

# CRIME LOGIC, CAMPUS SEXUAL ASSAULT, AND RESTORATIVE JUSTICE

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## I. INTRODUCTION

Recent events have brought extraordinary attention to the problem of campus sexual assault. Prompted in part by student activism,<sup>1</sup> the Obama Administration brought an unprecedented focus to the issue by including newly aggressive Department of Education (DOE) guidance and enforcement,<sup>2</sup> initiating a Department of Justice (DOJ) Campus Climate Survey Validation Study,<sup>3</sup> developing the White House Task Force to Protect

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1. See, e.g., *About KYIX*, KNOW YOUR IX, <http://knowyourix.org/about-ky9/> (last visited Dec. 8, 2016) (“Know Your IX is a survivor- and youth-led organization [established in 2013] that aims to empower students to end sexual and dating violence in their schools.”); see also THE HUNTING GROUND (Chain Camera Pictures 2015) (an award-winning documentary on campus sexual assault describing the rise of student activism).

2. See Office for Civil Rights, *Dear Colleague Letter from Assistant Secretary for Civil Rights Russlynn Ali*, U.S. DEP’T EDUC. (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [hereinafter Office for Civil Rights, *Dear Colleague Letter*]; see also THE UNIV. OF TEX. AT AUSTIN, INST. ON DOMESTIC VIOLENCE & SEXUAL ASSAULT, THE BLUEPRINT FOR CAMPUS POLICE: RESPONDING TO SEXUAL ASSAULT (2016), [http://www.nccpsafety.org/assets/files/library/Blueprint\\_for\\_Campus\\_Police.pdf](http://www.nccpsafety.org/assets/files/library/Blueprint_for_Campus_Police.pdf); U.S. DEP’T OF EDUC., THE HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING (2016), <https://www2.ed.gov/admins/lead/safety/handbook.pdf>; Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, U.S. DEP’T EDUC. (Apr. 29, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [hereinafter Office for Civil Rights, *Questions and Answers*] (describing formal and informal responses to sexual assault); *Protecting Students from Sexual Assault*, U.S. DEP’T JUST., [www.notalone.gov/schools](http://www.notalone.gov/schools) (last updated Nov. 10, 2016); Press Release, White House Office of the Press Sec’y, Fact Sheet: Not Alone – Protecting Students from Sexual Assault (Apr. 29, 2014), <https://www.whitehouse.gov/the-press-office/2014/04/29/fact-sheet-not-alone-protecting-students-sexual-assault>.

3. CHRISTOPHER KREBS ET AL., CAMPUS CLIMATE SURVEY VALIDATION STUDY: FINAL TECHNICAL REPORT 60 (2016), <https://www.bjs.gov/content/pub/pdf/ccsvsfr.pdf>.

Students from Sexual Assault,<sup>4</sup> and authoring the White House Council on Women and Girls Report.<sup>5</sup>

The most significant efforts have occurred with the DOE's Title IX enforcement efforts. Title IX law frames school sexual harassment, including sexual violence, as a form of prohibited sex discrimination.<sup>6</sup> Two recent DOE guidance documents, a 2011 "Dear Colleague Letter" (DCL)<sup>7</sup> and a subsequent "Questions and Answers" document,<sup>8</sup> provide detailed guidance for universities' prevention of and response to campus sexual violence. The framing of sexual violence as a civil rights matter could provide a welcome departure from the crime-centered approach to gender violence that has dominated the United States' response for more than two decades.<sup>9</sup> Defining sexual assault as a form of sex discrimination foregrounds the importance of the social construction of gender, sex, and social supports for gender subordination.<sup>10</sup> Furthermore, the campus setting (at least some campus settings) provides the opportunity to disrupt social supports for gender subordination in ways that may be less feasible in the larger community.<sup>11</sup>

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4. See Press Release, White House Office of the Press Sec'y, Memorandum -- Establishing a White House Task Force to Protect Students from Sexual Assault (Jan. 22, 2014), <https://www.whitehouse.gov/the-press-office/2014/01/22/memorandum-establishing-white-house-task-force-protect-students-sexual-assault>.

5. See THE WHITE HOUSE COUNCIL ON WOMEN & GIRLS AND THE OFFICE OF THE VICE PRESIDENT, RAPE AND SEXUAL ASSAULT: A RENEWED CALL TO ACTION (2014), [https://www.whitehouse.gov/sites/default/files/docs/sexual\\_assault\\_report\\_1-21-14.pdf](https://www.whitehouse.gov/sites/default/files/docs/sexual_assault_report_1-21-14.pdf).

6. 20 U.S.C. §§ 1681–83 (2016) (prohibiting discrimination on the basis of sex in education programs operated by recipients of federal financial assistance); Office for Civil Rights, *Dear Colleague Letter*, *supra* note 2, at 1 ("Sexual harassment of students, which includes acts of sexual violence, is a form of sex discrimination prohibited by Title IX."). See *infra* note 371 for a discussion of the DCL definition of "sexual violence." See generally 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, 211 (2011). Title IX is enforced in peer sexual violence cases in two ways: (1) a private right of action against the school or (2) an administrative enforcement through the DOE's Office for Civil Rights. *Id.* Different standards apply to these different avenues of redress. *Id.* at 225–33. The DOE can effectively require that schools adopt certain measures, and the failure to do so can be sufficient to make a school responsible under the administrative enforcement standard. *Id.* For an argument that the 2011 DCL is illegitimate because the DOE failed to follow the requirements of the Administrative Procedure Act, see Tamara Rice Lave, *Campus Sexual Assault Adjudication: Why Universities Should Reject the Dear Colleague Letter*, 64 KAN. L. REV. 913 (2016).

7. See Office for Civil Rights, *Dear Colleague Letter*, *supra* note 2.

8. Office for Civil Rights, *Questions and Answers*, *supra* note 2.

9. See Donna Coker & Ahjané D. Macquoid, *Why Opposing Hyper-Incarceration Should Be Central to the Work of the Anti-Domestic Violence Movement*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 585, 591–92 (2015).

10. See Alletta Brenner, Note, *Resisting Simple Dichotomies: Critiquing Narratives of Victims, Perpetrators, and Harm in Feminist Theories of Rape*, 36 HARV. J.L. & GENDER 503, 516–17 (2013) (noting that a framing of rape as a simplistic victim–perpetrator framework fails to recognize the ways that gender performance and gender identity shape sexual conduct).

11. See Nancy Chi Cantalupo, "Decriminalizing" *Campus Institutional Responses to Peer Sexual Violence*, 38 J.C. & U.L. 481, 523 (2012) (noting that Title IX provides schools with greater flexibility than is the case with criminal prosecution); *infra* Section IV.B (discussing the role of male peer networks and masculinity in male sexual assault of women).

There are, however, significant limitations to the models encouraged by the DOE and the DOJ. The Obama Administration promotes prevention and research programs, such as bystander education and campus climate surveys, that pay insufficient attention to intersecting forms of subordination and experience, including those based in race, class, sexual identity, sexual orientation, and gender. These intersections may create differential risks for sexual assault and differential trust in university administrations to respond fairly to claims of sexual assault.<sup>12</sup> The DOE allows schools to use voluntary “informal” processes but, in sharp contrast to the detailed requirements for formal investigations and hearings,<sup>13</sup> provides little guidance on how to develop informal processes, except to prohibit mediation in “cases involving an allegation of sexual assault.”<sup>14</sup>

Schools face intense political pressure, including from some feminist activists, to import what I refer to as “Crime Logic” into the resolution of campus sexual assault claims. Crime Logic refers to a set of beliefs and attitudes that dominate United States criminal justice processes as well as popular responses to interpersonal harm. Crime Logic is reflected in (1) a focus on individual culpability rather than on collective accountability; (2) a disdain for policy attention to social determinants of behavior; (3) a preference for narratives that center on bad actors and innocent victims; and (4) a preference for removing individuals who have harmed others as though excising an invasive cancer from the body politic. As I describe below, Crime Logic dominates the current popular response, including much of the feminist response, to campus sexual assault.

I argue that schools should adopt and feminists should support public health<sup>15</sup> approaches that are combined with an intersectional antistatutory perspective.<sup>16</sup> These approaches would seek foremost to change the social conditions that create and foster sexual violence, not only in prevention efforts but also, whenever possible, in responses to individual cases of sexual violence.

“Restorative Justice” (RJ) practices may offer a useful component of this approach. In response to individual cases of sexual assault and the aftermath of such cases, RJ processes fill the gap left by the DOE, providing

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12. See discussion *infra* Section III.B.

13. Office for Civil Rights, *Dear Colleague Letter*, *supra* note 2, at 8–14.

14. *Id.* at 8; see also discussion *infra* Part V (distinguishing RJ from mediation). The DCL requires schools to defer to victims’ decisions about whether to pursue an investigation and formal adjudication except when there is evidence that the accused student poses a substantial threat to others, a requirement that is met if the school is aware of claims by other students against whom the accused committed sexual violence or if the conduct alleged is particularly violent. Office for Civil Rights, *Dear Colleague Letter*, *supra* note 2, at 5.

15. See Margo Kaplan, *Rape Beyond Crime*, 66 DUKE L.J. 102, 104 (2017) (“Public health law’s focus on populations and evidence-based prevention provides a legal framework that requires lawmakers to consider how norms, beliefs, and social and economic systems . . . promote sexual violence.”).

16. See *infra* Section II.B (discussing the absence of an intersectional framework in campus Title IX work); *infra* Section IV.D.2 (discussing a “Transformative/Anti-Subordination” RJ process).

meaningful guidance for informal processes that do not involve formal adjudication.<sup>17</sup> “Feminist Restorative” models<sup>18</sup> have been successfully used in gender violence cases, including sexual assault cases.<sup>19</sup> Some feminists have expressed reservations about the use of RJ in gender violence cases,<sup>20</sup> but as the developers of RJ models have adopted victim-protective measures<sup>21</sup> and as the negative impacts of punitive criminal justice intervention are better understood,<sup>22</sup> there has been a growing interest among feminists in the use of RJ.<sup>23</sup> In 2015, Campus Promoting Restorative Initiatives for Sexual Misconduct (Campus PRISM) was formed. Campus PRISM is “an international team of researchers and practitioners” who research and promote restorative approaches to campus sexual assault.<sup>24</sup> In June 2016, Campus PRISM published a report that received a great deal of attention.<sup>25</sup> Scholarship exploring the use of RJ in gender violence cases has

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17. See *infra* Part V (discussing the RJ process at length).

18. See discussion *infra* Section V.D.1 (describing James Ptacek’s concept of Feminist Restorative Hybrid models).

19. See *infra* Section V.C (explaining the use of RJ models in sexual assault cases).

20. Well-developed feminist literature raises questions about the use of RJ in individual cases of gender violence. The objections center on concerns about the physical and emotional safety of the victim and on related concerns about coercion, both overt and subtle. See, e.g., Ruth Busch, *Domestic Violence and Restorative Justice Initiatives: Who Pays If We Get It Wrong*, in *RESTORATIVE JUSTICE AND FAMILY VIOLENCE* 223 (Heather Strang & John Braithwaite eds., 2002); Loretta Frederick & Kristine C. Lizdas, *The Role of Restorative Justice in the Battered Women’s Movement*, in *RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN* 255 (James Ptacek ed., 2010); Rashmi Goel, *Aboriginal Women and Political Pursuit in Canadian Sentencing Circles: At a Cross Roads or Cross Purposes?*, in *RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN*, *supra*, at 60; Julie Stubbs, *Restorative Justice, Gendered Violence, and Indigenous Women*, in *RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN*, *supra*, at 103. My empirical research on the use of Navajo Nation Peacemaker Courts in domestic violence cases concluded that “Peacemaking” offered a number of advantages for battered women but that there remained opportunities for coercion of victims and for the occurrence of “cheap justice.” Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 *UCLA L. REV.* 1 (1999). For a thorough review of concerns regarding the use of RJ in cases of domestic violence, see VALLI KALEI KANUHA, *FINAL REPORT: W. E. B. DU BOIS RESEARCH FELLOWSHIP* (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/216951.pdf>.

21. See *infra* Sections V.C–D.1 (describing the victim protection and empowerment methods of Feminist Restorative Hybrid models, such as RESTORE).

22. See *infra* Part II (describing an evolving understanding of the harm caused by punitive and mandated criminal justice intervention in cases of gender violence).

23. See, e.g., LEIGH GOODMARK, *A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM* 160–77 (2012); Mahealani Joy, *Here’s Why We Need Restorative Justice as an Option for Dealing with Abuse*, *EVERYDAY FEMINISM* (May 20, 2016), <http://everydayfeminism.com/2016/05/restorative-justice-for-abuse/>; Julie Zeilinger, *When Jail Time Isn’t Justice: An Emerging Movement Suggests How Healing Can Happen Outside of the Criminal System*, *MTV NEWS* (June 8, 2016), <http://www.mtv.com/news/2890468/when-jail-time-isnt-justice/>.

24. See *Campus PRISM: Promoting Restorative Initiatives for Sexual Misconduct on College Campuses*, SKIDMORE C., <http://www.skidmore.edu/campusrj/prism.php> (last visited Nov. 10, 2016) [hereinafter *Campus PRISM*]. I am a member of Campus PRISM.

25. DAVID R. KARP ET AL., *A REPORT ON PROMOTING RESTORATIVE INITIATIVES FOR SEXUAL MISCONDUCT ON COLLEGE CAMPUSES* 2, 3 (2016), [http://www.skidmore.edu/campusrj/documents/Campus\\_PRISM\\_Report\\_2016.pdf](http://www.skidmore.edu/campusrj/documents/Campus_PRISM_Report_2016.pdf); Irin Carmon, *What Advocates Are Doing to End Sexual Assault on Campus*, *NBC NEWS* (Sept. 4, 2016, 5:20 PM), <http://www.nbcnews.com/news/us-news/what-advocates-are-doing-end-sexual-assault-campus-n642156>; see also Mary P. Koss et al., *Campus Sexual Misconduct*:

also grown substantially.<sup>26</sup> In 2016, the DOJ's Office of Violence Against Women in collaboration with both the National Council of Juvenile and Family Court Judges and the Center for Court Innovation organized a national roundtable to discuss the use of RJ in sexual assault and domestic violence cases.<sup>27</sup> National<sup>28</sup> and international<sup>29</sup> RJ conferences have featured the use of RJ in gender violence cases, and the RJ response of Dalhousie University to a sexual harassment claim received international attention.<sup>30</sup> A number of United States RJ programs are involved with gender violence cases, including sexual assault.<sup>31</sup>

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*Restorative Justice Approaches to Enhance Compliance with Title IX Guidance*, 15 TRAUMA VIOLENCE & ABUSE 242 (2014). The Campus PRISM report and Koss et al. article offer suggestions for the use of RJ practices at several points in the Title IX complaint process, for the aftermath of a claim of sexual violence, and for the follow up with a student who has been found responsible for sexual violence. See KARP ET AL., *supra*; Koss et al., *supra*. My focus will be on the use of RJ processes to address specific instances of sexual misconduct. See, e.g., Carmon, *supra*.

26. See, e.g., GOODMARK, *supra* note 23; Donna Coker & Ahjané D. Macquoid, *Alternative U.S. Responses to Intimate Partner Violence*, in COMPARATIVE PERSPECTIVES ON GENDER VIOLENCE: LESSONS FROM EFFORTS WORLDWIDE 169 (Rashmi Goel & Leigh Goodmark eds., 2015); KANUHA, *supra* note 20; Leigh Goodmark, "Law and Justice Are Not Always the Same": Creating Community-Based Justice Forums for People Subjected to Intimate Partner Abuse, 42 FLA. ST. U. L. REV. 707, 722–23 (2015); Angela P. Harris, Book Review, *Beyond the Monster Factory: Gender Violence, Race, and the Liberatory Potential of Restorative Justice*, 25 BERKELEY J. GENDER L. & JUST. 199, 210–13 (2010) [hereinafter Harris, *Beyond the Monster Factory*]; Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation*, 37 WASH. U. J.L. & POL'Y 13 (2011) [hereinafter Harris, *Heteropatriarchy Kills*]; Koss et al., *supra* note 25, at 246; Clare McGlynn et al., 'I Just Wanted Him to Hear Me': Sexual Violence and the Possibilities of Restorative Justice, 39 J.L. & SOC'Y 213, 216 (2012); Deborah M. Weissman, *The Personal Is Political—and Economic: Rethinking Domestic Violence*, 2007 BYU L. REV. 387, 443–44 (2007); Alletta Brenner, Note, *Transforming Campus Culture to Prevent Rape: The Possibility and Promise of Restorative Justice as a Response to Campus Sexual Violence*, HARV. J.L. & GENDER 1, 15 (2013), <http://harvardjlg.com/wp-content/uploads/2013/10/Brenner-Transforming-Campus-Culture.pdf>; Lois Presser & Emily Gaarder, *Can Restorative Justice Reduce Battering? Some Preliminary Considerations*, 27 SOC. JUST. 175 (2000); see also Kathleen Daly, *Conventional and Innovative Justice Responses to Sexual Violence*, 12 ACSSA ISSUES NO. 1, (2011), <https://aifs.gov.au/sites/default/files/publication-documents/i12.pdf>; Lave, *supra* note 6; *infra* Section V.D.1 (describing RESTORE and Family Group Decision Making conferences). See generally RESTORATIVE JUSTICE AND FAMILY VIOLENCE, *supra* note 20; RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN, *supra* note 20; 11 VIOLENCE AGAINST WOMEN (2005) (a volume dedicated to exploration of Restorative Justice use in cases of violence against women).

27. *Restorative Practices in Cases of Intimate Partner Violence, Sexual Assault, and Dating Violence: A Roundtable Discussion* (May 17–18, 2016) (Santa Fe, N.M.) (invitation on file with author).

28. See, e.g., *3rd National Conference on Restorative Justice (June 8-10, 2011): Hosted by Campbell University, Raleigh, NC*, 17 VIOLENCE AGAINST WOMEN 287, 287–88 (2011); see also *Restorative Justice & Domestic Violence Conference*, MARQ. U.L. SCH., <https://law.marquette.edu/current-students/restorative-justice-domestic-violence-conference> (last visited Dec. 8, 2016).

29. See, e.g., *Exploring Possibilities: A Restorative Approach to Climate and Culture in Education, Workplaces and Professions*, RESTORATIVE CONF. HALIFAX 2016, <http://rahalifax2016.com/> (last visited Nov. 10, 2016). For example, the International Restorative Conference included an entire day session on gender violence. See *id.*

30. See JENNIFER J. LLEWELLYN ET AL., REPORT FROM THE RESTORATIVE JUSTICE PROCESS AT THE DALHOUSIE UNIVERSITY FACULTY OF DENTISTRY (2015), <https://www.dal.ca/content/dam/dalhousie/pdf/cultureofrespect/RJ2015-Report.pdf>.

31. See *infra* Section V.C.

In Part II of this Article, I describe the popular embrace of Crime Logic and the impact of this framing on the public understanding of sexual assault. In Part III, I describe and critique the dominant campus sexual assault narrative—the paradigm sexual assault case. The paradigm victim is a white, heterosexual female. She is the victim of an assault involving penetration that occurred when she was unable to consent (due to alcohol-induced incapacitation, for example) or under circumstances in which her non-consent was apparent. She is afraid of her assaulter and deeply traumatized by the assault. The emerging description of the campus sexual assaulter is that he is a “predator”—a repeat rapist who is dangerous, irredeemable, and likely to assault again.

I demonstrate that while some campus research found that white female students experience higher rates of rape than do other women, the prominence of this paradigm hides a more complicated and diverse reality. Lesbian, gay, bisexual, and transgender (LGBT) students are at a substantial risk for sexual assault. The intersection of race, ethnicity, and class frames not only risks for sexual assault but also the social construction of sexual experiences, the popular image of likely sexual assaulters, and the degree of confidence a student has in fair and supportive treatment by campus administrators.

The campus predator paradigm is based on misapplied snapshot research.<sup>32</sup> Longitudinal research that follows male students through their college careers finds that, contrary to expectations of predatory behavior, the assaultive behaviors of student rapists follow varying trajectories, including a substantial number who are not repeaters and repeaters whose assaulting behavior occurs during one time period and then ceases.<sup>33</sup>

The focus of the paradigm case on a rape allegation is also misleading. Title IX complaints frequently regard lesser forms of sexual violence, including sexual coercion.<sup>34</sup>

In Part IV, I summarize much of the social science research on campus male sexual assault of women. Three key findings that are particularly salient to campus environments emerge from this research. Sexual assaulters are more likely to report that their peers support sexual aggression towards women, hold hostile attitudes towards women, and engage in problematic drinking.<sup>35</sup> Campus sexual assault of men is far less researched than is assault of women, but what research exists suggests that problematic drinking is correlated with assaults on men, as is the case for assaults on women.<sup>36</sup> I

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32. *See infra* Section III.C (discussing sexual predator research).

33. *See infra* Section III.C.

34. *See infra* Section III.D (discussing the various meanings of sexual coercion).

35. *See infra* Part IV.

36. *See* Jessica A. Turchik, *Sexual Victimization Among Male College Students: Assault Severity, Sexual Functioning, and Health Risk Behaviors*, 13 *PSYCHOL. MEN & MASCULINITY* 243, 248–50 (2012).

conclude Part IV by arguing that prevention programs should include both an intersectional awareness and public health initiatives.

In Part V, I describe the potential for RJ processes to improve campus responses to sexual violence. RJ approaches integrate well with public health approaches to prevention. I examine the growth of “Feminist/ Restorative Justice”<sup>37</sup> models and “Transformative/Anti-Subordination” RJ models.<sup>38</sup> These RJ models provide an alternative form of response to specific instances of sexual misconduct that better meet the needs of some victims; are more likely to challenge social support for problematic masculinities and drinking, which are related to sexual assault; and, in appropriate cases, are more likely to result in changes to the social environments that promote sexual assault.

In Part VI, I describe two challenges to the use of RJ responses to campus sexual assault. The first is the DOE’s prohibition on the use of mediation in cases of sexual assault. Although RJ is distinguishable from mediation, a number of schools have rejected RJ out of fear of violating the DOE’s requirements.<sup>39</sup> The second challenge to establishing a campus RJ program is the need to establish a mechanism for preventing the admissibility in court of RJ-derived evidence against the respondent.<sup>40</sup> While this problem is also true for formal campus investigation and adjudication, the RJ requirement that the respondent admit to the conduct element of the claim presents particular risks for respondents.<sup>41</sup> I suggest remedies for this concern and limitations on RJ use until those remedies are in place.

I conclude that campus administrators should adopt and feminists should support public health responses to sexual assault that are informed by an understanding of the importance of intersectional experiences and intersectional subordination. This requires that universities and feminist activists abandon Crime Logic reasoning and instead look to change the social structures that encourage and support campus assault. RJ can be a useful tool in this effort. The integration of RJ into a larger public health/intersectional response to campus sexual assault may provide an alternative that is better for many victims, more likely to lead to real changes in the behavior of the assaulter, and more likely to change campus life.

In the Appendix, I offer four case studies, drawn from actual cases, to explore the use of RJ.

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37. *See infra* Section V.D.1 (describing James Ptacek’s RJ approach).

38. *See infra* Section V.D.2 (describing Angela Harris and this Author’s RJ approach).

39. *See infra* Section VI.A.

40. *See infra* Section VI.B (discussing methods of preventing the admission in court of evidence discovered during the course of an investigation).

41. *See infra* Section VI.B.

## II. CRIME LOGIC

The United States' response to intimate partner violence and sexual assault is marked by a central contradiction. On one hand, *formal* federal and state policies are dominated by what I refer to elsewhere as a "crime-centered" response, which is said to protect victims and take gender violence seriously.<sup>42</sup> The majority of federal dollars dedicated to responding to intimate partner violence and sexual assault are for criminal interventions that encourage arrests and train police and prosecutors.<sup>43</sup> "Zero tolerance" policies enacted by states and municipalities echo the claim that sexual assault and intimate partner violence are first and foremost criminal acts.<sup>44</sup> Sex offenders are presumed to be unredeemable deviants who must be tracked and registered.<sup>45</sup> On the other hand, research demonstrates that many criminal justice system actors remain hostile to victims of intimate partner violence and sexual assault.<sup>46</sup> Their hostility often tracks intersections of race and class as well as gender.<sup>47</sup> A recent national survey of service providers and advocates found widespread police dismissiveness and hostility toward intimate partner violence and sexual assault claims by sex workers, drug-involved women, poor women (particularly poor women of color), undocumented immigrant women, African American women, and LGBT individuals.<sup>48</sup> The survey also found that police are dismissive of sexual assault claims by *young* women and *all* men.<sup>49</sup>

The dominant focus on crime-centered responses to intimate partner violence and sexual assault is part of the larger phenomenon of what Jonathan Simon describes as "governing through crime," whereby "crime and the forms of knowledge historically associated with it . . . [have become] powerful tools with which to interpret and frame all forms of social action [areas] as a problem for governance."<sup>50</sup> In this way, criminal framing not

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42. See Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 NEW CRIM. L. REV. 801, 802–05 (2001) (formerly known as *Buffalo Criminal Law Review*).

43. *Id.*

44. *Id.* at 802 n.5.

45. See MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 196–214 (2015).

46. See DONNA COKER ET AL., *RESPONSES FROM THE FIELD: SEXUAL ASSAULT, DOMESTIC VIOLENCE, AND POLICING* 12–16 (2015), [http://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1075&context=c1\\_pubs](http://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1075&context=c1_pubs).

47. *Id.* at 17–21; see also Kathleen Daly, *Reconceptualizing Sexual Victimization and Justice*, in *JUSTICE FOR VICTIMS: PERSPECTIVES ON RIGHTS, TRANSITION AND RECONCILIATION* 378, 379 (Inge Vanfraeche et al. eds., 2014) (noting that the response to sexual violence is contradictory: on one hand, there is minimization of the harms of and occurrence of sex offending, while on the other hand there is demonization of "sex offenders").

48. See COKER ET AL., *supra* note 46, at 21–24 (reporting the survey results of more than 900 advocates and service providers and finding substantial police bias).

49. *Id.*

50. See JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME*

only pervades United States government policy responses to social problems but has also become the dominant public narrative through which inequality is understood.<sup>51</sup>

One aspect of governing through crime is the widespread acceptance of Crime Logic. Crime Logic refers to a set of beliefs and attitudes that dominate United States criminal justice processes as well as popular responses to interpersonal harm. Crime Logic is reflected in (1) a focus on individual culpability rather than on collective accountability; (2) a disdain for policy attention to social determinants of behavior;<sup>52</sup> (3) a preference for narratives that feature bad actors and innocent victims; and (4) a preference for removing individuals who have harmed others as though excising an invasive cancer from the body politic. As I describe below, Crime Logic dominates the current popular response, including much of the feminist response, to campus sexual assault.

Feminists turned to criminal law reform, in part, because they saw criminal justice reform as a powerful lever for transformative cultural change.<sup>53</sup> In this, they found ready allies among conservatives who “jumped on the sexual abuse awareness bandwagon as a way to demonstrate their ‘get tough on crime’ credentials.”<sup>54</sup>

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TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 17 (2007).

51. *Id.* at 108–09 (noting that initially, “[b]oth the black victims of racist violence and female victims of rape and assault tied . . . crime victims to the historical and sociological narrative of racial and gender domination,” but that over time, the crime victim subject became divorced from civil rights narratives). See generally Mimi Kim, *Dancing the Carceral Creep: The Anti-Domestic Violence Movement and the Paradoxical Pursuit of Criminalization, 1973–1986* (Univ. of Berkeley, Inst. for the Study of Societal Issues, Graduate Fellows Working Paper Series 2013–2014, Paper No. 70, 2015), <http://eprints.cdlib.org/uc/item/804227k6>.

52. Deborah Weissman’s comment about domestic violence policies could equally be said of anti-rape policies and activism: “Current views of domestic violence deem irrelevant the political economic circumstances of the perpetrator.” Deborah M. Weissman, *Law, Social Movements, and the Political Economy of Domestic Violence*, 20 DUKE J. GENDER L. & POL’Y 221, 229 (2013); see also GOODMARK, *supra* note 23, at 191 (“Giving [abusive] men access to economic opportunity is a crucial anti-abuse strategy.”); Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1010–13 (2000) (describing the importance of material resources to reduce women’s vulnerability to violence).

53. See Kim, *supra* note 51, at 9–17; cf. G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women’s Movement*, 42 HOUS. L. REV. 237, 264 (2005) (describing how feminists turned to mandatory police action for domestic violence cases in response to desperation over police inaction and misconduct). Feminist demands were not limited to crime policy, but legislative hostility to improvements in welfare spending and bipartisan support for criminal law legislation ensured that the legislation would be adopted. See Coker, *supra* note 52, at 803. See generally FEMINISTS NEGOTIATE THE STATE: THE POLITICS OF DOMESTIC VIOLENCE (Cynthia R. Daniels ed., 1997) (describing the tensions and compromises involved in feminist efforts in the 1990s to pass domestic violence legislation).

54. ROSE CORRIGAN, UP AGAINST A WALL: RAPE REFORM AND THE FAILURE OF SUCCESS 9 (2013); see also ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 183 (2000) (“As this issue [of intimate partner violence] has moved from one raised on the margins to one that has been appropriated by government, feminist liberatory discourse challenging patriarchy and female dependency . . . has been replaced by discourse emphasizing crime control.”).

Many feminist supporters of improved criminal justice responses did not support the draconian sentencing and increased criminal surveillance that were enacted in response to the perceived risks of sexual assault. For example, as Rose Corrigan describes, while feminists supported moderate sentences for sexual assaulters, reasoning that this would increase prosecution and convictions,<sup>55</sup> “Conservatives picked up feminist concerns about the prevalence of rape and leniency toward offenders to argue for tougher laws, but dismissed their related arguments about how rape laws supported racism, classism, sexism, and social control.”<sup>56</sup>

Further, as Mimi Kim’s description of work in California illustrates, feminist efforts to ensure that police provided equal protection to women abuse victims resulted, over time, in direct involvement of feminists in deepening and increasing a focus on criminal justice remedies to domestic violence, a phenomenon she calls “*carceral creep*.”<sup>57</sup>

Feminist anti-rape activists were largely successful in changing sexual assault law, but as a significant body of scholarship illustrates, the results have fallen far short of the feminist vision of social change.<sup>58</sup> “[C]riminal law remains a weak tool for addressing rape . . . , particularly rapes that do not fit the paradigm of the evil stranger and innocent victim.”<sup>59</sup> Further, criminal law is a particularly poor vehicle for creating larger social change.

Framing violence against women as a criminal issue rather than, for example, a civil rights, human rights, or public health issue, inevitably narrows the framework for understanding the scope, causes, consequences, and remedies for violence against women. A crime-centered frame focuses on interpersonal (individualistic) violence—a perpetrator harms a victim. It makes invisible the ways in which structural inequalities—many of which

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55. CORRIGAN, *supra* note 54, at 36.

56. *Id.* at 37.

57. See, e.g., Kim, *supra* note 51, at 24. A significant body of scholarship is critical of crime-centered approaches to gender violence. See, e.g., KRISTIN BUMILLER, IN AN ABUSIVE STATE xiv (2008); Coker & Macquoid, *supra* note 9; GOODMARK, *supra* note 23, at 24; KANUHA, *supra* note 20; BETH E. RICHIE, ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA’S PRISON NATION 3–4 (2012); Coker, *supra* note 42; Leigh Goodmark, *Decriminalizing Domestic Violence*, 40 HARV. J.L. & GENDER (forthcoming 2016); Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 624 (2009); Harris, *Heteropatriarchy Kills*, *supra* note 26; Miccio, *supra* note 53; Beth E. Richie, Transcript, *Keynote—Reimagining the Movement to End Gender Violence: Anti-Racism, Prison Abolition, Women of Color Feminisms, and Other Radical Visions of Justice*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 257 (2015); Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1478 (2012); Weissman, *supra* note 52.

58. Katharine K. Baker, *Why Rape Should Not (Always) Be a Crime*, 100 MINN. L. REV. 221, 227–32 (2015) (arguing that feminist reform of rape law has been largely successful, but these changes have failed to alter the cultural understanding of rape); cf. CORRIGAN, *supra* note 54, at 3–7 (arguing that the success of feminist rape reform efforts is overstated by both critics and supporters).

59. Kaplan, *supra* note 15, at 115.

are the product of state action—make some women and men more vulnerable to violence and some more likely to use violence.<sup>60</sup>

Over time, the alliance that some feminists made with criminal justice actors changed the public meaning of feminism. “By adopting a prosecutorial attitude, which largely conceives of rape . . . as a product of individual criminality rather than social inequality, the feminist rape reform movement strayed far from its anti-subordination origins and undermined its own efforts to change attitudes about date rape.”<sup>61</sup>

The ubiquity of Crime Logic is consistent with and reinforced by the rise of neoliberal policies and ideology. Neoliberalism ideology is “characterized by antagonism to the very concept of ‘society.’”<sup>62</sup> As Deborah Weissman notes, the influence of neoliberalism “is not just economics; it is politics and culture. It shapes . . . and mediates the meaning of law and social justice reform.”<sup>63</sup> For example, the trope of “personal responsibility” in welfare reform legislation<sup>64</sup> is echoed in social media diatribes against “takers.”<sup>65</sup>

The feminist investment in using criminal law as a lever to transform culture has evolved into a campaign to govern gender violence through

60. Coker & Macquoid, *supra* note 9, at 593 (footnote omitted). For comparisons between United States crime-centered approaches and welfare-based approaches, see Julie Goldscheid, *The Economics of Gender Violence in Norway: A Constructive Approach*, in *COMPARATIVE PERSPECTIVES ON GENDER VIOLENCE: LESSONS FROM EFFORTS WORLDWIDE* 141 (Rashmi Goel & Leigh Goodmark eds., 2015) and MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* 115–64 (2006) (comparing American feminist movements against rape and domestic violence with those in Britain).

61. See Gruber, *supra* note 57, at 585. Rose Corrigan argues further that the feminist focus on criminal justice reform has had a negative impact on feminist anti-rape activism. See CORRIGAN, *supra* note 54, at 17.

[T]he focus on criminal law as the primary vehicle to express feminist arguments about rape has had serious negative consequences for anti-rape groups, including the contraction of movement vision, political and ideological alienation from potential left-progressive allies, and an inability to see or harness the power of law as a vehicle for further social change.

*Id.*

62. Coker & Macquoid, *supra* note 9, at 591 (referring to Margaret Thatcher’s famous statement that there is no such thing as society).

63. Deborah M. Weissman, *Countering Neoliberalism and Aligning Solidarities: Rethinking Domestic Violence Advocacy*, 45 SW. L. REV. 915, 919–20 (2016).

64. RICHIE, *supra* note 57, at 57, 113, 116–17.

65. See, e.g., LISA D. BRUSH, *POVERTY, BATTERED WOMEN, AND WORK IN U.S. PUBLIC POLICY* 27–31 (2011); Gruber, *supra* note 57, at 618–20 (“The tough-on-crime philosophy that overtook America was . . . a distinct part of a neoliberal paradigm of rampant individualism, minimization of government services, and unconstrained capitalism. . . . The term ‘neoliberal’ . . . describes a moral directive in which considerations of nuance, inequality, and social conditions must necessarily yield to reductionist dichotomies of public-versus-private and right-versus-wrong.”) (footnote omitted).

crime.<sup>66</sup> Whether one calls this phenomenon neoliberal feminism<sup>67</sup> or carceral feminism,<sup>68</sup> the result is an embrace of Crime Logic. Today, for a significant number of feminists, Crime Logic *is* feminist logic. Social determinants of behavior are rendered unimportant. For example, in the aftermath of Brock Turner’s sexual assault conviction, Stanford University adopted new rules to prevent the type of excessive drinking that both Brock and the victim engaged in on the night he assaulted her. Despite empirical evidence that heavy drinking is associated with sexual assault and that limiting access to alcohol results in fewer sexual assaults,<sup>69</sup> some feminist activists responded negatively to Stanford’s new policy.<sup>70</sup> As one activist explained, “[B]anning hard liquor . . . sends the . . . message that alcohol causes rape . . . . Rapists cause rape, and they use alcohol as a tool to escape culpability.”<sup>71</sup> For these activists, the only explanation for Turner’s assault that mattered was that he “chose” to rape.<sup>72</sup>

The failure to address structural inequality and to recognize social determinants of behavior not only limits how perpetrators are understood

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66. Gruber, *supra* note 57, at 582, 606. Some scholars understand aspects of what I term Crime Logic to be central to feminist theoretical approaches to violence against women. *See, e.g.*, GOODMARK, *supra* note 23, at 9–28 (arguing that dominance feminism is partially responsible for creating and encouraging a view that domestic violence victims are helpless and without agency); Brenner, *supra* note 10 (arguing that both dominance feminism and equality feminism incorporate simplistic theories of rape).

67. *See generally* Weissman, *supra* note 63, at 2 (describing the ways in which feminist advocacy for the economic empowerment of victims of domestic violence relies on the logic of neoliberalism, rather than forming political alliances that challenge neoliberal policies, and noting that these programs are “derived from assumptions associated with punitive welfare systems, exploitative labor practices, and capitalist forms of consumer financialization”). Similarly, Ahjané Macquoid and I argue that anti-domestic violence activists should join forces with organizations seeking to dismantle hyper-incarceration as one means of resisting the consequences of neoliberal policies. Coker & Macquoid, *supra* note 9, at 610–14; *see also* Gruber, *supra* note 57.

68. *See* Elizabeth Bernstein, *Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns*, 36 *SIGNS* 45, 46–47 (2010) (describing the advent of carceral feminism in the collaboration between evangelical Christians and feminists in anti-sex trafficking efforts, “fueled by a shared commitment to carceral paradigms of social, and in particular gender, justice”).

69. *See, e.g.*, Caroline Lippy & Sarah DeGue, *Exploring Alcohol Policy Approaches to Prevent Sexual Violence Perpetration*, 17 *TRAUMA VIOLENCE & ABUSE* 26, 27 (2016).

70. *See, e.g.*, Carmon, *supra* note 25; Elaine C. Ray, *Stanford Updates Its Student Alcohol Policy*, *STAN. NEWS* (Aug. 22, 2016), <http://news.stanford.edu/2016/08/22/stanford-updates-student-alcohol-policy/>.

71. Carmon, *supra* note 25 (quoting campus activist Wagatwe Wanjuki). Carmon notes that upon hearing about Stanford’s policy, “[m]any activists recoiled.” *Id.*

72. *Id.* This framing of “choice” echoes second-wave feminist rhetoric that sought to discredit views of rapists as psychological deviants by expressing a simplistic, liberal conception of choice. *See, e.g.*, CORRIGAN, *supra* note 54, at 35 (“An insistence that rape was a conscious choice was integral to [the feminist rape law reform’s] political analysis; rape sprang from and reinforced male supremacist ideology, not from mental illness or frustrated sexual desire.”); *see also* Brenner, *supra* note 10, at 505–06, 518, 522 (describing the feminist framing of sexual assaulters as freely choosing their conduct); *infra* Section III.C (critiquing the predator narrative regarding campus sexual assaulters that is integral to the presumption that all incapacitated rapes are the result of intentional planning).

(and dehumanized)<sup>73</sup> but also undergirds popular narratives about gender violence *victims*. Nancy Berns describes the way that popular understandings of intimate partner violence result in what she calls “victim empowerment folklore.”<sup>74</sup> In this narrative, the cause of battering is found in the behavior of the victim—she “puts up” with abuse, the assistance she needs is to be empowered, and the remedy will only occur when she is willing to take action.<sup>75</sup> In this telling, the social inequalities that create intimate partner violence are dismissed in favor of stories about “worthy” and “unworthy” victims.<sup>76</sup>

Michelle Oberman and Katharine Baker argue that the significant number of young women who reject the label “rape” to describe experiences that would meet the legal definition of rape may be motivated by a similar felt contradiction: if they are independent actors, they cannot have been raped.<sup>77</sup>

As one woman who experienced an acquaintance rape relates,

I didn't tell people what had (or maybe had not) happened. Not because I was afraid or traumatized: I was ashamed. If I couldn't stop something like this in a studio apartment with a friend sleeping less than five feet away, what could I protect myself from? Maybe I wasn't the powerful young woman I thought I was.<sup>78</sup>

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73. See Elizabeth L. MacDowell, *Theorizing from Particularity: Perpetrators and Intersectional Theory on Domestic Violence*, 16 J. GENDER RACE & JUST. 531, 533–35 (2013) (describing how stereotypes of abusers affect legal advocacy and judicial decision-making in domestic violence cases). See generally Carolyn B. Ramsey, *The Stereotyped Offender: Domestic Violence and the Failure of Intervention*, 120 PENN ST. L. REV. 337 (2015) (describing the failure of feminist domestic violence models, such as the Duluth Abuse Intervention Program, to distinguish between different motivations for battering, creating a stereotype of abusers, and dismissing the importance of alcohol abuse, poverty, mental disorders, and other determinants of violence).

74. Nancy Berns, *Domestic Violence and Victim Empowerment Folklore in Popular Culture*, in VIOLENCE AGAINST WOMEN IN FAMILIES AND RELATIONSHIPS: THE MEDIA AND CULTURAL ATTITUDES 4, 105, 107 (Evan Stark & Eve S. Buzawa eds., 2009).

75. *Id.* Martha Mahoney similarly describes how the societal inability to believe that someone can be an agent while also being oppressed renders invisible the agency of women suffering domestic violence. See Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 61–63 (1991) [hereinafter Mahoney, *Legal Images of Battered Women*]; see also GOODMARK, *supra* note 23 (describing the harms of a false understanding of domestic violence victims as helpless and unable to make decisions that are not controlled by an abusive partner); Martha R. Mahoney, *Victimization or Oppression? Women's Lives, Violence, and Agency*, in THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE 59, 59–73 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994) [hereinafter Mahoney, *Victimization or Oppression?*].

76. See BRUSH, *supra* note 65.

77. Michelle Oberman & Katharine K. Baker, *Women's Sexual Agency and the Law of Rape in the 21st Century*, 69 STUD. L. POL. & SOC'Y 63, 96 (2016); see also Baker, *supra* note 58, at 261 (“If one sees oneself as a victim, one acknowledges a powerlessness and a lack of control. One has failed to be the agent one wants to be.”).

78. Tove K. Danovich, *Was I Raped? Brutal Assaults by Strangers Are Unambiguous. But What Should a Woman Do When She Is the Victim of an 'Almost Rape'?*, AEON (Aug. 24, 2015), <https://aeon.co/essays/is-there-such-a-thing-as-an-almost-rape> (describing an assault in which her boyfriend began

Thus, some who experience intimate partner violence or sexual assault feel that they face an untenable choice. They can embrace a Crime Logic framing of their experience—they are the victims, they have no agency, and harm was done to them; the person who harmed them is a criminal, a deviant; any right-thinking person would want him or her to be punished. Alternatively, they can deny the criminality of their experience, minimize its harmfulness, and refuse to identify their friend, lover, husband, wife, or fellow student as a rapist, batterer, criminal.

The embrace of Crime Logic is also apparent in the widespread, uncritical acceptance of the idea that campus sexual assault is committed by a small group of sexual predators.<sup>79</sup> Though grounded in a misapplication of research, this idea has been embraced by feminist publications and even by the White House Council on Women and Girls. The “sexual predator” narrative is congruent with the narrative that resulted in a moral panic around sex offenders, resulting in lengthy sentences, civil commitments, sex offender registries,<sup>80</sup> and the enactment of rules that make evidence of a defendant’s prior acts of sexual assault or child molestation admissible in sex abuse cases to prove any relevant matter, including the defendant’s propensity to engage in sex abuse.<sup>81</sup> These measures were pushed by Republican legislators, who adopted feminist rhetoric about the harms of rape but espoused “tough-on-crime” legislation that many feminists opposed.<sup>82</sup>

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having sex with her while she was asleep). Heather Littleton et al. explain that dominant “sexual scripts” define rape as involving “high levels of force by the assailant, clear resistance by the victim, and a nonintimate relationship between the victim and assailant.” Heather L. Littleton et al., *Rape Acknowledgement and Postassault Experiences: How Acknowledgement Status Relates to Disclosure, Coping, Worldview, and Reactions Received from Others*, 21 *VIOLENCE & VICTIMS* 761, 762 (2006) [hereinafter Littleton et al., *Rape Acknowledgement and Postassault Experiences*]. A victim may not define her experience as rape if it does not match the rape script. Heather L. Littleton et al., *Unacknowledged Rape: How Much Do We Know About the Hidden Rape Victim?*, 14 *J. AGGRESSION MALTREATMENT & TRAUMA* 57, 67–69 (2007) [hereinafter Littleton et al., *Unacknowledged Rape*]. Some research suggests that women who describe the event as rape report *greater* feelings of stigma than do women who declined to define the experience as rape. *Id.* The stigma of being “weak, vulnerable, and permanently damaged” may be attached to the social construction of the rape victim. Heather Littleton et al., *Sexual Assault Victims’ Acknowledgement Status and Revictimization Risk*, 33 *PSYCHOL. WOMEN Q.* 34, 35 (2009) [hereinafter Littleton et al., *Sexual Assault Victims’ Acknowledgement*].

79. See discussion *infra* Section III.C. In describing the predator narrative, Katharine Baker argues that this “competing construction[] of ‘the rapist’ undermined feminist attempts to denormalize male predatory behavior” by creating a “pathological view of rape [that] rejects the feminist insight . . . that male appropriation of sex is commonplace.” Baker, *supra* note 58, at 223.

80. See generally GOTTSCHALK, *supra* note 45. Gottschalk concludes that “[m]any recent laws targeted at sex offenders have resurrected a concept of the ‘degraded other’ that had been falling out of favor in U.S. law.” *Id.* at 213.

81. See, e.g., FED. R. EVID. 412–15.

82. See, e.g., 140 CONG. REC. H8991–92 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari) (a Republican Representative speaking in support of adopting current Federal Rules of Evidence 412–15); see also Bennett Capers, *Real Women, Real Rape*, 60 *UCLA L. REV.* 826, 845 n.94 (2013) (recognizing that while some feminists supported the adoption of the new evidence rules, the National Organization of Women’s Legal Defense Fund and other feminist groups did not and that some feminists saw the

### III. PROBLEMS WITH THE DOMINANT NARRATIVE ABOUT CAMPUS SEXUAL ASSAULT

#### A. *The Paradigm Victim: White, Heterosexual, and Female*

The paradigm victim of campus sexual assault that emerges from media stories is a white, heterosexual female who experiences nonconsensual penetration, often when she was incapacitated due to intoxication.<sup>83</sup> The paradigm obscures a more complicated reality and makes it difficult to address the risks of assault for nonheterosexual students, women of color, and heterosexual men. Further, the paradigm's focus on *rape* allegations creates a misleading picture of the range of sexual misconduct claims commonly brought to university administrators.

Data from the DOJ's 2016 Campus Climate Survey Validation Study (CCSVS) found rates of sexual assault<sup>84</sup> significantly higher for nonheterosexual female students than for heterosexual female students.<sup>85</sup> The Association of American Universities' (AAU) review of survey data from twenty-seven schools reached similar findings: a significant percentage of students who identified as transgender, genderqueer, nonconforming, questioning, or not listed (TGQN) reported nonconsensual sexual contact (penetration or touching) by force or incapacitation.<sup>86</sup> Lesbians reported

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Republican push for the rule as politically motivated in order to make the Republican Party appear to be committed to women's issues).

83. The focus on white, heterosexual female victims of sexual abuse is not limited to campus settings. *See, e.g.*, GOODMARK, *supra* note 23, at 70–75 (describing the paradigmatic victim of domestic violence as a white, heterosexual female); Cheryl Nelson Butler, *The Racial Roots of Human Trafficking*, 62 UCLA L. REV. 1464, 1484 (2015) (arguing that myths about the sexuality of young women of color as “hyper-sexualized” mask the vulnerability of trafficked minority teens); Adele M. Morrison, *Changing the Domestic Violence (Dis)Course: Moving from White Victim to Multi-Cultural Survivor*, 39 U.C. DAVIS L. REV. 1061, 1082 (2006) (arguing that access to “battered women’s services” helps to construct the identity “battered woman” and that women of color are denied equal access to these services, rendering the social construction of the battered woman identity as white); Adele M. Morrison, *Queering Domestic Violence to “Straighten Out” Criminal Law: What Might Happen When Queer Theory and Practice Meet Criminal Law’s Conventional Responses to Domestic Violence*, 13 S. CAL. REV. L. & WOMEN’S STUD. 81, 89 (2003) (discussing how service providers for intimate partner violence in LGBT communities have developed a “more gender-fluid approach to adult intimate violence and more nuanced, and therefore more effective, models of service” that should inform criminal law responses).

84. *See* KREBS ET AL., *supra* note 3, at 69–84. “Sexual assault” represented the combined numbers of sexual battery and rape. *Id.* at 62. Sexual battery was defined as “unwanted and nonconsensual sexual contact that involved forced touching of a sexual nature, not involving penetration,” while rape was defined as “unwanted and nonconsensual sexual contact that involved a penetrative act, including oral sex, anal sex, sexual intercourse, or sexual penetration with a finger or object.” *Id.* at 5.

85. *Id.* at 78.

86. DAVID CANTOR ET AL., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT 13–17 (2015), [http://sexualassaulttaskforce.harvard.edu/files/taskforce/files/o\\_harvard\\_specific\\_aau\\_campus\\_survey\\_on\\_sexual\\_assault\\_and\\_sexual\\_misconduct\\_.pdf](http://sexualassaulttaskforce.harvard.edu/files/taskforce/files/o_harvard_specific_aau_campus_survey_on_sexual_assault_and_sexual_misconduct_.pdf); *see also* Denise A. Hines et al., *Gender Differences in Sexual Assault Victimization Among College Students*, 27 VIOLENCE & VICTIMS 922, 933 (2012) (finding, in a multiyear sample of college students, that heterosexual men were 75% less likely to be sexually assaulted than were nonheterosexual men); Elizabeth

comparable rates to heterosexual females: 18.5% versus 18.1%, respectively.<sup>87</sup> Bisexual women reported significantly higher rates (31.7%) as did “Asexual, Questioning, Not listed” respondents (22.8%).<sup>88</sup>

National research found similarly significant rates of sexual assault for lesbian, bisexual, and transgender (LBT) women.<sup>89</sup> In 2010, the National Intimate Partner and Sexual Violence Survey (NISVS-2010) found, for example, that 13% of lesbians and 17% of heterosexual women experience rape during their lifetime, while the comparable statistic for bisexual women was a shocking 46%.<sup>90</sup> Further, a number of reports have found that transgender persons experience high levels of violence and sexual assault.<sup>91</sup>

There is far less research on the sexual victimization of college men than there is on college women.<sup>92</sup> One study of college men found that since the age of sixteen, nearly 22% had experienced unwanted sexual contact that did not include penetration; 12% experienced unwanted oral, vaginal, or anal sex due to psychological pressure; and another 17% experienced unwanted oral, vaginal, or anal sex because someone “took advantage of [their] being drunk or high” or they were physically restrained or forced.<sup>93</sup>

The AAU study found that gay and bisexual men reported higher rates of sexual assault than did heterosexual men: 12.1%, 11.1%, and 3.6%, respectively.<sup>94</sup> Researchers believe that the increased risk of sexual assault for gay and bisexual men is explained by the combination of risks of being

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Reed et al., *Alcohol and Drug Use and Related Consequences Among Gay, Lesbian and Bisexual College Students: Role of Experiencing Violence, Feeling Safe on Campus, and Perceived Stress*, 35 *ADDICTIVE BEHAVIORS* 168, 169 (2010) (discussing that gay, lesbian, and bisexual students were more likely to report threats or experience physical or sexual violence, were less likely to report feeling safe on campus, and reported greater stress than heterosexual students); Felecia Theune, *They Ask but They Don't Tell: Social Construction of Sexual Assault Leaves Non-Heterosexuals Voiceless on AAU Campuses* (unpublished manuscript) (on file with the author).

87. CANTOR ET AL., *supra* note 86, at 102.

88. *Id.*

89. MIKEL L. WALTERS ET AL., *THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (NISVS): 2010 FINDINGS ON VICTIMIZATION BY SEXUAL ORIENTATION* 21 (2013), [https://www.cdc.gov/violenceprevention/pdf/nisvs\\_sofindings.pdf](https://www.cdc.gov/violenceprevention/pdf/nisvs_sofindings.pdf).

90. *Id.* at 10. The large majority of bisexual and heterosexual female rape victims were assaulted by a male. *Id.* at 1. The estimates for the sex of the perpetrator for other groups (lesbians and gay and bisexual men) were too small to calculate. *Id.* For non-rape sexual violence against lesbians, heterosexual and bisexual females, and gay males, the perpetrator was most often male (roughly 85%, 95%, 88%, respectively), while nearly 55% of heterosexual male victims reported only female perpetrators. *Id.* at 1–2.

91. See, e.g., Leigh Goodmark, *Transgender People, Intimate Partner Abuse, and the Legal System*, 48 *HARV. C.R.-C.L. L. REV.* 51, 54–55 (2013); Emilia Lombardi et al., *Gender Violence: Transgender Experiences with Violence and Discrimination*, 42 *J. HOMOSEXUALITY* 89, 95–96 (2001).

92. See, e.g., Hines et al., *supra* note 86, at 923; Turchik, *supra* note 36, at 243.

93. Turchik, *supra* note 36, at 248 tbl.1. Nearly half (48%) of the perpetrators in the study were female. *Id.* at 248.

94. CANTOR ET AL., *supra* note 86.

raped by intimate male partners and vulnerability to homophobic sexual assaults.<sup>95</sup>

There has not been a great deal of research on racial or ethnic differences in campus sexual assault research. Some studies that compare rape rates for white women with those of other women find that white women experience substantially higher rates of campus rape.<sup>96</sup> Researchers believe that this racial difference is explained by a difference in drinking behavior.<sup>97</sup> Some campus surveys find that white female students are more likely to report having experienced incapacitated rape—the most common form of campus rape.<sup>98</sup> White women also report much higher rates of alcohol consumption, and high rates of alcohol consumption are significantly correlated with experiencing incapacitated rape.<sup>99</sup>

In contrast, national research (as compared to campus research) finds elevated risks of sexual violence for multiracial and indigenous women.<sup>100</sup> The NISVS-2010 study found that nearly 34% of multiracial non-Hispanic women and approximately 27% of indigenous women experienced rape victimization in their lifetime compared to 18.8% of white non-Hispanic women and 14.6% of Hispanic women.<sup>101</sup> In addition, poor women face higher risks for sexual assault.<sup>102</sup>

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95. Jayne Walker et al., *Effects of Rape on Men: A Descriptive Analysis*, 34 ARCHIVES SEXUAL BEHAV. 69, 70 (2005).

96. See, e.g., Linda Kalof, *Ethnic Differences in Female Sexual Victimization*, 4 SEXUALITY & CULTURE 75, 76–77 (2000) (finding that a higher percentage of white women reported being raped than did Hispanic and African American women); Mary P. Koss et al., *The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students*, 55 J. CONSULTING & CLINICAL PSYCHOL. 162, 166 (1987) (finding that a higher percentage of white women reported being raped than did Hispanic and African American women).

97. See, e.g., Meichun Mohler-Kuo et al., *Correlates of Rape While Intoxicated in a National Sample of College Women*, 65 J. STUD. ON ALCOHOL 37, 41 (2004) (describing how the Harvard School of Public Health's College Alcohol Study found that white, undergraduate females were more likely to experience sexual assaults while intoxicated than were other women—a finding that is likely attributable to the fact that heavy alcohol use is more common among white students); Christopher P. Krebs et al., *The Sexual Assault of Undergraduate Women at Historically Black Colleges and Universities (HBCUs)*, 26 J. INTERPERSONAL VIOLENCE 3640, 3654 (2011) (finding that differences in drinking behavior accounted for the significantly lower number of female sexual assault victims at historically black colleges and universities who experienced sexual assault); cf. KREBS ET AL., *supra* note 3, at 77 (finding no significant differences between white and nonwhite female students when the nine-school sample was combined, although when examined separately, two schools reported higher rates for white women).

98. Krebs et al., *supra* note 97, at 3643.

99. Mohler-Kuo et al., *supra* note 97, at 37.

100. See, e.g., MICHELE C. BLACK ET AL., NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 20 (2011), [https://www.cdc.gov/violenceprevention/pdf/nisvs\\_report2010-a.pdf](https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf); MATTHEW J. BREIDING ET AL., PREVALENCE AND CHARACTERISTICS OF SEXUAL VIOLENCE, STALKING, AND INTIMATE PARTNER VIOLENCE VICTIMIZATION – NATIONAL INTIMATE PARTNER VIOLENCE AND SEXUAL VIOLENCE SURVEY, UNITED STATES 2011, at 16 (2014), <https://www.cdc.gov/mmwr/preview/mmwrhtml/ss6308a1.htm>.

101. BLACK ET AL., *supra* note 100, at 2–3.

102. *Id.* at 83.

*B. Prevention and Intervention Strategies Fail to Address the Importance of Intersectionality*

Quite apart from questions of the prevalence of assault, LGBT students and students of color have raised concerns that their perspectives and experiences are largely absent from campus discussions of sexual assault.<sup>103</sup> In part, these concerns echo those of scholars who have criticized the dominant feminist framing of rape and gender violence as heteronormative<sup>104</sup> and white.<sup>105</sup>

“Gender violence” is frequently treated as the equivalent of “violence against women,”<sup>106</sup> but a number of scholars have called for the expansion of the meaning of gender violence to include violence that is intended to or results in policing gender conformity, punishing gender nonconformity, and creating racial/gender hierarchies of power.<sup>107</sup> This approach recognizes the ways in which racialized gender hierarchies harm men as well as women.<sup>108</sup> This “integrated approach” to antiviolence work “understand[s] the interplay

103. See, e.g., Darializa Avila-Chevalier, *Sister Outsider*, COLUM. SPECTATOR: THE EYE (Oct. 16, 2014, 1:38 AM), <http://columbiaspectator.com/eye/2014/10/16/sister-outsider> (“Many women of color at Columbia have expressed that they feel isolated and unwelcome in discussions pertaining to sexual violence and gender-based misconduct.”).

104. See, e.g., Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259, 1273–74 (2011).

105. See, e.g., GOODMARK, *supra* note 23; Valli Kalei Kanuha, *Domestic Violence, Racism, and the Battered Women’s Movement in the United States*, in FUTURE INTERVENTIONS WITH BATTERED WOMEN AND THEIR FAMILIES 34 (Jeffrey L. Edleson & Zvi C. Eisikovits eds., 1996); KANUHA, *supra* note 20, at 74 (noting that “[t]he field of violence against women cross-nationally continues to be dominated by the perspectives, theorizing, and policy advocacy of White feminists,” and this presents a barrier to developing alternative interventions including RJ and other culturally appropriate strategies).

106. Julie Goldscheid, *Gender Neutrality, the “Violence Against Women” Frame, and Transformative Reform*, 82 UMKC L. REV. 623, 624–26 (2014).

107. See Donna Coker et al., *Introduction: CONVERGE! Reimagining the Movement to End Gender Violence*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 249, 250–51 (2015); Harris, *Heteropatriarchy Kills*, *supra* note 26, at 207 (“[A] significant amount of the violence addressed by the criminal justice system is ‘gender violence.’”). This is the approach around which Leigh Goodmark has organized her Gender Violence Clinic. Leigh Goodmark, *CONVERGEing Around the Study of Gender Violence: The Gender Violence Clinic at the University of Maryland Carey School of Law*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 661, 662 (2015) (describing how the “Gender” part of the Gender Violence Clinic sees gender as “implicated whenever the legal system is acting, or refusing to act, in part as a result of the client’s gender, or when the client’s gender has some impact on the case or on the circumstances leading to the legal system’s intervention,” and noting that “[g]ender is also at issue when the social harm that requires remedying turns, in part or entirely, on a gender hierarchy or gender-related privilege or oppression”); Leigh Goodmark et al., Transcript, *Plenary 2—Redefining Gender Violence*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 289 (2015) (describing police harassment and violence directed at LGBT youth as gender violence); see also Rebecca Hall & Angela P. Harris, *Hidden Histories, Racialized Gender, and the Legacy of Reconstruction: The Story of United States v. Cruikshank*, in WOMEN AND THE LAW: STORIES 21, 23 (Elizabeth M. Schneider & Stephanie M. Wildman eds., 2011) (describing the construction of “racialized gender”).

108. See Capers, *supra* note 104, at 1306 (recognizing that the existence of male victims of rape upsets a feminist framing of rape around female victimization and allows for “interest convergence” when there is political recognition of men’s vulnerability to rape); A CALL TO MEN, <http://www.acalltomen.org> (last visited Nov. 11, 2016) (organizing men to oppose violence against women through the recognition of how the performance of masculinities has harmed them).

of race, sexuality, class, and gender.”<sup>109</sup> As Angela Harris explains, this approach “is a theoretical shift of focus from group identities to interlocking practices and beliefs that makes possible a broader definition of the problem: . . . the shift from ‘violence against women’ to ‘gender violence.’”<sup>110</sup>

Title IX law offers support for this framing. Recent DOE guidance underscores the meaning of sex discrimination under Title IX:

Title IX’s sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity . . . . Similarly, the actual or perceived sexual orientation or gender identity of the parties does not change a school’s obligations. Indeed, lesbian, gay, bisexual, and transgender (LGBT) youth report higher rates of sexual harassment and sexual violence. A school should investigate and resolve allegations of sexual violence regarding LGBT students using the same procedures and standards that it uses in all complaints involving sexual violence.<sup>111</sup>

Thus, sex discrimination violations under Title IX include sexual assault and sexual harassment of men by men, a problem that may be particularly present in male-only groups.<sup>112</sup> Take, for example, the description of a Title IX case offered by Nancy Cantalupo:

[A]fter four years of harassment involving homophobic name-calling, defacement of property, and pushing the [student] into lockers, a baseball teammate forced him into a corner of the locker room and rubbed his naked penis and scrotum on the [student’s] neck and face while another classmate made sure the [student] could not flee.<sup>113</sup>

Despite DOE encouragement to recognize gender discrimination as including violence intended to enforce heteronormativity, much of campus interventions are centered in a heteronormative narrative of sexual assault as fundamentally “a form of male (hetero)sexual coercion of females,” and the perpetrator as “quintessentially masculine, . . . a freely acting predator motivated by misogynist lust/hate.”<sup>114</sup> As one experienced commentator notes with regard to campus bystander intervention programs:

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109. See Harris, *Heteropatriarchy Kills*, *supra* note 26, at 36.

110. *Id.* at 36–37.

111. Office for Civil Rights, *Questions and Answers*, *supra* note 2, at 5–6.

112. Nancy Chi Cantalupo, *Masculinity & Title IX: Bullying and Sexual Harassment of Boys in the American Liberal State*, 73 MD. L. REV. 887, 947 (2014); Capers, *supra* note 104, at 1273 (“[A] significant percentage of male sexual victimizations occurs in hypermasculine environments, including fraternities and sports teams.”) (footnote omitted).

113. Cantalupo, *supra* note 112 (describing the facts of *Roe ex rel. Callahan v. Gustine Unified School District*, 678 F. Supp. 2d 1008 (E.D. Cal. 2009)).

114. Brenner, *supra* 10, at 517 (footnote omitted); see also Capers, *supra* note 104, at 1293 (discussing how feminist scholars frequently render male victimization as invisible or relegate it to a footnote).

[T]he possibility of lesbian, gay, bisexual and transgender (LGBT) student assaults are at best briefly mentioned and at worst silenced. Such programming has also been largely silent on the necessity of distinguishing between different cultural values and pressures, where concerns about reporting sexual violence may be radically different from one group to another.<sup>115</sup>

The DOE has encouraged universities to engage in campus climate surveys to gauge the prevalence of sexual assault on campus and test students' attitudes, particularly with regard to attitudes about rape.<sup>116</sup> The DOJ's survey, which is to serve as a model for campus adoption, probes climate issues for LGBT students: "At this school, it is common for students to call people who are gay or lesbian a negative name."<sup>117</sup> The survey does not probe further issues of hostility towards LGBT students and does not include any questions that might examine whether there are links between other forms of campus hostility based on identity—race or national origin—leaving it to race-specific and sexual orientation/sexual identity-specific surveys.<sup>118</sup> Little attention has been focused on whether these other forms of hostility make sexual assault interventions and prevention methods less effective; the degree to which bias based in race, sexual orientation, and sexual identity shapes risks for sexual assault; or biased treatment by administrators and students. Campus research finds, for example, that LGBT students experience higher rates of harassment, are more likely to report

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115. Sara Carrigan Wooten & Roland W. Mitchell, *Introduction*, in *THE CRISIS OF CAMPUS SEXUAL VIOLENCE: CRITICAL PERSPECTIVES ON PREVENTION AND RESPONSE 1* (Sara Carrigan Wooten & Roland W. Mitchell eds., 2016); see also Goodmark, *supra* note 91; Jeffrey L. Todahl et al., *Sexual Assault Support Services and Community Systems: Understanding Critical Issues and Needs in the LGBTQ Community*, 15 *VIOLENCE AGAINST WOMEN* 952 (2009) (noting that the overall discrimination against the LGBTQ community, the failure to discuss sexual violence within the LGBTQ community, and the associated gaps in services are key factors that negatively effect LGBTQ survivors of sexual assault).

116. See *Protecting Students from Sexual Assault*, U.S. DEP'T JUST., <https://www.justice.gov/ovw/protecting-students-sexual-assault> (last updated Nov. 23, 2016) (providing a number of resources including a model campus climate survey); see also *Draft Instrument for Measuring Campus Climate Related to Sexual Assault*, CHANGING OUR CAMPUS, [http://changingourcampus.org/application/files/4214/5381/9882/RevisedInstrumentModules\\_1\\_21\\_16\\_cleanCombined\\_psg.pdf](http://changingourcampus.org/application/files/4214/5381/9882/RevisedInstrumentModules_1_21_16_cleanCombined_psg.pdf) (last visited Dec. 12, 2016) (reporting minor revisions to the CCSVS instrument). "Rape myth" questions include, for example, "[a] person who is sexually assaulted while he/she is drunk is at least somewhat responsible for putting themselves in that position"; "[i]t is not necessary to get consent before sexual activity if you are in a relationship with that person"; and "[a]ccusations of sexual assault are often used by one person as a way to get back at the other." *Id.* at 25.

117. *Id.* at 24.

118. See Deborah Weissman, *Domestic Violence, Differences, and Intersectionality: Responses to Campus Sexual Assault* (unpublished manuscript) (on file with author). For an example of a campus climate survey regarding harassment and discrimination against LGBT students, see SUSAN R. RANKIN, *CAMPUS CLIMATE FOR GAY, LESBIAN, BISEXUAL, AND TRANSGENDER PEOPLE: A NATIONAL PERSPECTIVE* (2003), [http://www.thetaskforce.org/static\\_html/downloads/reports/reports/CampusClimate.pdf](http://www.thetaskforce.org/static_html/downloads/reports/reports/CampusClimate.pdf) (discussing survey data collected from college students from October 2000 to December 2001 finding that 36% of LGBT undergraduate students have experienced harassment within the past year and 41% said that their college was not addressing issues related to sexual orientation or gender identity).

feeling unsafe, and are more likely to be victims of violent acts than are heterosexual students.<sup>119</sup> Further, the most common basis for campus hate crimes reported to authorities is race, followed by anti-LGBT bias.<sup>120</sup>

Nor do campus climate surveys gather data on racialized sexism<sup>121</sup> or implicit racial bias.<sup>122</sup> Yet, there is no reason to believe that the implicit bias that so infects the criminal justice system<sup>123</sup> is absent from the campus. As Frank Rudy Cooper describes, a long, bitter racial history promotes the continuing presumptive image of African American men as the “Bad Black Man,” who is “animalistic, sexually depraved, and crime-prone.”<sup>124</sup> This image “emanates in part from a gender-specific assumption that heterosexual black men are a threat to the sexual security of white women.”<sup>125</sup>

Similarly, while some bystander intervention programs address sexist and homophobic beliefs,<sup>126</sup> I have found none that address racialized gender beliefs, such as “hypersexualized”<sup>127</sup> and violent stereotypes of African American men and women—an experience captured by the words of a Columbia University, African American, female student: “I feel unsafe at times. I feel that a lot of the stereotypes that come along with being black—we’re exoticized and hypersexualized—make me feel targeted a lot.”<sup>128</sup>

A number of scholars have expressed concern that racial bias may affect the outcomes in campus sexual assault adjudication<sup>129</sup> and that experiences with bias, both inside and outside of campus life, will encourage some victims of color not to seek assistance.<sup>130</sup> The intersection of class with race and gender may be important to assessing the risks for bias that some African

119. Reed et al., *supra* note 86, at 170–71.

120. SIMONE ROBERS ET AL., INDICATORS OF SCHOOL CRIME AND SAFETY: 2014 (2015), <http://nces.ed.gov/pubs2015/2015072.pdf>; see also Weissman, *supra* note 118.

121. Hall & Harris, *supra* note 107 (describing “racialized gender violence” intended to “maintain White supremacy through fear . . . and the denial of gender privilege”).

122. See, e.g., L. Song Richardson, *Cognitive Bias, Police Character, and the Fourth Amendment*, 44 ARIZ. ST. L.J. 267, 271–72 (2012).

123. *Id.*

124. Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853, 857 (2006).

125. *Id.* at 860–61. The “bestial black man” is “based upon three assumptions: (1) that black men are animalistic; (2) that black men are inherently criminal; and (3) that black men are sexually unrestrained.” *Id.* at 876 (citing N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Male*, 24 CARDOZO L. REV. 1315, 1320 (2004)).

126. See Ann L. Coker et al., *Evaluation of Green Dot: An Active Bystander Intervention to Reduce Sexual Violence on College Campuses*, 17 VIOLENCE AGAINST WOMEN 777, 791 (2011). Some bystander programs include a broader focus on changing sexist and homophobic attitudes, which promote gender violence. *Id.* Others are singularly focused on the prevention of violence in an immediate circumstance based on the premise “that bystanders can make positive behavioral interventions regardless of their adherence to historical myths related to” sexual assault or dating violence. *Id.*

127. Cooper, *supra* note 124; Avila-Chevalier, *supra* note 103.

128. Avila-Chevalier, *supra* note 103.

129. Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 900–01 (2016); Janet Halley, *Commentary, Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. F. 103, 106–08 (2015).

130. See Weissman, *supra* note 118.

American male college athletes face. Those whose class history is substantially poorer than that of other students may experience bias that is raced, classed, and gendered.<sup>131</sup> Racialized gender stereotypes of African American men as animalistic and hypersexual<sup>132</sup> may intersect with a deeply racialized and classed understanding of who is a “thug.”<sup>133</sup>

In addition, victimized students of color may face particular pressures that are the result of campus racial hostility. Victimization is often intra-racial; some students may fear that reporting will contribute to negative stereotypes of their ethnic or racial group.<sup>134</sup> Further, well-known police hostility toward women of color, particularly African American women,<sup>135</sup> and bias on the basis of sexual orientation and sexual identity<sup>136</sup> cannot help but be in the minds of some student victims when they consider whether and how to engage campus authorities.

### *C. The Paradigm Campus Assaulter: The “Sexual Predator”*

Over the last several years, the idea that campus sexual assaulters are “sexual predators” has emerged as part of the dominant narrative about the problem of campus assault.<sup>137</sup> As sexual assault researchers Kevin Swartout et al. describe, the belief that “a small distinct group of young men—often labeled *serial rapists*—commit most rapes on college campuses” has been repeated as fact by the White House Council on Women and Girls, the White House Task Force to Protect Students from Sexual Assault, and numerous

131. See Gersen & Suk, *supra* note 129, at 915 (“While the majority of student athletes in the country are white, on a predominantly white college campus, a minority presence of poor black men on scholarships may be concentrated in the school’s sports teams. Combining the CDC risk factors [for committing sexual assault] of hypermasculinity [, defined as male sports participation, and] poverty . . . creates a significant risk of precriminalizing minority men.”) (footnote omitted).

132. Cooper, *supra* note 124.

133. See, e.g., Donna Coker, “Stand Your Ground” in Context: Race, Gender, and Politics: *University of Miami Law Review Eleventh Circuit Issue: “Stand Your Ground” Laws*, 68 U. MIAMI L. REV. 943 (2014) (describing the social construction of criminality as raced, classed, and gendered); D. Marvin Jones, “He’s A Black Male . . . Something Is Wrong with Him!” *The Role of Race in the Stand Your Ground Debate*, 68 U. MIAMI L. REV. 1025, 1033 (2014) (stating that the image of the African American young male as an “urban thug” is “a function of a combination of middle class anxiety about the deteriorating urban scene and a spate of films and television images, which created a grotesquely racialized image of urban crime,” such that “[t]he same moral panic, which once targeted all blacks, has refocused on black males in urban areas with saggy pants and hoodies”).

134. See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

135. See, e.g., COKER ET AL., *supra* note 46.

136. *Id.*

137. Kevin M. Swartout et al., *Trajectory Analysis of the Campus Serial Rapist Assumption*, 169 [J]AMA PEDIATRICS 1148, 1149 (2015) (noting that “[a]n assumption runs throughout this discussion [of campus sexual assault] that a small distinct group of young men—often labeled *serial rapists*—commit most rapes on college campuses”).

research and public education publications.<sup>138</sup> “[This predator concept] suggests that . . . serial perpetrators are severely pathological men who instrumentally groom their victims prior to the assault [and] use alcohol to incapacitate their victims . . . .”<sup>139</sup>

The predator narrative is grounded in the research of David Lisak and Paul Miller.<sup>140</sup> Lisak, a psychologist and sexual assault researcher, has been a particularly strong proponent of the predator narrative. He writes,

[Undetected rapists]<sup>141</sup> are sophisticated sexual predators who plan their attacks exhaustively and with astonishing cunning. *Most of them* are serial rapists . . . . As a group, they are responsible for a wildly disproportionate amount of the sexual violence in their communities—whether college campuses or otherwise.

. . . .

. . . [T]he research on undetected rapists tells us that . . . a very small percentage of men—serial sexual predators—are responsible for a vastly disproportionate amount of sexual violence in any community. These men cannot be reached or educated. They must be identified and removed from our communities.<sup>142</sup>

Lisak and Susan Roth conducted interviews with a sample of college men who admitted to having engaged in sexual conduct that meets the legal requirements for rape or attempted rape.<sup>143</sup> Their published excerpts from some of these interviews provide chilling accounts of the calculated planning with which some campus sexual assaulters engage.

138. *Id.*; see also NAT’L SEXUAL VIOLENCE RES. CTR. (NSVRC), KEY FINDINGS: RETHINKING SERIAL PERPETRATION 1 (2015) [hereinafter NSVRC], <http://www.nsvrc.org/publications/nsvrc-publications-research-briefs/key-findings-rethinking-serial-perpetration> (“For several years, the serial perpetration hypothesis has been the dominant narrative of rape perpetration.”).

139. NSVRC, *supra* note 138.

140. Swartout et al., *supra* note 137 (reviewing the various references and determining that they all rely on a study by Lisak and Miller); see David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73 (2002); David Lisak, *Understanding the Predatory Nature of Sexual Violence*, 14 SEXUAL ASSAULT REP. 49 (2011). Lisak argues that repeat offenders explain why the percentage of college women reporting rape is higher than the percentage of college men who admit to engaging in rape. *Id.* Other researchers suggest that this gap is likely a reflection of gender differences in perception, untruthful male responses, or both. See, e.g., CHRISTOPHER P. KREBS ET AL., THE CAMPUS SEXUAL ASSAULT (CSA) STUDY: FINAL REPORT 5–28 (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>.

141. See Lisak & Miller, *supra* note 140, at 73 (noting that there are rapists who have not been identified as such by law enforcement).

142. DAVID LISAK, PREDATORS: UNCOMFORTABLE TRUTHS ABOUT CAMPUS RAPISTS 19 (2004), <http://files.eric.ed.gov/fulltext/EJ792548.pdf> (emphasis added); see also Lisak & Miller, *supra* note 140, at 49; Amanda Hess, *David Lisak on Acquaintance Rapists: “We’re Giving a Free Pass to Sexual Predators”*, WASH. CITYPAPER (Apr. 23, 2010, 1:00 PM), <http://www.washingtoncitypaper.com/blogs/sexist/2010/04/23/david-lisak-on-acquaintance-rapists-were-giving-a-free-pass-to-sexual-predators/>.

143. David Lisak & Susan Roth, *Motives and Psychodynamics of Self-Reported, Unincarcerated Rapists*, 60 AM. J. ORTHOPSYCHIATRY 268 (1990).

Charles would survey the women at a fraternity party with his friends and pick out “targets,” women who looked like they could be gotten drunk. He would then “work on them,” plying them with drinks, until he could escort or carry them up to his room. “Most of the time at that point they’re too drunk to resist even if they want to.”<sup>144</sup>

Predators exist, but does Lisak’s research substantiate his claims that most campus assaulters are predators who cannot be deterred? Note first that, as exemplified in the above quote, Lisak is making three claims: (1) that *most* undetected rapists are predators; (2) that repeat assaulters (predators) account for most rapes; and (3) that the only appropriate response to predators is to remove them.<sup>145</sup>

Lisak and Miller relied on snapshot surveys—that is, surveys that are given at a single point in time.<sup>146</sup> A respondent who answered “yes” to any one of the following questions was classified as a rapist or attempted rapist:

1. Have you ever been in a situation where you tried, but for various reasons did not succeed, in having sexual intercourse with an adult by using or threatening to use physical force (twisting their arm, holding them down, etc.) if they did not cooperate?
2. Have you ever had sexual intercourse with someone, even though they did not want to, because they were too intoxicated (on alcohol or drugs) to resist your sexual advances (e.g., removing their clothes)?
3. Have you ever had sexual intercourse with an adult when they didn’t want to because you used or threatened to use physical force (twisting their arm; holding them down, etc.) if they didn’t cooperate?
4. Have you ever had oral sex with an adult when they didn’t want to because you used or threatened to use physical force (twisting their arm; holding them down, etc.) if they didn’t cooperate?<sup>147</sup>

A participant who responded “yes” to one of the questions was asked follow-up questions regarding their age, the victim’s age, the number of times it happened, whether it happened with another person, and depending on which questionnaire was used, the frequency of other instances or numbers of victims.<sup>148</sup>

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144. *Id.* at 276.

145. LISAK, *supra* note 142. Lisak elsewhere writes, “[I]t is extremely difficult to change the behavior of a serial predator even when you incarcerate him and subject him to an intensive, multi-year treatment program.” Lisak, *supra* note 140, at 56.

146. Lisak & Miller, *supra* note 140, at 76 (stating that the study pools data from four surveys with a combined sample size of 1,882 men).

147. *Id.* at 77–78.

148. *Id.* at 78.

These questions are based on the Sexual Experiences Survey (SES), “the de facto ‘gold standard’ for the assessment of sexual coercion.”<sup>149</sup> The question of how to count “yes” responses for the SES is an issue for any researcher who uses the instrument (or any similar survey instrument).<sup>150</sup> The SES measures *acts* of sexual assault, but of course, a respondent may have engaged in more than one act during a single incident. Therefore, counting each act as though it were an incident will likely provide an overcount of repeat offenders. On the other hand, counting only the most serious assault admitted, as some researchers do,<sup>151</sup> likely provides an undercount of repeaters.

Lisak and Miller count rape acts to determine the number of repeat offenders.<sup>152</sup> Their repeat rapist numbers combine repeat rape acts against the same victim with those committed against multiple victims.<sup>153</sup> They do not report timing information, so the reader is not informed if respondents who committed more than one rape act or attempted rape act did so in one incident that involved multiple acts (e.g., forced oral penetration followed by attempted forced vaginal penetration with the same victim) or if the acts occurred in different incidents.<sup>154</sup> An additional limitation of the published research is that no data was given regarding time periods, so the reader is not told what time period separated rape acts or how long ago the acts occurred, including if the acts were committed during the respondents’ college careers or at an earlier time.<sup>155</sup>

Lisak and Miller determined the total number of rape acts and attempted rape acts represented in their sample and the percentage attributable to each offender.<sup>156</sup> Of a sample of 1,882 college men, 120 (6.4%) responded “yes” to one of the rape or attempted rape act questions.<sup>157</sup> For ease of conversation, I will refer to this as the “rapist group.”<sup>158</sup> Lisak and Miller

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149. Leah E. Adams-Curtis & Gordon B. Forbes, *College Women’s Experiences of Sexual Coercion: A Review of Cultural, Perpetrator, Victim, and Situational Variables*, 5 TRAUMA VIOLENCE & ABUSE 91, 115 n.2 (2004).

150. JIM HOPPER ET AL., AN INITIAL CRITICAL RESPONSE TO SWARTOUT ET AL.’S (2015) PAPER IN JAMA PEDIATRICS, ‘A TRAJECTORY ANALYSIS OF THE CAMPUS SERIAL RAPIST ASSUMPTION’ 5 (2016), [http://www.jimhopper.com/swartout/swartout\\_critique.pdf](http://www.jimhopper.com/swartout/swartout_critique.pdf) (criticizing Swartout et al.’s methodology (described *infra* notes 168–84) because it fails to count the number of repeat rape acts that occur during one assessment period).

151. *Id.*

152. Lisak & Miller, *supra* note 140, at 78.

153. *Id.*

154. *See id.*; *see also* Swartout et al., *supra* note 137 (describing Lisak and Miller’s research and noting the “important semantic difference” between the researchers’ finding that a majority of the rapist group were repeat offenders and the later interpretation given to the data that repeaters were “serial rapists,” a label that suggests that repeat offenders committed “at least 2 separate offenses . . . against multiple victims”).

155. *See* Lisak & Miller, *supra* note 140.

156. *Id.* at 78.

157. *Id.*

158. *Id.* at 73–76.

report that 37% of the rapist group committed a single rape act; 28% committed two rape acts; 16.6% committed between three and five rape acts; 17.5% committed between six and eight rape acts; and 9% committed between nine and fifty rape acts.<sup>159</sup> The researchers did not provide a further disaggregation of the nine to fifty group.<sup>160</sup> They combined all respondents who reported more than one rape act into a single repeat rapist group, concluding that 63% of the rapist group were repeat rapists.<sup>161</sup> This repeat rapist group accounted for 90% of the rape acts counted in the study.<sup>162</sup>

Their conclusion that the sample included a number of repeat rapists is unassailable, but their conclusion that *most* campus rapists are repeat offenders is misleading.<sup>163</sup> First, as described previously, this interpretation of the data may conflate “rape acts” with “rape incidents.” A respondent who perpetrated two rape acts in one incident is rendered a “repeat offender.”<sup>164</sup> Admittedly, as the number of acts increase, it becomes increasingly likely that the respondent was describing more than one incident, but this cannot be said with any certainty at the lower levels of rape acts (between two and three).

Furthermore, even if each rape act corresponded to a rape incident, the conclusion that most rapists are repeat offenders or predators is misleading. Recall that 28% (thirty-four) of respondents committed a total of two rape acts.<sup>165</sup> Surely, it is equally representative of the data to conclude that 65% of the rape group were low-level rapists, having committed one to two rapes, while a minority (35%), albeit a substantial minority, were repeat rapists, having committed three or more rape acts.

A second limitation of Lisak and Miller’s research is attributable to the limits of any snapshot survey: it does not capture *individual change over time*. Recall that the research provides no information regarding timing: when the rape acts occurred, how close together in time they occurred, or how long ago they occurred. Yet, Lisak’s conclusion that repeaters are predators who will not respond to interventions rests on the belief that prior offending is representative of future offending.

As Martie P. Thompson explains, a snapshot may be misleading in ways that longitudinal research illuminates:

Data from 795 males surveyed at the end of each of their 4 years in college suggested relatively stable rates of sexual aggression if one took a snapshot at each time point; 4.5% of males self-reported engaging in behaviors that

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159. *Id.* at 78.

160. *Id.*

161. *Id.*

162. *Id.* A total of 483 rape acts were reported: forty-four members of the rapist group committed one rape act, leaving 439 rape acts (90%) committed by the remaining members of the group. *Id.*

163. *See id.* at 80.

164. *See id.* at 74.

165. *Id.*

would meet the definition of rape during their freshman year [and similar percentages were found in each of the following three years studied]. [But a] trajectory-based analysis whereby changes in sexual aggression *within each person* over the four time points revealed patterns in the data not evident from a cross-sectional analysis.<sup>166</sup>

A small number of longitudinal studies have attempted to learn more about the patterns of college sexual aggressors.<sup>167</sup> The largest such study, published by Swartout et al. in *JAMA Pediatrics* in 2015,<sup>168</sup> relies on data collected in two prior studies, one published in 2004<sup>169</sup> and another in 2013.<sup>170</sup> The studies followed college male students through their four years of college.<sup>171</sup> The two studies have a combined 1,642 male college student respondents.<sup>172</sup>

Responding to a survey taken in their freshman year, 5.1% (eighty-four) of the combined sample answered “yes” to whether, since the age of fourteen, they had engaged in behaviorally described conduct that meets the FBI’s Uniform Crime Reporting (UCR) program’s definition of rape.<sup>173</sup> In subsequent surveys asking about the prior year of college, 7.9% (129) reported committing rape while attending college.<sup>174</sup> Most (58%) of those

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166. See Martie P. Thompson, *Risk and Protective Factors for Sexual Aggression and Dating Violence: Common Themes and Future Directions*, 15 TRAUMA VIOLENCE & ABUSE 304, 305 (2014) (emphasis added).

167. See, e.g., Antonia Abbey & Pam McAuslan, *A Longitudinal Examination of Male College Students’ Perpetration of Sexual Assault*, 72 J. CONSULTING & CLINICAL PSYCHOL. 747 (2004). Abbey and McAuslan gathered data at two time points from 197 freshman men: Time 1 was at the beginning of the respondents’ freshman year and Time 2 was eleven months later. *Id.* at 749. At Time 1, seven of the freshmen male respondents admitted to having engaged in conduct *prior* to entering college (since the age of fourteen) that would meet the legal definition of rape or attempted rape. *Id.* at 751. When surveyed at Time 2, five of those seven reported having committed rape/attempted rape acts in the intervening year. The published study combines all sexual aggression in the data on repeaters. Professor Abbey provided the breakout of rape/attempted rape numbers. See E-mail from Antonia Abbey, Professor & Area Chair, Wayne St. Univ., to Donna Coker, Professor, Univ. of Miami Sch. of Law (November 5, 2016) (on file with author). When measuring “sexual aggression,” which includes sexual assault and sexual coercion as well as rape, studies show higher numbers of repeaters. See, e.g., Antonio Abbey et al., *Patterns of Sexual Aggression in a Community Sample of Men: Risk Factors Associated with Persistence, Desistance, and Initiation Over a 1-Year Interval*, 2 PSYCHOL. VIOLENCE 1, 7 (2011) (finding that in a longitudinal study with a community sample of 423 men, ages eighteen to thirty-five, 43% acknowledged at Time 1 having engaged in sexually aggressive conduct since the age of fourteen, including the use of verbal coercion to achieve unwanted sex as well as nonconsensual sexual touching and intercourse; 42% of those who reported sexual aggression at Time 1 were repeaters, reporting having engaged in sexually aggressive conduct in the intervening year measured at Time 2).

168. Swartout et al., *supra* note 137. This will be referred to as the JAMA study.

169. Jacquelyn W. White & Paige Hall Smith, *Sexual Assault Perpetration and Reperpetration: From Adolescence to Young Adulthood*, 31 CRIM. JUST. & BEHAV. 182 (2004).

170. Martie P. Thompson et al., *Trajectories and Predictors of Sexually Aggressive Behaviors During Emerging Adulthood*, 3 PSYCHOL. VIOLENCE 247 (2013).

171. See *id.* at 249; White & Hall, *supra* note 169, at 185.

172. Swartout et al., *supra* note 137.

173. *Id.* at 1151.

174. *Id.*

who committed rape prior to entering college did not commit rape during the subsequent four years of college.<sup>175</sup> Most (72.9%) of those who initiated rape during college had not committed rape prior to college.<sup>176</sup> Only 2.2% (thirty-five) reported committing rape both before and during college. A total of 10.8% (178) of the entire sample reported committing rape before or after entering college.<sup>177</sup>

If most rapes are committed by serial rapists, one would expect to see a group who consistently committed rapes over the time period of the study. To determine whether this was the case, the researchers determined whether men who reported rape in one of the annual surveys reported rape in a subsequent survey and then determined the trajectories of rape commission.<sup>178</sup> Focusing on data from the most recent study, the researchers found that three groups were represented in the data. The majority (92.6%) of respondents were in a “none/low” group.<sup>179</sup> Ninety-two percent of the men in this “none/low” group did not commit any rape over the course of the study; the remaining 8% of the none/low group committed at least one rape act *but did not repeat offending across assessments*.<sup>180</sup> The second largest group (5.3%) were those who reported committing a rape act at more than one assessment interval but whose level of offending across the assessments decreased over time.<sup>181</sup> The smallest group (2.1%) were those whose perpetration increased across the intervals.<sup>182</sup> Most of the men (73%) who committed a rape act while attending college did so during a single academic year,<sup>183</sup> not consistently across the years as one would predict if the perpetrators were “predator” (serial) rapists. The authors concluded that their data does not support finding that “a cohesive group of men who consistently committed rape across emerging adulthood.”<sup>184</sup>

These longitudinal studies do not necessarily contradict Lisak and Miller’s findings that college rapists engage in multiple rape acts. Indeed, Professor Kevin Swartout, a member of the team who published the JAMA study, descriptively reports in a separate analysis that a substantial number of their sample reported committing multiple rape acts in numbers that are comparable to those found by Lisak and Miller.<sup>185</sup> The benefit of the longitudinal study is to put the findings of repeat rape acts into a timeline

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175. *Id.*

176. *Id.*

177. *Id.* at 1150.

178. *Id.* at 1151.

179. *Id.* at 1150.

180. *Id.* at 1151.

181. *Id.* at 1152.

182. *Id.*

183. *Id.*

184. *Id.* at 1153.

185. Kevin Swartout & Andra Teten Tharp, *Rethinking Serial Perpetration of Sexual Violence: Implications for Prevention*, PREVENTCONNECT (Sept. 15, 2015), [http://www.preventconnect.org/wp-content/uploads/2015/08/Serial-Perpetrator-9-14-15\\_KS\\_compressed.pdf](http://www.preventconnect.org/wp-content/uploads/2015/08/Serial-Perpetrator-9-14-15_KS_compressed.pdf).

perspective. A substantial number of college rapists may report multiple rape acts, but most are not repeaters *over time*. Rather, “most college men who perpetrate rape do so during relatively limited time frames.”<sup>186</sup> In other words, rape, like other crimes of youth, is often time limited.<sup>187</sup>

These findings when coupled with research on the social and psychological determinants of campus rape<sup>188</sup> have important implications for prevention and intervention. Lisak argues that campus prevention work should be concentrated on finding the predator rapists and that intervention should focus on punishing or expelling those pathological few.<sup>189</sup> Swartout and Tharp, in contrast, conclude that prevention efforts should recognize the heterogeneity of rapists.<sup>190</sup> They counsel against a “one-size-fits-all” approach to prevention and response.<sup>191</sup>

A report published by the National Sexual Violence Resource Center<sup>192</sup> describes the negative impact that the serial rape narrative has had on campus response to sexual assault:

Characterizing rape as a crime perpetrated by a few men may have made the problem seem more easily managed by simply identifying and prosecuting the guilty few. . . . In addition, the [serial rape] hypothesis has led to the perception that we must focus on a bystander to intervene in high risk situations because perpetrators are so pathological that their behavior cannot be changed by prevention strategies.<sup>193</sup>

What determines whether a man who commits sexual assault will do it a second time? Antonia Abbey and Pam McAuslan found that non-repeaters had significantly less hostile attitudes toward women than did repeat assaulters, were less likely to misperceive women’s sexual intentions, engaged in less delinquent behavior, and were less likely to drink prior to consensual sex.<sup>194</sup> Non-repeaters were also more likely to have expressed remorse over their past sexual assaults and were less likely to hold the women

186. *Id.*

187. *See, e.g.*, Abbey et al., *supra* note 167, at 4 (“[M]en who commit sexual assault in adolescence and/or young adulthood but then stop are likely to have done so as part of a larger pattern of acting out behavior that diminishes when they take on adult responsibilities.”) (citations omitted).

188. *See* discussion *infra* Part III.

189. *See* LISAK, *supra* note 142, at 24.

190. Swartout & Tharp, *supra* note 185; *see also* Adams-Curtis & Forbes, *supra* note 149, at 99 (“[T]he most common scenario [of sexual coercion] involves persons who know each other, who have been drinking, who have [a] history of consensual sexual activity, and who have been engaging in consensual sexually stimulating activities, very often including genital foreplay. At some point the woman signals that she wants to go no further. . . . The man . . . continues his sexual behavior. His continuation usually involves little, if any force.”) (citations omitted).

191. Swartout & Tharp, *supra* note 185.

192. NSVRC, *supra* note 138.

193. *Id.* at 2.

194. Abbey & McAuslan, *supra* note 167, at 751–52.

responsible for the assaults than were repeaters.<sup>195</sup> “These [non-repeating] men were often on a date with a woman at a fairly young age, engaged in some consensual sexual activities, thought the woman wanted to have sex, and pushed her to do so even when she made her lack of interest clear.”<sup>196</sup> One of the men who expressed remorse said that even though his girlfriend had forgiven him, “I still felt dirty . . . even now I feel like hell when I remember it.”<sup>197</sup> Another man who had forced his steady dating partner to have sexual intercourse when both were sixteen described the assault as “a sad but meaningful” experience and stated that he learned to request sex “plainly several times . . . it was my only time when I used force for having intercourse and since then it never happened.”<sup>198</sup> Several said that they thought their lack of experience with alcohol contributed to their actions,<sup>199</sup> an issue addressed more completely below.

*D. The Dominant Paradigm Does Not Capture the Range of Sexual Conduct Prohibited by Campus Codes, the Differences in Victim Experiences, or the Differences in Students Who Cause Harm*

High-profile cases are penetration cases in which the victim was either unable to consent due to incapacitation (usually alcohol) or claimed that she made her non-consent clear. In these paradigm cases, the victim remains fearful of her assaulter and suffers significant lasting trauma. The DOE guidance seems to have had this paradigm in mind when creating its requirement that schools promptly offer interim protections to complainants prior to the completion of an investigation, including class schedule or living arrangement changes, to ensure that the complainant does not have contact with the respondent–student.<sup>200</sup>

The paradigm narrative of the fearful traumatized victim, while accurate for some, is not accurate for all students who experience sexual violence as defined by campus conduct codes. This is because victims experience a range of harms, most obviously as a function of the severity of the conduct but also because of differences in their psychological makeup and vulnerability and as a function of the nature of the support they receive.<sup>201</sup>

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195. *Id.*

196. *Id.* at 754.

197. *Id.*

198. *Id.*

199. *Id.*

200. Office for Civil Rights, *Dear Colleague Letter*, *supra* note 2, at 15–16.

201. See Heather L. Littleton, *The Impact of Social Support and Negative Disclosure Reactions on Sexual Assault Victims: A Cross-Sectional and Longitudinal Investigation*, 11 J. TRAUMA & DISSOCIATION 210, 223 (2010) (reporting that research findings “support[] the notion that social support plays an important role in preserving a positive sense of worth following trauma” while “negative disclosure reactions predicted maladaptive coping”). Some research finds that incapacitated victims of rape experience more self-blame and more feelings of stigma than do non-incapacitated victims. Heather

As described below, campus conduct codes prohibit a range of sexual misconduct that varies dramatically in severity. Further, students who commit sexual violence vary significantly with regard to the risks they pose to victims for reabuse or retaliation.

The paradigm campus rape narrative is a rape committed against an incapacitated victim. In fact, research finds that a high percentage of campus rapes involve an intoxicated victim,<sup>202</sup> thus one would expect that incapacitation rapes would dominate the *rape* complaints brought by students. But rapes are not the only kinds of cases reported to campus administrators. It is difficult to discern what percentage of Title IX sexual assault complaints are cases alleging rape. Schools are not required to publicly report information about Title IX cases.<sup>203</sup> Anecdotal evidence suggests that “[t]here is a significant disconnect between the current discussions . . . about the epidemic of campus rape, and the fact patterns involved in the allegations now routinely investigated as sexual misconduct.”<sup>204</sup> Guidance from the DOE’s Office for Civil Rights mandates a broad definition of sexual violence and campus conduct codes reflect that range.<sup>205</sup> Furthermore, my conversations with campus administrators suggest that this range is reflected in the cases brought to the attention of campus authorities.<sup>206</sup>

The 2011 DCL governs university responses to “sexual violence.” The DCL defines “sexual violence” as follows:

[P]hysical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent . . . due to the [victim’s] . . . use of drugs or alcohol . . . . A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, sexual abuse, and sexual coercion.<sup>207</sup>

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Littleton et al., *Impaired and Incapacitated Rape Victims: Assault Characteristics and Post-Assault Experiences*, 24 VIOLENCE & VICTIMS 439, 452 (2009).

202. See, e.g., KREBS ET AL., *supra* note 3, at 106 (finding that the percentage of rape incidents that occurred when the victim was using alcohol or drugs ranged from 43% to 75% across the schools studied); KREBS ET AL., *supra* note 140, at vxiii (noting that most campus sexual assaults of women occur when the woman is incapacitated, primarily as a result of alcohol intoxication).

203. Yale University has taken the unusual step of publicly reporting all reported cases of sexual misconduct. See Yale Office of the Provost, *Reports: Complaints of Sexual Misconduct*, YALE UNIV., <http://provost.yale.edu/title-ix/reports> (last visited Nov. 7, 2016). An analysis of the sexual misconduct complaints reported online by Yale for the 2013–2016 period found that approximately 28% regarded an act of sexual touching other than penetration; 23% were in an undifferentiated category that included “sexual activity” and “certain sexual acts”; and 49% concerned an alleged act of penetration. *Id.*

204. Gersen & Suk, *supra* note 129, at 942.

205. See Office for Civil Rights, *Dear Colleague Letter*, *supra* note 2.

206. Interviews with Campus Administrators (including Title IX investigators) (these interviewees preferred to remain anonymous). Some of the interviewees are also trained in RJ facilitation.

207. Office for Civil Rights, *Dear Colleague Letter*, *supra* note 2, at 1–2.

“Sexual coercion” may be a particularly broad category of conduct. The DOE does not define the term, but it is a term used by campus researchers. For example, the current version of the SES,<sup>208</sup> the most commonly used instrument for measuring campus sexual assault, measures sexual coercion as sexual actions done without the respondent’s consent that were the result of one of the following coercive actions:

- [1.] Telling lies, threatening to end the relationship, threatening to spread rumors about me, making promises I knew were untrue, or continually verbally pressuring me after I said I didn’t want to.
- [2.] Showing displeasure, criticizing my sexuality or attractiveness, getting angry but not using physical force, after I said I didn’t want to.<sup>209</sup>

Schools define sexual coercion in a variety of ways.<sup>210</sup> The model campus conduct code created by the National Center for Higher Education Risk Management (NCHERM) Group, a leading company that provides consultation to universities on compliance with Title IX, defines sexual coercion as “unreasonable pressure for sexual activity. When someone makes clear to you that they do not want sex, that they want to stop, or that they do not want to go past a certain point of sexual interaction, continued pressure beyond that point can be coercive.”<sup>211</sup> The NCHERM offers this example of conduct that would violate the model code’s rule on sexual coercion:<sup>212</sup>

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208. Mary P. Koss et al., *Revising the SES: A Collaborative Process to Improve Assessment of Sexual Aggression and Victimization*, 31 *PSYCHOL. WOMEN Q.* 357 (2007); see also KATHLEEN C. BASILE ET AL., *SEXUAL VIOLENCE SURVEILLANCE: UNIFORM DEFINITIONS AND RECOMMENDED DATA ELEMENTS 12* (2014), [https://www.cdc.gov/violenceprevention/pdf/sv\\_surveillance\\_definitions1-2009-a.pdf](https://www.cdc.gov/violenceprevention/pdf/sv_surveillance_definitions1-2009-a.pdf) (recommending that researchers define “Nonphysically Pressured Unwanted Penetration” as “[v]ictim was pressured verbally or through intimidation or misuse of authority to consent or acquiesce to being penetrated” and providing examples, such as “being worn down by someone who repeatedly asked for sex or showed they were unhappy; feeling pressured by being lied to, or being told promises that were untrue; having someone threaten to end a relationship or spread rumors; and sexual pressure due to someone using their influence or authority”).

209. Koss et. al, *supra* note 208, at 368–69.

210. See, e.g., *Consent and Coercion Discussed*, UNC PEMBROKE, <http://www.uncp.edu/about-uncp/administration/departments/title-ix-and-clery-compliance/consent-coercion-exploitation> (last visited Nov. 11, 2016). The University of North Carolina explains that “coercion/exploitation” happens, “for example, when someone is pressured unreasonably for sex,” while Williams College defines coercion as “words or conduct . . . [that] wrongfully impair another individual’s freedom of will and ability to choose whether or not to engage in sexual activity,” providing as examples “threatening to ‘out’ someone based on sexual orientation, gender identity, or gender expression and threatening to harm oneself if the other party does not engage in the sexual activity.” *Definition of Terms*, WILLIAMS C. TITLE IX, <http://titleix.williams.edu/definition-of-terms/> (last visited Dec. 9, 2016).

211. BRETT A. SOKOLOW ET AL., *ATIXA SEX/GENDER-BASED HARASSMENT, DISCRIMINATION AND SEXUAL MISCONDUCT MODEL POLICY 9–17* (2015), [https://atixa.org/wordpress/wp-content/uploads/2012/01/ATIXA-Model-Policy\\_07-02-15\\_Final.pdf](https://atixa.org/wordpress/wp-content/uploads/2012/01/ATIXA-Model-Policy_07-02-15_Final.pdf).

212. *Id.*; see also Gersen & Suk, *supra* note 129, at 936–38 (discussing the federal complaint of a male Columbia University student who campus adjudicators found responsible for engaging in

Amanda and Bill meet at a party. They spend the evening dancing and getting to know each other. Bill convinces Amanda to come up to his room. From 11:00pm until 3:00am, Bill uses every line he can think of to convince Amanda to have sex with him, but she adamantly refuses. He keeps at her, and begins to question her religious convictions, and accuses her of being “a prude.” Finally, it seems to Bill that her resolve is weakening, and he convinces her to give him a “hand job” (hand to genital contact). Amanda would never had done it but for Bill’s incessant advances. He feels that he successfully seduced her, and that she wanted to do it all along, but was playing shy and hard to get. Why else would she have come up to his room alone after the party? If she really didn’t want it, she could have left.<sup>213</sup>

#### IV. WHAT RESEARCH TELLS US ABOUT CAMPUS SEXUAL ASSAULTERS: ALCOHOL USE, PEER NORMS, AND HOSTILE MASCULINITY

A significant body of research—much of it campus-based—examines attitudes, experiences, and social factors that are strongly correlated with male commission of sexual assault against women. Three key findings that are particularly salient in campus environments emerge from this research. Sexual assaulters are more likely to report that their peers support sexual aggression towards women, to hold hostile attitudes towards women, and to engage in problematic drinking.<sup>214</sup> Researchers emphasize that it is the *interaction* of these variables—the individual and the environment—that correlate with sexual assault.<sup>215</sup>

While research on male sexual assault on men has received significantly less attention, research suggests that male rape thrives in “hyper-masculine” environments, including some fraternities and sports teams.<sup>216</sup> Research also suggests that abusing alcohol may increase an individual’s risk for experiencing sexual assault—a finding true for both male and female victims.<sup>217</sup>

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“nonconsensual sexual intercourse” with a female student because he “directed unreasonable pressure for sexual activity toward the Complainant over a period of weeks”) (quoting *Doe v. Columbia Univ.*, 101 F. Supp. 3d 356, 370 (S.D.N.Y. 2015)).

213. SOKOLOW ET AL., *supra* note 211.

214. Thompson, *supra* note 166. Other factors correlated with sexual aggression include engaging in frequent casual sex. See White & Hall, *supra* note 169, at 198. Subclinical elevated measures of psychopathology are found correlative for those who persist over time. *Id.* Childhood victimization (sexual abuse, witnessing domestic violence, and experiencing parental physical punishment) and juvenile delinquency are correlated with male, *adolescent* sexual aggression. See *id.*

215. See generally *infra* Sections IV.A–B.

216. Capers, *supra* note 104, at 1273.

217. See Turchik, *supra* note 36.

### A. *Alcohol Abuse*

“Numerous studies have found a direct association between alcohol use and sexual violence perpetration in diverse populations, including high school and college students, adolescent and adult sex offenders, community men and women, and among individuals in same-sex relationships.”<sup>218</sup> Heavy drinking is associated with male commission of sexual assault and with more severe sexual assaults.<sup>219</sup> A representative community sample survey of men found that among those who committed sexual assault, those drinking heavily at the time “used more isolating and controlling behaviors to get the victim alone, misperceived her degree of sexual interest for a longer period of time, used more physical force and committed more severe assaults” than did those who were not drinking or drinking lightly at the time of an assault.<sup>220</sup> Researchers note that “men who drink heavily in general and in dating and sexual situations commit more sexual assaults and more severe sexual assaults than other men.”<sup>221</sup>

While both not-drinking and drinking male sexual assaulters misperceive women’s sexual intentions—believing that friendliness indicates sexual interest—drinking assaulters are much more likely have this misperception.<sup>222</sup> Heavy drinking can “interfere[] with one’s ability to attend to less central and ambiguous cues.”<sup>223</sup> Researchers conclude that given these findings,

Prevention programs targeting alcohol-involved perpetrators should specifically address the content of men’s alcohol beliefs[,] . . . men should be warned not to trust their perceptions of women’s sexual interest when drinking. Through role-playing, men could practice listening and responding appropriately to women’s refusals. . . . Finally, programs should emphasize that drinking should not be used [as] a strategy or an excuse for forcing sex on an unwilling person.<sup>224</sup>

Researchers believe that alcohol effects likely interact with environmental factors and preexisting personality traits to predict male-on-female sexual assault behavior.<sup>225</sup> “For some men, on some

218. See Lippy & DeGue, *supra* note 69 (citation omitted).

219. Antonia Abbey, *Alcohol’s Role in Sexual Violence Perpetration: Theoretical Explanations, Existing Evidence and Future Directions*, 30 *DRUG & ALCOHOL REV.* 481, 486 (2011).

220. *Id.*

221. Antonia Abbey et al., *Review of Survey and Experimental Research That Examines the Relationship Between Alcohol Consumption and Men’s Sexual Aggression Perpetration*, 15 *TRAUMA VIOLENCE & ABUSE* 265, 277 (2014).

222. See Abbey, *supra* note 219, at 484.

223. *Id.*

224. Tina Zawacki et al., *Perpetrators of Alcohol-Involved Sexual Assaults: How Do They Differ from Other Sexual Assault Perpetrators and Nonperpetrators?*, 29 *AGGRESSIVE BEHAV.* 366, 378 (2003).

225. See Lippy & DeGue, *supra* note 69.

occasions, alcohol may be the final straw that produces sexual violence. On other occasions, perhaps with stronger social norms against violence, alcohol consumption may not lead to sexual aggression.”<sup>226</sup>

Thus, heavy drinking “interact[s] with existing individual-level risk factors for sexual aggression (e.g., general aggressiveness, belief in rape myths, hostility toward women, or exposure to violence in childhood) and sociocultural norms about alcohol and gender in ways that can encourage or facilitate male sexual aggression.”<sup>227</sup> It is the combination of definitions of masculinity centered on sexual encounters and conquests that is most correlated with male sexual aggression.<sup>228</sup>

Among some groups of adolescent and young men there is an emphasis on frequenting bars and/or parties in order to engage in casual sex as well as an emphasis on bragging about sexual conquests or “hook-ups” to one’s peers. Within these peer groups, there may also be a normalization of engaging in coercive strategies to obtain sex.<sup>229</sup>

Studies find that policies that decrease alcohol consumption—for example, taxes that increase alcohol prices—are linked to lowered rates of self-reported sexual assault as well as reductions in other violent crime.<sup>230</sup> Similarly, research on campus sexual assault finds that “policies banning alcohol on campus or substance use in residence halls [are] associated with reduced rates of self-reported sexual violence victimization.”<sup>231</sup> A college woman who attends a school with a high percentage of students who are “heavy episodic drinkers” has 1.8-fold increased odds of experiencing sexual assault than does a woman who attends a school with a low percentage of heavy drinkers.<sup>232</sup> As one researcher concludes, “[G]iven the relationships between substance use, sexual risk taking, and sexual victimization in both college men and women, prevention and intervention programs that combine information on health risk behaviors[, including excessive drinking,] and sexual victimization may be appropriate for college students of both sexes.”<sup>233</sup>

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226. See Abbey, *supra* note 219, at 487 (footnote omitted).

227. Lippy & DeGue, *supra* note 69 (citation omitted).

228. See Heather Littleton, *Interpersonal Violence on College Campuses: Understanding Risk Factors and Working to Find Solutions*, 15 TRAUMA VIOLENCE & ABUSE 297, 298 (2014).

229. *Id.* (citations omitted).

230. Lippy & DeGue, *supra* note 69, at 31, 32 (referencing a study that found that the number of licensed alcohol outlets in an area was positively related to the likelihood of rape and used self-reported rape and sexual assault data from the National Crime Victimization Survey (NCVS)) (citing Sara Markowitz, *An Economic Analysis of Alcohol, Drugs and Violent Crime in the National Crime Victimization Survey*, 25 INT’L REV. L. & ECON. 20, 24 (2005)).

231. Lippy & DeGue, *supra* note 60, at 11.

232. Mohler-Kuo et al., *supra* note 97, at 40–41. Heavy, medium, and low episodic drinking was determined by the percentage of students whose answers corresponded to the three categories as self-reported on a survey. *Id.* at 39.

233. Turchik, *supra* note 36, at 252.

*B. Peer Norms and Hostile Masculinities*

[T]here is a need to fully identify the social and cultural factors that, in addition to alcohol use, contribute to sexual assault perpetration. One such factor . . . is the persistence of a sexual double standard . . . where engaging in casual and noncommitted sex is regarded as enhancing men's sexual reputation, whereas women who do so risk being negatively labeled. . . . [Y]oung men may perceive tremendous pressure to "score" as a means to enhance their own reputation. . . . [N]egative stereotypes about women who drink alcohol, wear revealing clothing, or who have previously engaged in casual sex can contribute to the belief that such women are acceptable targets for sexual advances and that any sexual refusal they engage in is not genuine.<sup>234</sup>

A key finding in research on male perpetrated sexual assault of women is the significant correlation between engaging in sexually coercive conduct<sup>235</sup> and endorsing views supporting sexual dominance and hostility towards women,<sup>236</sup> sometimes labeled "hostile masculinity" or "hypermasculinity."<sup>237</sup> Sexual dominance is often measured by asking respondents the degree to which particular feelings or beliefs are motivations for engaging in sexual acts.<sup>238</sup> Examples of dominance items include "I enjoy the feeling of having someone in my grasp" and "I enjoy the conquest."<sup>239</sup> Hostility towards women is frequently measured by the degree to which respondents agree with statements such as "I feel upset even by slight criticism by a woman."<sup>240</sup> In general, measures of hostile masculinity capture the degree to which respondents endorse ideas such as the following: "[T]hat violence is 'manly' . . . ; that men are naturally aggressive and dominant over women; that relationships between women and men are adversarial; and that the 'sexual conquest' of women is an important aspect of masculinity."<sup>241</sup>

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234. Littleton, *supra* note 228, at 297–98 (citations omitted).

235. Adams-Curtis and Forbes's review of the literature defines "sexual coercion" to include "any situation in which one party use verbal or physical means (including administering drugs or alcohol to the other party either with or without her consent) to obtain sexual activity against freely given consent." Adams-Curtis & Forbes, *supra* note 149, at 99.

236. *See id.* at 104, 107–08 (finding that negative affect about and toward women is most closely associated with the perpetration of sexually coercive conduct and reviewing research findings that sexual dominance and hostility toward women are related to sexual coercive conduct; the concept of "hostile masculinity" is operationalized by testing support for sexual dominance and hostility towards women).

237. *Id.* at 107–08; Neil M. Malamuth & Nancy Wilmsen Thornhill, *Hostile Masculinity, Sexual Aggression, and Gender-Biased Domineeringness in Conversations*, 20 *AGGRESSIVE BEHAV.* 185, 186 (1994) (stating that hostile masculinity is "typically operationalized by scales measuring a constellation of three components: hostility towards women, dominance in sexual relations, and attitudes accepting of violence against women").

238. Malamuth & Thornhill, *supra* note 237, at 189.

239. *Id.*

240. *Id.*

241. Sarah K. Murnen & Marla H. Kohlman, *Athletic Participation, Fraternity Membership, and Sexual Aggression Among College Men: A Meta-Analytic Review*, 57 *SEX ROLES* 145, 146 (2007).

These beliefs and feelings are often dynamic and their relationship to conduct is even more so.<sup>242</sup> The extent to which men who endorse hostile masculinity also engage in sexual coercion is mediated, at least in part, by the social context.<sup>243</sup> The role of peer networks is a particularly important part of this context for adolescents and young adult men.<sup>244</sup>

Male sexual assaulters are more likely to believe that their peers support sexual aggression and hold hostile attitudes towards women.<sup>245</sup> They are also more likely to have friends who pressure them to be sexually active.<sup>246</sup> For some, sexual assault commission in adolescence or young adulthood is “part of a larger pattern of acting out and sexual experimentation that diminishes with time.”<sup>247</sup> Antonia Abbey et al. notes,

Masculine identity formation in adolescence often involves treating sex as a game or competition. . . . Young men with little sexual experience who are highly motivated to have sex with many women may have a particularly difficult time recognizing the line between seduction and coercion. . . . [T]his suggests that these behaviors may diminish over time as they focus their energies on forming mutually satisfying relationships with women rather than impressing other men.<sup>248</sup>

The interrelationship between individual endorsement of hostile masculinity, peer support for sexual aggression and hostile views of women, and engagement in binge drinking may be critical to understanding the frequent findings of higher rates of sexual aggression in fraternities and male college sports teams.<sup>249</sup> Rather than a universal relationship, research supports differentiating between high- and low-risk fraternities and sports teams.<sup>250</sup> For example, research conducted by Stephen Humphrey and Arnold Kahn compared responses to sexual aggression questionnaires of members of fraternities and athletic teams that students identified as “high-risk” and “low-risk” for sexual assault.<sup>251</sup> Questionnaires that measured hostility towards women, male peer support for sexual aggression,

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242. *Id.*

243. *See id.* at 146–47.

244. *See id.* at 148.

245. Adams-Curtis & Forbes, *supra* note 149, at 105 (noting that a review of research finds that “[t]he most important rape-supporting social relationships appear to be the man’s immediate circle of friends”); Kevin M. Swartout, *The Company They Keep: How Peer Networks Influence Male Sexual Aggression*, 3 *PSYCHOL. VIOLENCE* 157, 158 (2013).

246. Adams-Curtis & Forbes, *supra* note 149, at 105 (citing research finding that men who rape are more likely to report that their friends support sexual aggression and that friends pressured them to engage in sexual activity).

247. Abbey et al., *supra* note 167, at 11.

248. *Id.* at 11.

249. *See* Mumen & Kohlman, *supra* note 241, at 155.

250. Stephen E. Humphrey & Arnold S. Kahn, *Fraternities, Athletic Teams, and Rape: Importance of Identification with a Risky Group*, 15 *J. INTERPERSONAL VIOLENCE* 1313, 1315–16 (2000).

251. *See id.*

and engagement in sexually aggressive acts were administered to members of both high-risk and low-risk groups as well as to male students who were not members of a fraternity or sports team.<sup>252</sup> The researchers found that members of high-risk groups reported committing significantly more sexual aggression than did members of low-risk groups.<sup>253</sup> Further, low-risk group members were no more likely to commit sexual aggression than were male students who were not members of a group.<sup>254</sup> High-risk group members also scored significantly higher on rates of hostility towards women and peer support for sexual aggression as compared to the low-risk groups.<sup>255</sup>

High-risk male organizations may also support drinking norms that foster sexual aggression. In fact, some research suggests that changes in alcohol use may be more determinative of the relationship between sexual aggression and membership in a fraternity than other factors.<sup>256</sup> For example, Jeffrey Kingree and Martie Thompson's longitudinal study of male students found that fraternity membership increased respondents' reports of engaging in sexually aggressive acts, but the increase was associated with changes in alcohol use.<sup>257</sup> The researchers found that "high-risk alcohol use accounted for the association between joining a fraternity and sexual aggression, such that males who joined a fraternity showed increases in their high-risk alcohol use and this in turn increased their likelihood of engaging in sexual aggression."<sup>258</sup>

### C. Summary

The fact that many young men who sexually assault do so for a limited period of time suggests the value of university interventions to curtail assault. The interactive role of peer support, problem drinking, and hostile masculinity points to opportunities for universities to disrupt patterns of sexual aggression.<sup>259</sup> For schools to take advantage of this opportunity,

252. *Id.* at 1316–17.

253. *Id.* at 1318.

254. *Id.*

255. *Id.*

256. Jeffrey B. Kingree & Martie P. Thompson, *Fraternity Membership and Sexual Aggression: An Examination of Mediators of the Association*, 61 J. AM. C. HEALTH 213, 219 (2013). It is not entirely clear whether some male organizations attract members who are inclined towards sexual aggression or whether membership in certain organizations increases the likelihood of sexual aggression. Some research finds that college men who intend to pledge a fraternity have higher levels of rape myth acceptance than those who did not plan to join a fraternity. Sarah McMahon, *Rape Myth Beliefs and Bystander Attitudes Among Incoming College Students*, 59 J. AM. C. HEALTH 3, 10 (2010). But, as described in the text, other research finds that membership increases the risk of committing sexual aggression.

257. *Id.*

258. *Id.*

259. See Abbey et al., *supra* note 221, at 275–78; Humphrey & Kahn, *supra* note 250, at 1318–19 (noting that some studies suggest that "changes in perceptions of peer norms condoning forced sex, frequency of casual sexual relationships, and drinking in these sexual situations may be tied to changes in sexual aggression status").

university administrators must reject Crime Logic and instead look to change the social conditions that foster sexual violence.<sup>260</sup> The DOE's encouragement of universities to adopt bystander education recognizes the importance of peer supports.<sup>261</sup> In addition to bystander education, schools should adopt other public health measures, including, when appropriate, alcohol control measures.<sup>262</sup>

Public health approaches must incorporate greater awareness of the opportunities for bias based in the intersections of race, class, sexual orientation, and sexual identity.<sup>263</sup> This problem may be particularly acute when schools adopt a broad definition of violence. "Sexual coercion" and similarly ambiguous standards provide a potential for university overreach and deepen concerns that implicit bias—racial or sex—will fill the gap. The understanding of sexual coercion seems ripe for the deployment of traditional gender roles of male pursuers and female prey.<sup>264</sup> Furthermore, school responses to sexual assault should be flexible and modulated to reflect not only variances in the severity of the conduct and in the harms experienced but also differences between assaulters and the context in which the assault occurred.<sup>265</sup>

Further, in order to craft effective programs that are accessible to all students, campus climate surveys must provide accurate comprehensive information. Surveys that gather data on students' endorsement of "rape

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260. Kaplan, *supra* note 15, at 104–10.

261. See, e.g., Office on Violence Against Women, *Bystander-Focused Prevention of Sexual Violence*, U.S. DEP'T JUST. (Apr. 2014), <https://www.justice.gov/ovw/page/file/905957/download>.

262. DOE guidance has had remarkably little to say about the incorporation of alcohol policies in sexual assault prevention measures. For example, the only references in the DCL to the link between alcohol use and sexual assault perpetration are the inclusion of a footnote citation to the DOE Higher Education Center for Alcohol, Drug Abuse, and Violence Prevention and the inclusion within the list of training a Title IX Coordinator should receive "information on the link between alcohol and drug abuse and sexual harassment or violence and best practices to address that link." See Office for Civil Rights, *Dear Colleague Letter*, *supra* note 2, at 15 n.40, 17. The absence of guidance on alcohol policies stands in contrast to the detailed attention given to encouraging schools to adopt bystander education and conduct campus climate surveys. The White House Task Force to Protect Students from Sexual Assault, in collaboration with the Center for Disease Control, has published guides that more directly address alcohol policies. See, e.g., Jenny Dills et al., *Sexual Violence on Campus: Strategies for Prevention*, NAT'L CTR. INJURY PREVENTION & CONTROL 10, 16 (2016), <https://www.cdc.gov/violenceprevention/pdf/campus-svprevention.pdf> (encouraging schools to partner sexual assault prevention efforts with drug and alcohol abuse prevention programs and noting that "[p]olicies that reduce access to alcohol . . . may be useful in reducing rates of sexual assault").

263. See Gersen & Suk, *supra* note 129 (arguing that the risks for race/class bias in identifying student assaulters are encouraged by a public health approach that identifies poverty and male sports involvement as "risk factors" for committing sexual assault); discussion *supra* Section III.B.

264. Brenner, *supra* note 10, at 518–19 (arguing that simplistic "victim/perpetrator" accounts "fail to consider how the constraints of normative sexual desire as played out through gender identity and performance shapes the behavior of perpetrators"); Capers, *supra* note 104.

265. See Koss et al., *supra* note 25, at 245 ("[T]he DCL guidance has extended Title IX's applicability to a wide range of behavior that . . . is incapable of being addressed appropriately by a one-size-fits-all resolution process. Yet, [the DCL provides] . . . minimal attention to any responses other than quasi-criminal justice.").

myths” should also incorporate questions regarding racialized sexual beliefs. Campus climate queries should further incorporate awareness of what may be intersecting forms of campus hostility—race, class, gender, sexual orientation, and sexual identity. Campus services should reflect this same potential for intersecting forms of subordination.

This approach should guide not only prevention efforts but, as much as possible, responses to specific cases of sexual violence as well.<sup>266</sup> RJ processes will be useful in developing the nuanced and flexible response required to meet the different experiences described in Part III and can be useful in changing the social circumstances that promote sexual assault described in Part IV. RJ processes have the potential to interrupt peer networks that support hostile masculinity and problem drinking in the life of the individual student who perpetuates sexual aggression. Additionally, RJ processes can reach beyond the individual student to effectuate larger changes in the campus environment and can introduce rehabilitation measures for the assaulter when appropriate.

In the Section that follows, I describe RJ processes generally as well as processes designed specifically to address gender violence, including sexual assault. I examine the use of what James Ptacek refers to as “Feminist/ Restorative Hybrid” (F/R) processes as well as emerging Anti-Subordination/Transformative RJ processes for use in response to campus sexual assault.<sup>267</sup>

## V. RESTORATIVE JUSTICE

### A. *Restorative Justice Theory*

RJ responses to incidents of harm center on three central questions: (1) Who has been harmed?, (2) What are their needs?, and (3) Whose obligation is it to meet those needs?<sup>268</sup>

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266. Office for Civil Rights, *Dear Colleague Letter*, *supra* note 2. Neither the DOE’s DCL nor the Questions and Answers document suggests what rehabilitative measures, if any, colleges and universities should consider for students found responsible for violating sexual misconduct college codes, other than to mention “counseling for the perpetrator” as a potential remedy. *See id.*; Office for Civil Rights, *Questions and Answers*, *supra* note 2, at 34. The Questions and Answers document also notes that to ensure that there is no hostile environment, colleges and universities may engage in “[t]argeted training for a group of students if, for example, the sexual violence created a hostile environment in a residence hall, fraternity or sorority, or on an athletic team.” Office for Civil Rights, *Questions and Answers*, *supra* note 2, at 36.

267. *See infra* discussion Section V.D.1 (discussing Ptacek’s distinction between F/R models and other RJ models).

268. *See* 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) (transcript of sujatha baliga’s remarks describing her RJ practice with youth, including sexual assault cases). *See generally* HOWARD ZEHR, *CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE* (3rd ed. 2005).

RJ supporters argue that victims of crime benefit from RJ processes because they are given the opportunity to “express their feelings directly to their offenders with a legitimacy that no one else can bring.”<sup>269</sup>

For most victims it is satisfying to be able to express feelings about the offence directly to the offender and to explain fully its consequences. It is even more satisfying to see that the offender properly understands, sincerely apologizes for the offence and pledges actions to ensure s/he will never behave this way again. . . . [Victims and] others closely connected to the crime . . . usually desire as well some form of censure by the community, a recognition of the wrong as a wrong which is owed to the victim. They also need the offender to undertake a course of action that signals remorse and underlines the sincerity of the apology.<sup>270</sup>

As Sujatha Baliga describes, a victim-centered RJ approach begins with asking a victim: “How do *you* define the harm? What do you think you need moving forward? What are your safety concerns? What are your material needs? How are you harmed—[in] all the different ways you could be harmed—financially, emotionally, physically, spiritually?”<sup>271</sup>

But harmful acts are not understood “in isolation but within a broader social and cultural context.”<sup>272</sup> Jennifer Llewellyn describes RJ as based in a “relational conception[] of justice” that is “concerned . . . with the harm and effects of wrongs on relationships at all levels: individual, group, community, national, and international.”<sup>273</sup> Llewellyn writes, “A relational approach . . . draws attention to the ways in which harms related to wrongdoing extend from the individual victim(s) and wrongdoer(s) to affect those connected with them.”<sup>274</sup> Thus, as Mary Koss et al. explain, the harm has “ripple effects on (a) family and friends of victims who suffer distress over the injury . . . ; [and] (b) family and friends of responsible persons who may experience shame, anger, and other emotions.”<sup>275</sup>

RJ theory incorporates not only an expanded understanding of who is harmed by wrongdoing but also an expanded understanding of who is responsible for causing and repairing harm.<sup>276</sup> Thus, while RJ processes focus on the responsibility of individuals who *directly* caused the harm, the

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269. Heather Strang, *Is Restorative Justice Imposing Its Agenda on Victims?*, in CRITICAL ISSUES IN RESTORATIVE JUSTICE 95, 100 (Howard Zehr & Barb Toews eds., 2004) (describing the Reintegrative Shaming Experiments (RISE) in Australia).

270. *Id.* at 102.

271. Coker et al., *supra* note 268, at 372.

272. Brenner, *supra* note 10, at 561.

273. Jennifer J. Llewellyn & Daniel Philpott, *Restorative Justice and Reconciliation: Twin Frameworks for Peacebuilding*, in RESTORATIVE JUSTICE, RECONCILIATION, AND PEACEBUILDING 14 (Jennifer J. Llewellyn & Daniel Philpott eds., 2014).

274. *Id.*

275. Koss et al., *supra* note 25, at 246.

276. KARP ET AL., *supra* note 25, at 6.

process has the potential to reach and change larger systemic causes of harm and to tap community resources to repair harms.<sup>277</sup> “A restorative approach is responsive to individual incidents of misconduct as well as to the broader cultural contexts that support such behavior by offering non-adversarial options for prevention education, resolution, and pathways to safe and accountable reintegration.”<sup>278</sup>

Though not always articulated as such, RJ scholarship and practice rests on a set of underlying beliefs about the human capacity for change.<sup>279</sup> RJ then challenges the Crime Logic belief in the necessity of incapacitation that has gripped the United States criminal justice system and provided some of the ideological cover for mass incarceration. Heather Strang posits that “empathy is the ‘engine’ that drives remorse on the offender’s part” that results in changes in behavior.<sup>280</sup> Strang recounts the results of an empirical analysis on 232 RJ cases in Australia.<sup>281</sup> Recidivism rates for those involved in property crimes were no better than the recidivism rates for property cases seen in ordinary criminal processing.<sup>282</sup> But violent crime offenders whose cases went to RJ were 40% less likely to reoffend than were those whose violent cases were dealt with in the ordinary criminal justice system.<sup>283</sup> Strang believes the difference is explained by the emotional quality of the RJ meetings: victims in the property crime cases “rarely expressed strong emotions” while violent crime victims “brought considerable emotional power” to the conference.<sup>284</sup> In these emotional cases, offenders were faced with the consequences of their actions in a powerful and transformative way, which Strang believes resulted in less reoffending.<sup>285</sup> As I describe more thoroughly below, this faith in the capacity for individual change receives qualified support in the research on RJ’s impact on recidivism.<sup>286</sup>

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277. Coker, *supra* note 20, at 14–15 (describing a study of domestic violence cases heard in Navajo Peacemaking Courts, which found that Peacemaking processes can disrupt familial support for an abuser’s behavior by confronting sexist beliefs and marshalling support (both material and emotional) for the victim); *see also* Donna Coker, *Restorative Justice, Navajo Peacemaking and Domestic Violence*, 10 *THEORETICAL CRIMINOLOGY* 67 (2006).

278. KARP ET AL., *supra* note 25, at 6.

279. LAWRENCE W. SHERMAN & HEATHER STRANG, *RESTORATIVE JUSTICE: THE EVIDENCE* 15 (2007) (describing the way in which RJ persuades offenders to not reoffend); Strang, *supra* note 269, at 100–03 (describing the role of empathy in offender change).

280. Strang, *supra* note 269, at 101.

281. *Id.* at 99–101.

282. *Id.*

283. *Id.* at 100.

284. *Id.* at 99–100.

285. *Id.* at 100–01.

286. *See infra* notes 312–18 and accompanying text (discussing the lower rates of recidivism when RJ is used).

### B. Restorative Justice Conferencing

RJ programs are frequently adjuncts to the criminal justice system.<sup>287</sup> When this is the case, the accused may be offered diversion to RJ, or RJ may be used in making sentencing recommendations.<sup>288</sup> After a sentence is imposed, RJ may be used as a therapeutic benefit for the victim and offender.<sup>289</sup>

RJ processes have been used with adult offenders as well as juveniles, including those with violent felonies.<sup>290</sup> RJ processes are also used outside of the criminal justice context in child welfare cases to assist families in making plans for the care of children; in schools, including colleges and universities; and in workplaces.<sup>291</sup>

There are a number of RJ practices, including circles, victim-offender dialogues, victim impact panels, sentencing circles, and conferencing.<sup>292</sup> My focus will be the conferencing models that are currently used on college campuses for student misconduct<sup>293</sup> and that are the models used in RJ processes for sexual assault and intimate partner violence.<sup>294</sup> Most RJ practices, and all of those that involve sexual assault, require that the victim first agree to the use of RJ.<sup>295</sup> If the victim agrees, then the accused must make an informed decision to participate as well.<sup>296</sup> The accused must admit to having engaged in the *conduct* that is the subject of the accusation.<sup>297</sup> As described in more detail below, these requirements distinguish RJ

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287. Kathleen Daly, *What is Restorative Justice? Fresh Answers to a Vexed Question*, 11 VICTIMS & OFFENDERS 9, 14 (2016).

288. Coker & Macquoid, *supra* note 26, at 169, 171.

289. See, e.g., GOODMARK, *supra* note 23, at 178–79 (describing numerous “alternative” responses to intimate partner violence, including surrogate RJ programs that pair women who have experienced abuse with men in prison who have accepted responsibility for the abuse they committed against other women; this “give[s] women an outlet for their anger,” and women report feeling empowered by the meetings while men who have been abused report increased empathy for their victims); SUSAN L. MILLER, *AFTER THE CRIME: THE POWER OF RESTORATIVE JUSTICE DIALOGUES BETWEEN VICTIMS AND VIOLENT OFFENDERS* (2011) (describing the impact of the prison-based RJ program, Victims’ Voices Heard).

290. See SHERMAN & STRANG, *supra* note 279, at 52 (providing a comprehensive review of empirical research on RJ use with both juveniles and adults and including violent and nonviolent crimes).

291. See SHERMAN & STRANG, *supra* note 279, at 32 (noting the use of RJ in workplaces).

292. Mary P. Koss, *Restorative Justice for Acquaintance Rape and Misdemeanor Sex Crimes*, in RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN, *supra* note 26, at 220.

293. See, e.g., Thom Allena, *Restorative Conferences: Developing Student Responsibility by Repairing the Harm to Victims and Restoring the University Community*, in RESTORATIVE JUSTICE ON THE COLLEGE CAMPUS: PROMOTING STUDENT GROWTH AND RESPONSIBILITY, AND REAWAKENING THE SPIRIT OF CAMPUS COMMUNITY 11 (David R. Karp & Thom Allena eds., 2004).

294. See, e.g., KARP ET AL., *supra* note 25, at 24–25; Koss, *supra* note 292, at 218.

295. See KARP ET AL., *supra* note 25.

296. See *id.* at 25.

297. See C. Quince Hopkins, *The Devil Is in the Details: Constitutional and Other Legal Challenges Facing Restorative Justice Responses to Sexual Assault Cases*, 50 CRIM. L. BULL. 1 (2014) (stating that the respondent in RESTORE RJ processes for sexual assault cases had to admit to having engaged in the conduct but not necessarily to its illegality or to a mental state).

conferencing models from community mediation projects<sup>298</sup> and transitional justice processes, which incorporate fact-finding.<sup>299</sup>

In many cases, including those involving sexual assault, RJ processes require a great deal of preparation with all conference participants before a meeting occurs.<sup>300</sup> A conference generally involves a face-to-face meeting with the victim, the offender, a trained facilitator, the victim and offender's supporters, and possibly professionals (e.g., alcohol treatment providers or school counselors).<sup>301</sup> The victim's supporters are family members, teachers, or friends who describe the impact of the offender's conduct on the victim.<sup>302</sup> The offender's supporters provide encouragement to the offender to take responsibility and to amend his or her conduct and may also speak to the offender's positive qualities.<sup>303</sup>

In the conference meeting(s), the offender usually begins by describing his or her conduct.<sup>304</sup> The victim follows by describing the impact of the harm, and the victim's supporters fill in additional information.<sup>305</sup> The victim has the opportunity to ask questions of the offender, such as "Why did you think this was okay?" or "Why did you choose me?"<sup>306</sup>

The process, if successful, ends in a reparative plan.<sup>307</sup> Plans may include victim compensation, rehabilitative measures for the offender (counseling, for example), stay-away provisions, and community service.<sup>308</sup> RJ program staff follow up with the offender to be sure that the plan is completed and with the victim to see that she or he is receiving support and that she or he has not experienced retaliation.<sup>309</sup> David Karp notes that when community service is part of a reparative plan in campus RJ, it should serve to reintegrate the respondent, in part, by "reframing individual student misconduct as a community issue."<sup>310</sup> Karp provides the following examples:

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298. See M. Eve Hanan, *Decriminalizing Violence: A Critique of Restorative Justice and Proposal for Diversionary Mediation*, 46 N.M.L. REV. 123 (2016).

299. Daly, *supra* note 287; Koss et al., *supra* note 25 (stating that RJ conferencing is not about adjudicating guilt but rather about repairing harm; it is "present and future oriented").

300. Koss, *supra* note 292, at 218.

301. Coker, *supra* note 277.

302. *Id.* at 95.

303. See Koss, *supra* note 292, at 231 (expressing the importance of avoiding shaming offenders).

304. *Id.* at 232.

305. *Id.*

306. Mary P. Koss et al., *Restorative Justice for Sexual Violence: Repairing Victims, Building Community, and Holding Offenders Accountable*, 989 ANNALS N.Y. ACAD. SCI. 384, 398 (2003).

307. *Id.*; KANUHA, *supra* note 20, at 19 (noting that plans "not only address what offenders will do to fulfill their responsibilities and obligations to repair the harm to victims, but what they will do to better understand their conduct and how they will prevent future such acts").

308. Koss et al., *supra* note 306. All reparative plans used by the RJ program RESTORE included a "stipulation that the offender be evaluated by a state licensed sexual offender treatment provider and, if indicated, undergo treatment targeting deviant arousal patterns, alcohol/drug use, and anger." *Id.*

309. *Id.*

310. David R. Karp, *Introducing Restorative Justice to the Campus Community*, in RESTORATIVE JUSTICE ON THE COLLEGE CAMPUS, *supra* note 293, at 5.

The student who uses hate speech might work with a diversity specialist to organize a campus event on multicultural issues; the drunk driver might work with MADD (Mothers Against Drunk Driving) to bring a relevant speaker to campus; the student who downloaded a term paper from the Internet might organize a session during freshman orientation regarding the standards of academic integrity.<sup>311</sup>

Some research finds that RJ has a positive impact on recidivism.<sup>312</sup> A comparative review of empirical studies of RJ's effect on recidivism concludes that "[t]he key finding is that RJ may work better with more serious crimes rather than with less serious crimes, contrary to the conventional wisdom."<sup>313</sup> For example, as described above, the research on the RISE juvenile program in Canberra, Australia, found dramatic differences in reoffending for violent crimes.<sup>314</sup> Among white participants assigned to RJ for a violent crime, recidivism dropped to 84/100 offenders, *more* than in the control group, whose cases were sent to ordinary criminal processing.<sup>315</sup> In a review of cases involving juvenile female offenders assigned to RJ, RJ attenders had twice as great a reduction in arrest per 100 offenders compared to the control group.<sup>316</sup> Further, offenders seen in RJ are more likely to comply with terms of probation or diversion than are those processed in the ordinary criminal justice system.<sup>317</sup>

In addition, studies find significantly higher rates of victim satisfaction<sup>318</sup> and fewer cases of posttraumatic stress symptoms for victims who participated in RJ as compared to victims whose cases were dealt with in the ordinary criminal justice system.<sup>319</sup>

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311. *Id.* at 11–12.

312. *See, e.g.,* Lawrence W. Sherman et al., *Are Restorative Justice Conferences Effective in Reducing Repeat Offending? Findings from a Campbell Systematic Review*, 31 J. QUANTITATIVE CRIMINOLOGY 1, 11 (2015) (reviewing ten studies of RJ conferences and finding that “across 1,880 offenders[,] the average effect size is .155 standard deviations less repeat offending among the offenders in cases randomly assigned to RJ[] than among the offenders in cases [not] assigned [to RJ]”).

313. *Id.*

314. SHERMAN & STRANG, *supra* note 279.

315. *Id.* (emphasis added). “[A]rrest measure[s] included all kinds of crimes . . . . These effects were not found among Aboriginal offenders, but the sample size for that stratum was too small for an adequately powered test.” *Id.* (citation omitted).

316. *Id.* The comparison group received a standard “talking-to” by a police officer with a parent present. *Id.* There were no differences in recidivism among juvenile boys in the same experiment. *Id.* at 53. The authors provide additional examples of recidivism research. *Id.* at 68–71.

317. *Id.* at 58.

318. *Id.* at 63–64 (reporting findings from several studies: the RISE study found that 69% of victims were pleased with the process compared to 48% of court victims; the Bethlehem Restorative Policing Experiment found that 96% of victims in RJ cases expressed satisfaction compared to 79% of victims whose cases were assigned to court; the Indianapolis Juvenile Restorative Justice Experiment found high rates of victim satisfaction in the RJ group; the Justice Research Consortium's eight trials found 85% of victims expressed satisfaction with RJ); *see also infra* Section V.C.

319. *See* Caroline M. Angel et al., *Short-Term Effects of Restorative Justice Conferences on Post-Traumatic Stress Symptoms Among Robbery and Burglary Victims: A Randomized Controlled Trial*,

*C. Restorative Justice Conferencing in Cases of Sexual Assault*

A number of RJ programs include sexual assault cases. In Australia, RJ is frequently used in criminal sexual assault cases involving a juvenile offender,<sup>320</sup> and some United States juvenile programs are seeing sexual assault cases as well.<sup>321</sup> Kathleen Daly's research on the use of RJ in Australian juvenile sexual assault cases found that RJ cases were resolved more quickly and had lower attrition rates than did cases sent to conventional criminal justice processing.<sup>322</sup> This finding was even more notable because those cases deemed the most "serious" were processed in the conventional criminal justice system.<sup>323</sup>

RESTORE was a four-year demonstration project for the use of RJ in adult sexual assault cases.<sup>324</sup> Founded by leading sexual assault researcher Mary Koss, RESTORE operated from 2003 to 2007 in Tucson, Arizona, and has since served as a model for a New Zealand program.<sup>325</sup> In its four-year history, RESTORE saw twenty-two cases, including eleven misdemeanors and eleven felonies.<sup>326</sup> Of the twenty-two cases, four (three felonies and one misdemeanor) did not complete the redress plan: two cases were terminated because of "non-compliance related to alcoholism, financial distress, or homelessness," and one withdrew because she or he recanted responsibility.<sup>327</sup> Only one offender reoffended—an elderly person, who facilitators believed to be suffering from dementia, was arrested for indecent exposure.<sup>328</sup> Follow-up research found that more than 90% of participants were satisfied with their preparation, conference, and redress plan.<sup>329</sup> The most satisfied were survivors who attended their conference.<sup>330</sup> More than 90% of participants agreed or strongly agreed that they "felt safe, listened to,

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10 J. EXPERIMENTAL CRIMINOLOGY 291, 292 (2014) (finding 49% fewer cases of clinical posttraumatic stress symptoms in the RJ group).

320. Kathleen Daly, *Restorative Justice and Sexual Assault: An Archival Study of Court and Conference Cases*, 46 BRIT. J. CRIMINOLOGY 334, 334–40 (2006).

321. Interview with sujatha baliga, Vice President & Dir., Restorative Justice Project (RJP) (Oakland, California) (2016).

322. Daly, *supra* note 320, at 334–56.

323. *Id.*

324. Mary P. Koss, *The RESTORE Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcomes*, 29 J. INTERPERSONAL VIOLENCE 1623 (2014).

325. See Shirley Jülich et al., *Yes, There Is Another Way!*, 17 CANTERBURY L. REV. 222 (2011).

326. Koss, *supra* note 324.

327. *Id.* at 1647.

328. *Id.*

329. *Id.*

330. *Id.* Survivors had to agree that conferencing could take place, but they could elect not to participate. *Id.* at 1632. In the cases in which they elected not to participate, a surrogate would stand in for them. *Id.* Most of the felony survivors (75%) wished to have a face-to-face meeting rather than have a surrogate. *Id.* at 1649.

supported, treated fairly, treated with respect, and not expected to do more than they anticipated [in the conference].”<sup>331</sup>

In the RESTORE model, the prosecutor’s office referred cases to the program, and the RESTORE staff further screened them.<sup>332</sup> The allegations ranged from noncontact sex crimes (e.g., indecent exposure, public masturbation, and voyeurism) to rape.<sup>333</sup> A number involved college student sexual assault cases.<sup>334</sup> To be admitted to the program, the accused had to admit to the *conduct* alleged but not necessarily to the wrongfulness of the conduct or to a mental state.<sup>335</sup>

The RESTORE staff engaged in a great deal of preparation with participants before a conference.<sup>336</sup> A case manager met with the victim to complete a safety assessment “to decide who [would] be attending the conference with the victim; to prepare her to describe the injury she ha[d] experienced, and to formulate appropriate reparation expectations.”<sup>337</sup> Separate conference preparation meetings occurred with all other participants.<sup>338</sup>

In addition, the accused who participated in RESTORE were required to receive a psychosexual evaluation and participate in counseling for a year after completing the conference.<sup>339</sup> This is a more extensive use of therapeutic interventions than is the case with many RJ programs.<sup>340</sup>

Proponents of the use of RJ in sexual offense cases argue that RJ offers particular benefits for victims. RJ can better meet victims’ justice needs to “(1) contribute input into key decisions . . . about their case, (2) receive response with minimal delay, (3) tell their story without interruption by adversarial and sometimes hostile questioning, (4) receive validation, (5) shape a resolution that meets their material and emotional needs, and (6) feel safe.”<sup>341</sup>

RJ may be particularly useful in helping sexual assault victims overcome feelings of shame—shame from conduct that made them vulnerable to assault and shame from being vulnerable.<sup>342</sup> Victims may experience shame because they blame themselves for the assault, believing

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331. *Id.* at 1644.

332. *Id.* at 1623.

333. *Id.* at 1626–27.

334. Koss et al., *supra* note 25, at 248 (10% involved university students).

335. Koss, *supra* note 324, at 1626.

336. *Id.* at 1628–30.

337. Koss et al., *supra* note 306, at 390.

338. *Id.* RESTORE required a forensic exam before acceptance to RJ, and part of the reparative plan was therapy for sex offending. *Id.*

339. *Id.* at 391–92.

340. Daly, *supra* note 320, at 356.

341. Koss, *supra* note 292, at 221–22 (citations omitted).

342. Audrey K. Miller et al., *Deconstructing Self-Blame Following Sexual Assault: The Critical Roles of Cognitive Content and Process*, 16 VIOLENCE AGAINST WOMEN 1120, 1122 (2010).

that their failure to communicate clearly, their consensual sexual conduct prior to the assault, or their drinking was the cause of the assault.<sup>343</sup>

One of the greatest benefits of RJ is the opportunity for victims to “tell their story.”<sup>344</sup> As Mary Koss notes, some victims of rape “don’t want to ruin a person’s life . . . . They want to be validated and believed and seen as legitimate.”<sup>345</sup> Leigh Goodmark describes the ways in which RJ processes may provide voice, validation, and vindication for the victim.<sup>346</sup> “Voice” is “the opportunity to tell one’s story, unmediated”; “validation” acknowledges the harm done to the victim and “affirms the victim’s personhood and restores the victim’s dignity”; and “[v]indication requires the community to publicly stand with the victim . . . and to hold offenders accountable for their actions.”<sup>347</sup> Similarly, Kathleen Daly argues that RJ has the potential to meet the “justice interests”<sup>348</sup> of many victims of sexual misconduct by allowing them “to tell their own stories[,] . . . obtain answers to questions [from the responsible party], experience validation as a legitimate victim, observe offender remorse for harming them, receive support that counteracts isolation and self-blame, and above all have choice and input into the resolution of their violation.”<sup>349</sup>

RJ proponents often believe that the offender’s apology is essential to the RJ process and, further, that the process should move victims to forgive their offenders.<sup>350</sup> In contrast, feminist supporters for RJ responses to gender violence (mindful that apologies can be a form of what I have referred to as “cheap justice”)<sup>351</sup> are skeptical about centering RJ on the offender’s apology. For example, Koss notes that with RESTORE, offenders did not write apologies until the last session.<sup>352</sup> Koss believes that the offender needed to complete the entire process and integrate the information before he was ready to give a full and sincere apology.<sup>353</sup> Though victims were invited to attend this last meeting, none chose to do so; therefore, the written apologies were transmitted to them after the fact.<sup>354</sup> An offender who raped his college classmate wrote,

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343. *Id.* It is common for people who experience a terrible event to ruminate over how things might have turned out differently if they had only taken different action. This common “counterfactual” thinking can turn into disproportionate self-blame. *Id.*

344. Danovich, *supra* note 78 (quoting Mary Koss).

345. *Id.*

346. GOODMARK, *supra* note 23, at 710.

347. *Id.* at 727–30.

348. Daly, *supra* note 320, at 334–56.

349. Koss et al., *supra* note 25, at 246–47.

350. James Ptacek, *Resisting Co-Optation: Three Feminist Challenges to Antiviolence Work*, in *RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN*, *supra* note 20, at 24.

351. Coker, *supra* note 277, at 85.

352. Keith V. Bletzer & Mary P. Koss, *From Parallel to Intersecting Narratives in Cases of Sexual Assault*, 22 *QUALITATIVE HEALTH RES.* 291 (2012).

353. *Id.*

354. *Id.*

No matter how many times I say the words, “I’m sorry,” nothing will change the hurt I inflicted on you. . . . My rash and imprudent decision to sexually assault you has caused consequences I never dreamed of and changed our lives forever. My actions have caused you and your family to undergo pain and suffering. I am truly sorry for the unnecessary pain I caused you, your family and your friends.<sup>355</sup>

*D. Feminist/Restorative Hybrid Projects and Transformative Restorative Justice*

*1. Feminist/Restorative Hybrids*

RESTORE is an example of F/R processes. James Ptacek draws a distinction between earlier models of RJ, which are said to be significantly focused on reforming the offender and insufficiently concerned with the needs of victims, and F/R models, which are designed to address gender violence. F/R promoters “argue that existing legal responses fail victims of battering, rape, and child abuse in terms of safety and accountability. To keep people safe, it is necessary to widen the circle of responsibility, and this is what restorative practices can accomplish.”<sup>356</sup>

F/R programs address the needs unique of many gender violence cases through ongoing monitoring of the offender; limiting the offender’s access to the victim when necessary;<sup>357</sup> enlisting human service providers, other helping professionals, or sexual assault or intimate partner violence advocates to participate in the processes; providing support and assistance for victims both pre- and post-conference; engaging in extensive pre-conference preparations with all parties; consulting the victim on whom to invite to participate; and maintaining adequate and appropriately trained staff capable of providing necessary support and guidance for all parties both pre- and post-conference.<sup>358</sup>

*2. Transformative/Anti-Subordination Restorative Justice*

RJ practitioners and theorists have been criticized for failing to incorporate an awareness of structural inequality, including that based in

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355. *Id.* at 297.

356. *Id.* at 24.

357. Joan Pennell & Mimi Kim, *Opening Conversations Across Cultural, Gender, and Generational Divides: Family and Community Engagement to Stop Violence Against Women and Children*, in RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN, *supra* note 20, at 184. This includes attention to safety in the organization of a conference. *Id.* For example, Joan Pennell writes, with regard to Family Group Decision Making conferences, that if necessary for the safety of a victim, the offender may join the meeting by phone. *Id.*

358. *See id.*; Koss, *supra* note 292, at 224.

race, class, gender, sexual orientation, and sexual identity.<sup>359</sup> The criticism is two-fold. The first criticism is more structural. Because RJ programs are frequently allied with the criminal justice system, they may have a net-widening effect, and at any rate, they may serve to promote the considerable violence of the state in pursuance of “crime.”<sup>360</sup> The second criticism is more about practice. The question is whether RJ can be a vehicle for changing structural inequalities of race, gender, and class, or do RJ processes reconstitute those inequalities in their focus on one-time instances of criminal conduct?<sup>361</sup>

In prior work, I argue that what is required is the development of RJ processes that “incorporate[] insights from feminist and critical race feminist theory,” a process I term “Transformative Justice” and here refer to as “Transformative RJ.”<sup>362</sup> A Transformative RJ model attends to the impact of intersecting subordination both in the life of the person who committed harm as well as in the life of the person who was harmed.<sup>363</sup> Rather than presume that families and communities will side with the victim of gender violence,

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359. Harris, *Monster Factory*, *supra* note 26, at 211. Critics also argue that the alliance between RJ programs and the criminal justice system ignores the significant violence that the state perpetrates through crime governance. See Donna Coker, *Transformative Justice: Anti-Subordination Processes in Cases of Domestic Violence*, in *RESTORATIVE JUSTICE AND FAMILY VIOLENCE*, *supra* note 20, at 128; Harris, *Heteropatriarchy Kills*, *supra* note 26, at 58–59 (noting that “[r]estorative justice advocates tend to embrace representatives of the state” and fail to address the violence of the criminal justice system, treating the state as merely a “stakeholder” rather than as a primary perpetrator of violence).

360. Andrea Smith, *Beyond Restorative Justice: Radical Organizing Against Violence*, in *RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN*, *supra* note 20, at 255, 261 (arguing that RJ proponents “often . . . fail[] to conceptualize the state, not simply as flawed in its ability to redress violence, but as a primary perpetrator of violence against women in its own right”).

361. Some RJ programs are centered on interrupting racial subordination. For example, RJ programs in secondary school systems have been developed as a means of interrupting the “school-to-prison pipeline” that results in criminal penalties for school-based infractions against disproportionate numbers of students of color. See Fania E. Davis et al., *Restoring Racial Justice*, in *EMERGING TRENDS IN THE SOCIAL AND BEHAVIORAL SCIENCES: AN INTERDISCIPLINARY, SEARCHABLE, AND LINKABLE RESOURCE* (Robert A. Scott & Marlis C. Buchmann eds., 2015).

362. Coker, *supra* note 359, at 130. The term “Transformative Justice” is also used to refer to “community accountability” interventions that operate *outside* of the state. See Coker & Macquoid, *supra* note 26, at 171; Mimi Kim, *Alternative Interventions to Intimate Violence: Defining Political and Pragmatic Challenges*, in *RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN*, *supra* note 20, at 193; Mimi E. Kim, *Moving Beyond Critique: Creative Interventions and Reconstructions of Community Accountability*, 37 *SOC. JUST.* 14, 14–34 (2011). Angela Harris describes the difference between the vision of Community Accountability/Transformative Justice advocates and RJ advocates: “Restorative justice advocates tend to embrace representatives of the state, the family, and the community as stakeholders along with offenders and victims . . . . Transformative justice, however, recognizes that all these stakeholders are embedded in unjust relations of power, including pervasive racism, economic exploitation, xenophobia, and heteropatriarchy.” Harris, *Heteropatriarchy Kills*, *supra* note 26, at 58–59.

363. Coker, *supra* note 359, at 144 (arguing that in the context of domestic violence cases, such a process “would address . . . the relationship of battering to social inequality” along two dimensions: “[T]he manner in which subordinating experiences in the lives of batterers relate to their decisions to batter and the manner in which their battering subordinates women”); see also Coker, *supra* note 277, at 91 (describing Peacemaker’s use of traditional Navajo creation stories to reinforce gender complementarity rather than hierarchy).

Transformative RJ practitioners understand that the RJ process is a dynamic one that works to build community change.<sup>364</sup>

Angela Harris similarly argues for a model of Transformative Justice that combines RJ theory and practice with Anti-Subordination theory and practice.<sup>365</sup> Harris argues,

To truly restore justice means “making right” not only the wrongs of individual offenders, but also the social institutions that facilitate, reflect, and/or contribute to particular offenses. If gender violence is facilitated by cultural ideals of masculinity, then masculinity as it is taught and reinforced in families and in the criminal justice state must be challenged.<sup>366</sup>

In my earlier research on domestic violence cases in Navajo Peacemaking, a process similar to conferencing, I found that, in addition to support and validation for the victim, Peacemaking may provide an opportunity to change the social conditions that foster violence.<sup>367</sup> This occurs, for example, when the victim receives material assistance from family members or the abuser or when the abuser’s family and friends are confronted with the ways in which they provide social support for the abuser’s conduct.<sup>368</sup> It also occurs through the rehabilitative measures that the abuser agrees to undergo.<sup>369</sup>

A Transformative RJ response to campus sexual violence would seek to change the social conditions that foster sexual aggression. What this means will vary, just as perpetrators, circumstances, and victims’ needs vary. On the individual level, for the student who accepts responsibility for causing harm, it may mean a reparative plan that requires ongoing counseling and includes alcohol evaluation and treatment, if appropriate. Reparative plans may incorporate protections that DOE guidance recommends, such as changes in housing or classroom schedules to avoid repeated close contact between the complainant and the respondent.<sup>370</sup> But by broadening the scope of responsibility and action, RJ plans can expand. For example, a respondent whose sexual violence was perpetrated in the context of a high-risk male organization might agree to work with the university to develop new rules for Fraternity and Sorority Life, work to change alcohol use, or assist with student training on gender subordination and sexual assault.

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364. Coker, *supra* note 277, at 96–101; *see infra* Appendix, Case Study #3 (describing a change in the attitude of the mother of the offender as a result of the RJ process).

365. Harris, *Monster Factory*, *supra* note 26, at 212 (arguing for a RJ practice that includes the “recognition that pervasive group inequality makes impossible a simple ‘restoration’ of harmony”).

366. *Id.*

367. *See* Coker, *supra* note 20, at 1–2.

368. *Id.*

369. *Id.*

370. *See* Office for Civil Rights, *Dear Colleague Letter*, *supra* note 2; Office for Civil Rights, *Questions and Answers*, *supra* note 2.

RJ may prove a useful component of the kind of public health response advocated here, but there are several challenges to enacting such a program. In the next Section, I take up two of the most significant challenges.

## VI. CHALLENGES TO THE USE OF RESTORATIVE JUSTICE

### A. *The Department of Education's Office for Civil Rights' Prohibition on Mediation in Sexual Assault Cases*

DOE guidance prohibits the use of mediation for sexual assault cases.<sup>371</sup>

Grievance procedures generally may include voluntary informal mechanisms (*e.g.*, mediation) for resolving some types of sexual harassment complaints. OCR has frequently advised recipients, however, that it is improper for a student who complains of harassment to be required to work out the problem directly with the alleged perpetrator, and certainly not without appropriate involvement by the school (*e.g.*, participation by a trained counselor, a trained mediator, or, if appropriate, a teacher or administrator). In addition, as stated in the *2001 Guidance*, the complainant must be notified of the right to end the informal process at any time and begin the formal stage of the complaint process. *Moreover, 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.<sup>372</sup>

It is not hard to imagine the stories that prompted the prohibition against mediation. For example, an investigation by the Center for Public Integrity found that complainants were often urged to mediate with their assaulter, a process that had no rules and no preparation for the complainant or the

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371. Office for Civil Rights, *Dear Colleague Letter*, *supra* note 2, at 8 (emphasis added). Another point of ambiguity regards the kinds of cases that are subject to the mediation prohibition. The relevant portion of the DCL limits the prohibition to “sexual assault” cases: “[I]n cases involving allegations of sexual assault, mediation is not appropriate.” *Id.* The DCL guidelines regard the broader category “sexual violence,” which includes “rape, sexual assault, sexual battery, and sexual coercion.” *Id.* at 1–2. Of the forms of violence included in this list, only sexual coercion is not co-extensive with the most common legal meaning of “sexual assault.” Thus, one might read the DCL to provide an exception for “sexual coercion” cases to the prohibition on mediation. However, the Office for Civil Rights appears to intend to close whatever window the wording creates. In subsequent communications with schools regarding Title IX investigations, the Office for Civil Rights has amended the DCL language to say, “[I]n cases involving allegations of sexual *assault/violence*, mediation is not appropriate even on a voluntary basis.” See Letter from Joel J. Berner, Regional Director, U.S. Dep’t of Educ., Office for Civil Rights, Region I, to Martha C. Minow, Dean, Harvard Law School 7 (Dec. 30, 2014), <http://www2.ed.gov/documents/press-releases/harvard-law-letter.pdf> (emphasis added).

372. *Id.* at 8.

respondent.<sup>373</sup> Some complainants said that university administrators' encouragement to accept mediation bordered on coercion. As one victim described the conversation, administrators acted as though mediation was the "best option ever."<sup>374</sup>

In addition, some were likely concerned that mediation would provide an opportunity for the accused student to intimidate the victim. Concerns that mediation can further abuse are longstanding. For example, many states prohibit the use of mediation in domestic violence family court cases.<sup>375</sup> These prohibitions arose from concerns that face-to-face meetings between a victim and a partner who abused her would be intimidating for the victim, would result in unfair agreements, and could also be physically dangerous.<sup>376</sup>

RJ is not mediation, though the two may appear to be similar. Both involve face-to-face meetings; both employ trained facilitators.<sup>377</sup> Further, both mediation and RJ may address criminal behavior.<sup>378</sup> But there are critical differences, both in practice and in theoretical understandings, that distinguish RJ from mediation. The most critical difference is that RJ conferencing, of the kind described in this Article and practiced on college campuses, 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.<sup>379</sup> Mediation does not presume a harm-causing party and a harmed party.<sup>380</sup> Rather, mediation is "neutral because it does not assume that the accused is guilty and that 'healing' or repair is warranted."<sup>381</sup> In this way, RJ is typically aligned with the moral judgment that gave rise to the rule that the responsible party has violated. "When someone has been harmed by another person, mediation that provides

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373. CTR. FOR PUB. INTEGRITY, SEXUAL ASSAULT ON CAMPUS: A FRUSTRATING SEARCH FOR JUSTICE 20 (2010), <https://cloudfront-files-1.publicintegrity.org/documents/pdfs/Sexual%20Assault%20on%20Campus.pdf>.

374. *Id.* at 28 (quoting Mallory Shear-Heyman, former Bucknell University student, who describes the way mediation was presented to her by campus administrator).

375. See GOODMARK, *supra* note 23 (describing family court prohibitions on the use of mediation in cases involving domestic violence, even when both parties desire mediation.)

376. See Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117 (1993) (describing the ways in which battering men may use family court mediation to control and intimidate their ex-partners).

377. See *Campus PRISM Project Brief: Distinguishing Campus Restorative Justice from Mediation* (Aug. 2016).

378. See Hanan, *supra* note 298.

379. Koss et al., *supra* note 25, at 242; see also Hanan, *supra* note 298, at 146–47 (indicating that mediation is preferable to RJ because the latter "curtails party self-determination" by "not permit[ting] the accused and complaining witness to determine the underlying facts and the meaning of the incident" but rather, presumes that one party is the "offender" who must admit his/her responsibility and the other is the "victim," which may result in an over-focus on the needs of the complaining witness).

380. Hanan, *supra* note 298.

381. *Id.* at 125. Hanan argues that mediation for violent crimes is preferable to RJ because many RJ programs "narrowly define their goals according to affixed agenda regarding the needs of 'victims' and 'offenders,'" which "predetermines the outcome[s,]" while mediation "permits the parties to determine the outcome." *Id.*

neutrality and treats parties as equal partners in the resolution process is inappropriate.”<sup>382</sup> While mediation may operate with meta-rules that encourage compromise,<sup>383</sup> for example, mediation does not operate with the moral compass that is true of most RJ programs. “Mediation . . . involves mediating facts . . . with the implication that no blame is apportioned.”<sup>384</sup> In contrast, RJ centers on a strong set of normative values, including the moral imperative that harm perpetrated by a person against another is morally wrong.<sup>385</sup>

A second difference has to do with the use of supporters in RJ conferencing. Supporters may help the facilitator ensure that no one is intimidated or disrespected in the meeting. They frequently offer some measure of emotional safety for the victim. Further, because a victim’s supporters may be better able to articulate the harms than is the victim, they play a key role in encouraging the offender to develop empathy and commit to change.<sup>386</sup>

RJ conferencing programs of the kind described in this Article are responsive to the concerns that gave rise to the mediation prohibition. These programs engage in careful screening and individual preparation with complainants before any face-to-face meeting occurs to be certain that the complainant both positively desires RJ conferencing and that she or he is not intimidated by the responsible party.<sup>387</sup> The complainant’s supporters are also prepared before any face-to-face meeting to ensure their positive participation in the meeting.<sup>388</sup>

Despite the substantial differences between RJ and mediation, the college administrators with whom I spoke reported that university counsel have prevented the use of RJ out of fear of running afoul of the DCL rule.<sup>389</sup> In fact, some universities prevent staff from facilitating *any* meeting that involves a potential complainant and a potential respondent outside of formal adjudication.<sup>390</sup>

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382. Koss et al., *supra* note 25, at 246.

383. See Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 *YALE L.J.* 1545, 1560 (1991) (noting that the “informal law” of child custody mediation requires parties to avoid making individual rights claims, avoid blame statements, and be seen as willing to compromise).

384. McGlynn et al., *supra* note 26.

385. Goodmark, *supra* note 26, at 730 (stating that RJ should vindicate the victim who was harmed and that the harm was morally wrong).

386. See Strang, *supra* note 269 (describing the role of empathy in curbing recidivism).

387. *Id.* at 25.

388. *Id.* at 40–41 (explaining that most student victims elect not to participate in a mediation).

389. See Interviews with Campus Administrators, *supra* note 206.

390. See *id.*

B. *Preventing the Admission in Court and Administrative Hearings of Restorative Justice-Derived Evidence*

A number of scholars have raised concerns about the procedural fairness of the process DOE guidance requires schools to adopt.<sup>391</sup> These concerns have centered on the requirement that schools adopt a preponderance of the evidence standard of proof; the policy adopted by some schools of investing investigation and guilt determination duties in the same person; and the limited rights of cross-examination of the complainant.<sup>392</sup>

An additional concern that has received little attention is the absence of a requirement that universities provide students the equivalent of a *Miranda* warning regarding the potential admissibility of their statements in court.<sup>393</sup> My conversations with university administrators suggest that this risk may be underappreciated.<sup>394</sup>

The problem posed by the potential admissibility in court or in an administrative hearing is particularly acute in RJ, given the requirement that he or she admit to the conduct alleged by the victim–claimant as a precondition for entry. The victim–complainant and other participants in RJ conferencing also have a legitimate interest in speaking freely without fear that their statements will be used against them.

Evidence derived from a campus RJ process may be covered by state statutes that privilege communications in alternative dispute resolution

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391. See, e.g., Lave, *supra* note 6; Tamara Rice Lave, *Ready, Fire, Aim: How Universities Are Failing the Constitution in Sexual Assault Cases*, 48 ARIZ. L.J. 637 (2016); *Law Professors' Open Letter Regarding Campus Free Speech and Sexual Assault*, SAVE SERVS. (June 1, 2016), <http://www.save-services.org/wp-content/uploads/Law-Professor-Open-Letter-May-16-2016.pdf>; *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>.

392. Lave, *supra* note 391; *Rethink Harvard's Sexual Harassment Policy*, *supra* note 391.

393. The student respondent (or claimant) who is subsequently a party in a criminal or civil case may find his or her statements to the Title IX investigator or hearing panel admissible against him or her. See, e.g., FED. R. OF EVID. 801(d)(2) (stating that party admissions are not hearsay). A respondent's right to remain silent in the administrative investigation process is a separate and critical concern. See Lave, *supra* note 391, at 23 (reporting that a review of Title IX procedures at fifty universities found that forty-two gave respondents the right to remain silent, three gave the respondent the right to remain silent but provided that an adverse inference could be drawn from this silence, and the relevant policies of five schools could not be determined).

394. Interviews with Campus Administrators, *supra* note 206. The Association for Student Conduct Administration's "Gold Standard" document on best practices for responding to sexual assault on campus does not address the issue. ASS'N FOR STUDENT CONDUCT ADMIN., ASCA 2014 WHITE PAPER: STUDENT CONDUCT ADMINISTRATION & TITLE IX: GOLD STANDARD PRACTICES FOR RESOLUTION OF ALLEGATIONS OF SEXUAL MISCONDUCT ON COLLEGE CAMPUSES (2014), <http://www.theasca.org/Files/Publications/ASCA%202014%20White%20Paper.pdf>.

processes,<sup>395</sup> mediation,<sup>396</sup> victim–offender mediation,<sup>397</sup> community dispute resolution centers,<sup>398</sup> and RJ.<sup>399</sup> But in a number of states, these statutes define the process subject to privilege in a way that is not applicable to a campus RJ program,<sup>400</sup> or they apply only to cases that are referred by a prosecutor or the court.<sup>401</sup>

An alternative form of protection used by many RJ programs is to 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

395. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 154.073 (West 2016) (“[Subject to some exceptions.] communication relating to any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings . . . may not be used as evidence against the participant in any judicial or administrative proceeding.”).

396. *See, e.g.*, CAL. EVID. CODE § 1119 (West 2016) (stating that evidence derived from mediation is not admissible in civil cases). Most states provide some level of protection in civil suits for evidence derived from mediation but vary with regard to whether the privilege extends to evidence proffered in a criminal case. *See* UNIFORM MEDIATION ACT § 6 cmt. 10 (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2003) (encouraging states to clarify whether the privilege otherwise afforded in the legislation for communications made in mediation applies to criminal cases as well as civil cases). The Uniform Mediation Act (UMA) provides that mediation communication proffered in a criminal case may be admissible if the court determines, after a hearing in camera, that the evidence is not otherwise available and the need for the evidence substantially outweighs the interest in protecting confidentiality. *Id.* § 6(b)(1).

397. DEL. CODE ANN. tit. 11, § 9503 (West 2016) (“All memoranda, work notes or products, or case files or programs established under this [victim–offender mediation] chapter are confidential and privileged and are not subject to disclosure in any judicial or administrative proceeding . . . . Any communication relating to the subject matter of the resolution made during the mediation process by any participant, mediator or any other person is a privileged communication and is not subject to disclosure in any judicial or administrative proceeding unless all parties to the communication waive the privilege.”).

398. *See, e.g.*, ALASKA STAT. ANN. § 47.12.450(e) (West 2016) (“[A]ll memoranda, work notes or products, or case files” of community dispute resolution centers and “[a]ny communication relating to the subject matter of the resolution made during the resolution process by a participant, mediator, or another person” “are confidential and privileged and are not subject to disclosure in any judicial or administrative proceeding.”); ARK. CODE ANN. § 16-7-206(a) (West 2016) (“[A] communication relating to the subject matter of any civil or criminal dispute made by a participant in a dispute resolution process, whether before or after the institution of formal judicial proceedings, is confidential and is not subject to disclosure and may not be used as evidence against a participant in any judicial or administrative proceeding.”).

399. *See, e.g.*, W. VA. CODE ANN. § 49-4-725(d) (West 2016) (providing that “[n]o information obtained as the result of a restorative justice program is admissible in a subsequent proceeding under this article”).

400. *See, e.g.*, NEB. REV. STAT. ANN. § 43-247.03 (applying only to juvenile justice cases). It is unclear whether mediation privilege statutes would apply to campus RJ programs. The UMA, adopted by a number of states, defines mediation as “a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.” UNIFORM MEDIATION ACT § 2(1). As described previously, RJ practitioners and theorists generally do not understand the RJ process to involve resolving a “dispute.” *See infra* Section V.A. Nonetheless, some RJ practitioners believe that mediation statutes may offer protection against the use of RJ-derived evidence in civil court. *See* Interview with sujatha baliga, *supra* note 321 (describing the program’s use of California’s mediation privilege to protect against the admissibility of RJ communications in civil court coupled with an MOU with the juvenile prosecutor to protect against the admissibility of communications in criminal court).

401. *See, e.g.*, DEL. CODE ANN. tit. 11, § 9504 (stating that to be eligible for victim–offender mediation, the attorney general must certify that the offender is appropriate for the program).

subsequent criminal case.<sup>402</sup> To provide a measure of protection against civil liability, programs sometimes require that victims sign a waiver of their right to pursue a civil action against the offender, provided the RJ process is completed successfully.<sup>403</sup>

Absent statutory protection, universities that establish an RJ program should develop a MOU with the local prosecutor. The ideal MOU would provide use immunity for all evidence obtained as part of the RJ process but, at a minimum, would protect statements made by the respondent. An agreement of this nature in no way binds the complainant to continue an RJ process and thus would not violate the DCL's requirement that complainants be allowed to stop an informal process at any time and begin a formal process.<sup>404</sup> Nor would it violate the DCL's prohibition on universities discouraging complainants from filing a criminal complaint.<sup>405</sup> Complainants who are unhappy with the progress of RJ would (and should) remain free to stop the process and pursue other avenues of redress, including criminal justice interventions. Furthermore, the 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.

Even without these protections in place, there are cases for which RJ remains a viable alternative. There is little risk to respondents in those cases that involve non-criminal conduct, for example.<sup>406</sup> Further, in most

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402. Hopkins, *supra* note 297. RESTORE's MOU with the local prosecutor protected statements made by the offender from future use in criminal prosecution. The Restorative Justice Project, a juvenile justice project in Oakland, California, has an expansive agreement with the juvenile court prosecutor whereby "the DA agrees that all new information learned in the conferencing process (including pre-conference meetings) will not be used against the youth." Interview with sujatha baliga, *supra* note 321 (quoting from MOU between the Restorative Justice Project and the local juvenile prosecutor). Specifically, the prosecutor will not subpoena witnesses from the RJ staff or other participants to share facts learned in the RJ matter to "testify about any information that is learned through the RCC [RJ] process." *Id.* Further, if another youth's criminal conduct is uncovered in the RJ meeting, the prosecutor agrees not to use the information against that youth. *Id.* The same is true for immigration matters: the prosecutor agrees not to share immigration information with federal immigration. *Id.* Unlike other MOU agreements with RJ programs, the agreement covers all cases in RJ, not just those that are referred by the prosecutor. When cases are pre-charge diversion cases (and therefore referred by the prosecutor), the prosecutor agrees to withhold charges for a certain period of time to allow the RJ process to proceed and if the youth completes the process, to not charge. *Id.* Prosecution may proceed in cases that are not diversion, but the immunity for evidence that is derived in RJ still applies. *Id.*

403. Hopkins, *supra* note 297 (describing RESTORE's requirement that victims waive their right to pursue a civil action against the defendant, provided the RJ process was successfully completed; if the offender failed to complete the year-long RJ process, the victim was released from the waiver).

404. Office for Civil Rights, *Dear Colleague Letter*, *supra* note 2, at 8 ("[T]he complainant must be notified of the right to end the informal process at any time and begin the formal stage of the complaint process.").

405. *Id.* at 10 ("A school should notify a complainant of the right of file a criminal complaint, and should not dissuade a victim from doing so either during or after the school's internal Title IX investigation.").

406. See discussion *supra* Section III.D (describing the range of conduct proscribed by Title IX provisions against sexual violence).

jurisdictions, there will be little risk in those cases that involve a claim that would support at most a low-level criminal offense.

## VII. CONCLUSION

*[W]e wanted space to explain the devastating and lingering impact [of sexual assault], and we needed to trust that the perpetrators would never violate another person. . . . [R]estorative processes were exactly what my friends and I were asking for. We wanted to hear [the perpetrators] take responsibility for their actions. We wanted to share how we, our parents, our partners, our friends have been impacted by those actions. We wanted to know that they were going to actively and consciously educate and . . . rehabilitate themselves to prevent the creation of more victims. We'd been asking for a restorative process, but we didn't know that one existed. We deserve and deserved better options . . . .*<sup>407</sup>

*One of the most powerful things I get to see is when a young man makes amends in a sexual harm case. He admits what he has done and looks his victim in the eye and takes responsibility. When he does this, he is not harmed, he is not punished; rather, through the community, through family support, and through understanding the impact of his behavior on his victim, he is made into someone who will never do this again. That is actually to his great benefit and to all of our benefit.*<sup>408</sup>

Campus administrators should adopt and feminists should support public health responses to sexual assault that are informed by insights regarding the importance of intersectional experiences and intersectional subordination. This requires that universities and feminist activists abandon Crime Logic reasoning and instead look to change the social structures that encourage and support campus sexual assault. With appropriate safeguards for both claimants and respondents, RJ can be a useful tool in this effort. The integration of RJ into a larger public health/intersectional response to campus sexual assault may provide an alternative that is better for many victims, more likely to lead to real changes in the behavior of the assaulter, and more likely to change campus life.

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407. Jasmyn Story, *Reflection by Jasmyn Story, Recent Skidmore College Alumna and Current RJ Facilitator*, in PRISM, *Campus Interest in Adding Restorative Justice as an Option for Campus Response to Sexual Misconduct* (Oct. 2016) (on file with author).

408. Coker et al., *supra* note 268, at 376 (transcript of remarks by sujatha baliga, describing her RJ practice with Restorative Justice Project).

## APPENDIX: CASE STUDIES

While much of the discussion in this Article presumes an RJ process that would replace formal investigation and adjudication, RJ processes may be usefully incorporated at other stages of Title IX processing. Koss et al. write that RJ may be useful after formal adjudication finds a respondent responsible, as a means to determine a reparative plan.<sup>409</sup> Additionally, students may elect an RJ process to address sexual harms that are not violations of the campus code, as described below in Case Study #1.

In this Appendix, I discuss four case studies to explore the potential for the use of RJ. Two of these cases are from interviews with campus administrators who work directly with campus sexual assault claimants and have RJ training.<sup>410</sup> The third case is a previously unpublished description of a RESTORE case involving a campus rape.<sup>411</sup> The fourth is from a published description of the use of RJ in a sexual harassment case.<sup>412</sup>

**Case Study #1**

*A male and a female student were part of a group of friends that regularly engaged in significant drug and alcohol use. The two students had had sex with each other before. The woman later went to the administrator for help with a sexual encounter with the male student that she found distressing. The sexual encounter started as consensual sexual intercourse. She had her back to him. At some point, she no longer wanted to have intercourse. She began crying and she said, "no," but she was not sure if he heard her. She was uncomfortable calling this sexual assault because she was not sure if he knew it was nonconsensual. She was hurt by his behavior because he "wasn't paying attention to her" during the sex. She did not want an investigation or a hearing, but she wanted him to know that she had been harmed by his conduct and that he should "pay attention" in future sexual encounters. The male student told the administrator that he felt badly, and he agreed that he should have been "paying better attention." He reported that not paying attention was a major problem for him in general, in part, because of his drug use and that he wanted to change his behavior. The female student said that she felt "heard" and understood by the student.*

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409. Koss et al., *supra* note 25, at 250. RJ may also serve as a "reintegration process" after sanctioning is completed. *Id.* at 253; *see also* KARP ET AL., *supra* note 25.

410. Interviews with Campus Administrators, *supra* note 206.

411. *See* E-mail from Mary Koss, Regents' Professor in the Mel & Enid Zuckerman Coll. of Pub. Health, Univ. of Ariz., to Donna Coker, Professor, Univ. of Miami Sch. of Law (Oct. 10, 2016) (on file with author).

412. LLEWELLYN ET AL., *supra* note 30 (describing the RJ process at Dalhousie University in response to claims of sexual harassment in the School of Dentistry).

Absent evidence that the male student knew that the female had withdrawn her consent to sexual intercourse, there is neither criminal conduct nor is there likely to be a campus code violation. In the actual case, both the male and female student wanted to participate in an RJ process. Despite the questionable nature of a claim to have violated the university code of conduct, university counsel prohibited the use of an RJ process for fear of violating the DOE prohibition on the use of mediation. Because a face-to-face meeting was prohibited, the campus administrator met separately with each student and, with their permission, carried information back and forth.

### **Case Study #2**

*A female and a male student, who were friends, were watching a movie together; he had his arm around her. He put his hand down the back of her pants. She moved his hand away. He leaned over to kiss her and put his hand on her breast. She moved away from him. He made a third try for sexual contact. The woman then told him to leave and he did. The woman came to campus administrators for assistance. She did not want the male student to be sanctioned. She wanted assistance with helping him “understand how his behavior had changed how she dates.” The administrator spoke separately with the male student, who told the administrator, “I know I overstepped the boundaries.”*

These facts, if believed, would support finding a violation of the campus code, which prohibits “unwanted non-consensual sexual touching and kissing.”<sup>413</sup> As was true in the first case, both parties preferred an RJ process, but university counsel prohibited the use of RJ to resolve the complaint, again due to concerns that RJ would violate the DOE prohibition on the use of mediation. Formal adjudication found the male student responsible, and after the appeal process had expired, both students volunteered to participate in an RJ process. The RJ facilitator reported that both expressed satisfaction with the meeting.

### **Case Study #3**

*A female college student attended a sorority function. After the function, she went with a group of friends to her date’s dormitory room. When the group left for another party, she declined to go. She was feeling intoxicated and asked if she could find a place to lie down and sleep. Her date suggested that she sleep in his room because his roommate was out. The other people left and she fell asleep on the floor. She was awakened when her date’s roommate was having sexual intercourse with her.*

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413. Interviews with Campus Administrators, *supra* note 206.

*[The roommate was criminally charged. With the agreement of the victim and the accused, the prosecutor referred the case to RESTORE.]*<sup>414</sup> Prior to the conference, the Responsible Party (RP) acknowledged responsibility for having non-consensual sex with the Survivor/Victim (S/V).<sup>415</sup> The S/V had two objectives for the conference: (1) she wanted to share with the RP and his supporters the impact the assault had had on her life; (2) she wanted the RP to spend his year of supervision researching, preparing, and delivering a sexual assault prevention presentation; and (3) she wanted him to make a donation to a charitable cause she supported. The S/V, RP, and their supporters attended the conference.

*The reparative plan (termed “redress plan” in the RESTORE process) requirements included that the RP complete a psychosexual evaluation, therapeutic counseling, substance abuse counseling, cover the medical and counseling expenses for the S/V, avoid all contact with the S/V, present a sexual assault prevention presentation attended by friends and family, and attend weekly group meetings and regular Community Accountability and Reintegration Board (CARB) meetings.*<sup>416</sup>

*In individual post-conference meetings, the S/V reported that she thought the RP was defiant at the beginning of the conference but that his demeanor changed during the course of the conference. She reported that she felt the RP accepted full responsibility for his actions. She said that she believed that the RP had made a wrong decision but that he was not a bad person. She reported feeling hopeful and relieved. The RP said that it was the victim’s impact statement that “opened my eyes and made a definitive impact on me.”*

*The RP’s mother was initially antagonistic about RESTORE, but at the end of the program, she expressed approval of the process. She felt that the program taught her son to take responsibility for his actions and brought her family closer together.*

*In addition to the presentation agreed to in the reparative plan, the RP become an active participant in a campus sexual assault prevention and awareness program.*

This case provides an example of the ways in which an RJ process can change a RP’s support networks: moving family or peers from supporting or denying the assault to instead supporting the RP’s efforts to take responsibility for the assault. The RP’s mother was initially hostile, but the

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414. See *supra* note 332 and accompanying text (describing the RESTORE process).

415. The RESTORE project, from which this case is drawn, refers to the offender as the “Responsible Party” (RP) and the victim as the “Survivor/Victim” (S/V).

416. RESTORE required that all RPs undergo a psychosexual evaluation, therapeutic counseling, substance abuse counseling, and meet regularly with the CARB over the course of a year. Koss et al., *supra* note 25, at 248.

fairness of the process and the change in her son convinced her that it was useful. The RP's involvement in campus sexual assault prevention programs provides an example of the way in which an RJ process can become a pathway for an assaulter's involvement in making changes in the social conditions that foster sexual violence.

#### Case Study #4

*A sexual harassment claim was brought to Dalhousie University School of Dentistry in Halifax, Nova Scotia, in 2014–2015. The claim was based on female students' discovery of a private Facebook page created by thirteen male students that depicted specific female students in derogatory and sexist ways and included general misogynistic comments.<sup>417</sup> The complainants also complained of a generally negative campus climate for female students. All thirteen male students acknowledged responsibility for the conduct and twelve agreed to an RJ process, as did most of the women bringing the complaint.<sup>418</sup>*

*The twelve respondents spent hundreds of hours training on topics such as sex bias, rape culture, power and privilege, bystander intervention, and professionalism.<sup>419</sup> Respondents met with the complainants in private sessions, with facilitators in individual sessions, and with community organizations that were involved in other RJ processes.<sup>420</sup> At the conclusion of this process, the participants organized a Day of Learning "to share some of the valuable lessons they gained" with more than eighty participants—all of whom were members of organizations that had been a part of the university RJ process.<sup>421</sup>*

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417. LLEWELLYN ET AL., *supra* note 30, at 4. The objectionable statements included a poll on "who would you 'hate f\_\_k'?" with members providing names and others voting on response. *Id.* at 19. Both the male students who posted and female students reported that this was not intended to refer to violence but rather meant (as defined by *Urbandictionary*): "[T]o have sex, especially in a rough manner, with someone who one finds physically attractive but personally loathsome." *Id.* at 45. Another example was a definition of "penis" from an online source: "The tool used to wean and convert lesbians and virgins into useful productive members of society." *Id.* at 41. Follow-up posts from group members included "and by productive I'm assuming you mean it inspires them to become chefs, housekeepers, babysitters, etc." *Id.*

418. *Id.* at 18.

419. *Id.* at 36.

420. *Id.* at 37. For example, they met with Halifax fire fighters who had used RJ processes. *Id.*

421. *Id.* Unlike most RJ processes, the Dalhousie process incorporated fact-finding and resulted in a report. Meetings with students and faculty uncovered widespread student concerns that (1) some of the mostly male faculty were suspected of having sexual relationships with some female students, prompting concerns of favoritism; (2) the centrality of alcohol use and a "work hard/play hard" attitude contributed to sexual harassment and other problems; (3) male faculty frequently engaged in conduct that made female students uncomfortable, including sharing sexually inappropriate jokes; (4) the rules for making sexual harassment (or other) complaints were unclear to both students and faculty; and (5) foreign students were not well integrated, there was no programming to ensure their integration, and faculty treated these students in a "culturally insensitive" and discriminatory manner. *Id.* at 50–52.

*A male student who engaged in the RJ process commented,*

*Everybody can make mistakes. However, being able to deal with mistakes and problems professionally is almost as important as preventing them in the first place. As a result of what has happened, I am proud to be a member of Dalhousie Dentistry and I know that what has happened will make a positive difference in the years to come, not only for me but for this class and faculty and for the profession.<sup>422</sup>*

*The women complainants wrote a joint statement reflecting on the RJ experience:*

*The restorative process has provided a very important space for us to engage safely and respectfully with our colleagues and others to convey our perspectives and needs. . . . Additionally, it allows us to address underlying systemic and institutional issues influencing the climate and culture in which we live and learn. We want this process to make a significant contribution to bringing about a change in that culture and hope that we will be given the respect, time and space needed to do this work.<sup>423</sup>*

The Dalhousie RJ process provides an example of the most extensive involvement of an RJ process in larger social change efforts on campus. This example is directly applicable to the use of RJ processes in prevention efforts. It may also be applicable in response to sexual assault incidents—for example, if a group of sexual violence victims sought to make changes in the campus response to high-risk male organizations or to campus climate more generally. But victims of sexual assault frequently want their assault to remain private, and RJ conferencing (and Title IX guidance) provides a level of confidentiality for victims. Thus, many sexual assault victims will prefer not to take the public role that the Dalhousie sexual harassment victims chose to take.

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422. *Id.* at 63.

423. *Id.* at 68.