Dear Colleague Letter by name in her speech, it was clearly her target, and she specifically denounced its re-

59. Ashe Schow, Opinion, *Members of Civil Rights Commission Oppose ‘Disregard for Rule of Law’ over Campus Sexual Assault Rules*, WASH. EXAMINER (Mar. 2, 2015, 10:26 AM), <https://www.washingtonexaminer.com/members-of-civil-rights-commission-oppose-disregard-for-rule-of-law-over-campus-sexual-assault-rules>.

60. Harvey A. Silverglate, Opinion, *Yes Means Yes—Except on Campus*, WALL ST. J. (July 15, 2011), <https://www.wsj.com/articles/SB10001424052702303678704576440014119968294> (decrying campus sexual assault proceedings as “campus kangaroo courts” and raising First Amendment objections to the 2011 Dear Colleague Letter). Mr. Silverglate is the former president of the Massachusetts ACLU. *Harvey Silverglate*, ZALKIND, DUNCAN & BERNSTEIN LLP, <https://www.zalkindlaw.com/harvey-silverglate.html> (last visited Oct. 17, 2018).

61. Kaminer, *supra* note 53 (describing herself as a “civil libertarian feminist,” and calling campus sexual assault proceedings “kangaroo courts”).

62. See Letter from Senator James Lankford to John King, Acting Sec’y, U.S. Dep’t of Educ. (raising First Amendment objections and arguing the 2011 Dear Colleague Letter was impermissible rulemaking in violation of the Administrative Procedure Act), <https://www.lankford.senate.gov/imo/media/doc/Sen.%20Lankford%20letter%20to%20Dept.%20of%20Education%201.7.16.pdf>.

63. George F. Will, Opinion, *The Legislative and Judicial Branches Strike Back Against Obama’s Overreach*, WASH. POST (Feb. 19, 2016), [https://www.washingtonpost.com/opinions/the-legislative-and-judicial-branches-strike-back-against-obamas-overreach/2016/02/19/15f403b8-d672-11e5-be55-2cc3c1e4b76b\\_story.html](https://www.washingtonpost.com/opinions/the-legislative-and-judicial-branches-strike-back-against-obamas-overreach/2016/02/19/15f403b8-d672-11e5-be55-2cc3c1e4b76b_story.html) (arguing that the 2011 Dear Colleague Letter was an example of unconstitutional executive-branch overreach).

64. See generally Elizabeth Bartholet et al., Opinion, *Rethink Harvard’s Sexual Harassment Policy*, BOS. GLOBE (Oct. 15, 2014), <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html> (arguing that, in attempting to comply with the 2011 Dear Colleague Letter, Harvard’s Title IX policy “departs dramatically” from existing Supreme Court precedent).

65. See generally Eugene Volokh, *Open Letter from 16 Penn Law School Professors About Title IX and Sexual Assault Complaints*, WASH. POST (Feb. 19, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/02/19/open-letter-from-16-penn-law-school-professors-about-title-ix-and-sexual-assault-complaints> (discussing an open letter from sixteen Penn Law professors who oppose the OCR’s approach).

66. Betsy DeVos, Sec’y of Educ., Remarks at George Mason University (Sept. 7, 2017), <https://www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement>.

67. *Id.*

quirement that schools use a preponderance of evidence standard.<sup>68</sup> When asked by a reporter later that day if she intended to rescind Obama-era guidelines, she responded, “Well, that’s the intention, and we’ve begun the process to do so . . . . The process is an extended one . . . . But it is the intention to revoke or rescind the previous guidance around this.”<sup>69</sup>

Later that month, the OCR announced it had formally rescinded the 2011 Dear Colleague Letter and a 2014 Question & Answer—meant to help explain the Dear Colleague Letter—and issued new interim guidance to universities in the form of a Question & Answer on Campus Sexual Misconduct.<sup>70</sup> That document removed many of the restrictions the 2011 Dear Colleague Letter placed on colleges, including the requirement that they use a preponderance of the evidence standard (schools can now use the more rigorous “clear and convincing evidence” standard)<sup>71</sup> and the suggestion that most investigations should conclude within sixty days.<sup>72</sup> Crucially, the Interim Guidance also formally provided permission to colleges and universities to facilitate “informal resolutions” of Title IX complaints, including mediation, provided all parties voluntarily agree and do so knowingly; and provided that the school determines that “the particular Title IX complaint is appropriate for such a process.”<sup>73</sup>

The Trump Administration’s rescission of the 2011 Dear Colleague Letter was not a surprise, given the prior statements from DeVos and other Trump Administration officials: Secretary DeVos had been cagey on the topic at her confirmation hearing in January, telling Senator Bob Casey of Pennsylvania that “there’s a lot of conflicting ideas and opinions around [the 2011 Dear Colleague Letter and other Obama-era guidance], and if confirmed I would look forward to working with you and your colleagues and understand the range of opinions and understand the

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68. *Id.* (“Washington dictated that schools must use the lowest standard of proof.”) Commentators have agreed that the 2011 Dear Colleague Letter was the target of DeVos’s remarks. See, e.g., Jeannie Suk Gersen, *Betsy DeVos, Title IX, and the “Both Sides” Approach to Sexual Assault*, NEW YORKER (Sept. 8, 2017), <https://www.newyorker.com/news/news-desk/betsy-devos-title-ix-and-the-both-sides-approach-to-sexual-assault> (noting that DeVos was “primarily referring to” the 2011 Dear Colleague Letter with her remarks).

69. *DeVos Says She’ll Rescind Obama’s Title IX Sexual Assault Guidelines*, CBS NEWS (Sept. 7, 2017, 5:34 PM), <https://www.cbsnews.com/news/devos-to-rescind-obama-era-title-ix-order-on-withholding-school-funds-for-assault-inaction>.

70. Press Release, *supra* note 10.

71. OFFICE FOR CIVIL RIGHTS, U.S. DEP’T EDUC., SEPTEMBER 2017 Q&A ON CAMPUS SEXUAL MISCONDUCT 5 (2017).

72. *Id.* at 3 (“There is no fixed time frame under which a school must complete a Title IX investigation. OCR will evaluate a school’s good faith effort to conduct a fair, impartial investigation in a timely manner designed to provide all parties with resolution.”).

73. *Id.* at 4 (“If all parties voluntarily agree to participate in an informal resolution that does not involve a full investigation and adjudication after receiving a full disclosure of the allegations and their options for formal resolution and if a school determines that the particular Title IX complaint is appropriate for such a process, the school may facilitate an informal resolution, including mediation, to assist the parties in reaching a voluntary resolution.”).

issues from the higher ed institutions that are charged with resolving these and addressing them.”<sup>74</sup> As was true with the announcement of the 2011 Dear Colleague Letter, reaction to its rescission has been mixed. Some have decried the move as “a signal that the Trump [A]dministration will make way for what is nothing less than an all-out attack on survivors.”<sup>75</sup> Others, though, have praised DeVos’s decision and speech, pushing back against the notion that it removes protections for survivors and instead arguing that “what has been portrayed as a roll-back of Title IX is really an embrace of a framework of compatibility: one in which Title IX seriously addresses sexual violence and also requires fairness to the accuser and the accused.”<sup>76</sup> Even progressive California Governor Jerry Brown vetoed a bill that would have kept the 2011 Dear Colleague Letter as law in California, noting that “[s]ince this law was enacted, however, thoughtful legal minds have increasingly questioned whether federal and state actions to prevent and redress sexual harassment and assault—well-intentioned as they are—have also unintentionally resulted in some colleges’ failure to uphold due process for accused students.”<sup>77</sup> As one commentator put it, “this issue has divided thoughtful, progressive men and women of good will.”<sup>78</sup>

On November 16, 2018, Secretary DeVos announced new Proposed Regulations regarding Title IX.<sup>79</sup> The Proposed Regulations will be open for sixty days for public comment, and thus are not final as of the time of this Article’s publishing.<sup>80</sup> But the proposal preserves the Interim Guidance’s explicit permission to colleges and universities to use informal resolution processes to resolve claims brought under Title IX, and pro-

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74. Nick Anderson, *Under DeVos, Education Department Likely to Make Significant Shift on Sexual Assault*, WASH. POST (Jan. 18, 2017), <https://www.washingtonpost.com/news/grade-point/wp/2017/01/18/under-devos-education-department-likely-to-make-significant-shift-on-sexual-assault>. The move was also unsurprising after President Trump named Jerry Falwell, Jr. to head up a higher education task force for him. Goldie Blumenstyk, *Jerry Falwell Jr. Says He Will Lead Federal Task Force on Higher-Ed Policy*, CHRON. HIGHER EDUC. (Jan. 31, 2017), <https://www.chronicle.com/article/Jerry-Falwell-Jr-Says-He-Will/239062>. Falwell, who is president of the Christian-based Liberty University in Lynchburg, Virginia, told reporters in January that he saw his appointment to the task force as a response to what he called “‘overreaching regulation’ and micromanagement by the [Department of Education].” *Id.* The timing of his appointment and remarks is telling: earlier that month, the Department of Education launched a Title IX investigation at Liberty University. See Josh Moody, *Feds Drop Title IX Probe of LU Prompted by Sex Assault Claim*, NEWS & ADVANCE (June 21, 2017), [https://www.newsadvance.com/news/local/feds-drop-title-ix-probe-of-lu-prompted-by-sex/article\\_0dccc76-55fb-11e7-8f2b-73a3b1cb1e90.html](https://www.newsadvance.com/news/local/feds-drop-title-ix-probe-of-lu-prompted-by-sex/article_0dccc76-55fb-11e7-8f2b-73a3b1cb1e90.html).

75. Bolger & Brodsky, *supra* note 51.

76. Gersen, *supra* note 68.

77. David French, *Can We Finally Agree That Betsy DeVos Isn’t a Rape Apologist?*, NAT’L REV. (Oct. 17, 2017, 6:52 PM), <https://www.nationalreview.com/2017/10/betsy-devos-title-ix-jerry-brown-agrees>.

78. Alexandra Brodsky & Lara Bazelon, *Repealing Title IX Guidelines on Sexual Assault: A Dialogue*, AM. PROSPECT (Oct. 27, 2017), <http://prospect.org/article/repealing-title-ix-guidelines-sexual-assault-dialogue>.

79. See Press Release, *supra* note 11.

80. *Id.* (“The Department’s proposed Title IX rule will be open for public comment for 60 days from the date of publication in the Federal Register.”)

vide more context for that decision.<sup>81</sup> The Proposed Regulations note that “The Department . . . recognizes that in responding to sexual harassment, it is important to take into account the needs of the parties involved in each individual case, some of whom may prefer not to go through a formal complaint process.”<sup>82</sup> The Proposed Regulations require that the parties to any informal proceeding be provided with:

- (A) The allegations;
- (B) The requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, if any; and
- (C) Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.<sup>83</sup>

The Proposed Regulations also require that all parties give their written, voluntary “consent to the informal resolution process.”<sup>84</sup> The Proposed Regulations include these safeguards in order “[t]o ensure that the parties do not feel forced into an informal resolution by a recipient, and to ensure that the parties have the ability to make an informed decision.”<sup>85</sup> The Proposed Regulations posit that “[i]nformal resolution options may lead to more favorable outcomes for everyone involved,” but caution that this will depend upon a variety of factors, including “the age, developmental level, and other capabilities of the parties; the knowledge, skills, and experience level of those facilitating or conducting the informal resolution process; the severity of the misconduct alleged; and likelihood of recurrence of the misconduct.”<sup>86</sup>

As with the responses to the 2011 Dear Colleague Letter and the responses to Secretary DeVos’s rescission thereof, responses to the Proposed Regulations are “sharply divided” as of the time of this Article’s publication.<sup>87</sup>

## II. RESTORATIVE JUSTICE

In the wake of Secretary DeVos’s removal of the Obama-era guidance on sexual assault, and especially in light of the OCR’s express

81. See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462, 61,479–80 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106).

82. *Id.* at 61,479.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. See, e.g., Michael T. Nietzel, *Four Things Betsy DeVos Gets Wrong About Sexual Assault*, FORBES (Nov. 19, 2018, 9:13 AM), <https://www.forbes.com/sites/michaelt Nietzel/2018/11/19/four-things-betsy-devos-gets-wrong-about-sexual-assault> (“Predictably, reaction to the proposal is sharply divided.”).



blessing in the Interim Guidance and Proposed Regulations of colleges utilizing “informal resolutions” for Title IX claims, some have wondered whether it was time to reconsider the use of restorative justice in campus sexual assault proceedings.<sup>88</sup> Certainly, others have supported the use restorative justice practices on campus since before Secretary DeVos’s announcement—in June 2017, an American Bar Association (ABA) Task Force encouraged schools to consider restorative justice processes as an alternative to traditional adjudication.<sup>89</sup> The 2011 Dear Colleague Letter never formally forbid restorative justices practices as a way of addressing claims under Title IX, as restorative justice is distinct from mediation<sup>90</sup> (which the 2011 Dear Colleague Letter prohibited by name, even on a voluntary basis<sup>91</sup>). Nonetheless, because of the 2011 Dear Colleague Letter’s ban on mediation, as well as the controversy surrounding the use of restorative justice for claims of sexual violence, colleges avoided using restorative justices practices.<sup>92</sup> Even before Secretary DeVos’s rescission of the 2011 Dear Colleague Letter, though, activist groups had lobbied for the inclusion of restorative justice practices in campus Title IX proceedings.<sup>93</sup>

#### A. *What Would Restorative Justice Look Like on a College Campus?*

As a concept, restorative justice stubbornly resists simple description and easy classification.<sup>94</sup> No single definition or example of restorative justice exists.<sup>95</sup> Rather, it is an umbrella term that encompasses a variety of practices, from facilitated conferences between the parties to community circles wherein other people can weigh in on how to address

88. Stacy Teicher Khadaroo, *Campus Sexual Assault: Should Restorative Justice Be an Option?*, CHRISTIAN SCI. MONITOR (Oct. 13, 2017), <https://www.csmonitor.com/EqualEd/2017/1013/Campus-sexual-assault-Should-restorative-justice-be-an-option>.

89. ABA CRIMINAL JUSTICE SECTION TASK FORCE ON COLL. DUE PROCESS RIGHTS & VICTIM PROTS.: RECOMMENDATIONS FOR COLLEGES AND UNIVERSITIES IN RESOLVING ALLEGATIONS OF CAMPUS SEXUAL MISCONDUCT 3 (2017) [hereinafter ABA CRIMINAL JUSTICE SECTION REPORT] (“Where appropriate, the Task Force encourages schools to consider non-mediation alternatives to resolving complaints that are research or evidence-based, such as Restorative Justice processes.”).

90. Coker, *supra* note 17, at 200 (explaining the various ways that restorative justice is distinct from mediation, including that restorative justice conferencing “requires that the person who is accused of causing harm admit to his or her conduct and take responsibility for repairing the harm as a precondition to participation,” whereas mediation does not presume harm).

91. 2011 Dear Colleague Letter, *supra* note 13, at 8.

92. Coker, *supra* note 17, at 201.

93. For example, the Campus PRISM Project, an international network of scholars and practitioners coordinated by the Skidmore College Project on Restorative Justice, released a report in April 2016 aimed at promoting restorative practices on college campuses. *See generally* DAVID R. KARP ET AL., SKIDMORE COLL. PROJECT ON RESTORATIVE JUSTICE, CAMPUS PRISM: A REPORT ON PROMOTING RESTORATIVE INITIATIVES FOR SEXUAL MISCONDUCT ON COLLEGE CAMPUSES (2016).

94. *See, e.g.*, ABA CRIMINAL JUSTICE SECTION REPORT, *supra* note 89, at 4 (noting that “there is a lot of misunderstanding about restorative justice”).

95. Margo Kaplan, *Restorative Justice and Campus Sexual Misconduct*, 89 TEMP. L. REV. 701, 704 (2017).

and ameliorate the harm done.<sup>96</sup> At its core, the “conceptual foundation” for restorative justice is the idea that “harm has been done and someone is responsible for repairing it.”<sup>97</sup> A restorative justice approach to harm seeks to answer three key questions: “(1) Who has been harmed?, (2) What are their needs?, and (3) Whose obligation is it to meet those needs?”<sup>98</sup>

As noted above, restorative justice is distinct from mediation. Restorative justice begins with an acknowledgement of harm, whereas mediation “is a process where there’s no assignment of guilt.”<sup>99</sup> “The fundamental difference between mediation and [restorative justice] is the requirement that the responsible person accepts responsibility as a precondition of participation as opposed to neutrality toward the parties.”<sup>100</sup>

The restorative justice approach, as its name suggests, seeks not only to understand the harm caused by the misconduct but also to restore a sense of community by preventing the reoccurrence of the harm and “creating a space for offenders to be accountable for their actions and take steps to reduce their risk of reoffending.”<sup>101</sup> A key tenet of restorative justice is the idea that misconduct harms not only the specific victim of the misconduct but also that it has “ripple effects” on family and friends of both victims and responsible persons, as well as community members who may feel less safe and less a part of a community “when they perceive high levels of offense and low deterrence.”<sup>102</sup> Thus, restorative justice theory is predicated upon both an “expanded understanding of who is harmed by wrongdoing [and also] an expanded understanding of who is responsible for causing and repairing harm.”<sup>103</sup>

A restorative approach looks not only at what happened but also at the “broader cultural contexts” at play.<sup>104</sup> Indeed, the roots of restorative justice are found in culturally responsive attempts to address certain injustices of historically marginalized groups, including the Truth and Reconciliation Commission in South Africa, family group conferences practiced by the Maori people of New Zealand, and circle sentencing practices used by some First Nations’ members in Canada.<sup>105</sup> As one author notes, “A restorative approach may provide a meaningful ap-

96. Khadaroo, *supra* note 88.

97. Mary P. Koss et al., *Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance*, 15 TRAUMA, VIOLENCE & ABUSE 242, 246 (2014).

98. Coker, *supra* note 17, at 187 (citing Donna Coker et al., Transcript, *Plenary 3—Harms of Criminalization and Promising Alternatives*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 369, 375–76 (2015)).

99. Khadaroo, *supra* note 88 (quoting David Karp, Dir. of the Project on Restorative Justice, Skidmore Coll.).

100. Koss et al., *supra* note 97.

101. KARP ET AL., *supra* note 93, at 2.

102. Koss et al., *supra* note 97.

103. Coker, *supra* note 17, at 188.

104. KARP ET AL., *supra* note 93, at 2.

105. *Id.* at 11.

proach that is culturally sensitive and conscientious about power dynamics present in both the conduct process and in the wider campus culture.”<sup>106</sup> As such, restorative justice offers survivors an appealing alternative to the quasi-judicial practices most universities adopted under the 2011 Dear Colleague Letter—practices that critics argue disproportionately impacts students of color.<sup>107</sup>

Although restorative justice can take a variety of forms, the practice most commonly suggested for adoption on college campuses to address sexual violence is the restorative conference model.<sup>108</sup> Although the process will vary from campus to campus and could be adapted based on individual circumstances, best practices suggest that there are generally four stages to the conference process: “(1) Referral and Intake, (2) Preparation, (3) Conference—sometimes more than one; and (4) Monitoring and Reintegration.”<sup>109</sup>

At the referral and intake stage, schools should present survivors with the options available for proceeding on campus or for making a formal complaint to the police, not just with restorative justice practices.<sup>110</sup> Survivors must be informed that they have the option of withdrawing their consent to participate in the restorative justice process at any point, and that if they do so the process will stop.<sup>111</sup> The Proposed Regulations would somewhat codify these best practices, as they require that participation in an informal resolution process be voluntary and that students be provided with information that gives them “the ability to make an informed decision.”<sup>112</sup> However, the Proposed Regulations presently would not require that survivors be given the option of withdrawing their consent to participate at any point, as they note that schools should explain to the parties whether “one or more available informal resolution options would become binding on the parties at any point.”<sup>113</sup>

106. *Id.*

107. *See* Halley, *supra* note 55; *see also* Yoffe, *supra* note 55. *But see* Deborah L. Brake, *Fighting the Rape Culture Wars Through the Preponderance of the Evidence Standard*, 78 MONT. L. REV. 109, 145–49 (2017) (challenging Professor Halley’s articulation of the problem and noting that “if there is a racial impact in campus punishment, it has more to do with the institutional and structural factors responsible for racial disparities in school discipline more broadly. Given the prevalence of implicit racial bias, it would be surprising if race did not affect perceptions of credibility, determinations of fault, and feelings of empathy in institutional fact-finding processes.”).

108. *See, e.g.*, ABA CRIMINAL JUSTICE SECTION REPORT, *supra* note 89, at 5 (noting that conferencing is the most widely used model of restorative justice).

109. KARP ET AL., *supra* note 93, at 25 (citing Mary P. Koss, *Restorative Justice for Acquaintance Rape and Misdemeanor Sex Crimes*, in RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN 218, 230–34 (James Ptacek ed., 2009)).

110. *Id.*

111. ABA CRIMINAL JUSTICE SECTION REPORT, *supra* note 89, at 4.

112. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462, 61,479 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106).

113. *Id.*

If the survivor is interested in pursuing a restorative justice conference, the accused student is invited to participate, but may only do so if the accused student is willing to admit responsibility.<sup>114</sup> Again, the accused student should be counseled about possible ramifications of participating in this process, including some of the possible legal consequences discussed in Part III below, and should be made aware that he or she can withdraw his or her consent to participate at any time.

If both parties agree to participate in the restorative conference, a trained facilitator will guide the preparation process, which may take some time depending on the complexity and severity of the case.<sup>115</sup> Quality training for the facilitator is essential, and an “apprenticeship model,” whereby “practice begins with simpler cases and progresses, with support and supervision, to more complex cases,” is recommended.<sup>116</sup> Further, it is critical that facilitators have training specific to the field of sexual assault and sexual trauma.<sup>117</sup>

At the conference stage, a trained facilitator will guide the discussion using a “carefully developed script that structures the dialogue and order of questions.”<sup>118</sup> The first stage of the conference focuses on what happened, and includes the survivor sharing a statement regarding the impact of the assault.<sup>119</sup> The second stage explores “how the harm can be addressed and what can be done to rebuild trust.”<sup>120</sup> The parties reach an agreement about how to help repair the harm—an agreement that “delineates tasks and a timeline of restoration and reintegration.”<sup>121</sup> This redress plan can include options such as counseling, community service, and victim restitution.<sup>122</sup> It can also include an agreement that the responsible student will leave campus, either permanently or for a set period of time.<sup>123</sup>

Finally, in the monitoring and reintegration stage, conduct administrators meet with offenders to ensure compliance with the agreement as

114. KARP ET AL., *supra* note 93, at 25.

115. *Id.* at 26.

116. DAVID KARP, CAMPUS PRISM PROJECT BRIEFING PAPER: NEXT STEPS FOR A RESTORATIVE JUSTICE APPROACH TO CAMPUS-BASED SEXUAL AND GENDER-BASED HARASSMENT, INCLUDING SEXUAL VIOLENCE 2 (2017).

117. *Id.* (“For sexual misconduct cases, it is necessary to have training in restorative practices, student development in higher education, and especially trauma-informed gender-based harassment and violence.”).

118. KARP ET AL., *supra* note 93, at 26.

119. *Id.*

120. *Id.*

121. *Id.*

122. ABA CRIMINAL JUSTICE SECTION REPORT, *supra* note 89, at 5 (citing Koss et al., *supra* note 97, at 248).

123. KARP ET AL., *supra* note 93, at 36 (“Although some students who violate campus sexual and gender-based misconduct policies will require criminal prosecution and/or expulsion from the institution, others will remain enrolled or be allowed to reenter after some period of suspension.”).

well as with survivors to keep them informed of progress and ensure that they are receiving the support they need.<sup>124</sup>

### *B. Criticisms of Restorative Justice for Campus Sexual Assault*

As noted above, the use of restorative justice practices for sexual violence, especially on college campuses, is controversial. Critics have articulated a number of potential problems with its use, and each of those will be briefly explained here and responded to, with one exception: the potential problem of offender statements made during restorative justice practices later being used against the offender in a criminal action will be addressed in greater detail in the next Part, along with possible workarounds to address that possibility.

Regarding the use of restorative justice for Title IX claims, some advocates have expressed fear that by opening the door to less formal methods of resolving these claims, it might “signal to campuses that they are free to take sexual violence less seriously.”<sup>125</sup> As one Title IX coordinator put it, there is a danger that restorative justice will become the new version of “write a paper,” a reference to the “five-page book report Occidental College assigned to a student found responsible for rape, according to a federal complaint.”<sup>126</sup> The ABA Task Force recommending the use of restorative justice stresses that its use cannot be an “escape mechanism for schools to avoid fully and fairly resolving allegations of campus sexual misconduct.”<sup>127</sup>

Because so many universities utterly failed to address campus sexual assault for so many years,<sup>128</sup> this concern is certainly understandable. However, it is also easily addressed by structuring restorative justice as one of *several* options for addressing Title IX claims on campuses. As advocates make clear, no one is suggesting that restorative justice be the *only* option available. Indeed, as noted above, survivors would first be counseled about all of their options—both on campus and through the criminal justice system—before beginning the restorative justice process. Survivors could choose to reject restorative justice options entirely and instead have their claims addressed through the traditional quasi-judicial investigative hearing models contemplated under the 2011 Dear Colleague Letter. Thus, schools would not be relieved of any duty to take campus sexual assault seriously—they would still need to retain the same processes and would simply add another option to the menu. Further, nothing about restorative justice removes serious punishment as an op-

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124. *Id.* at 26.

125. Khadaroo, *supra* note 88.

126. Alexandra Brodsky, *Can Restorative Justice Change the Way Schools Handle Sexual Assault?*, NATION (Apr. 14, 2016), <https://www.thenation.com/article/what-if-punishment-wasnt-the-only-way-to-handle-campus-sexual-assault>.

127. ABA CRIMINAL JUSTICE SECTION REPORT, *supra* note 89, at 4.

128. *See* Gertner, *supra* note 50.

tion for offenders—for example, the restorative conference could end in a school deciding that the offending student leave campus.<sup>129</sup> Even if restorative justice is less likely to result in harsher penalties than the traditional investigative model of resolving Title IX claims, that may not ultimately be a bad thing as “[n]ot every survivor wants his or her assailant to be expelled.”<sup>130</sup>

Of course, universities have a duty to protect students that extends beyond implementing the wishes of survivors regarding offender punishment. Thus, another criticism of restorative justice is that restorative justice practices may allow a dangerous person to remain on campus, “free to offend again.”<sup>131</sup> The concern is a serious one. Although exact statistics vary from source to source, there is reason to believe that people who commit a sexual crime are at an increased risk of reoffending in the future. An editorial opposing restorative justice cites to a government source for the proposition that “[t]wo-thirds of male sex offenders will re-offend if they are not treated and restrained as criminals.”<sup>132</sup> However, the restorative justice model can address some of these concerns. First, nothing would prohibit a campus from including a “stakeholder” in restorative justice conferences as a “voice . . . [to] represent institutional concerns about ongoing community safety.”<sup>133</sup> Further, restorative justice practices show some promise for reducing recidivism rates when used in sexual violence cases, although the sample sizes are small. Australia and New Zealand both routinely use restorative justice conferences with cases of youth sexual assault.<sup>134</sup> In an empirical analysis of 232 restorative justice cases in Australia, violent crime offenders whose cases were handled through restorative justice practices were 40% less likely to reoffend than those whose cases went through the criminal justice system.<sup>135</sup> Here

129. Brodsky, *supra* note 126 (“[R]estorative justice does not necessarily preclude serious consequences for wrongdoers.”).

130. *Id.*

131. Michael Dolce, Opinion, *Say No to Restorative Justice for Sex Offenders*, HILL (Jan. 31, 2017, 3:00 PM), <https://thehill.com/blogs/pundits-blog/crime/317111-say-no-to-restorative-justice-for-sex-offenders> (arguing against restorative justice in part because “in many cases, [restorative justice] actually serves to leave an offender free to offend again”). The ABA Criminal Justice Section Report clarifies that restorative justice is “only appropriate in certain circumstances, such as when the offender does not pose an immediate or ongoing danger,” but it does not include any criteria for making that determination. ABA CRIMINAL JUSTICE SECTION REPORT, *supra* note 89, at 4.

132. Dolce, *supra* note 131 (citing Roger Przybylski, *Chapter 5: Adult Sex Offender Recidivism*, OFF. SEX OFFENDER SENT’G, MONITORING, APPREHENDING, REGISTERING & TRACKING, [https://www.smart.gov/SOMAPI/sec1/ch5\\_recidivism.html](https://www.smart.gov/SOMAPI/sec1/ch5_recidivism.html) (last visited Oct. 19, 2018)). The two-thirds reoffender statistic appears to be a distortion of the cited government source, which notes that recidivism rates among untreated sex offenders can be as high as 60% and makes no claims about those who have not been jailed (only those who have not been treated). See Przybylski, *supra*.

133. KARP, *supra* note 116, at 2–3.

134. Kathleen Daly, *Restorative Justice and Sexual Assault: An Archival Study of Court and Conference Cases*, 46 BRIT. J. CRIMINOLOGY 334, 334 (2006).

135. Coker, *supra* note 17, at 189 (citing Heather Strang, *Is Restorative Justice Imposing Its Agenda on Victims?*, in CRITICAL ISSUES IN RESTORATIVE JUSTICE 95, 100 (Howard Zehr & Barb Toews eds., 2004)).

in the United States, one of the only programs that has used restorative justice for sexually violent crimes has shown similar promise in reducing recidivism rates. The RESTORE program in Pima, Arizona, which ran for four years, had twenty cases that completed restorative justice conferencing.<sup>136</sup> Of those, only one participant reoffended in the following year—“an older person showing signs of dementia.”<sup>137</sup> Ultimately, restorative justice “rests on a set of underlying beliefs about the human capacity for change,”<sup>138</sup> and is premised on the notion that rehabilitation is possible.<sup>139</sup>

Advocates have also expressed concern that “social pressure—including a very gendered expectation that good girls forgive—may lead survivors to opt into restorative processes even when they would rather pursue an adversarial, punitive model.”<sup>140</sup> Although it can be difficult to protect survivors from “coercive pressure” to choose restorative justice practices, it is essential to do so given the centrality of truly voluntary participation to the restorative justice process.<sup>141</sup> One way to guard against this is to make sure that restorative justice is framed as one of several options that a survivor may choose. Indeed, the Interim Guidance produced under Secretary DeVos does just that—it allows mediation and other forms of informal resolution for Title IX claims only where all parties voluntarily agree after being given “a full disclosure of the allegations and their options for formal resolution.”<sup>142</sup> The Proposed Regulations also address this issue, providing several safeguards about notice and consent “[t]o ensure that the parties do not feel forced into an informal resolution” by their college or university.<sup>143</sup> It is also crucial to respect that survivors may have well-thought-out, independent reasons for preferring restorative justice (many of which are discussed below), and it would be condescending to automatically conclude they were simply responding to gendered expectations.

It is important to note when addressing these criticisms that, even with shortcomings, some survivors may find restorative justice prefera-

136. Khadaroo, *supra* note 88.

137. *Id.*

138. Coker, *supra* note 17, at 189 (citing LAWRENCE W. SHERMAN & HEATHER STRANG, *RESTORATIVE JUSTICE: THE EVIDENCE* 15 (2007)); and then citing Strang, *supra* note 135, at 100–01).

139. See ABA CRIMINAL JUSTICE SECTION REPORT, *supra* note 89, at 5 (“[Restorative justice] has been shown to be effective at lowering recidivism and empowering victims in both academic and non-academic settings.”); Brake, *supra* note 107, at 150 (citing Koss et al., *supra* note 97, at 247–48, 254) (“Although there is not yet empirical evidence to evaluate restorative justice programs as applied to campus sexual assault, restorative justice methods have been successfully used in sexual assault cases in the criminal justice system.”).

140. Brodsky, *supra* note 126.

141. KARP, *supra* note 116, at 1 (noting the importance of voluntary participation).

142. OFFICE FOR CIVIL RIGHTS, *supra* note 71, at 4.

143. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462, 61,479 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106).

ble to the current options of pursuing a traditional campus claim or a criminal investigation. As one advocate put it in a *New York Times* op-ed,

[M]any student activists have become disillusioned with an emphasis on punitive justice—firings, expulsions and in some cases, prison sentences. We’ve seen firsthand how rarely it works for survivors. It’s not designed to provide validation, acknowledgment or closure. It also does not guarantee that those who harmed will not act again.<sup>144</sup>

Restorative justice “cannot be evaluated in a vacuum but instead must be viewed against the backdrop of current practice.”<sup>145</sup> Survivors may be unwilling to pursue a formal complaint on campus for a variety of reasons, including “the social complications of continuing to coexist in shared friendship groups with offenders; and/or the wish to prioritize education and treatment for offenders over punishment.”<sup>146</sup> The due process concerns some critics have with campus investigations and hearings, highlighted above, have led to calls for universities to no longer adjudicate sexual assault complaints and instead turn each case over to the police.<sup>147</sup> But, the challenges that survivors face in the criminal justice system are, of course, well known.

[W]omen are right to be skeptical about the criminal justice system—about full-blown criminal trials and appeals and the toll they take on witnesses and accusers, about the higher standard of criminal proof, beyond a reasonable doubt, which, though justified by the risk of imprisonment, can leave many claims un-redressed.<sup>148</sup>

Campus disciplinary processes are not always markedly better for survivors.

The adversarial design of most campus grievance processes creates onerous burdens for rape survivors in other ways, too. Not only are survivors effectively forced to prosecute their case through a system designed to disbelieve them, the very process of doing so . . . may be hostile and traumatizing. As a result, many survivors may be unable or unwilling to do so.<sup>149</sup>

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144. Sofie Karasek, Opinion, *I’m a Campus Sexual Assault Activist. It’s Time to Reimagine How We Punish Sex Crimes*, N.Y. TIMES (Feb. 22, 2018), <https://www.nytimes.com/2018/02/22/opinion/campus-sexual-assault-punitive-justive.html>.

145. Koss et al., *supra* note 97, at 247.

146. KARP ET AL., *supra* note 93, at 12.

147. *See, e.g.*, Joyce, *supra* note 16 (“The complexity around campus sexual misconduct has led observers from diverse political backgrounds to call for turning the whole matter over to the police.”).

148. Gertner, *supra* note 50.

149. Alletta Brenner, *Transforming Campus Culture to Prevent Rape: The Possibility and Promise of Restorative Justice as a Response to Campus Sexual Violence*, HARV. J.L. & GENDER, Oct. 2013, at 1, 2, 6, <http://harvardjlg.com/wp-content/uploads/2013/10/Brenner-Transforming-Campus-Culture.pdf> (describing several problems with campus Title IX disciplinary programs).



Because restorative justice practices are predicated on the acknowledgement of harm by the offending party, “the disabling consequences of the adversarial process for victims are avoided.”<sup>150</sup> The deficiencies and drawbacks of survivors’ experiences in other systems may make restorative justice look more appealing.<sup>151</sup>

Beyond simply looking better in comparison to current campus and criminal justice practices, there are additional reasons survivors may prefer restorative justice. Research supports the notion that survivors have unique needs that may well be met by restorative justice practices, including: the need to tell their own stories, the need to “observe offender remorse for harming them,” and the need to have choice and agency in charting the course of the resolution.<sup>152</sup> As one survivor put it, “Everything about [restorative justice] spoke to the needs that I had . . . [Restorative justice was] a process that truly meets the need to be heard, the need for accountability, the need for some type of attempt at repair . . . .”<sup>153</sup> Because restorative justice is predicated on an acknowledgement of responsibility from the offending party, it may also satisfy survivors’ need to be “believed, absolved, and vindicated.”<sup>154</sup> For all of these reasons, many scholars support offering restorative justice programs in response to sexual assault on campus, even Title IX administrators who describe themselves as otherwise supportive of the Obama Administration’s Title IX efforts.<sup>155</sup> As Professor Howarth eloquently put it, “[r]estorative justice methods recognize the institution’s responsibilities to all students involved. Restorative justice models hold the accused accountable for the harm he has caused, but acknowledge that both accuser and accused are members of the community.”<sup>156</sup>

Of course, restorative justice almost certainly provides better options for meeting the needs of offenders and may provide better options for meeting the needs of the larger community as well.<sup>157</sup> Although

150. Daly, *supra* note 134, at 338.

151. See Brake, *supra* note 107, at 151 (“Studies to date have shown better outcomes for victims using restorative justice methods than those resulting from traditional criminal law enforcement, since restorative justice gives victims a more active and empowering role in the resolution process.”).

152. Koss et al., *supra* note 97, at 246–47; see also Daly, *supra* note 134, at 338 (noting potential benefits of restorative justice include victim voice and participation, and victim validation, and offender responsibility).

153. Khadaroo, *supra* note 88 (quoting Jasmyn Elise Story, survivor).

154. KARP ET AL., *supra* note 93, at 13.

155. Joan W. Howarth, *Shame Agent*, 66 J. LEGAL EDUC. 717, 717, 719–20 (2017) (recounting Professor Howarth’s experiences as a Title IX administrator and noting that she is “fundamentally supportive of the Obama administration’s Title IX enforcement efforts,” even as she ultimately recommends the use of restorative justice practices).

156. *Id.* at 735–36.

157. KARP ET AL., *supra* note 93, at 10–13 (Restorative justice can help meet community needs such as creating “opportunities to communicate through differences” and to provide fora to “explore the harm of sexual and gender-based misconduct and to deliberate about community standards and expectations.” It may help meet offender needs by “call[ing] for accountability within a context of social support.”).

“[s]ex offenders rarely garner sympathy,”<sup>158</sup> attention to their need for education and rehabilitation may be one reason that restorative justice practices seem to lead to lower recidivism rates, as discussed above. As one survivor explained, “putting him in prison seemed almost laughably ill suited to what I needed. What I wanted was for him to change his behavior. He needed an intervention, not prison. He got neither.”<sup>159</sup>

Restorative justice can help colleges apply “an intersectional view of how and why campus rape occurs,” and allow them to “seek to engage the broader student community in dialogue and utilize the grievance process as a means of both holding offenders accountable and preventing future rapes.”<sup>160</sup> Further, because of restorative justice’s roots in providing culturally sensitive redress to historically marginalized groups,<sup>161</sup> and its emphasis on addressing power dynamics in communities,<sup>162</sup> it may be one of the more promising methods of addressing the issue of racial bias in campus disciplinary proceedings.<sup>163</sup>

For all of these reasons, even though the idea of using restorative justice practices in campus sexual assault proceedings remains controversial, many “feminists have come to strongly advocate for it, arguing that it actually provides a more empowering and survivor-oriented approach than the traditional criminal justice system.”<sup>164</sup>

### III. ADDRESSING THE USE OF STATEMENTS MADE IN RESTORATIVE JUSTICE SESSIONS IN LATER COURT PROCEEDINGS

One major complication in using restorative justice in Title IX proceedings on campuses is the potential harm to offenders in later (or concurrent) criminal justice proceedings (or civil cases) if the statements they make during a restorative conference are admitted into evidence or simply reach the hands of prosecutors or plaintiffs’ attorneys. Restorative justice begins with an offender acknowledging harm; an offender who is unwilling to make such an acknowledgement formally would be unable to participate in a restorative justice conference. But what about an offender who makes such an acknowledgement and then is confronted with those words later in a criminal or civil trial? “Although university disciplinary proceedings are confidential, they may nonetheless be admissible in a criminal trial.”<sup>165</sup> The transcripts of university discipline hearings

158. *Id.* at 13.

159. Karasek, *supra* note 144.

160. Brenner, *supra* note 149, at 2.

161. KARP ET AL., *supra* note 93, at 11.

162. *Id.*

163. See Brake, *supra* note 107, at 149 (“I will not pretend that there is an easy answer to the disciplinary dilemmas or risks of racial bias in campus disciplinary processes. But a more promising path for addressing these concerns than raising the standard of proof is to construct a campus process that makes room for an alternative approach to the traditional disciplinary process based on restorative justice principles.”).

164. Brenner, *supra* note 149, at 18.

165. Kaplan, *supra* note 95, at 733.

can be subpoenaed<sup>166</sup> and possibly admitted into evidence in subsequent civil or criminal actions as party admissions are admissible exceptions to hearsay rules in the federal system (and in many states as well).<sup>167</sup> Such a possibility may deter offenders from acknowledging the harm their actions created, thereby undermining the goals of restorative justice practices and precluding their use.

Other scholars have acknowledged this potential complication and provided suggestions for a framework of what a solution might look like.<sup>168</sup> The most prominent suggestion from these scholars is that schools that use restorative justice practices to resolve Title IX claims should enter into a Memorandum of Understanding (MOU) with the local prosecutor “by which the prosecutor agrees not to use any evidence that emerges from the RJ process—including evidence gained in pre-planning processes—in a subsequent criminal case.”<sup>169</sup> Even with such an agreement in place, a survivor could decide at any point to discontinue the restorative justice conference and instead pursue another remedy.<sup>170</sup> And, of course, a prosecutor could still decide to pursue formal charges in a sexual assault case, even if both parties went through a restorative justice conference, provided that the prosecutor felt the evidence apart from statements made in the restorative justice conference was compelling enough.<sup>171</sup>

For a university that wishes to use restorative justice practices, the development of a MOU with a prosecutor is probably the most feasible solution it can hope to achieve, at least in the short term. But such an ad hoc solution has several downfalls, including: (1) the costs associated with negotiating such an agreement, especially when it would have to be renegotiated with each subsequent prosecutor; (2) the possibility that universities in the same jurisdiction would reach different agreements with the same prosecutor, thus leading to a different outcome based simply on where a student attends college; and (3) the possibility that a

166. Such records are carved out for protection from the Family Educational Rights and Privacy Act (FERPA), which provides that personally identifiable educational records can be disclosed without a student’s consent if the disclosure is “to comply with a judicial order or lawfully issued subpoena.” 34 C.F.R. § 99.31(a)(9)(i) (2018); see also Casey McGowan, *The Threat of Expulsion as Unacceptable Coercion: Title IX, Due Process, and Coerced Confessions*, 66 EMORY L.J. 1175, 1189 (2017) (citing FERPA, 34 C.F.R. § 99.31(a)(9)(i)) (“Title IX proceedings can be subpoenaed and the accused student’s statements turned over to the prosecution in a criminal proceeding.”).

167. See, e.g., FED. R. EVID. 801(d)(2) (stating that party admissions are not hearsay); W.VA. R. EVID. 801(d)(2) (West Virginia rule stating that party admissions are not hearsay).

168. See, e.g., Coker, *supra* note 17, at 203–04 (advising universities who wish to employ restorative justice practices to work out an agreement with the prosecutor); Kaplan, *supra* note 95, at 735 (providing options for universities to avoid issues with the criminal justice system).

169. Coker, *supra* note 17, at 203–04.

170. *Id.* at 204.

171. See, e.g., Kaplan, *supra* note 95, at 734 (noting that “the decision to pursue criminal charges is at the discretion of the prosecutor’s office, not the victim”); see also Coker, *supra* note 17, at 204 (“[T]he MOU with the prosecutor would not prevent the prosecutor from bringing criminal charges against the respondent, provided there was sufficient evidence to support the charge that was not obtained through the RJ process.”).

prosecutor would refuse to make such an agreement, thus severely curtailing the school's ability to utilize restorative justice practices. Therefore, this Part endeavors to outline what a *nationwide* solution may look like.

This Part first attempts to trace the philosophical underpinnings of such a nationwide solution by briefly outlining analogous situations where policy makers (both here in the United States and in other nations) have calculated that it was worthwhile to encourage candor outside of the courtroom by limiting what could be admitted inside it. This context is not purely academic; however, it is crucial to provide. Advocates wishing to encourage policy makers to shield statements made in a restorative justice conference by students accused of sexual assault from admission in a criminal trial will no doubt face backlash, including allegations that they are perpetuating gender violence and trivializing the impact of sexual assault on women.<sup>172</sup> Legislators may fear that the adoption of such an approach will make them appear as though they are shielding rapists from prosecution or are otherwise "soft on crime." These federal legislators will benefit from models, including those previously passed by state legislatures, where prior legislators have codified the practice of making inadmissible certain statements made by people who have caused harm to advance other goals, including victim empowerment and reduced litigation. These analogous situations include medical apology laws, statements made to truth and reconciliation commissions, restricted reports of sexual assault in the military, and Queen for a Day proffer sessions. While none of these situations provide a proper model for the exact contours of a solution, they are worthy of examination here, as each provides helpful features of what a solution might look like, and perhaps more crucially, provide rationales for such a rule.

The Part concludes by briefly examining what a nationwide solution to this problem might look like, using Federal Rules of Evidence 408 and 410 as model rules. Rule 408 prohibits statements made during settlement negotiations from being introduced into evidence at trial,<sup>173</sup> while Rule 410 prohibits statements made during plea negotiations, as well as any withdrawn guilty pleas or nolo contendere pleas, from being introduced into evidence at trial. Although Rules 408 and 410 only apply in the federal system, and thus are not operative in state or local courts

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172. This backlash and criticism would probably mirror the backlash and criticism that the introduction of restorative justice itself into campus sexual assault proceedings has already faced. *See, e.g., supra* Section II.B.

173. Some jurisdictions also provide protection for statements made during the course of mediation. *See, e.g.,* CAL. EVID. CODE § 1119(a) (2018), which provides that "[n]o evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery." However, as noted above, restorative justice is different from mediation, so it is unlikely these statutes would protect statements made during restorative justice conferences. *See generally* Kaplan, *supra* note 95, at 733 n.201.

(where sexual assault cases are most often prosecuted), most states have adopted Rules 408 and 410 in some fashion.<sup>174</sup>

### A. Medical Apology Laws

When an adverse medical event happens—a surgery results in complication, a birth results in injury to the baby—patients need answers from their doctors. However, doctors who fear malpractice lawsuits may be hesitant to speak to their patients about the adverse event at all, let alone offering any acknowledgement of a mistake or an apology for the outcome. “This response is exactly opposite from what a patient or patient’s family needs after an adverse medical incident.”<sup>175</sup> Because patients are unable to receive the answers they are seeking, they are then more likely to sue, “to get the answers in court that the physician deprived them of in the hospital.”<sup>176</sup>

Recognizing that open dialogue between doctors and patients—dialogue that includes an apology when appropriate—can help reduce rates of medical malpractice lawsuits and concomitant litigation expenses, many state legislatures have passed “medical apology laws.”<sup>177</sup> These laws—currently in place in some form in thirty-six states, the District of Columbia, and Guam<sup>178</sup>—prohibit parties from using “expressions of sympathy, condolences or apologies . . . against medical professionals in court.”<sup>179</sup> The first medical apology law was passed in Massachusetts in 1986, championed by a state senator who had tragically lost his daughter when she was struck by a car while riding her bicycle.<sup>180</sup> The senator was furious that the driver of the car never apologized (he had been told that to do so “could have constituted an admission in the litigation surrounding the girl’s death”).<sup>181</sup> Thus, he championed a bill that provided a safe harbor for statements of apology.<sup>182</sup>

174. See, e.g., 1 BETTE J. ROTH ET AL., ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE § 27:18 (2017) (noting that “[t]he majority of states have adopted rules of evidence identical or similar in scope to Fed. R. Evid. 408,” and identifying which have done so verbatim); see also 21 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 5009 (2d ed. 2018) (noting that only six states—Georgia, Illinois, Massachusetts, Missouri, New York, and Virginia—have not adopted some form of the Federal Rules of Evidence).

175. Alan G. Williams, *The Cure for What Ails: A Realistic Remedy for the Medical Malpractice “Crisis,”* 23 STAN. L. & POL’Y REV. 477, 507 (2012).

176. *Id.*

177. *Id.* at 511.

178. Heather Morton, *Medical Professional Apologies Statutes*, NAT’L CONF. ST. LEGISLATURES (Jan. 21, 2014), <http://www.ncsl.org/research/financial-services-and-commerce/medical-professional-apologies-statutes.aspx>.

179. *Id.*

180. Michael B. Runnels, *Apologies All Around: Advocating Federal Protection for the Full Apology in Civil Cases*, 46 SAN DIEGO L. REV. 137, 151–52 (2009).

181. *Id.* (quoting Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 YALE L.J. 1135, 1151 (2000)). Although there have been calls for a similar amendment to Federal Rule of Evidence 408, no federal medical apology law exists. *Id.* at 146–48.

182. *Id.* at 151–52.

Because parties generally bring medical malpractice claims under state laws, state legislatures have created the medical apology laws. Proponents of restorative justice methods could introduce similar legislation to prohibit parties from admitting into evidence statements made in the course of restorative justice conferences at a later civil or criminal trial. Of course, the motivation behind such laws would be very different: whereas state legislatures introduced medical apology laws to reduce malpractice lawsuits, they would introduce restorative justice “safe harbor” laws to protect survivors’ option of choosing to proceed with restorative justice practices on campus. Further, the interest groups that coalesced to help pressure states to pass medical apology laws<sup>183</sup> would be absent here: there is no powerful or wealthy restorative justice lobbying group. Nonetheless, as the next examples demonstrate, there are historical examples of policy makers passing exclusionary rules even where there are no powerful lobbying interests and even where the topics are controversial and involve criminal behavior.

### *B. South Africa Truth and Reconciliation Commission*

An interesting analogy that provides justification for excluding as inadmissible statements made in on-campus restorative justice conferences is the practice of providing amnesty to people who provide statements to truth and reconciliation commissions (though, to be clear, this Article is not suggesting full amnesty for those who participate in restorative justice conferences). There have been many truth and reconciliation commissions over the past several decades, but South Africa’s stands out, having been called “the best example of restorative justice ideals and practices implemented on a national level.”<sup>184</sup> In the wake of the end of the apartheid era, South Africa passed the Promotion of National Unity and Reconciliation Act of 1995 (the Act).<sup>185</sup> In 1996, the Act created a Truth and Reconciliation Commission to investigate apartheid-era human rights atrocities.<sup>186</sup> The Commission adopted an amnesty process “as a means to elicit the truth about South Africa’s past.”<sup>187</sup> The amnesty pro-

183. For example, when Wisconsin’s medical apology law was passed in 2014, it was supported by associations representing doctors and hospitals, including the Wisconsin Medical Society, which urged its members to call their state senators to support the bill and provided talking points for those conversations. *Calls Needed Today on Physician Condolence Bill*, WIS. MED. SOC’Y (Mar. 31, 2014), <https://www.wisconsinmedicalsociety.org/advocacy/at-the-capitol/take-action/key-contacts/calls-needed-today-physician-condolence-bill>. As one reporter put it, “[t]he medical lobby, supported by powerful business groups, outmaneuvered trial lawyers” in getting the medical apology bill passed. Cary Spivak & Kevin Crowe, *Medical Lobby Is a Powerhouse in Wisconsin Capitol*, J. SENTINEL (June 28, 2014, 5:00 PM), <http://archive.jsonline.com/watchdog/watchdogreports/medical-lobby-is-a-powerhouse-in-wisconsin-capitol-b99291106z1-265030841.html>.

184. Carrie J. Niebur Eisnaugle, *An International “Truth Commission”: Utilizing Restorative Justice as an Alternative to Retribution*, 36 VAND. J. TRANSNAT’L L. 209, 224 (2003).

185. Emily H. McCarthy, *South Africa’s Amnesty Process: A Viable Route Toward Truth and Reconciliation?*, 3 MICH. J. RACE & L. 183, 185 (1997).

186. *Id.* at 186.

187. *Id.*

cess was adopted in part because South Africa was “not in a position to establish war crimes tribunals like those in Nuremberg or Tokyo.”<sup>188</sup> But it was also adopted because war-crimes tribunals “consume an enormous amount of time and money, and their results are often disappointing.”<sup>189</sup> Anti-apartheid activists also recognized that the amnesty process offered through the Truth and Reconciliation Commission would promote more “reconciliation” than criminal prosecutions and also allow victims to receive more attention in a process many would find “cathartic.”<sup>190</sup> Further, by forcing apartheid regime members to publicly acknowledge their abuses, the Truth and Reconciliation Commission hoped to force a public reckoning with past atrocities.<sup>191</sup> “Victims of the apartheid struggle also benefit from the process by confronting their abusers, discovering what happened to their loved ones, and telling their own stories.”<sup>192</sup>

The threshold for receiving amnesty through the Truth and Reconciliation Commission was relatively low: so long as an applicant had a prior relationship with a known political organization, was confessing to an “act associated with a political objective,” and fully disclosed all relevant facts, that applicant received protection from civil and criminal liability.<sup>193</sup> The amnesty provided by the Truth and Reconciliation Commission of South Africa far exceeds what this Article proposes for restorative justice statements in that it provided full protection from liability, rather than simply making inadmissible certain statements. However, that approach still provides an interesting model for thinking through the moral and practical justifications of excluding statements made in restorative justice conferences as inadmissible in later trials. Just as the anti-apartheid activists concluded that war-crimes tribunals were too often expensive, draining, and not likely to end in convictions, survivors of sexual violence may feel similarly about criminal prosecutions. Just as the anti-apartheid activists recognized the value of allowing victims to confront their accusers and hear an acknowledgement of the harm they experienced, so too might survivors of sexual violence.

### C. *Queen for a Day Proffer Sessions*

A “Queen for a Day” agreement is “a limited use immunity agreement where the suspect agrees to provide information in exchange for a promise from the Government that any statements made during the prof-

188. *Id.* at 186–87 (noting that there was “no clear victor in South Africa after apartheid,” “no incriminating paper trail left behind,” and the dangerous risk of violent retaliation should the police or armed forces have been put on trial for human rights abuses).

189. *Id.* at 187.

190. *Id.* at 188.

191. *Id.* at 188–89 (“Unlike criminal proceedings, South Africa’s amnesty process forces the apartheid regime to admit its abuses publicly and requires perpetrators to reveal and discuss their crimes. Such confessions compel the White population to acknowledge the atrocities committed by the government they continuously re-elected.”).

192. *Id.* at 189.

193. *Id.* at 185.

fer will not be used against the profferrer.”<sup>194</sup> Statements made during such sessions are protected under Rule 11(f) of the Federal Rules of Criminal Procedure and Rule 410 of the Federal Rules of Evidence, which both provide that statements made by a criminal defendant during plea discussions are inadmissible.<sup>195</sup> Parties generally enter into these agreements whenever the prosecution believes that a potential defendant has information that could make them a valuable cooperator.<sup>196</sup> A defendant’s cooperation with the prosecution can result in the prosecutor recommending a lower sentence range under the Federal Sentencing Guidelines or a judge departing from the recommended range.<sup>197</sup>

Queen for a Day agreements are especially interesting in the context of restorative justice because they are governed in part by Federal Rule of Evidence 410. Rule 410, discussed in greater detail below, is a good starting place for an exclusionary rule for statements made during restorative justice conferences. In a proffer session, a potential criminal defendant may well admit to criminal behavior in the presence of prosecutors as part of a plea agreement or a cooperation agreement. Sometimes, potential defendants then later recant that agreement and plead not guilty to the behavior that they admitted to in the prosecutor’s presence during the proffer session. Rule 410(b)(2) permits a court to admit proffer statements in a criminal proceeding for perjury if the defendant made the statement “under oath, on the record, and with counsel present.”<sup>198</sup> However, the prosecutor cannot otherwise admit a statement made by the defendant during plea discussion in a later criminal trial.

Obvious parallels arise between the exclusion of statements made in Queen for a Day proffer sessions and the proposed exclusion of statements made in restorative justice conferences. Both exclude from evidence statements made by potential defendants, even ones that admit to criminal activity. In proffer sessions, a court must exclude such state-

194. *United States v. Lauersen*, No. 98CR1134, 2000 WL 1693538, at \*1 (S.D.N.Y. 2000).

195. See FED. R. CRIM. P. 11(f) (“The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410.”); see also FED. R. EVID. 410(a)(4) (providing that statements made during plea discussions that did not result in a guilty plea or resulted in a later withdrawn guilty plea are not admissible against the defendant in a civil or criminal case).

196. See generally Benjamin A. Naftalis, “*Queen for A Day*” Agreements and the Proper Scope of Permissible Waiver of the Federal Plea-Statement Rules, 37 COLUM. J.L. & SOC. PROBS. 1, 5 (2003).

197. *Id.* at 11–12. Although Mr. Naftalis’s article was written prior to the Guidelines being made advisory, not mandatory, through the *United States v. Booker*, 543 U.S. 220 (2005), decision, cooperation with the prosecution remains one factor in determining an appropriate Guidelines sentence or in departing from one. See, e.g., Lisa A. Rich, *Congress Should Engage in Sentencing Review: Some Ideas for the 111th Congress*, 21 FED. SENT’G REP. 17, 17 (2008) (“[D]espite the Department of Justice’s concerns immediately after *Booker* that it would lose leverage to gain cooperation from defendants, not only has the rate of substantial assistance motions remained relatively steady, the percentage of government-sponsored below-range sentences has continued to increase since *Booker*.”); see *Booker*, 543 U.S. at 245 (2005) (discussing how sentencing guidelines are now advisory).

198. FED. R. EVID. 410(b)(2).



ments even though they were made to a *prosecutor*. Viewed in that sense, the proposed rule excluding statements made in restorative justice conferences is arguably more palatable from a law-and-order perspective than the exclusion of a potential defendant's admissions of criminal activity to a prosecutor.

#### *D. Restricted Reports of Sexual Assault in the Military*

In the U.S. military, survivors of sexual assault have the option of making a "restricted report," wherein they have access to support such as counseling and medical resources, but their reporting of sexual assault will not trigger any proceeding in the military justice system.<sup>199</sup> In the early 2000s, the military faced constant negative media attention and public outcry for the failure to address the problem of sexual assault and harassment.<sup>200</sup> As a result, Congress instituted major policy changes, including a rewrite to the provision of the Uniform Code of Military Justice that dealt with rape.<sup>201</sup> Those reforms provided survivors the option to make a restricted report.<sup>202</sup>

In the military, typically commanding officers decide whether to prosecute a sexual assault (and even whether to accept the findings of a court martial).<sup>203</sup> However, recent legislation has curtailed that decision-making power somewhat, and commanders are urged to work with military prosecutors in making these decisions.<sup>204</sup> Because of this dynamic, survivors of sexual assault, many of whom have the same commanding officer as their assailant, may have a variety of reasons for not wishing to launch a formal investigation—survivors may live in the same barracks, eat in the same mess hall, or participate in the same social circles as their rapist.<sup>205</sup> Similarly, survivors of on-campus sexual assault may live in the

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199. Lorelei Laird, *Military Lawyers Confront Changes as Sexual Assault Becomes Big News*, ABA J. (Sept. 2013), [http://www.abajournal.com/magazine/article/military\\_lawyers\\_confront\\_changes\\_as\\_sexual\\_assault\\_becomes\\_big\\_news](http://www.abajournal.com/magazine/article/military_lawyers_confront_changes_as_sexual_assault_becomes_big_news) ("Restricted reports give victims access to counseling, medical resources and chaplains, but they don't go through the military justice system. Thus, there's no possibility of prosecution, but also no possibility of retaliation by a commander.").

200. *Id.* ("Reports of sexual assault during deployments in Iraq and Afghanistan led to several reforms in 2004, including a rewrite of Article 120 of the Uniform Code of Military Justice, the provision dealing with rape, effective in 2007.").

201. *Id.*

202. *Id.*

203. See Eric R. Carpenter, *An Empirical Look at Commander Bias in Sexual Assault Cases*, 22 BERKELEY J. CRIM. L. 101, 103–04 (2017).

204. *Id.* at 103 ("Congress has rewritten the UCMJ's sexual assault provisions to focus the prosecutor's attention on the offender's behavior rather than the victim's . . . and severely curtailed a commander's authority to disapprove of a court-martial's findings and sentence. In turn, the President has limited the commander's use of an accused's good military character when deciding how to dispose of a case, and the factfinder's use of that evidence during the guilt phase of the trial." (footnotes omitted)).

205. See Graci Bozarth, *The Price of Pleasure: Sexual Assault and the Evolution of the Uniform Code of Military Justice*, 84 UMKC L. REV. 181, 208 n.222 (2015) (explaining that survivors may file restricted reports because they lack "'faith in the military justice system,' because they do not wish to bring negative attention to their unit, because a victim foresees future interaction with an

same dorm, eat in the same cafeteria, and belong to the same close-knit group of friends as his or her rapist. Thus, as the Navy explains on its website, survivors may prefer restricted reports because they provide them “time to consider options and to begin the healing process,” and empower survivors “to seek relevant information and support, and to make more informed decisions about participating in a criminal investigation.”<sup>206</sup>

The U.S. military’s practice of allowing restricted reports of sexual assault is, of course, different from the three previous models—it is not a program that provides for the exclusion of certain statements. However, it is still an example worth examining here. It is an example of policy makers deciding that the goal of respecting the autonomy of sexual assault survivors and allowing them to choose whether to trigger an automatic investigation of their assailants is a worthy goal, even if it results in fewer criminal convictions (indeed, the Navy specifically acknowledges that one “limitation” of restricted reporting is that the “[p]erpetrator may remain unpunished and at large”<sup>207</sup>). As noted above, there are many similarities between college students and members of the military, including their average age, their overlapping social circles (living together, working together, eating together), and the close-knit groups they often form. Just as policy makers allowed restricted reporting to give sexual assault survivors in the military the option of time to heal and make an informed decision about whether to participate in a criminal investigation, the wishes of a college student survivor could be taken into consideration in drafting legislation limiting the use of statements in restorative justice conferences at a later trial. Military survivors have the option at any point of changing their restricted report into an unrestricted report, thereby beginning the investigation through the mili-

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offender or because the victim was committing collateral misconduct” (quoting Katherine A. Krul, *The Sexual Assault Prevention and Response (SAPR) Program—in Need of More Prevention*, ARMY LAW., Nov. 2008, at 41, 43–44)).

206. *Reporting Options*, COMMANDER, NAVY INSTALLATIONS COMMAND, [https://www.cnic.navy.mil/ffr/family\\_readiness/fleet\\_and\\_family\\_support\\_program/sexual\\_assault\\_prevention\\_and\\_response/reporting\\_options.html](https://www.cnic.navy.mil/ffr/family_readiness/fleet_and_family_support_program/sexual_assault_prevention_and_response/reporting_options.html) (last visited Oct. 18, 2018).

207. *Id.* Of course, just as restorative justice has to be weighed against existing Title IX practices on college campuses, restricted reporting must be weighed against other options of reporting in the military. If servicemen and women were hesitant for whatever reason to bring forward their reports in the formal system, allowing those survivors the option of restricted reporting would not increase the number of perpetrators who remain at large because they would have remained at large under the formal system as well, as those survivors would not have made reports. The actual number is difficult to know, but one scholar estimates that as many as 95% of campus assaults are never reported to school officials. See Brenner, *supra* note 149, at 6–7 (“Contributing to the widespread ineffectiveness of campus disciplinary processes is the fact that the vast majority of student rape survivors do not pursue formal action, by either not reporting the rape to campus administrators or deciding not to take action against the other student. The extremely low percentage of sexual assaults reported by colleges and universities each year reflects this tendency . . . . [O]ver ninety-five percent of survivors choose not to report.” (footnote omitted)).

tary justice system.<sup>208</sup> Similarly, should a survivor feel, after beginning the restorative justice process, that the survivor wishes to cooperate with a criminal prosecution, nothing would stop him or her from doing so. The only limitation that would result from such a decision is that the alleged assailant's statements made in the restorative justice conference would not be admissible.

*E. Federal Rules of Evidence 408 and 410 as a Model*

As the preceding examples demonstrate, policy makers occasionally conclude that the benefits of excluding certain statements from admission outweigh any possible negative impacts. In the military's restricted reporting program, policy makers have even decided that the benefits of respecting sexual assault survivors' wishes regarding how or whether to prosecute their cases outweigh the possibility of fewer trials and fewer convictions. Having established a philosophical basis for shielding statements made in restorative justice conferences from admission, and provided historical examples of policy makers voting to do so, this Section outlines what such a rule might look like. Each portion of the proposed rule is explained below, and the complete text of the proposed rule is provided at the end of the Section.

Federal Rule of Evidence 408(a)(2) provides that, subject to certain exclusions, "a statement made during compromise negotiations about the claim," is not admissible by either party to "either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction."<sup>209</sup> This Rule could be modified to exclude statements made in collegiate<sup>210</sup> restorative justice conferences relatively easily. The proposed rule should exclude from admission at any subsequent civil or criminal trial any statements made by any party in a restorative justice conference formally recognized and organized by an accredited college or university. By requiring that the restorative justice conference be formally recognized and organized by the university, the rule will prevent abuse by those who might seek to take advantage of the fact that the term "restorative justice" is broad and does not always lend itself to an easy definition.<sup>211</sup>

Because the mere act of participating in a restorative justice conference could alone be viewed as a type of admission (given that partici-

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208. *Reporting Options*, *supra* note 206 ("Remember, if you initially make a *restricted report*, you can change it to an *unrestricted report* at a later date. However, if you initially make an *unrestricted report*, you cannot change it to a *restricted report*.").

209. FED. R. EVID. 408(a)(2).

210. This Article focuses on restorative justice in the context of college sexual assault, and so this proposal likewise focuses on college restorative justice conferences. If municipalities decide they are interested in developing restorative justice programs to address sexual assault, the rule could be modified to include those, but that is outside the scope of this Article and proposal and involves a different set of factors to weigh.

211. See *supra* Part II and accompanying notes.

pants must accept responsibility as a precondition to participation), the proposed rule should also borrow language from Federal Rule of Evidence 410. Rule 410 prohibits the admission of statements made during plea negotiations as well as any evidence of a later-withdrawn guilty plea.<sup>212</sup> Accordingly, the proposed rule should provide that evidence of participation in a restorative justice conference should be excluded from admission, in addition to the statements made therein.

This proposed rule, one that excludes from admission participation in a restorative justice conference as well as any statements made therein, will make the implementation of restorative justice conferences on college campuses easier while still protecting the rights of sexual assault survivors. First, a survivor's participation in a restorative justice conference would remain entirely voluntary. A survivor who is interested in pursuing a civil or criminal prosecution might not pursue a restorative justice conference at all.<sup>213</sup> If survivors should later change their minds or be unsatisfied with the restorative justice process and wish to pursue a civil or criminal action, nothing about this proposed rule would stop them from doing so. Although survivors would not be able to introduce as evidence the fact that a restorative justice conference occurred or the statements made by either side during the conference, they could still pursue the claim itself and introduce the traditional evidence used in most prosecutions or civil trials for sexual assault. Although at least one restorative justice program required that survivors waive their right to pursue later civil claims as a condition of participation,<sup>214</sup> this Article does not propose such a waiver. Rather, the proposed rule is modest in its scope: it's designed to provide enough protection to accused students such that their participation in a restorative justice conference is tolerable from a legal perspective but to also protect the rights of the survivor.

Accordingly, the full text of the proposed rule is as follows:

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212. The Rule provides:

In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:

- (1) a guilty plea that was later withdrawn;
- (2) a nolo contendere plea;
- (3) a statement made during a proceeding on either of those pleas under Federal Rule of Criminal Procedure 11 or a comparable state procedure; or
- (4) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.

FED. R. EVID. 410(a).

213. Of course, as discussed above, the restorative justice program on campus must be structured so that participation is truly voluntary, that there is no pressure on participants to participate or not to participate, and each side should be made fully aware of any rules regarding the exclusion of statements or participation from later legal actions.

214. For example, in the RESTORE program run in Arizona, participants agreed to waive their right to pursue a civil action against their assailant if the restorative justice program was completed. Koss, *supra* note 109, at 225.

Evidence of the following is not admissible—on behalf of any party—in a civil or criminal proceeding:

- (1) any statements made by any party in a restorative justice conference that (a) focused on sexual violence or harassment and was (b) formally recognized and organized by an accredited college or university;
- (2) evidence of participation in a restorative justice conference that (a) focused on sexual violence or harassment and was (b) formally recognized and organized by an accredited college or university.

#### CONCLUSION

The problem of sexual violence on college campuses is real and must be taken seriously and properly addressed. But sexual assault survivors deserve better and more diverse options than those currently offered, and restorative justice practices show great promise for meeting survivors' unique needs. These practices also show promise for helping communities to heal, helping educate offenders, and reducing recidivism rates. As another scholar put it, "[w]hile restorative justice is not a panacea, it holds promise for improving outcomes for students harmed by sexual assault."<sup>215</sup> As in so many promising programs, the devil is in the details here, and any collegiate restorative justice program that addresses sexual violence must be properly designed and properly facilitated, making use of existing research and best practices. Most importantly, it must be a truly *voluntary* option for survivors, one that is part of a menu of choices, and one that they can change their mind about at any point. To make it available as a meaningful option for survivors, we must offer some protection to the accused student, and the exclusionary rule proposed here properly balances the various interests involved. Although, at first blush, such an exclusionary rule may seem too controversial for nationwide enactment, it is just one of many such rules that policy makers enact to incentivize certain behaviors, whether that be physicians apologizing for injuries or potential defendants candidly speaking with prosecutors. Given the Trump Administration's expressed interest in overhauling campus sexual assault proceedings, and the promulgation of new Proposed Regulations regarding Title IX, the time is ripe to explore restorative justice practices.

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215. Brake, *supra* note 107, at 151.

