

# TRANSFORMING CAMPUS CULTURE TO PREVENT RAPE: THE POSSIBILITY AND PROMISE OF RESTORATIVE JUSTICE AS A RESPONSE TO CAMPUS SEXUAL VIOLENCE

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## INTRODUCTION

Though feminists have long argued that rape is linked to sex discrimination,<sup>1</sup> legal responses to rape tend to ignore the ways that social and cultural norms contribute to sexual violence.<sup>2</sup> One exception, however, exists in the context of federal anti-discrimination law under Title IX, which applies to colleges and universities that receive federal funds. Under the legal framework established by Title IX, rape constitutes a form of severe sexual harassment, to which educational institutions are legally obligated to respond.<sup>3</sup> An institution's failure to do so is considered evidence of sex discrimination and may subject it to both federal penalties and civil liability.<sup>4</sup> Recently, this obligation was further strengthened by the passage of legislation that codifies particular aspects of what campus grievance processes for rape survivors must include and requires schools to

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<sup>1</sup> *See generally* SUSAN BROWNMILLER, *AGAINST OUR WILL* (1975) (arguing that rape is a product and tool of male domination); LORENNE M.G. CLARK & DEBRA J. LEWIS, *RAPE: THE PRICE OF COERCIVE SEXUALITY* (1977) (arguing that rape was an expression of perceived male entitlement to the control and use of female sexuality),

<sup>2</sup> *See* Susan Estrich, *Rape*, 95 *YALE L.J.* 1087 (1986) (arguing that the law of rape fails to protect women from acquaintance rape because it simultaneously considers the fact of social context, in that the victim and perpetrator know each other, to imply consent while failing to account for how social context sets up the necessary conditions for sexual coercion); CATHARINE MACKINNON, *WOMEN'S LIVES, MEN'S LAWS* 240–48 (2005) (arguing that criminal law fails to account for power imbalances between victims and perpetrators and that rather than using a consent standard, rape law should employ a standard of whether the sex was “wanted”).

<sup>3</sup> Under Title IX, once an incident of campus rape has occurred, schools must “take immediate and appropriate steps to investigate or otherwise determine what occurred and take prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again.” *See* U.S. DEPARTMENT OF EDUCATION OFFICE FOR CIVIL RIGHTS, *REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES* 2–4, 15 (2001).

<sup>4</sup> *Id.*

take affirmative steps to transform campus culture to prevent rape.<sup>5</sup>

Despite this clear legal mandate, rape remains a serious and enduring problem at colleges and universities in the United States. Indeed, roughly one in five female students are victims of rape at some point in their post-secondary education.<sup>6</sup> If we add to this the substantial numbers of male<sup>7</sup> and transgender<sup>8</sup> students who experience sexual violence also, it is clear that the scope of the problem is huge. The overwhelming majority of these rapes are “acquaintance rapes”—nonconsensual sex between students who have some pre-existing social relationship.<sup>9</sup> As these numbers indicate, many institutions fail to take adequate steps to respond to and prevent campus sexual violence.<sup>10</sup>

In a related article, *Resisting Simple Dichotomies: Critiquing Narratives of Victims, Perpetrators, and Harm in Feminist Theories of Rape*,<sup>11</sup> which was published in

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<sup>5</sup> Violence Against Women Reauthorization Act of 2013, PUB. L. NO. 113-14, Sec. 304, 127 Stat 54, 89–92 (2013) (codified at 20 U.S.C.A. § 1092).

<sup>6</sup> According to the most comprehensive study available, roughly twenty to twenty five percent of women are raped at some point while in college. See BONNIE S. FISHER, ET AL., U.S. DEPT OF JUSTICE, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 10, 17 (2000). See also AMERICAN COLLEGE HEALTH ASSOCIATION, NATIONAL COLLEGE HEALTH ASSESSMENT SPRING 2012 REFERENCE GROUP EXECUTIVE SUMMARY 5 (2012) (confirming that approximately 3.5 percent of college women reported being raped in a 12-month period).

<sup>7</sup> See CHRISTOPHER P. KREBS ET AL., THE CAMPUS SEXUAL ASSAULT STUDY: FINAL REPORT 5.5 (2007) (finding that 6.1 percent of male students were victims of completed or attempted sexual assault during college). But see Mary E. Larimer, Amy R. Lydum, Britt K. Anderson, and Aaron P. Turner, *Male and Female Recipients of Unwanted Sexual Contact in a College Student Sample: Prevalence Rates, Alcohol Use, and Depression Symptoms*, 40 SEX ROLES 295, 301–02, 305–06 (1999) (reporting findings of study where undergraduate males reported unwanted and coerced sexual activity at levels comparable to those of their female counterparts).

<sup>8</sup> See Rebecca L. Stotzer, *Violence Against Transgender People: A Review of United States Data*, 14 AGGRESSION & VIOLENT BEHAV. 170, 177–78 (2009) (surveying data and concluding that all transgender persons have an especially high lifelong risk of multiple types and incidences of violence, particularly sexual violence).

<sup>9</sup> See FISHER, *supra* note 6, at 17 (finding that more than ninety percent of female college rape victims know their attacker); Larimer, *supra* note 7, at 305–06 (finding that coercive sex experienced by male students was perpetrated by other students, usually female).

<sup>10</sup> See Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 210–24, 235–44 (2012) (discussing deficiencies in colleges’ and universities’ systems for responding to sexual violence and the way that inadequate enforcement of federal laws aimed at improving responses exacerbates the problem).

<sup>11</sup> Alletta Brenner, *Resisting Simple Dichotomies: Critiquing Narratives of Victims, Perpetrators, and Harm in Feminist Theories of Rape*, 36 Harv. J. L. & Gender 503 (2013).

the Summer 2013 issue of the Harvard Journal of Law and Gender, I argued that feminist theories of rape tend to be imbued with dichotomous ways of thinking that limit both theoretical frameworks for understanding sexualized violence, and practical legal proposals for how to better prevent and respond to it. In that article I argued feminists should adopt an intersectional view of such violence that treats it as a rupture in the process of human recognition. This approach, which emphasizes the individualized effects of sexualized violence, attempts to draw attention to the ways that the construction and performance of identities can contribute to dehumanization and seeks solutions that help to re-humanize both victims and perpetrators. I concluded by arguing that a possible alternative to addressing sexualized violence may look like the emerging practice of restorative justice.

This second article aims to translate the theoretical foundation offered in *Resisting Simple Dichotomies* into a concrete proposal for real-world practice. In many ways, college campuses offer a rich environment for developing radically new ways of thinking about and responding to rape. For, as much as rape is a particularly serious problem on campuses, it occurs within a social and institutional framework that offers profound possibilities for the mobilization of social change.

The starting point of this paper is the premise that campus grievance processes should be more survivor-oriented and equitable. Applying an intersectional view of how and why campus rape occurs, I argue that colleges and universities should 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. Restorative justice offers one model for how schools might augment their campus grievance processes to

respond to acquaintance rape cases to achieve these goals. Though a restorative justice approach may not be appropriate in every case, I argue that it may provide significant benefits for some survivors and offenders, and help to fill the gaps between existing preventative and remedial approaches.

#### INADEQUACIES OF EXISTING CAMPUS GRIEVANCE PROCESSES

The harm of rape is often articulated in terms of its disempowering and dehumanizing effects.<sup>12</sup> As one feminist scholar and rape survivor describes it: “Rape denies that you are a person, that you exist.”<sup>13</sup> Hence, the justice needs of rape survivors are integrally tied to validation and empowerment.<sup>14</sup> Research has shown that rape survivors often express the need “to tell their story, to be heard, have input into how to resolve the violation, receive answers to questions, observe offender remorse, and experience a justice process that counteracts isolation in the aftermath of the crime.”<sup>15</sup> Accordingly, a comprehensive, survivor-oriented approach to campus sexual violence has long been advocated.<sup>16</sup> In contrast, the grievance processes available to survivors of

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<sup>12</sup> See, e.g., LOUISE DU TOIT, A PHILOSOPHICAL INVESTIGATION OF RAPE: THE MAKING AND UNMAKING OF THE FEMININE SELF 82 (2009) (“[H]er body swallows up her whole existence and its limits become the limits of her world; she becomes pure immanence, pure body and dead, objective fleshiness without a trace of subjectivity, transcendence or a will of her own. . . . Becoming an object in this way, means that the world she once inhabited as a subject is destroyed, and in its place she finds herself in a place or world that cannot be mastered or ordered but only endured.”).

<sup>13</sup> Lynne N. Henderson, Review Essay, *What Makes Rape a Crime?*, 3 BERKELEY WOMEN’S L.J. 193, 226 (1988) (emphasis omitted).

<sup>14</sup> See JUDITH LEWIS HERMAN, TRAUMA AND RECOVERY 133–34 (1997) (discussing the healing needs of sexual trauma survivors, with validation of experiences, empowerment and the ability to regain a sense of control being central).

<sup>15</sup> Mary P. Koss, *Restoring Rape Survivors: Justice, Advocacy and a Call to Action*, 1087 ANNALS N.Y. ACAD. SCI. 206, 209 (2006) [hereinafter Koss, *Restoring Rape Survivors*].

<sup>16</sup> Nancy Chi Cantalupo, *Campus Violence: Understanding the Extraordinary Through the Ordinary*, 35 J.C. & U.L. 613, 665–74 (2009) (describing wide agreement by relevant federal agencies, victim advocates and courts that “emulating or drawing from the criminal system in addressing cases of peer sexual violence in institutions is not helpful at best and damaging or not legally sufficient at worst” and that instead colleges and universities should implement “policies, procedures, and practices [that] privilege a survivor’s privacy and control over the process wherever possible.”).

acquaintance rapes at most colleges and universities tend to treat individual acts of sexual violence in isolation and disempower survivors, providing for none of these needs.

*A. Most campus grievance processes do not hold offenders accountable*

Recently, campus grievance processes at colleges and universities have come under increasing scrutiny for being hostile to campus rape survivors and failing to hold student rapists accountable.<sup>17</sup> One recent investigation into the outcomes of disciplinary actions against accused student sexual assault perpetrators at twenty-six post-secondary institutions supports these claims.<sup>18</sup> Despite the fact that campus grievance processes, being civil in nature, may use a lower standard of proof in determining offender responsibility,<sup>19</sup> this study found that many cases never reach a formal resolution because the school fails to initiate an investigation, resolves the complaint ‘informally,’ or dismisses the complaint before it ever reaches a disciplinary hearing.<sup>20</sup> Of those cases that did proceed, only roughly half of accused perpetrators were found “responsible” for

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<sup>17</sup> See Richard Pena and Ian Lovett, *2 More Colleges Accused of Mishandling Assaults*, N.Y. TIMES, April 19, 2013, A14 (describing recent focus on tendency of many well-known colleges to be callous towards victims of sexual violence and to suppress reporting rather than hold perpetrators accountable, in violation of federal law). One recent notable example that has received much attention occurred at Amherst College. See Angie Epifano, *An Account of Sexual Assault at Amherst College*, THE AMHERST STUDENT (Oct. 17, 2012, 12:07 AM), <http://amherststudent.amherst.edu/?q=article/2012/10/17/account-sexual-assault-amherst-college> (alleging that sexual assault perpetrators at Amherst experienced “less punishment than stealing” and recounting how she was pressured to take time off instead of pursuing disciplinary action against her rapist); Katie J.M. Baker, *Amherst Sweeps Sexual Assault Allegations Under the Rug*, JEZEBEL (Oct. 18, 2012, 11:40 AM), <http://jezebel.com/5952784/amherst-sweeps-sexual-assault-allegations-under-the-rug> (describing controversy at school over problem of overly lax punishment for perpetrators of campus sexual assaults).

<sup>18</sup> See CENTER FOR PUBLIC INTEGRITY, ON CAMPUS, A FRUSTRATING SEARCH FOR JUSTICE: A CULTURE OF SECRECY SURROUNDS HIGHER EDUCATION’S HANDLING OF SEXUAL ASSAULT CASES 38 (2010) [hereinafter ON CAMPUS REPORT] (reporting findings of study based on data provided by U.S. Department of Justice).

<sup>19</sup> See Lavinia M. Weizel, *The Process That Is Due: Preponderance of the Evidence as the Standard of Proof for University Adjudications of Student-on-Student Sexual Assault Complaints*, 53 B.C. L. REV. 1613, 1616 (2012) (discussing standard of proof for university adjudications of rape complaints).

<sup>20</sup> ON CAMPUS REPORT, *supra* note 18, at 19–20, 37–38.

sexual misconduct,<sup>21</sup> and only ten to fifteen percent of these actually received serious sanctions, such as being forced to leave school.<sup>22</sup>

There are a number of reasons why campus grievance processes may be so ineffective at holding perpetrators of acquaintance rapes accountable. For one, college administrators, who are often in the position of deciding whether a case proceeds to a formal hearing process, may have a poor understanding of the dynamics of campus sexual violence. They may be more sympathetic to male offenders than to female survivors,<sup>23</sup> particularly when ill informed about issues related to sex discrimination and sexual violence.<sup>24</sup> Similarly, when the accused is a person of high status in the campus community, or when there is a concern about protecting a school's reputation, there can be a powerful institutional imperative to cover up accusations, silence survivors, and ignore the problem.<sup>25</sup>

In addition to these problems, campus grievance processes may also fail to hold student rapists accountable because of the way they are structured. At most schools, disciplinary processes follow an adversarial format modeled on the criminal justice

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<sup>21</sup> Because campus grievance procedures are civil in nature, student offenders are found “responsible” not “guilty.” Similarly, many schools’ conduct codes do not define rape or even sexual assault specifically, but rather address such activity under broader categories like “sexual misconduct” or “improper sexual contact.” See Justin Neidig, *Sex, Booze, and Clarity: Defining Sexual Assault on a College Campus*, 16 WM. & MARY J. WOMEN & L. 179, 190–92 (2009) (describing vagueness of student conduct and honor codes at colleges with respect to the definition of sexual assault and rape).

<sup>22</sup> ON CAMPUS REPORT, *supra* note 18, at 56–57.

<sup>23</sup> See Amy Grubb and Julie Harrower, *Attribution of Blame in Cases of Rape: An Analysis of Participant Gender, Type of Rape and Perceived Similarity to the Victim*, 13 AGGRESSION AND VIOLENT BEHAVIOR 396, 402–03 (2008) (describing studies showing that people tend to identify with the party who shares their own characteristics, and that this affects their attributions of blame in rape cases). Some have argued that this may have been part of the problem at Amherst College, where most members of the disciplinary committee were male. See Baker, *supra*, note 17

<sup>24</sup> See Gerd Bohner, et al., *Rape Myth Acceptance: Cognitive, Affective and Behavioral Effects of Beliefs that Blame the Victim and Exonerate the Perpetrator*, in RAPE: CHALLENGING CONTEMPORARY THINKING 17–37 (Miranda Horvath and Jennifer Brown eds. 2009) (describing various studies showing correlation between rape myth acceptance and tendency to blame victims rather than perpetrators for rapes).

<sup>25</sup> See Cantalupo, *Burying our Heads in the Sand*, *supra* note 10, at 220–24 (discussing institutional incentives to avoid the issue in campus rape cases); Diane Rosenfeld, *Changing Social Norms? Title IX and Legal Activism*, 31 Harv. J. L. & Gender 407, 413–18 (2008) (describing indifference that schools sometimes show to sexual harassment and assault when the perpetrators are college athletes).

system, which tends to favor accused students.<sup>26</sup> In fact, the procedural and evidentiary requirements for the prosecution of rape allegations at many schools are more stringent than those required to secure a criminal rape conviction in their jurisdictions.<sup>27</sup> Such requirements make it even harder for survivors at these schools to obtain a favorable outcome through campus grievance processes. 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, as discussed *infra*, may be hostile and traumatizing. As a result, many survivors may be unable or unwilling to do so.

*B. Most student survivors choose not to seek help from school authorities*

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.<sup>28</sup> The extremely low percentage of sexual assaults reported by colleges and universities each year reflects this tendency. Statistics indicate that each

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<sup>26</sup> Cantalupo, *Campus Violence*, *supra* note 16, at 679–80 (discussing how most schools’ disciplinary procedures tend to treat accused students as though they were defendants in a criminal trial and survivors as though they were complaining witnesses, to the effect that policies and procedures overwhelmingly favor the accused); and Cantalupo, *Burying our Heads in the Sand*, *supra* note 10, at 208 (discussing criticism that “school adjudications of campus peer sexual violence cases are “kangaroo courts” with the deck stacked in favor of the alleged perpetrator, and that a survivor of campus peer sexual violence needs independent representation because she cannot rely on her school to protect her rights.”). Not all schools use an adversarial process to adjudicate student sexual assault claims. Some have no system of adjudication at all for such claims, while some use unstructured mediation. Both alternatives have been subject to harsh criticism as also being wholly inadequate and not in compliance with federal law, which mandates some form of formal resolution process. *See ON CAMPUS REPORT*, *supra* note 18, at 38–39 (describing and criticizing various campus judiciary processes in response to sexual assault).

<sup>27</sup> *See generally* Weizel, *supra* note 19 (discussing how many colleges and universities require a higher standard of proof and heavier evidentiary burden than the criminal law in the same jurisdiction).

<sup>28</sup> In one US Justice Department survey ninety-five percent of students did not report their rape. *See ON CAMPUS REPORT*, *supra* note 18, at 33. While schools still arguably have a duty under Title IX to pursue disciplinary proceedings against any student accused of rape, schools often seek to dismiss cases before they ever reach a hearing. *See ON CAMPUS REPORT*, *supra*, note 20, at 38.

year, over 700,000 rapes occur at post-secondary institutions.<sup>29</sup> And yet, in 2011, post-secondary schools nationwide identified a total of only 3,826 sexual offenses.<sup>30</sup> Indeed, over ninety-five percent of survivors choose not to report.<sup>31</sup>

One well-documented reason students may not report rapes, is that many fail to recognize that what happened to them was rape.<sup>32</sup> Other reasons include shame or embarrassment; the desire to not let others know what happened to them; the fear they will not be believed;<sup>33</sup> and the perception, not unreasonable, that reporting is unlikely to lead to a meaningful remedy.<sup>34</sup> Finally, another significant, but far less scrutinized explanation, may be that the campus grievance process itself is oriented more towards the protection of perpetrators than the vindication of survivors.

### *C. Campus grievance processes are not 'survivor-oriented'*

In contrast to the kind of supportive, survivor-oriented approach that is recognized as ideal, most campus grievance processes are adversarial, placing high burdens on complainants. Typically, a student who has been raped must affirmatively file a

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<sup>29</sup> Of the roughly 21.6 million students who attend a college or university in the United States, WILLIAM J. HUSSAR AND TABITHA M. BAILEY, NATIONAL CENTER FOR EDUCATION STATISTICS, PROJECTIONS OF EDUCATION STATISTICS TO 2021 20 (2012), about 35 out of every 1,000 are raped in a given year. FISHER, *supra* note 6 at 10.

<sup>30</sup> *Criminal Offenses- On Campus (Reporting Year 2011)*, and *Criminal Offenses- Non-campus (Reporting Year 2011)*. Data tables available from U.S. Department of Education, Office of Postsecondary Education, *Campus Safety and Security Data Analysis Cutting Tool*. Available at <http://ope.ed.gov/security/GetAggregatedData.aspx> (last accessed April 18, 2013).

<sup>31</sup> FISHER, *supra* note 6, at 23.

<sup>32</sup> FISHER, *supra* note 6, at 15. See also Samuel Pillsbury, *Crimes Against the Heart: Recognizing the Wrongs of Forced Sex*, 35 LOY. L.A. L. REV. 845, 870–71(2002) (discussing tendency for many college acquaintance rape survivors to resist calling it rape and the reasons why, including self-blame for what happened, and difficulty accepting that a trusted friend would do such a thing to them.)

<sup>33</sup> FISHER, *supra* note 6 at 23; See also Marjorie R. Sable, et al., *Barriers to Reporting Sexual Assault for Women and Men: Perspectives of College Students*, 55 J. AMERICAN COLLEGE HEALTH 157 (finding that student rape victims often do not report the crime to authorities out of embarrassment or shame, concerns about confidentiality, fear of not being believed).

<sup>34</sup> Cantalupo, *Campus Violence*, *supra* note 16 at 618 (discussing evidence on the reasons students do not report rapes including fear of hostile treatment, lack of proof, lack of faith in proceedings, or embarrassment).

complaint against the offending student and then pursue charges against him or her.<sup>35</sup> Then, following an investigation by campus administrators, the process usually concludes with some kind of formal hearing, where each ‘side’ presents evidence (in some cases questioning each other), and members of a panel render a decision, first on the responsibility of the accused student for the alleged misconduct, and then on the appropriate sanction.<sup>36</sup> At the conclusion of the process, the accused, though not always the complainant, may be able to file an appeal.<sup>37</sup>

Designing campus grievance processes in this way is especially problematic because such approaches tend to disempower and silence survivors.<sup>38</sup> Though better training for facilitators and adjudicators may improve the environment of campus grievance processes, any adversarial system in which third parties render judgment will inevitably leave rape survivors feeling as though they are the ones on trial. Rather than offering survivors an opportunity to truly be heard and seek meaningful recognition of the harm they experienced, such proceedings can instead contribute to their pain.

The story of Angie Epifano, a former student at Amherst College, whose story of sexual assault by another student received substantial national attention in the fall of

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<sup>35</sup> See Kathryn M. Reardon, *Acquaintance Rape at Private Colleges and Universities: Providing for Victims’ Educational and Civil Rights*, 38 *Suffolk U. L. Rev.* 395, 407–12 (2005) (describing typical investigation and grievance procedures at most colleges and universities for responding to sexual assault and rape cases).

<sup>36</sup> *Id.*

<sup>37</sup> In response to such unequal right to appeal at some schools, OCR has specified that the opportunity to appeal must be afforded equally to complaining and accused students. U.S. Department of Education Office of Civil Rights, *Dear Colleague Letter*, April 4, 2011, at 12. Available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>.

<sup>38</sup> See Nicola Lacey, *Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law*, 11 *CAN. J.L. & JURISPRUDENCE* 47, 62 (1998) (arguing that the criminal justice process silences rape victims and denies them “both the status of personhood and the chance to approach the court as an audience capable of acknowledging their trauma”); Rajib Chanda, *Mediating University Sexual Assault Cases*, 6 *HARV. NEGOTIATION L. REV.* 265, 292–301 (2001) (describing how the criminal legal process tends to be traumatizing for rape survivors and how disciplinary mechanisms typical at most colleges and universities reflect many of the same structural problems, in large part due to their adversarial nature); Koss, *Restoring Rape Survivors*, *supra* note 15, at 218–21 (describing how the adversarial nature of both criminal and civil processes tends to have detrimental impacts on rape survivors).

2012, illustrates the way some acquaintance rape survivors feel campus disciplinary proceedings to be unhelpful and traumatizing and how this contributes to their decision not to participate:

They told me: We can report your rape as a statistic, you know for records, but I don't recommend that you go through a disciplinary hearing. It would be you, a faculty advisor of your choice, him, and a faculty advisor of his choice in a room where you would be trying to prove that he raped you. You have no physical evidence, it wouldn't get you very far to do this. Hours locked in a room with him and being called a liar about being raped? No thank you, I could barely handle seeing him from the opposite end of campus.<sup>39</sup>

As Epifano's account indicates, when grievance procedures are adversarial and offender-focused, many survivors will simply choose not to participate rather than subject themselves to such a hostile process.

#### *D. Campus grievance processes do not allow for needed dialogue*

The fact that campus grievance procedures are typically closed and confidential contributes to their ineffectiveness as a means of offering meaningful redress to rape survivors.<sup>40</sup> While administrators often raise the required protection of both students' privacy rights as the reason for keeping hearings closed, federal law does not mandate it.<sup>41</sup> Such policies limit rape survivors' participation in proceedings<sup>42</sup> and prevent them

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<sup>39</sup> Epifano, *supra* note 17.

<sup>40</sup> ON CAMPUS REPORT, *supra* note 18, at 15–17 (describing how many student rape survivors are prevented by confidentiality policies from speaking about their crimes outside of school disciplinary proceedings and how these are often so highly secretive that a “thick blanket of secrecy [] envelops cases involving sexual assault on campus”).

<sup>41</sup> *Id.* (describing how many schools justify confidentiality policies on the basis that federal privacy laws require it, even though federal law allows the release of such information when students are found responsible for violent acts against other students). See also *Dear Colleague Letter*, *supra* note 37, at 14 (describing legal basis for release of information related to grievance processes in sexual assault cases).

<sup>42</sup> ON CAMPUS REPORT, *supra* note 18, at 20–25 (describing how student survivors are kept out of proceedings, denied access to information about their cases and prevented from being able to speak about it openly). In some cases, student survivors are subject to disciplinary action for speaking about their rapes. See Tyler Kingkade, *UNC Sexual Assault Survivor Faces Honor Code Violation After Speaking Publically About Abuse*, THE HUFFINGTON POST, (Feb. 25, 2013, 3:41 PM), available at [http://www.huffingtonpost.com/2013/02/25/unc-sexual-assault-survivor\\_n\\_2760097.html](http://www.huffingtonpost.com/2013/02/25/unc-sexual-assault-survivor_n_2760097.html) (describing case of Landen Gambill, who was accused of “intimidating” her rapist).

from benefitting from moral vindication and community recognition of what happened to them.<sup>43</sup> This is especially harmful in a campus context because the close social environment makes survivors who report their rapes particularly vulnerable to harassment and blame by other students who ‘choose sides’ with the perpetrator.<sup>44</sup> Finally, limiting participation and information about grievance processes undermines their capacity to serve rape prevention goals. It prevents other students affected by what happened from sharing in the resolution and hinders a broader campus dialogue about rape.

*E. Campus grievance processes offer too limited of remedies*

Aside from these issues, campus grievance procedures tend to have limited outcomes. Once a student perpetrator has been found “responsible” for sexual misconduct, most schools offer few options for redress, usually ranging from a warning to permanent expulsion.<sup>45</sup> Though the goal is typically framed as educational,<sup>46</sup> adjudicators rarely mandate measures meaningfully directed at changing a perpetrator’s behavior. While an individual may be required to avoid contact with the survivor, attend a class on sexual consent, or even leave campus,<sup>47</sup> such measures do little to push offenders to actually acknowledge and repair the harms of their actions. Similarly, rarely,

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<sup>43</sup> Cantalupo, *Burying our Heads in the Sand*, *supra* note 10, at 264 (arguing that “[a]n inability to re-disclose the very finding that establishes her credibility and her assailant’s culpability significantly diminishes the value of going through the process at all. Even worse, it can allow the perpetrator to exploit the survivor’s compelled silence by lying about the outcome to others. All in all, it sets a victim up to feel re-victimized by the system.”).

<sup>44</sup> *Id.* (discussing how peer pressure can make it difficult for survivors because friends may rally around the perpetrator and ‘gang up’ on the survivor in response to allegations).

<sup>45</sup> For example, the student code at Harvard College allows for warnings, disciplinary probation, requiring the student to withdraw for disciplinary reasons, dismissal, or expulsion. Though a student may be subject to additional limitations and requirements while on probation, such measures are generally related to the modification of the student’s behavior, not any form of reparation to the student harmed by their conduct. *See General Regulations: The Administrative Board of Harvard College*, HARVARD COLLEGE HANDBOOK FOR STUDENTS 2010-2011. Available at <http://isites.harvard.edu/icb/icb.do?keyword=k69286&pageid=icb.page355883> (last accessed Apr. 18, 2013).

<sup>46</sup> ON CAMPUS REPORT, *supra* note 18, at 59.

<sup>47</sup> *Id.* at 60–61.

if ever, is any emphasis placed on providing direct restitution to the survivor.<sup>48</sup> To the contrary, survivors have very little, if any, opportunity to participate in determining what sanctions are given.<sup>49</sup> As a result, even when proceedings favor the survivor's account of what happened, the outcome often feels inadequate.

The story of Trey Malone, another Amherst student who was sexually assaulted illustrates this problem.<sup>50</sup> In Malone's case, the school's disciplinary committee determined that the other student was responsible for sexual misconduct, but Malone still felt that the resolution the process conferred was inadequate.<sup>51</sup> As he stated in his suicide note, "What began as an earnest effort to help on the part of Amherst, became an emotionless hand washing. In those places I should've received help, I saw none."<sup>52</sup> In the end, after withdrawing from Amherst entirely, Malone killed himself in June 2012.<sup>53</sup> For many student rape survivors, campus grievance processes are the only means of vindication available.<sup>54</sup> When these processes deny students' justice needs, it denies their human worth and dignity, sometimes with devastating consequences.<sup>55</sup>

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<sup>48</sup> *Id.*

<sup>49</sup> For example, at Harvard, decisions on what disciplinary measures are to be taken against a student found responsible for misconduct are determined by a vote of the members of the Administrative Board, which is made up of faculty, senior administrators and resident deans. HARVARD COLLEGE HANDBOOK, *supra* note 45.

<sup>50</sup> See William McGuinness, *Amherst College Student's Suicide Note Points Blame at School Administration for Mishandling Sexual Assault*, HUFFINGTON POST (last updated Nov. 14, 2012, 5:36 PM), [http://www.huffingtonpost.com/2012/11/08/amherst-college-student-suicide-note\\_n\\_2095386.html](http://www.huffingtonpost.com/2012/11/08/amherst-college-student-suicide-note_n_2095386.html) (recounting Malone's story).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Conduct that might lead to a finding of civil responsibility under a student conduct code does not necessarily meet the narrower legal definition and higher standard of evidence required to achieve a criminal conviction in the same jurisdiction. Further, a significant number of rape cases fail to result in convictions due to inadequacies in rape law enforcement. See generally David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317 (2000) (discussing the legal treatment of acquaintance rape in various jurisdictions and the systemic inadequacies in the legal system that render the criminal law ineffective in responding to and preventing such violence).

<sup>55</sup> Malone's suicide is not an isolated incident, but part of an alarming trend. See Rahiel Tesfamariam, *Audrie Pott: Sexual Assault, Cyberbullying and Suicide*, *The Washington Post*, (Apr. 16, 2013, 10:06 PM), available at [http://www.washingtonpost.com/blogs/therootdc/post/audrie-pott-rape-case-sexual-assault-cyberbullying-and-suicide/2013/04/16/d00eb450-a6b9-11e2-b029-8fb7e977ef71\\_blog.html](http://www.washingtonpost.com/blogs/therootdc/post/audrie-pott-rape-case-sexual-assault-cyberbullying-and-suicide/2013/04/16/d00eb450-a6b9-11e2-b029-8fb7e977ef71_blog.html) (describing

*F. Campus grievance processes do not sufficiently focus on behavior modification*

Given that the purpose of campus grievance processes is not to determine guilt or innocence but to ensure the safety and wellbeing of all students, they should be especially oriented towards preventing future violence. Instead, it appears that the processes at many schools afford little benefit in this respect. Since so few student perpetrators found responsible receive serious sanctions,<sup>56</sup> the deterrent effect from such proceedings is low.<sup>57</sup> Even when grievance processes are initiated against a perpetrator, the same individual will sometimes go on to commit additional rapes on the same campus.<sup>58</sup>

In some cases, student grievance procedures may actually reinforce, rather than transform, harmful behavior. Adversarial adjudicatory processes tend to discourage accused persons from admitting responsibility and acknowledging the harm caused by their actions.<sup>59</sup> Many offenders will go through the process without any meaningful recognition of the wrong committed, and some, especially if they are let ‘off the hook’ without having their underlying beliefs challenged,<sup>60</sup> may actually feel emboldened to continue the same pattern of behavior. Evidence shows that a substantial number of

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recent cases of student rape victim suicides, often following bullying by the perpetrator and a lack of community support).

<sup>56</sup> ON CAMPUS REPORT, *supra* note 18.

<sup>57</sup> See Chanda, *supra* note 38, 288–89 (arguing that the deterrence effect of student disciplinary processes is low and noting that even if colleges refer a majority of cases to law enforcement, the tendency of police not to pursue cases still undermines deterrence).

<sup>58</sup> See ON CAMPUS REPORT, *supra* note 18, at 30 (recounting story of Kathryn Russell, a student at UVA who filed a Title IX complaint against the school for its mishandling of her sexual assault case, where multiple complaints were filed against the same perpetrator, including one well over a year after Russell’s case had gone through the school’s grievance process).

<sup>59</sup> See Stephanos Bibas and Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 Yale L.J. 85, 95–99, 114–21 (2004) (describing how the criminal justice system discourages offenders from admissions of guilt and remorse, and how non-adversarial processes that allow for face-to-face interaction between victim and offender contributes to acceptance of responsibility and reductions in recidivism).

<sup>60</sup> See Antonia Abbey, et al., *Risk Factors for Sexual Aggression in Young Men: An Expansion of the Confluence Model*, 37 AGGRESSIVE BEHAVIOR 450, 451–52 (2011) (describing and summarizing research showing that attitudinal factors, including beliefs about sex and those that justify male sexual coercion of females, contribute significantly to male sexual aggression, including perpetration of rape); Joetta L. Carr & Karen M. VanDeusen, *Risk Factors for Male Sexual Aggression on College Campuses*, 19 J. FAM. VIOLENCE 279, 280–81 (2004) (describing the influence of gender norms and stereotypes on male college students’ tendency to rape).

campus rapes are committed by a small subset of repeat offenders, and that most of these “undetected rapists” never face formal criminal sanctions.<sup>61</sup> Hence, even when found “responsible” through campus grievance procedures and given the most serious sanction usually possible—expulsion—it is likely that many campus rapists go on to repeat the same acts somewhere else.<sup>62</sup>

#### CAMPUS RAPE PREVENTION AND RESPONSE REQUIREMENTS UNDER FEDERAL LAW

Colleges and universities that receive federal funds have a duty and obligation to respond to and prevent campus rape.<sup>63</sup> Recently, this mandate has been strengthened through a new advisory opinion from the U.S. Department of Education Office of Civil Rights (OCR),<sup>64</sup> and new federal legislation, passed as part of the Violence Against Women Act Reauthorization in 2013.<sup>65</sup> Together, these measures define in unprecedented detail the steps that post-secondary institutions must take to comply with Title IX.

To comply with federal law, school grievance procedures for cases involving sexual violence must meet the following elements: notice to students of procedures and outcomes; adequate and impartial investigation of complaints; equitable procedures wherein parties have equal opportunity to speak, present evidence, and have representatives present, facilitated by individuals who receive annual training on sexual

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<sup>61</sup> See David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE AND VICTIMS 73, 80–81 (2002) (discussing finding that a large percentage of rapes by college men are committed by the same small subset of undetected individuals and that such individuals are very likely to be repeat offenders); see also ON CAMPUS REPORT, *supra* note 18, at 85–87.

<sup>62</sup> *Id.*

<sup>63</sup> See REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 3.

<sup>64</sup> *Dear Colleague Letter*, *supra* note 37. Although the guidelines in the letter serve the purpose of policy guidance and do not change the underlying legal requirements, they set out OCR’s interpretation of the law and how OCR will apply it to institutions against whom Title IX complaints are filed.

<sup>65</sup> This new law is known as the Campus Sexual Violence Elimination (SaVE) Act. See Violence Against Women Reauthorization Act of 2013, PUB. L. NO. 113-4, Sec. 304, 127 Stat 54, 89–92 (2013) (to be codified at 20 U.S.C.A. § 1092). See also *The Campus Sexual Violence Elimination (SaVE) Act*, <http://www.securityoncampus.org/campus-sexual-violence-elimination-save-act> (last accessed April 17, 2013) (describing provisions of new law) [hereinafter *SaVE Act*].

violence issues; reasonably prompt resolution; and remedial measures to prevent reoccurrence.<sup>66</sup> Though a particular standard of evidence is not statutorily mandated, OCR has argued that schools should use a “preponderance of evidence” (more likely than not) standard in weighing student allegations and evidence.<sup>67</sup>

Together, these requirements attempt to tip the balance of disciplinary procedures away from favoring students accused of rape towards one that places equal emphasis on the safety and well being of survivors. This means that schools should not simply treat both parties the same. Rather, because survivors and perpetrators are differently situated with respect to their relative vulnerability, schools should take special measures to minimize burdens on survivors and ensure the process does not contribute to their further re-victimization.<sup>68</sup>

Critically, schools are required to not only respond promptly and equitably to protect students, investigate allegations, and provide grievance procedures for redress when rapes occur, but also to develop a campus culture of preventing violence in the first place.<sup>69</sup> For example, schools are now required to have primary awareness programs for all students and employees, which include information about sexual assault, legal standards of consent, and bystander intervention.<sup>70</sup> If schools take these new requirements seriously, they could become effective levers for broader social transformation and a move towards the eventual elimination of “rape supportive

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<sup>66</sup> Violence Against Women Reauthorization Act, *supra* note 65, at 91 (to be codified at 20 USCA § 1092(8)(B)(iii), (iv); and *Dear Colleague Letter*, *supra* note 37, at 9–14.

<sup>67</sup> *Dear Colleague Letter*, *supra* note 37, at 10–11.

<sup>68</sup> *See id.* at 15–16 (discussing appropriate remedies and enforcement for campus sexual assault cases). For example, OCR directs schools that they should take measures to prevent campus grievance procedures from perpetuating a hostile environment, and notes that “schools should ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant.” *Id.* at 12.

<sup>69</sup> *Save Act*, *supra* note 65; *Dear Colleague Letter*, *supra* note 37, at 9–14.

<sup>70</sup> Violence Against Women Reauthorization Act, *supra* note 65, at 90 (to be codified at 20 USCA § 1092(8)(B)(i)(I)).

culture”<sup>71</sup> from the United States.

### RESTORATIVE JUSTICE

Restorative justice offers another method for colleges and universities to supplement their comprehensive rape prevention and response programs to better meet the justice needs of students and comply with the goals and requirements of federal law. Though a growing number of colleges and universities are experimenting with the use of restorative justice as a means of responding to student misconduct, none are currently using it for campus rape cases.<sup>72</sup>

#### *A. What Is Restorative Justice?*

Restorative justice is fundamentally different from other methods of conflict resolution in that it is conceived from the outset as a process of transformation and community healing. Broadly defined, restorative justice is “a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.”<sup>73</sup> The most effective form of restorative justice follows an “empowerment model,” which holds that “justice and fair treatment are equally the right of both the victim and offender.”<sup>74</sup> Within a restorative justice approach, justice is determined by the

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<sup>71</sup> “Rape supportive culture” is defined as the set of widely held social and cultural beliefs that tend to make sexual violence invisible and inevitable. *See generally* BROWNMILLER, *supra*, note 1 (describing rape-supportive culture) and TRANSFORMING A RAPE CULTURE (Emilie Buchwald, Pamela R. Fletcher and Martha Roth, eds. 2005) (describing rape culture and articulating approaches to its transformation).

<sup>72</sup> *See* Justine Darling, Restorative Justice in Higher Education: A Compilation of Formats and Best Practices 3 (2011) (unpublished M.A. thesis, University of San Diego) (describing and comparing in detail campus restorative justice programs throughout the United States).

<sup>73</sup> HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE 20, 37 (2002).

<sup>74</sup> CHARLES K. B. BARTON, RESTORATIVE JUSTICE: THE EMPOWERMENT MODEL 42–47 (2003) (discussing and comparing different restorative justice models and providing a detailed description and analysis of how

extent to which all parties participate, feel validated, acknowledge the harm, consider the matter settled, and make amends.<sup>75</sup> Hence, at its core, restorative justice is grounded in concepts of “mutual responsibility and interdependence.”<sup>76</sup>

*B. How does restorative justice work?*

The empowerment model of restorative justice takes the form of a facilitated conference between affected parties, including not only individual offenders and victims but also stakeholder community members.<sup>77</sup> Thus, unlike a criminal trial, resolution in a restorative justice process does not occur with the judgment of a panel of outsiders, but takes place through a collaborative process wherein the parties attempt to arrive at a consensus about what happened and then agree on a plan to repair the harm.<sup>78</sup> Unlike victim-offender mediation, a restorative justice conference involves all parties who are stakeholders.<sup>79</sup> Ideally, each the offender and victim are accompanied in the conference process by at least four to six persons who are closest to (and also respected by) them. Other stakeholders who participate in the process may include specially trained advocates and counselors. The participation of the broader community, properly facilitated, plays a critical role in keeping the parties honest, holding them accountable, and ensuring that the environment remains productive and safe.<sup>80</sup>

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to conduct restorative justice conferences that are geared towards the empowerment and emotional engagement of the participants in order to maximize its benefits).

<sup>75</sup> See MARIAN LIEBMANN, *RESTORATIVE JUSTICE: HOW IT WORKS* 25–35 (2007) (describing principles and values of restorative justice). Not all practices broadly defined as restorative justice are equally faithful to these.

<sup>76</sup> Kay Pranis, *Restorative Values and Confronting Family Violence*, in *RESTORATIVE JUSTICE AND FAMILY VIOLENCE* 25 (pincite?- I believe this is the page number. It is a book. This particular chapter in the book starts on page 23) (Heather Strang and John Braithwaite eds., 2002).

<sup>77</sup> BARTON, *supra* note 74, at 7–8.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 4.

<sup>80</sup> *Id.* at 5–6, 40. This is one of the critical distinctions between restorative justice and mediation. Whereas in mediation individuals may be prone to engage in abusive and dishonest tactics, restorative justice, by

During the conferencing process, each participant speaks uninterrupted about what transpired and how it affects them, and then in turn responds to other participants' testimony.<sup>81</sup> The primary focus is thus on the direct testimony of the parties involved in and affected by the harmful behavior.<sup>82</sup> In this way, restorative justice is well suited for cases where the majority of the relevant evidence is not physical but testimonial in nature.

Because restorative justice is non-adversarial, it can, if properly facilitated, offer a better environment for ensuring that all participants speak and listen in a balanced way. Perhaps for this reason, offenders who participate in restorative justice are far more likely to accept responsibility for their behavior, acknowledge the harm, and actively seek to provide reparations to parties injured by their actions.<sup>83</sup>

Once the parties have concluded a full exploration of the harm in question and the acts that precipitated it, the participants work to form an agreement on what should be done to repair the harm.<sup>84</sup> In stark contrast to traditional methods of adjudication, restorative justice gives those who are injured by the offender's behavior a central role in determining the remedy according to their own needs for resolution and healing. The prescribed remedies can vary widely, from individual apologies to punitive measures and forms of civil restitution.

Though the victim takes the lead in choosing the remedy, offenders and participating community members provide input to help ensure the agreement is

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including the participation of the most important and respected persons in the offender's life, is designed to limit on such behavior. *Id.* at 6.

<sup>81</sup> *Id.* at 67–77.

<sup>82</sup> *Id.*

<sup>83</sup> See generally Barton Poulson, *A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice*, 2003 UTAH L. REV. 167 (2003) (analyzing studies on restorative justice outcomes).

<sup>84</sup> *Id.* at 75–77.

meaningful and realistic.<sup>85</sup> This encourages offenders to, not only accept responsibility, but also take genuine steps to respond directly to the harm they caused.<sup>86</sup> In this way, restorative justice encourages the moral engagement of both victims and offenders.<sup>87</sup> For these reasons, both victims and offenders who participate in restorative justice report far higher rates of satisfaction with the process and the outcome than those who are limited to more traditional, adversarial adjudicatory processes.<sup>88</sup>

### *C. Applying restorative justice to rape cases*

The idea of using restorative justice in rape cases is controversial. However, some 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:

[Restorative justice] condemns violence in meaningful and consequential ways, permits telling stories, encourages admissions of offending, validates [survivors'] experiences and reassures them that they are not to blame, provides more options for those who do not want formal prosecution, and provides space for airing upsetting aspects of the incident that may not formally qualify as crimes and therefore would be excluded by any other legal process.<sup>89</sup>

In other words, restorative justice offers the promise of a process that is more responsive to the needs of victims. Such benefits are particularly meaningful for those who have suffered sexual violence. Critically, restorative justice offers rape survivors the opportunity and space to speak openly about what happened to them, to have their account recognized and validated by the broader community, and to take an active role in

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<sup>85</sup> *Id.* at 76.

<sup>86</sup> *Id.* at 48–60. See also Mark Umbreit et al., *Victim-Offender Dialogue in Violent Cases: A Multi-Site Study in the United States*, in *RESTORATIVE JUSTICE: POLITICS, POLICIES AND PROSPECTS* 22–36 (Jan Glazewski ed. 2007) (describing findings that overwhelming majorities of offenders reported that conferencing significantly changed their understanding of how their crimes harmed others).

<sup>87</sup> *Id.* at 50–51.

<sup>88</sup> Bibas and Bierschbach, *supra* note 59, at 116. See also Umbreit, *supra* note 86 (describing extremely high rates of participant satisfaction reported from victim-offender conferences).

<sup>89</sup> *Id.* at 223.

determining on their own terms what kind of redress is appropriate.<sup>90</sup> In doing so, it acts as a response to the disbelief and dehumanization that often accompany being a survivor of sexual violence, providing survivors with an avenue to regain a sense of control over their healing. Hence, while the use of restorative justice to respond to sexual violence is a relatively novel idea,<sup>91</sup> a handful of organizations have begun developing special restorative justice programs for this purpose.<sup>92</sup>

Though restorative justice can be an excellent tool outside a criminal law context,<sup>93</sup> most programs addressing sexual violence work in collaboration with the criminal justice system, with conferences taking place at various points in the formal legal process. In some cases, the conferencing process may begin when the offender is charged,<sup>94</sup> whereas in others it begins only after the offender has either plead guilty or been convicted.<sup>95</sup>

Given the particular vulnerabilities involved in sexual violence cases, such programs usually include specially trained facilitators and carefully designed conferencing protocols to avoid re-victimization and/or re-traumatization.<sup>96</sup> In addition,

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<sup>90</sup> See SHIRLEY JULICH, ET AL., PROJECT RESTORE: AN EXPLORATORY STUDY OF RESTORATIVE JUSTICE AND SEXUAL VIOLENCE 20–25, 31–40 (2010), available at [http://www.academia.edu/274691/Project\\_Restore\\_An\\_Exploratory\\_Study\\_of\\_Restorative\\_Justice\\_and\\_Sexual\\_Violence](http://www.academia.edu/274691/Project_Restore_An_Exploratory_Study_of_Restorative_Justice_and_Sexual_Violence) (last accessed Apr. 24, 2013).

<sup>91</sup> Koss, *Restoring Rape Survivors*, *supra* note 15, at 222.

<sup>92</sup> See Mary Koss and Mary Achilles, Restorative Justice Responses to Sexual Assault, VAWnet Applied Research Forum 7–9 (Feb. 2008), available at [http://www.vawnet.org/applied-research-papers/print-document.php?doc\\_id=1231](http://www.vawnet.org/applied-research-papers/print-document.php?doc_id=1231) (last accessed Apr. 24, 2013) (describing various restorative justice programs currently addressing forms of sexual violence worldwide).

<sup>93</sup> See generally Howard J. Vogel, *The Restorative Wager: The Promise and Hope of A Value-Based, Dialogue-Driven Approach to Conflict Resolution for Social Healing*, 8 CARDOZO J. CONFLICT RESOL. 565 (2007) (arguing in favor of the use of restorative justice as a means of resolving civil disputes).

<sup>94</sup> See, e.g. Mary P. Koss, *Restorative Justice for Acquaintance Rape and Misdemeanor Sex Crimes*, in RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN 218, 220 (James Ptacek ed., 2010) [hereinafter Koss, *Restorative Justice*] (describing RESTORE project for acquaintance rape in Pima County, Arizona).

<sup>95</sup> See, e.g. JULICH, *supra* note 90, at 18–19 (describing restorative justice program for gender violence in New Zealand).

<sup>96</sup> Koss, *Restorative Justice*, *supra* note 93, at 221–26; JULICH, *supra* note 900, at 17–53. See also Sarah Curtis-Fawley & Kathleen Daly, *Gendered Violence and Restorative Justice: The Views of Victim Advocates*, 11 VIOLENCE AGAINST WOMEN 603, 610, 625–26 (2005) (discussing re-victimization issues

some programs exclude certain types of cases from participation, such as those involving repeat offenders, where more serious physical injuries resulted, or where children were harmed.<sup>97</sup> Also, some programs pre-screen offenders and survivors by psychologists to ensure that restorative justice is appropriate.<sup>98</sup> In every program, the first and most important goal is that the survivor is empowered and protected to the fullest extent possible.<sup>99</sup>

#### USING RESTORATIVE JUSTICE TO RESPOND TO CAMPUS ACQUAINTANCE RAPE

Though none presently use it to respond to campus sexual violence, colleges and universities across the country are increasingly turning to restorative justice as an additional mechanism for resolving student conduct code violations.<sup>100</sup> Using the empowerment model, a restorative justice program for campus acquaintance rape could offer a powerful opportunity for survivors to seek validation and meaningful redress, while also giving perpetrators the opportunity to learn and change.

##### *A. What would a campus rape restorative justice program look like?*

In order to ensure that survivors are protected and that proceedings are equitable and fair, any restorative justice program dealing with campus rape cases should adopt

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with use of restorative justice in rape cases), Pamela Rubin, *A Community of One's Own?: When Women Speak to Power About Restorative Justice*, in RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN 79 (James Ptacek ed., 2010) (discussing example of one restorative justice program for sexual assault that was created without consideration of gender/power dynamics or an explicit agenda to avoid victim marginalization and local feminist responses to address these problems).

<sup>97</sup> Koss, *Restorative Justice*, *supra* note 94, 230.

<sup>98</sup> *Id.* At 227; JULICH, *supra* note 90, at 18–19.

<sup>99</sup> Kathleen Daly, *Sexual Assault and Restorative Justice*, in RESTORATIVE JUSTICE AND FAMILY VIOLENCE 62 (Heather Strang & John Braithwaite eds., 2002) (discussing the key features and values of a restorative justice approach to sexual violence from a feminist standpoint and the importance of prioritizing the vindication of harms experienced by victims before offender rehabilitation).

<sup>100</sup> Justine Darling, *Restorative Justice in Higher Education: A Compilation of Formats and Best Practices* 3 (2011) (unpublished M.A. thesis, University of San Diego).

measures developed by the programs discussed above in Part IV. This includes giving survivors control at each juncture over whether the process should go forward; using well-trained facilitators who are not only familiar with the restorative justice process but also well versed in issues related to sex discrimination and sexual assault; and preparing participants in advance. Participating stakeholders should include the students involved, their families, close friends, trained counselors, and members of the faculty who have strong relationships with the students.

Restorative justice aims to achieve substantive equality between participants. As such, facilitators must recognize the effects of victimization and take measures to account for offenders and survivors' different vulnerabilities and justice needs.<sup>101</sup> While the conferencing process can be intense, control must be exercised throughout to ensure the environment never becomes hostile or succumbs to uneven power dynamics between parties.<sup>102</sup> If necessary, a conference could extend over multiple sessions to avoid overwhelming participants and ensure that it is not rushed. Likewise, once an agreement has been reached, program facilitators should always follow up to ensure that it is being kept and, particularly in the survivor's case, that ongoing needs and issues continue to be addressed.

Restorative justice must always be voluntary and non-coercive for all parties involved. It should never be the only remedy available or preclude parties from pursuing other avenues. Rather, a restorative justice program for campus acquaintance rape could work in tandem with existing remedies—as an alternative to traditional grievance procedures, or in conjunction with, parallel to, or following other more traditional

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<sup>101</sup> JULICH, *supra* note 90, at 22.

<sup>102</sup> See generally JULICH, *supra* note 90 (describing development of restorative justice program for addressing sexual violence, including how specific measures were taken to address survivor concerns and how these worked).

methods of adjudication. For example, as a hybrid approach, once a student offender has been found responsible through a traditional process, restorative justice could be available as an alternative way of determining what sanctions should be imposed on the offender and what redress provided for the harmed student.

*B. What about OCR's position that mediation is never appropriate in rape cases?*

Many schools with restorative justice programs may be reluctant to use them to address acquaintance rape due to the strong position taken by OCR that mediation is never appropriate for responding to allegations of sexual violence.<sup>103</sup> However, restorative justice is vastly different from mediation and can be conducted in ways that not only comply with federal law, but that actually further the goals of effectively responding to and preventing sexual harassment and violence.

One of the principal critiques of mediation as a response to sexual violence is that it fails to adequately account for and address disparities of power between victims and perpetrators, and that as such, it often becomes a way for schools to silence survivors and “sweep” their complaints “under the rug.”<sup>104</sup> Indeed, strong criticism has been leveled at schools for using mediation programs to keep sexual assault allegations quiet.<sup>105</sup> Because it places pressure on the students involved to come to a resolution, mediation, particularly when un-structured, may end up placing undue pressure on survivors to ‘forgive and forget’ without offering any meaningful recourse or recognition for the harm they experienced.

In contrast, restorative justice, when practiced according to the empowerment

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<sup>103</sup> See REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 3, at 21; *Dear Colleague Letter*, *supra* note 37, at 8.

<sup>104</sup> See ON CAMPUS REPORT, *supra* note 18, at 18–20.

<sup>105</sup> *Id.*

model, is explicitly geared towards addressing inequities between parties and ensuring that outcomes are just and survivor-oriented. As discussed in parts IV and V above, a properly administered restorative justice program should not lead to survivor re-victimization. To the contrary, restorative justice can offer a more equitable and empowering path to recourse than traditional, adversarial grievance processes. For these reasons, the OCR directive against mediation should not prevent schools from adopting restorative justice.<sup>106</sup>

### *C. Additional benefits of restorative justice in a campus context*

A restorative justice program for responding to campus acquaintance rape could function synergistically with other forms of sexual assault prevention, offering not only an opportunity for the community to confront and repair such violence, but a way to actually transform students and prevent future acts of violence. It has long been recognized that students who ascribe to common ‘rape myths’ are far more likely to commit acquaintance rape.<sup>107</sup> Evidence shows that individuals who develop greater empathy with rape survivors and who are educated about sexual assault and discrimination are less likely to rape and more likely to intervene if they see someone else being assaulted.<sup>108</sup> While sexual assault education should be given to all students as

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<sup>106</sup> One possible issue worthy of consideration, but not discussed in this paper due to space limitations is whether VAWA grant funding may be used to support the development of restorative justice programs for sexual assaults on campus given the general prohibition on programs that bring victims and offenders together. See Koss, *Restoring Rape Survivors*, *supra* note 15, at 226 (noting barriers to the development of such programs, due in part to the fact that “[p]rograms that bring SVs and offenders together are forbidden by policy in the United States and are barred from applying for grants funded through the Violence Against Women Act”).

<sup>107</sup> See *supra* note 60.

<sup>108</sup> Paul A. Schewe, *Guidelines for developing rape prevention and risk reduction interventions*, in PREVENTING VIOLENCE IN RELATIONSHIPS: INTERVENTIONS ACROSS THE LIFE SPAN 107-36 (Paul A. Schewe ed., 2002) (finding that as men increase their empathy with survivors and understand rape trauma, they tend to have more aversion to rape and report less likelihood of raping). John D. Foubert, Eric E. Godin and Jerry L. Tatum, *In Their Own Words: Sophomore College Men Describe Attitudinal and Behavior Changes Resulting From a Rape Prevention Program 2 Years After Their Participation*, 25 J.

part of schools' rape prevention programs, the restorative justice process offers an additional and targeted opportunity to directly engage with perpetrators to help them recognize the harm of their behavior and reduce the likelihood that they will repeat it. Hence, while not all offenders are amenable to change,<sup>109</sup> restorative justice can be a powerful tool for engaging those who are.<sup>110</sup>

#### ADDITIONAL CONCERNS

Restorative justice is not a panacea, and, like any approach to interpersonal violence, it has shortcomings.<sup>111</sup> The sections below discuss some of the principal concerns that have been raised with using restorative justice for sexual violence and how they might be addressed.

##### *A. What if survivors do not want to participate?*

Given that many campus acquaintance rape survivors wish to keep what happened to them private<sup>112</sup> and/or to avoid contact with the perpetrator entirely,<sup>113</sup> one concern is that survivors would not want to participate in restorative justice. However, measures could be adopted to alleviate such concerns. Proceedings could be confidential, and, though face-to-face conferences are most effective, conferences can and do happen where

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INTERPERSONAL VIOLENCE 2237, 2243–50 (2010) (finding that male participants in a sexual assault prevention program exhibited prolonged attitudinal and behavioral changes, with participants more likely to reject rape supportive ideas and behavior, to ensure affirmative consent of their sexual partners and to intervene in situations where a peer may be engaging in sexual assault).

<sup>109</sup> See *Abbey*, *supra* note 60, at 460–62 (finding that propensity to rape results from a confluence of factors, including personality traits that make some perpetrators less susceptible to change).

<sup>110</sup> See Koss and Achilles, *supra* note 92, at 10 (discussing benefits of restorative justice as a form of secondary prevention for offenders).

<sup>111</sup> See Kathleen Daly, *Restorative Justice: the Real Story*, in RESTORATIVE JUSTICE: CRITICAL ISSUES 208–09 (Eugene McLaughlin et al. eds., 2003) (noting limitations of restorative justice and arguing that “[c]onferencing, or any new justice practice, is not nirvana and ought not to be sold on those terms”).

<sup>112</sup> See Sable, *supra* note 33..

<sup>113</sup> *Id.*

the victim is represented by proxy.<sup>114</sup> Moreover, even if some survivors still choose not to participate, this does not diminish the benefit to those who do. Rather, by offering an additional and survivor-oriented option for redress, it is likely that at least some survivors will choose to participate who otherwise would not. Evidence from the few restorative justice programs that have been created to respond sexual violence suggests that, if given the option, a substantial number of campus rape survivors would participate and that, for these survivors, the process could have positive benefits.<sup>115</sup>

*B. What if perpetrators will not accept responsibility?*

Some may be concerned that restorative justice places too much emphasis on offender rehabilitation at the expense of accountability. However, the goals of accountability and rehabilitation are not at odds within the restorative justice model. Rather, under the empowerment model, the aim of the conferencing process is to create accountability that is genuine and meaningful for everyone involved.<sup>116</sup>

The conferencing process often begins with the offender's account of what happened. At the outset, an offender may not fully accept his or her role in the harm alleged. However, by the end of the restorative justice process, most offenders do acknowledge some degree of responsibility for their actions.<sup>117</sup> This acceptance of responsibility is reflected in the fact that offenders who participate in restorative justice are more likely to comply with restitution agreements than those who are sentenced

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<sup>114</sup> See Koss and Achilles, *supra* note 92, at 8 (describing operation and initial findings from RESTORE project).

<sup>115</sup> *Id.*

<sup>116</sup> BARTON, *supra* note 74, at 4.

<sup>117</sup> See Koss and Achilles, *supra* note 92, at 8 (describing positive effects of program on offenders); Umbreit, *supra* note 86, at 35–36 (same).

through more traditional processes.<sup>118</sup>

Finally, in the event that an offender refuses to acknowledge the harm and accept his or her role in it, or where the parties cannot arrive at a just resolution, it is always possible to revert to other grievance mechanisms.<sup>119</sup> Even if this happens, the conference process is not a total loss. In many cases, it is participation in the process itself—not the outcome—that offers the biggest benefit to victims.<sup>120</sup>

### *C. Timeliness issues*

In addition to setting out certain procedural requirements, federal law stipulates that campus grievance processes for sexual violence should be prompt.<sup>121</sup> Hence, one concern with restorative justice may be that its complex and resource-intensive nature might take too long. However, this is not necessarily the case. Because the conferencing process may be initiated as an alternative to a formal disciplinary hearing, it can lead to a more prompt resolution of some cases. Traditional campus disciplinary procedures are often lengthy and though initiated by student complaints, proceed according to institutional timelines.<sup>122</sup> In contrast, restorative justice, while requiring institutional support, is driven much more directly by the parties themselves. For this reason, to the extent that a survivor wishes to proceed more quickly, a restorative justice process should be more amendable to doing so. Moreover, while any process should be managed to avoid unreasonable delays, the aforementioned benefits of restorative justice outweigh

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<sup>118</sup> Jaimie P. Beven, et al., *Restoration or Renovation: Evaluating Restorative Justice Outcomes*, 12 *PSYCHIATRY, PSYCHOL. & L.* 194, 195 (2005).

<sup>119</sup> See Koss and Achilles, *supra* note 92, at 8 (describing referral of small number of cases where resolution could not be reached or where there was non-compliance with the agreed-upon remedy back to criminal prosecutors).

<sup>120</sup> Beven, *supra* note 118, at 204–05.

<sup>121</sup> Violence Against Women Reauthorization Act, *supra* note 65, at 91 (to be codified at 20 USCA § 1092(8)(B)(iii), (iv); and *Dear Colleague Letter*, *supra* note 37, at 12.

<sup>122</sup> See ON CAMPUS REPORT, *supra* note 18, at 37–39 (describing institutional barriers to prompt resolution of student sexual assault complaints through traditional grievance procedures).

the cost of the additional preparation it requires.

#### CONCLUSION

When sexual violence occurs on campuses and authorities fail to adequately respond, there is a fundamental breakdown in a school's educational mission and duty to its students.<sup>123</sup> Current mechanisms used by most schools to respond to campus acquaintance rape do not meet the needs of students, repair the community, or prevent further violence. Restorative justice offers one promising option that schools can implement as part of a comprehensive approach to addressing these shortcomings and fulfilling their obligations under federal law.

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<sup>123</sup> Cantalupo, *Campus Violence*, *supra* note 16, at 631.