

# ADDRESSING SEXUAL ASSAULT IN CRIMINAL JUSTICE, HIGHER EDUCATION AND EMPLOYMENT: WHAT RESTORATIVE JUSTICE MEANS FOR SURVIVORS AND COMMUNITY ACCOUNTABILITY

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## I. INTRODUCTION

The focus on the harm caused by sexual assault and harassment which began as a result of the #MeToo movement is long overdue. The liberating experience of hearing others speak out has sometimes enabled other survivors to do the same.<sup>1</sup> But the same obstacles remain today that have long prevented many survivors from talking publicly about what happened to them behind closed doors. Many still do not feel safe speaking about their experiences. They fear, with good reason, that people will not believe them. Others dread being re-traumatized if they speak out within the criminal justice system or penalized if they report sexual harassment by a work supervisor or academic mentor.<sup>2</sup>

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<sup>1</sup> Douglas states as follows:

On October 15, 2017, in an effort to highlight the magnitude of sexual abuse, assault and harassment, actress Alyssa Milano tweeted, ‘Suggested by a friend: If all the women who have been sexually harassed or assaulted wrote ‘Me Too’ as a status, we might give people a sense of the magnitude of the problem.’

Kelly Douglas, *How #MeToo Is Changing the Way We Talk About Sexual Assault*, UNWRITTEN (Apr. 2, 2018), <https://www.readunwritten.com/2018/04/02/how-metoo-changing-talk-sexual-assault/> [https://perma.cc/9HQ9-MRCQ]. “Milano’s tweet sparked a floodgate of people of all genders and backgrounds to tweet #MeToo as a show of solidarity for other sexual abuse or assault survivors.” *Id.* “Milano’s actions came in response to a number of women in Hollywood opening up about their own experiences, many involving sexual harassment at the hands of well-known film producer Harvey Weinstein.” *Understanding the Me Too Movement: A Sexual Harassment Awareness Guide*, MARYVILLE UNIV., <https://online.maryville.edu/blog/understanding-the-metoo-movement-a-sexual-harassment-awareness-guide/> [https://perma.cc/PM2Z-KALH].

<sup>2</sup> See, e.g., *Understanding the Me Too Movement*, *supra* note 1.

System responses to sexual assault and harassment play a major part in deterring disclosure. Too often systems are perceived as inflexible, uncaring and unfair<sup>3</sup>—because many times, they are. It is time to consider whether in some cases, alternative remedies that address sexual violence in the criminal justice system, in institutions of higher education (“IHEs”) and in the workplace might work better for both survivors and society. Such alternatives would still need to provide an assurance of community safety and lessen the possibility of repeat offending.

Alternatives must also protect the constitutional rights of the accused. But survivors’ voices must be heard and options that are not available today in most jurisdictions or on many college campuses should be offered. There need to be system options for dealing with sexual violence that more effectively prevent future harm and increase reporting. The crux of the matter is whether the person who committed a sex offense is willing to admit responsibility and whether the survivor is interested in a restorative justice approach.

#### ***A. Healing and Prevention of Recurring Harm Are Linked***

The law must begin to consider how healing, forgiveness and accountability can work together to achieve justice and prevent the recurrence of harm. While forgiveness is not the goal of restorative justice, many cultures which practice restorative justice find that it may occur. Restorative justice is rooted in the practices of many different indigenous cultures: “Forgiveness, tolerance, mercy and kindness figure prominently in philosophical and religious traditions . . . and in ancient practices of native peoples in Hawai’i, Canada, New Zealand, Sierra Leone, and elsewhere.”<sup>4</sup> Forgiveness may accompany acknowledgement of wrong, but current legal rules penalize those who apologize and make both apology and forgiveness less likely.<sup>5</sup> Forgiveness can benefit the survivor as much, if not more, than the one who caused the harm. Some survivors may seek to forgive their offender, but others seek only to forgive themselves for having unfairly accepted blame that should have gone to their offender. As one writer put it, “Forgiving isn’t something you do for someone else. It’s something you do for yourself. It’s saying, ‘You’re not important enough to have a stranglehold on me.’ It’s saying, ‘You don’t get to

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<sup>3</sup> See Rachel M. Venema, *Police Officer Schema of Sexual Assault Reports: Real Rape, Ambiguous Cases, and False Reports*, 31 J. INTERPERSONAL VIOLENCE 872 *passim* (2016); RUSSEL W. STRAND, U.S. ARMY MIL. POLICE SCH., THE FORENSIC EXPERIENTIAL TRAUMA INTERVIEW (FETI), <https://www.mncasa.org/wp-content/uploads/2018/07/FETI-Public-Description.pdf> [https://perma.cc/4Q4U-ZC2C].

<sup>4</sup> See MARTHA MINOW, WHEN SHOULD LAW FORGIVE? 3–4 (2019); *see generally* Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1 (1999) (the orthodox view is that it is too dangerous to use a process like restorative justice, which can involve face-to-face interaction between parties involved in interpersonal violence, but scholars like Coker note that its use has been used effectively among indigenous peoples in the past).

<sup>5</sup> See, e.g., CAL. EVID. CODE § 1220 (West, Westlaw through Ch. 362 of 2021 Reg. Sess.).

trap me in the past. I am worthy of a future.”<sup>6</sup> Needless to say, there must also be consequences for the perpetrator that accompany this process. Forgiveness may follow when a just outcome is achieved, but it is not necessarily a goal. Putting the survivor’s needs first is the primary goal. Addressing the needs of the larger community through accountability and recidivism reduction is key.

In the experience of one group of Indigenous people in Canada, when the only choice given to the survivor of familial sexual abuse was to file a criminal charge that would involve the offender’s incarceration, the survivor was unwilling to report, which perpetuated the intergenerational cycle of familial sexual abuse.<sup>7</sup> No one would speak out. When an alternative justice practice began to be used by the Ojibwe of Hollow Water, they found survivors and perpetrators alike began to disclose abuse.<sup>8</sup> Breaking the silence broke the cycle of violence and promoted accountability and healing.<sup>9</sup> Not only was power returned to a native people marginalized in the past, through this partnership with the Canadian justice system, but recidivism rates were very low.<sup>10</sup> A study by the Canadian government found that less than two percent of offenders reoffended ten years later.<sup>11</sup>

Today, Black Americans and female legislators influence restorative justice policymaking which underlies the trend of considering alternative solutions: “The diversification of the United States and the closing of the gender gap in the political arena may be contributing to the construction of justice policy solutions which are less patriarchal and more egalitarian.”<sup>12</sup> The recent impetus in the United States towards prison reform has aided the restorative justice movement: “[R]estorative justice [is] a multifaceted paradigm with the ability to unite and hold together the many faces of justice.”<sup>13</sup>

### ***B. Effective Alternatives to Incarceration May Increase Reporting***

Past conventional wisdom held that only incarceration could deter sexual recidivism because these offenders cannot be cured and will not or cannot stop offending. Contrary to popular belief, though, people convicted of sex offenses actually have lower rates of re-offense than other types of criminal offenders.<sup>14</sup>

<sup>6</sup> JODI PICOULT, *THE STORYTELLER* 195 (2013).

<sup>7</sup> JOE COUTURE, TED PARKER, RUTH COUTURE & PATTI LABOUCANE, *NATIVE COUNSELLING SERVS. OF ALTA., A COST-BENEFIT ANALYSIS OF HOLLOW WATER’S COMMUNITY HOLISTIC HEALING CIRCLE PROCESS* 1–8 (2001). “An impressive low recidivism rate remains unmatched in the justice system.” *Id.* at 23.

<sup>8</sup> JUDAH OUDSHOORN, MICHELLE JACKETT & LORRAINE STUTZMAN AMSTUTZ, *THE LITTLE BOOK OF RESTORATIVE JUSTICE FOR SEXUAL ABUSE: HOPE THROUGH TRAUMA* 72 (2015).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 73.

<sup>11</sup> *Id.* (citing COUTURE ET AL., *supra* note 7, at 1–8).

<sup>12</sup> Shannon M. Sliva, *Finally “Changing Lenses?” State-Level Determinants of Restorative Justice Laws*, 98 *PRISON J.* 519, 534 (2018).

<sup>13</sup> *Id.* (citing Kent Roach, *Changing Punishment at the Turn of the Century: Restorative Justice on the Rise*, 42 *L. & CRIM. J.* 249 (2000)).

<sup>14</sup> PATRICK A. LANGAN, ERICA L. SCHMITT & MATTHEW R. DUROSE, U.S. DEP’T OF JUST.,

A Bureau of Justice Statistics study found that just five percent of people convicted of sex offenses who were followed for three years after their release from prison in 1994 were arrested for another sex crime.<sup>15</sup> This study also found that within three years, only “3.3% (or 141 of 4,295) of released child molesters were arrested again for committing another sex crime against a child.”<sup>16</sup> This “study of nearly 10,000 [people convicted of sex offenses] found that [they] had a re-arrest rate [twenty-five] percent lower compared to all other criminals.”<sup>17</sup> More recent California studies of the recidivism rates of people convicted of sex offenses are consistent, showing recidivism rates are low.<sup>18</sup> But recidivism is based on whether a new crime is reported.

It is a universally acknowledged truth that reporting rates for sexual assault are much lower than the actual rate of occurrence, whether reported to police, IHEs or employers.<sup>19</sup> While it is not surprising that many people are reluctant to report sexual abuse, the scale of the problem is staggering:

[E]mpirical research both inside and outside of academia shows rates of sexual harassment and sexual violence that are much higher than the number of reports of such conduct to anyone in an official capacity. Indeed, that sexual harassment is a significantly and consistently underreported problem, whether on a campus or not, is well-established. With respect to workplace sexual harassment overall, estimates indicate that “only [one percent] of victims participate in litigation.”<sup>20</sup>

Many sources confirm that much crime goes unreported, often unmentioned at all, hidden by the shame associated with victimization or due to other fears, including the fear of sending loved ones or acquaintances to prison.<sup>21</sup>

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RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 1 (2003).

<sup>15</sup> *Id.* at 28.

<sup>16</sup> *Id.* at 31.

<sup>17</sup> Heather Ellis Cucolo & Michael L. Perlin, *Preventing Sex-Offender Recidivism through Therapeutic Jurisprudence Approaches and Specialized Community Integration*, 22 TEMP. POL. & C.R. L. REV. 1, 35 (2012).

<sup>18</sup> See SEUNG C. LEE, CARLETON UNIV., ALEJANDRO RESTREPO, ANNIE SATARIANO, CAL. DEP'T OF JUST., R. KARL HANSON & PUB. SAFETY CAN., STATE AUTHORIZED RISK ASSESSMENT TOOL FOR SEX OFFENDERS, THE PREDICTIVE VALIDITY OF STATIC-99R FOR SEXUAL OFFENDERS IN CALIFORNIA: 2016 UPDATE (2016), [https://saratso.org/pdf/ThePredictiveValidity\\_of\\_Static\\_99R\\_forSexualOffenders\\_inCalifornia\\_2016v1.pdf](https://saratso.org/pdf/ThePredictiveValidity_of_Static_99R_forSexualOffenders_inCalifornia_2016v1.pdf) [<https://perma.cc/F4HC-JJK6>]; R. Karl Hanson, Alyson Lunetta, Amy Phoenix, Janet Neeley & Doug Epperson, *The Field Validity of Static-99/R Sex Offender Risk Assessment Tool in California*, 1 J. THREAT ASSESSMENT & MGMT. 102, 111 (2014).

<sup>19</sup> McKenzie Wood & Amy Stichman, *Not a Big Deal? Examining Help-Seeking Behaviors of Sexually Victimized Women on the College Campus*, 62 INT'L J. OFFENDER THERAPY & COMP. CRIM. 1415 *passim* (2016); RACHEL E. MORGAN & JENNIFER L. TRUMAN, BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., CRIMINAL VICTIMIZATION, 2019 1 (2020).

<sup>20</sup> Nancy Chi Cantalupo & William C. Kidder, *A Systematic Look at a Serial Problem: Sexual Harassment of Students by University Faculty*, 2018 UTAH L. REV. 671, 683–84 (2018).

<sup>21</sup> Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1206

If survivors become aware of choices permitting a solution which do not involve their own cross-examination, or require a known perpetrator's incarceration or sex offender registration, their options might be less stark and encourage increased reporting.<sup>22</sup>

One observer notes that the current court process, and the roles played by prosecutors and defense counsel,

support cognitive distortions that can be used by sex offenders as ways of justifying sexual offending and, by emphasizing punishment, retribution, and incapacitation, often provide disincentives for sex offenders to undergo treatment. Similarly, "the confrontational adjudicative process of traditional courts encourages advocacy of innocence, discourages acceptance of responsibility, and influences [subsequent acceptance] of treatment once sentenced."<sup>23</sup>

When looking at the scholarship investigating "sexual violence, there are many studies examining the development of innovative and alternative justice mechanisms, such as restorative justice . . . ."<sup>24</sup> Studies agree that the focus of restorative justice should be the sexual assault survivor, and that the survivor's most essential need is to be heard and believed: "Distilling these findings, [one researcher] suggests that the main justice interests of victim-survivors are participation, voice, validation, vindication and 'offender accountability-taking responsibility.'"<sup>25</sup> Even in alternative ways of addressing sexual harm, consequences are essential, but individuals who are given the choice may opt to utilize alternatives which do not result in punishment or imprisonment.

A rare example of a true restorative justice option coexisting within a state's criminal justice system was the Responsibility and Equity for Sexual Transgressions Offering a Restorative Experience ("RESTORE") Program, which successfully undertook restorative justice conferences in cases of sexual violence.<sup>26</sup> The RESTORE Program found "that survivors are 'not always seeking imprisonment as an outcome of reporting sexual abuse,' particularly

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(2015).

<sup>22</sup> See OUDSHOORN ET AL., *supra* note 8, at 72. "[W]hen the criminal justice systems gets involved, victims often lose control of their case. . . . If the offender pleads not guilty, the victim will likely be cross-examined by the offender's attorney in an attempt to discredit the victim's story." *Id.* at 38. Clare McGlynn & Nicole Westmarland, *Kaleidoscopic Justice: Sexual Violence and Victim-Survivors' Perceptions of Justice*, 28 SOC. & LEGAL STUD. 179, 187 (2018) (noting that a positive consequence for one survivor would have been if her perpetrator had access to counseling, rather than prison, so that she "knew it wasn't going to happen again.").

<sup>23</sup> Cucolo & Perlin, *supra* note 17, at 36 (citing Astrid Birgden & Heather Cucolo, *The Treatment of Sex Offenders: Evidence, Ethics and Human Rights*, 23 SEXUAL ABUSE 295, 306 (2011)) (alteration in original).

<sup>24</sup> McGlynn & Westmarland, *supra* note 22, at 181.

<sup>25</sup> *Id.*

<sup>26</sup> Mary P. Koss, *The RESTORE Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcomes*, 29 J. INTERPERSONAL VIOLENCE 1623 *passim* (2014).

those who have experienced abuse in a family setting.<sup>27</sup> A good outcome for some survivors was “unlikely to include a punitive sentence.”<sup>28</sup> What survivors wanted was acknowledgement of their experience, and “that punishment be reconceived as a form of institutional forgiving involving the ‘imposition of consequences in response to responsibility for crime’: to ‘punish with forgiveness.’”<sup>29</sup>

The discussion of alternative sanctions for sexual violence is similar to the one occurring in the context of addressing intimate partner violence. Unintended consequences of the current criminal justice system’s response to intimate partner violence include unintended effects on survivors, such as negative effects occurring after institution of mandatory arrest policies, the increase in dual arrests, failure to prevent recidivism after criminal justice interventions and policies that ignore the right of victims to choose whether or not to participate in the criminal justice system. The conversation has increasingly turned to alternatives to incarceration as sanctions for domestic violence:

Reducing . . . the use of incarceration or creating alternatives to incarceration is one possibility; employing other justice strategies, like restorative or therapeutic justice, to address intimate partner violence is another. Decreasing the use of the criminal legal system and addressing the unintended consequences of criminalizing domestic violence without abandoning criminalization altogether are also [potentially viable responses] . . .<sup>30</sup>

In the past, feminist theory held that restorative justice practices should not be used in domestic violence cases due to concerns about victim safety, especially when both parties would have to participate in a facilitated conference or treatment.<sup>31</sup> Nevertheless, “there has been an increased interest in considering

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<sup>27</sup> McGlynn & Westmarland, *supra* note 22, at 187.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* (citations omitted).

<sup>30</sup> Leigh Goodmark, *Should Domestic Violence Be Decriminalized?*, 40 HARV. J.L. & GENDER 53, 58–59 (2017).

<sup>31</sup> Linda G. Mills, Briana Barocas, Robert P. Butters & Barak Ariel, *A Randomized Controlled Trial of Restorative Justice-Informed Treatment for Domestic Violence Crimes*, 3 NATURE HUM. BEHAV. 1284, 1285 (2019) (finding that joint treatment for domestic violence has been rare, both because it was “‘thought to be ineffective’ but also ‘possibly dangerous.’”); *see also* Goodmark, *supra* note 30, at 59, 93–94 (2017) (“Anti-violence advocates have opposed the idea of using alternative dispute resolution in cases involving domestic violence. Concerns have been raised about whether such processes can be made sufficiently safe and whether they will actually hold offenders accountable for their actions. Moreover, having worked for forty years to have domestic violence treated as a crime, advocates are unwilling to risk diluting the power of the criminal legal response by creating parallel or alternative justice systems.”); C. Quince Hopkins, Mary P. Koss & Karen J. Bachar, *Applying Restorative Justice to Ongoing Intimate Violence: Problems and Possibilities*, 23 ST. LOUIS U. PUB. L. REV. 289, 289–311 (2004); Julie Stubbs, *Domestic Violence and Women’s Safety: Feminist Challenges to Restorative Justice*, in RESTORATIVE JUSTICE AND FAMILY

restorative [justice] in [domestic violence] criminal cases, including in Austria, Canada, New Zealand, Norway, Arizona, Utah and South Africa.”<sup>32</sup>

Additionally, the concern about endemic racism in the United States is driving change to the feminist view about the use of restorative justice in interpersonal violence cases: “[T]he Black Lives Matter movement and research on . . . mass incarceration in the [United States] have” meant feminist perspective may be changing.<sup>33</sup> Advocates are increasingly open “to non-incarceration options for [domestic violence] crimes,” either within or outside the traditional criminal justice system.<sup>34</sup> This change has led some researchers to focus on cost-effectiveness of alternatives. A recent review of the ten most rigorous studies of systems using restorative justice principles focused on the recidivism rates of 1,879 people accused or convicted of committing sex offenses.<sup>35</sup> The researchers concluded that “on average, use of restorative justice practices cause a modest but highly cost-effective reduction in the frequency of repeat offending.”<sup>36</sup> Others are more skeptical about whether restorative justice, properly implemented, is a true cost-saving measure, given the number of players involved, the training required and the follow-up necessary.<sup>37</sup>

Alternative treatments for domestic violence perpetrators that can enhance batterers’ intervention programs are starting to be used in some jurisdictions, some of which are incorporating restorative justice practices.<sup>38</sup> These programs:

provide a particularly promising addition to treatment options for [domestic violence] offenders because, as this and other [restorative justice]-related studies have suggested, it has the potential not only to reduce recidivism given certain conditions, but also to increase satisfaction, address particular offender crimes and characteristics, incorporate an offender’s readiness for change and remorse and engage victims of all types in ways that other programmes have not yet done.<sup>39</sup>

The shift in thinking about ways feminist theory can coexist with non-carceral sanctions means more options to an unsolved problem can be

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VIOLENCE (Heather Strang & John Braithwaite eds., 2002).

<sup>32</sup> Mills et al., *supra* note 31, at 41.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> HEATHER STRANG, LAWRENCE W. SHERMAN, EVAN MAYO-WILSON, DANIEL WOODS & BARAK ARIEL, RESTORATIVE JUSTICE CONFERENCING (RJC) USING FACE-TO-FACE MEETINGS OF OFFENDERS AND VICTIMS: EFFECTS ON OFFENDER RECIDIVISM AND VICTIM SATISFACTION. A SYSTEMATIC REVIEW 4 (2013), <https://restorativejustice.org.uk/sites/default/files/resources/files/Campbell%20RJ%20review.pdf> [<https://perma.cc/2WQR-M35Y>].

<sup>36</sup> *Id.* at 2.

<sup>37</sup> Melanie Randall, *Restorative Justice and Gendered Violence? From Vaguely Hostile Skeptic to Cautious Convert: Why Feminists Should Critically Engage with Restorative Approaches to Law*, 36 DALHOUSIE L.J. 461, 496 (2013).

<sup>38</sup> Goodmark, *supra* note 30, at 59.

<sup>39</sup> Mills et al., *supra* note 31, at 41.

considered. The current perspective is that the criminal justice system frequently fails victims of gendered violence in two ways.<sup>40</sup> It either marginalizes them in the process or it fails to address the harm done to them entirely by either declining to file charges or dismissing charges at an early stage.<sup>41</sup> Feminist-led efforts to expand the options available to survivors should work to alter the ineffective traditional criminal justice system. In conjunction with changes to the carceral system, restorative justice can play a key role in expanding prevention education, because “[b]y centrally including community members in restorative approaches to gendered violence, a much more robust connection between violence responses and violence prevention can be made.”<sup>42</sup>

### ***C. System Change Must Address the Harm Caused to Prevent Future Sexual Harm***

Incarceration in the criminal justice setting, expulsion in the higher education arena or termination of employment do not solve the problem of future sexual recidivism. In none of these scenarios is the offender normally required to do anything to address the issues that led to the sexual misconduct. There is no therapeutic intervention required.<sup>43</sup> These systems trust, without any evidence that it works, that the mere fact of being sanctioned will produce the desired result—cessation in offending. Or perhaps the desired result is merely ending the possibility of re-offense in the same setting—i.e., at the same campus or workplace, via expulsion or termination.

Association with other criminals in prison may actually lead to increased risk of future re-offense after release.<sup>44</sup> Incarceration may also result in increased violence after release.<sup>45</sup> A prison record also makes it harder to obtain employment and establish a proactive social life because of the stigma of being a person formerly incarcerated, and often further harms families and the community in general.<sup>46</sup> For children in particular, “coming of age with a parent

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<sup>40</sup> Randall, *supra* note 37, at 483.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 479.

<sup>43</sup> In 2006, at least forty-four states and the federal system offered or required participation in in-prison, sex offender-specific treatment programs. See PEGGY HEIL & KIM ENGLISH, CAL. DEP'T OF CORR. & REHAB., PRISON SEX OFFENDER TREATMENT: RECOMMENDATIONS FOR PROGRAM IMPLEMENTATION 4 (2007), [https://www.cure-sort.org/uploads/2/6/6/6/26665362/psot\\_cdcr\\_report.pdf](https://www.cure-sort.org/uploads/2/6/6/6/26665362/psot_cdcr_report.pdf) [<https://perma.cc/54H8-LANP>]. In California, treatment for most people convicted of a sexual offense in California is mandatory only while the person is on probation or parole. CAL. PENAL CODE §§ 1203.067, 3008 (West, Westlaw through Ch. 362 of 2021 Reg. Sess.). If the person is sentenced to community supervision, there is no mandatory sex offender-specific treatment unless court ordered. *Id.*

<sup>44</sup> McLeod, *supra* note 21, at 1203.

<sup>45</sup> *Id.*

<sup>46</sup> McLeod states as follows:

Of separate though equal concern, the violence and dehumanization of incarceration not only shapes those who are incarcerated, but produces destructive consequences for entire communities. People leaving prison are marked by the experience of incarceration in ways that makes the world outside prison more violent and insecure; it becomes harder



incarcerated generally has a substantial and negative impact on [their] life chances.”<sup>47</sup>

In the education and employment contexts, the lack of any effective intervention strategy may lead to what has been called the pass-the-harasser situation.<sup>48</sup> Colleges often unwittingly participate in a pass-the-harasser scenario. The college hires the accused harasser from another school, unaware that harassment allegations against that faculty member were being investigated, or a college begins to investigate sexual harassment allegations against a faculty member who then moves to another school, usually after resigning prior to being disciplined.<sup>49</sup> An anecdote about this all-too-common situation illustrates the problem:

A telling recent example involved a Spanish professor hired at a west coast university that was not aware that the same professor had faced complaints of sexual harassment at his previous university on the east coast. In fact, when the west coast institution was disciplining this professor in 2015 for repeated inappropriate conduct toward students, it would not have learned of the earlier allegations of serial harassment but for the faculty member’s own admission. . . . Rather, it is likely that news coverage of a faculty member’s alleged sexual harassment will commonly not include evidence of prior investigations and/or allegations at the professor’s previous university for reasons that parallel the larger discussion of confidentiality.<sup>50</sup>

Similar to the pass-the-harasser scenario is what could be called the pass-the-rapist practice at IHEs. IHEs which find a student responsible for forcible sexual assault usually discipline, and may expel, the perpetrator.<sup>51</sup> The next institution of higher education which admits that person will have no idea of the reason for why the person left the last school,<sup>52</sup> because only a transcript without

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to find employment and to engage in collective social life because of the stigma of criminal conviction. Further, incarcerating individuals has harmful effects on their families. The children, parents, and neighbors of prisoners suffer while their mothers, fathers, children, and community members are confined.

*Id.* at 1183–84.

<sup>47</sup> *Id.* at 1184.

<sup>48</sup> Cantalupo & Kidder, *supra* note 20, at 714–15.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> One article notes that while expulsion for campus sexual assault was once rare, it is becoming something campuses increasingly consider. Elena Kadvany, *Should Student Sex Offenders Be Expelled?*, PALO ALTO WKLY. (Mar. 20, 2015, 8:09 AM), <https://www.paloaltoonline.com/news/2015/03/20/should-student-sex-offenders-be-expelled> [<https://perma.cc/G2WA-QRCC>].

<sup>52</sup> Kristen Lombardi, *A Lack of Consequences for Sexual Assault: Students Found “Responsible” Face Modest Penalties, While Victims Are Traumatized*, CTR. FOR PUB. INTEGRITY (July 14, 2014, 4:50 PM), <https://publicintegrity.org/education/a-lack-of-consequences-for-sexual-assault>; Kenny Jacoby, *College Athletes More Likely to Be Disciplined for Sex Assault*, USA TODAY (Dec. 16, 2019, 11:10 AM), <https://www.usatoday.com/in-depth/news/investigations/2019/12/12/ncaa-athletes-more-likely-disciplined-sex-assault/4379153002/> [<https://perma.cc/Q4FN-7RXV>] (find

disciplinary notations will be sent.<sup>53</sup> Nor will the student have been required to attend any kind of treatment program or other educational program to address their risk or needs to try to preclude repetition of the same conduct.<sup>54</sup>

It makes sense that employment terminations for sexual harassment are even more likely to hide evidence of the reason for termination. To avoid the risk of civil liability, most businesses are advised not to give the reason for terminating an employee—just the dates of employment.<sup>55</sup>

System change that addresses this neglect of the root causes of the initial act of sexual misconduct would involve giving the low-risk offender the chance to opt into a system that allows for a second chance. A prerequisite is that the offender must be willing to engage in a treatment program that addresses the causes of the act. Such a system might encourage reporting by a survivor who is reluctant to report due to fear of destroying their family or the reputation or career of the offender. Survivors often want to ensure that no one else is victimized and may be more willing to engage with a system that addresses the behavior in a noncriminal context. A restorative justice process gives the sexual assault survivor a chance to be heard in a nonadversarial context and can become part of a healing process as well. It can also give perpetrators a chance to address the root causes of their behavior, a way to make amends and a path to a more functional life.

#### *D. Obstacles to System Change*

There are statutory, resource and attitudinal barriers to changing existing justice, campus and workplace systems to incorporate restorative or therapeutic justice alternatives for sexual assault. One such barrier is erected by the very terms of the Violence Against Women Act: “For example, programs that treat both survivor/victims and offenders are ineligible to apply for grant funds made available through the Violence Against Women Act.”<sup>56</sup> Similarly, other grants

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ing that of forty-seven athletes found responsible for sexual offenses, at least eleven transferred and played at other NCAA schools, and another twenty-two transferred to other colleges); Tyler Kingkade, *How Colleges Let Sexual Predators Slip Away to Other Schools*, HUFFPOST (Dec. 6, 2017, 7:49 AM), [https://www.huffpost.com/entry/college-rape-transfer\\_n\\_6030770](https://www.huffpost.com/entry/college-rape-transfer_n_6030770) [<https://perma.cc/8NVA-VHXC>].

<sup>53</sup> Paul Fain, *Registrars: Transcripts Can Cite Disciplinary Actions*, INSIDE HIGHER ED (Feb. 24, 2016), <https://www.insidehighered.com/quicktakes/2016/02/24/registrars-transcripts-can-cite-disciplinary-actions> [<https://perma.cc/NH7Z-6PVV>] (noting that while in the past noting disciplinary records on college transcripts was frowned on, that may be changing).

<sup>54</sup> Raina V. Lamade, Elise Lopez, Mary P. Koss, Robert Prentky & Alexandra Brereton, *Developing and Implementing a Treatment Intervention for College Students Found Responsible for Sexual Misconduct*, J. AGGRESSION, CONFLICT & PEACE RSCH. 134, 139 (2018).

<sup>55</sup> See Suzanne Lucas, *Your Former Employees Want a Reference. Here Is What Your Attorney Thinks About That.*, INC. (Oct. 2, 2014), <https://www.inc.com/suzanne-lucas/your-former-employees-want-a-reference-here-is-what-your-attorney-thinks-about-t.html> [<https://perma.cc/PG63-X547>].

<sup>56</sup> MARY KOSS & MARY ACHILLES, RESTORATIVE JUSTICE RESPONSES TO SEXUAL ASSAULT 10 (2008), [https://vawnet.org/sites/default/files/materials/files/2016-09/AR\\_RestorativeJustice.pdf](https://vawnet.org/sites/default/files/materials/files/2016-09/AR_RestorativeJustice.pdf) [h

have restrictions that block the use of innovative new strategies: “Other funds to address victim or offender services are earmarked for continuation of existing programs, resulting in a failure to reward or nurture innovation. . . . [A]vailable federal dollars [often] cover only evaluation costs, not the much more significant costs to develop and operate new programs.”<sup>57</sup> For many employers, firing someone may be the quick answer to deal with an employee who has sexually harassed another employee. Finally, attitudes about alternatives to incarceration must be addressed. Buy-in by prosecutors will be an obstacle to criminal justice reform and require education about restorative justice’s effectiveness in promoting justice and meaningful accountability.

While system change is possible, it will require thought and political will to overcome preconceptions about how best to deal with sexual assault. It is common knowledge today that most sexual assaults are not perpetrated by strangers.<sup>58</sup> We know that survivors and their families are often reluctant to prosecute a family member or friend.<sup>59</sup> Nevertheless, it will take education for key players in the criminal justice system, and the public, to understand that most sexual assaults are not reported and therefore are never addressed through the criminal justice system. The Rape, Abuse, and Incest National Network (“RAINN”) estimates that, based on 2010-2014 U.S. Department of Justice statistics, less than one-third of rapes are reported to police and, of those, only 0.7% result in a felony conviction.<sup>60</sup>

There must be a shift in public thinking about this subject to deal with the historical silence about sexual assault and harassment that enables offenders to continue those behaviors. Only with that shift will the law bend to incorporate remedies that allow society to deal with sexual offending in a variety of ways, including through restorative or therapeutic justice models. The one-size-fits-all system available in most jurisdictions and on most college campuses is a failure.

The vast majority of survivors do not report assaults by family, acquaintances and friends because of the black-and-white system responses then

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<https://perma.cc/68SA-K3CU>].

<sup>57</sup> *Id.*

<sup>58</sup> MICHELLE C. BLACK, KATHLEEN C. BASILE, MATTHEW J. BREIDING, SHARON G. SMITH, MIKEL L. WALTERS, MELISSA T. MERRICK, JIERU CHEN & MARK R. STEVENS, CTNS. FOR DISEASE CONTROL & PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 1–2 (2011); Aimee Wodda, *Stranger Danger!*, 18 J. FAM. STRENGTHS, Oct. 2018, at 1.

<sup>59</sup> McGlynn & Westmarland, *supra* note 22, at 187 (“Survivors are not always seeking imprisonment as an outcome of reporting sexual abuse, particularly those who have experienced abuse in a family setting.”); Richard Felson & Paul-Philippe Paré, *The Reporting of Domestic Violence and Sexual Assault by Nonstrangers to the Police*, 67 J. MARRIAGE & FAM. 597 *passim* (2005); Tara N. Richards, Marie Skubak Tillyer & Emily M. Wright, *When Victims Refuse and Prosecutors Decline: Examining Exceptional Clearance in Sexual Assault Cases*, 65 CRIME & DELINQ., 474 *passim* (2019).

<sup>60</sup> *The Criminal Justice System: Statistics*, RAINN, <https://www.rainn.org/statistics/criminal-justice-system> [<https://perma.cc/N3JV-VCSA>].

set in motion.<sup>61</sup> Often the system response is simply to move the perpetrator on after probation, prison or college expulsion without addressing the root cause of the behavior, leading to enhanced risks of reoffending.<sup>62</sup> While the #MeToo movement has partially shone light on what happens when people hesitate to report sexual assault, it has not solved the problem of what to do once a disclosure of sexual assault or harassment is made. The time is now for implementing better solutions to an age-old problem.

## II. ALTERNATIVE WAYS OF DEALING WITH SEXUAL MISCONDUCT SO ALL PARTIES PERCEIVE THE RESOLUTION AS FAIR

### A. *Restorative and Therapeutic Justice Approaches*

Restorative justice and therapeutic justice are two different approaches that can, in certain circumstances, replace the traditional system of trial/hearing and punishment/expulsion. In both restorative and therapeutic systems, the person who caused the harm must agree to participate after admitting responsibility for the harm caused.<sup>63</sup> In a therapeutic justice model the survivor may opt not to participate, as opposed to the method used in the restorative justice model which operates only if the survivor decides to participate; in some settings, the survivor may choose to appoint a representative to participate in their stead.<sup>64</sup>

Therapeutic justice may be one solution that survivors and the community are willing to embrace. Some researchers note that unlike the criminal justice system, restorative and transformative justice are intended to address the root causes of the behavior: “Therapeutic justice practices are intended to have a positive and therapeutic impact on parties to proceedings . . . by removing any processes that alienate or stigmatise; by ensuring that parties engage with and understand the relevant process; and by giving attention to the underlying reasons for the offending.”<sup>65</sup> Therapeutic justice processes in the United States

<sup>61</sup> Catharine Richmond & Melissa Richmond, *The Future of Sex Offense Courts: How Expanding Specialized Sex Offense Courts Can Help Reduce Recidivism and Improve Victim Reporting*, 21 CARDOZO J.L. & GENDER 443, 444–56 (2015).

<sup>62</sup> TRACY VELÁSQUEZ & REAGAN DALY, VERA INST. OF JUST., THE PURSUIT OF SAFETY: RESPONSES TO SEX OFFENDERS IN THE U.S. 1, 4 (2001), [https://www.vera.org/downloads/Publications/the-pursuit-of-safety-sex-offender-policy-in-the-united-states/legacy\\_downloads/Sex\\_offender\\_reports\\_summary-1.pdf](https://www.vera.org/downloads/Publications/the-pursuit-of-safety-sex-offender-policy-in-the-united-states/legacy_downloads/Sex_offender_reports_summary-1.pdf) [https://perma.cc/FH6L-HLH3] (“The proportion of imprisoned sex offenders in treatment at any given time ranges widely across states, from nearly none to one-third. Access to jail- and prison-based programs is often limited by the number of treatment beds available, however. For people who are under community supervision, CBT [(cognitive behavioral therapy)] is available in 85 percent of the states we surveyed. However, in most of those, participation in community treatment may depend on ability to pay, which limits access to these programs.”).

<sup>63</sup> DAVID R. KARP, THE LITTLE BOOK OF RESTORATIVE JUSTICE FOR COLLEGES AND UNIVERSITIES: REPAIRING HARM AND REBUILDING TRUST IN RESPONSE TO STUDENT MISCONDUCT 11 (2015) (stating offenders must take active responsibility for their transgressions).

<sup>64</sup> MARIAME KABA & SHIRA HASSAN, FUMBLING TOWARDS REPAIR: A WORKBOOK FOR COMMUNITY ACCOUNTABILITY FACILITATORS 99 (2019).

<sup>65</sup> CTR. FOR INNOVATIVE JUST., RMIT UNIV., INNOVATIVE JUSTICE RESPONSES TO SEXUAL

today traditionally exist within the adversarial system, but usually only after an offender has pleaded guilty.

A major policy reason for considering a restorative or therapeutic justice approach to sexual misconduct is reducing case attrition, i.e., reducing the large numbers of cases in the criminal justice system closed at various stages short of trial. When prosecutors or police close cases short of trial, that premature closure ends in “cutting off survivor victims’ search for acknowledgment of their harm and a concrete response to it.”<sup>66</sup> Very few cases reported to police in the United States ever result in a finding of guilt at trial—only thirteen percent.<sup>67</sup> The process, even in the rare case that proceeds to judicial conclusion, may never validate the status of survivors as legitimate. The process does not “provide[] a forum to voice the harm done to them, accord them influence over decisions about their case, or incorporate their input into the consequences imposed.”<sup>68</sup>

One restorative justice approach has been called a dual opt-in system.<sup>69</sup> This type of system requires that (1) the state’s penal or criminal code or college or employer policies have developed criteria for an alternative sanction/therapeutic model, such as diversion or suspension premised on specific terms regarding treatment participation, and (2) the offender and survivor to opt-in to the program voluntarily.<sup>70</sup> A dual opt-in system allows specific surrounding circumstances and the individual needs of the survivor and offender to be considered. Alternative placement in a therapeutic justice model in lieu of imprisonment, expulsion from school or termination from employment is a privilege that would come with well-defined requirements.

Failure to comply with those requirements, which should be strictly monitored, would mean incarceration, expulsion or termination. If offenders know they will reject the rehabilitative treatment that is the hallmark of the therapeutic justice model, then they need not opt-in. Traditional sanctions—incarceration, expulsion or termination—would then apply.

If the parties opt to participate in an alternative system there are other choices to be made. Some jurisdictions, colleges or employers may choose to offer a therapeutic justice approach only to low-risk offenders; others may also offer, with the survivor’s consent and participation, a restorative justice model. Both the restorative justice model and the criminal justice’s diversion, or treatment, model share characteristics of a therapeutic justice system that focuses on what Professor Amy Ronner has called the three V’s: voice,

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OFFENDING: PATHWAYS TO BETTER OUTCOMES FOR VICTIMS, OFFENDERS AND THE COMMUNITY 12 (2014), <http://mams.rmit.edu.au/qt1g6twlv0q3.pdf> [<https://perma.cc/H56M-2MHD>].

<sup>66</sup> Koss, *supra* note 26, at 1627.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* (citing Laura M. Monroe, Linda M. Kinney, Mark D. Weist & Denise Spriggs Defeamekpor, *The Experience of Sexual Assault: Findings from a Statewide Victim Needs Assessment*, 20 J. INTERPERSONAL VIOLENCE 767 (2005)).

<sup>69</sup> Richmond & Richmond, *supra* note 61, at 461.

<sup>70</sup> *Id.*

validation, and voluntary participation.<sup>71</sup> In other words, as one proponent of therapeutic justice puts it:

Litigants must have a sense of voice or a chance to tell their story to a decision maker. If that litigant feels that the tribunal has genuinely listened to, heard, and taken seriously the litigant's story, the litigant feels a sense of validation. When litigants emerge from a legal proceeding with a sense of voice and validation, they are more at peace with the outcome. Voice and validation create a sense of voluntary participation, one in which the litigant experiences the proceeding as less coercive. Specifically, the feeling on the part of litigants that they voluntarily partook in the very process that engendered the end result or the very judicial pronouncement that affects their own lives can initiate healing and bring about improved behavior in the future. In general, human beings prosper when they feel that they are making, or at least participating in, their own decisions.<sup>72</sup>

Restorative justice allows survivors the ability to relate what happened outside the context of traditional (and ineffective) questioning techniques: "A consensus of published studies is that survivors need to tell their own stories about their experiences."<sup>73</sup> In that way, they can "obtain answers to questions, experience validation as a legitimate victim, observe offender remorse for harming them, and receive support that counteracts isolation and self-blame."<sup>74</sup> It is vital that survivors "have choice and input into the resolution of their violation."<sup>75</sup> The criminal justice system emphasizes punishment, retribution and incapacitation, which often provides disincentives for people convicted of sex offenses to undergo treatment.<sup>76</sup> The confrontational adjudicative process of traditional courts encourages advocacy of innocence, in fact presuming it.<sup>77</sup> The court process discourages acceptance of responsibility and influences subsequent acceptance of treatment once sentenced.<sup>78</sup> Use of a restorative or therapeutic justice model makes it easier for offenders to deal with the causes of their behavior and provides more assurance to survivors that the behavior will not reoccur.

A final compelling reason to consider restorative or therapeutic justice

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<sup>71</sup> Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles*, 71 U. CIN. L. REV. 89, 94–95 (2002).

<sup>72</sup> Cucolo & Perlin, *supra* note 17, at 34.

<sup>73</sup> Koss & Achilles, *supra* note 56, at 2.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> See William Edwards & Christopher Hensley, *Restructuring Sex Offender Sentencing: A Therapeutic Jurisprudence Approach to the Criminal Justice Process*, 45 INT'L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 646 (2001).

<sup>77</sup> *Id.* at 646–47.

<sup>78</sup> Astrid Birgden, *Therapeutic Jurisprudence and Sex Offenders: A Psycho-Legal Approach to Protection*, 16 SEXUAL ABUSE 351–64 (2004)) (citing Edwards & Hensley, *supra* note 76, at 646–62).

alternatives is that criminal conviction is unlikely to increase the chances for rehabilitation for someone who committed a sexual offense, thereby decreasing the risk of future recidivism. Most sexual offense convictions result in a requirement to register as a sex offender with the state and publication of the person's name and sometimes address and employer on a state registry.<sup>79</sup> Yet isolation and shame work against the successful reintegration of offenders into the community. Not all offenders are at high risk for reoffending.<sup>80</sup>

A restorative justice approach combines accountability with requiring steps toward change—change in thoughts, behaviors and relationships.<sup>81</sup> The consequences that follow a restorative justice process are not just doing time. Instead, a restorative justice approach incorporated into the criminal justice system can require targeted therapy involving a working partnership with criminal justice professionals and sex offender specific-treatment providers.<sup>82</sup> This partnership can provide a way forward without imposing the stigma of being a registered sex offender. Empathy for those who have caused harm while offering inclusion in a community aware of the offender's past behavior offers hope for the future which is essential to change—and to lessening the chance of future harm.

The questions asked in a restorative justice setting are:

- (1) Who has been hurt?
- (2) What do they need?
- (3) Whose obligations are they?
- (4) What are the root causes?
- (5) How do we engage relevant stakeholders in addressing these needs and obligations?
- (6) What needs to be done to make things as right as possible, including addressing root causes?<sup>83</sup>

### ***B. Transformative Justice***

A third approach, often referred to as transformative justice, is a “framework that is often in an uncomfortable alliance with the more established and recognized practice of restorative justice.”<sup>84</sup> Transformative justice is a

<sup>79</sup> VELÁSQUEZ & DALY, *supra* note 62, at 4.

<sup>80</sup> R. Karl Hanson, Andrew J. R. Harris, Elizabeth Letourneau, L. Maaïke Helmus & David Thornton, *Reductions in Risk Based on Time Offense-Free in the Community: Once a Sexual Offender, Not Always a Sexual Offender*, 24 PSYCH., PUB. POL'Y, & L. 48 *passim* (2018).

<sup>81</sup> OUDSHOORN ET AL., *supra* note 8, at 52–53.

<sup>82</sup> One such system is used in Canada. See *Restorative Opportunities Program*, CORR. SERV. CAN. (July 20, 2021), <https://www.csc-scc.gc.ca/restorative-justice/003005-1000-eng.shtml> [<https://perma.cc/9L97-MGRF>].

<sup>83</sup> OUDSHOORN ET AL., *supra* note 8, at 25 (2015) (citing HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* (2002)).

<sup>84</sup> KABA & HASSAN, *supra* note 64, at 22 (quoting Erica Meiner).

political outlook driven by values of prison-industrial complex abolition, harm reduction, and holistic healing which does not rely on the state, meaning the prison-industrial complex or criminal legal system.<sup>85</sup> It contemplates an outcome outside of the state's criminal justice systems. As far back as 2003, Angela Davis said, "Our most difficult and urgent challenge to date is that of creatively exploring new terrains of justice where the prison no longer serves as our major anchor."<sup>86</sup>

Proponents of a transformative justice approach point to the deadly consequences of ignoring extreme trauma and of trying to address past injustices instead of looking ahead:

Just as battered children have a higher likelihood of growing up to be battered or battering adults, oppressed people who have not had the opportunity to do the work of collective healing can end up assuming oppressor roles to others, and the pattern of feeling victimized, and believing that therefore the world owes us more than it owes other people, is particularly deadly.<sup>87</sup>

Thus, a common response to horrific violence is trying to prevent things that have already happened, "lead[ing] to militarization, to extreme nationalism, and to the kind of opportunism . . . [seeking to promote one's] own group at the expense of others—which of course only continues the cycle [of violence], creating new groups of desperate people" who try to prevent it through ineffective and even counterproductive means.<sup>88</sup>

Another view of transformative justice is simply that it is a way of "creating safety, justice and healing for survivors of violence that does not rely on the state."<sup>89</sup> In this view, the transformative justice philosophy should be to actively resist the state's criminal injustice system.<sup>90</sup> Transformative justice asks whether the community, including harmed individuals, can ever truly be healed while unjust caste and patriarchal systems persist.

Leigh Goodmark recounts the efforts of several community-based groups to organize community responses to domestic violence that operate, at the request of survivors, outside the criminal justice system.<sup>91</sup> These organizations use community members who volunteer for prevention activities as well as actually confronting and responding to interpersonal violence.<sup>92</sup> Tools include safety planning, intervention tools and helping abusers accept accountability.<sup>93</sup> These approaches enlist the wider community in the process. Some focus on

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

<sup>86</sup> *Id.* at 15.

<sup>87</sup> *Id.* at 6 (citing Aurora Levins Morales).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 21 (citing Leah Lakshmi Piepzna-Samarasinha).

<sup>90</sup> *Id.* (citing Mia Mingus).

<sup>91</sup> Goodmark, *supra* note 30, at 97–100.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*



relationship skill building.<sup>94</sup>

Other community groups target violence in general, which often includes intervention in domestic violence situations. Safe Streets Baltimore says it disrupts potential community violence that often begins as intimate partner violence.<sup>95</sup> Safe Streets attempts to connect both abused and abuser with services and supports, including employment training, mental health care and substance abuse treatment.<sup>96</sup>

Some groups choose to organize community accountability alternatives because they do not feel safe asking for help from the criminal justice system. One such group, the Young Women’s Empowerment Project, describes being unable to access police because its members are cisgender and transgender women of color who had current or prior experience in the sex work industry.<sup>97</sup> It developed strategies based on relationship building to interrupt and transform violence.<sup>98</sup> This group trained facilitators through the Just Practice Collaborative to deal with violence and abuse outside the criminal justice system.<sup>99</sup>

Critical Resistance is a group that advocates for abolition of state-controlled policing and the prison-industrial complex.<sup>100</sup> It states its vision is “the creation of genuinely healthy, stable communities that respond to harm without relying on imprisonment and punishment. . . . We work to build healthy, self-determined communities and promote alternatives to the current system.”<sup>101</sup> To that end, Critical Resistance lists in its resources a variety of community accountability groups.<sup>102</sup>

INCITE! is another such group. It was formed by women of color and describes itself as “a network of radical feminists of color organizing to end state violence and violence in our homes and communities.”<sup>103</sup> It advocates developing sustainable strategies to address community members’ abusive behavior, creating a process for them to account for their actions and transform their behavior.<sup>104</sup> To that end, it provides a list of community resources for developing concrete strategies for community accountability.<sup>105</sup>

In 2004, Mimi Kim founded Creative Interventions, with the goal of

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> Shira Hassan, *Opening Thoughts*, in KABA & HASSAN, *supra* note 64.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *About*, CRITICAL RESISTANCE, <http://criticalresistance.org/about/> [https://perma.cc/QJ99-S64R].

<sup>101</sup> *Id.*

<sup>102</sup> *Resources*, CRITICAL RESISTANCE, <http://criticalresistance.org/resourcest/> [https://perma.cc/Q66P-3S32].

<sup>103</sup> *About*, INCITE!, <https://incite-national.org/history/> [https://perma.cc/UV4J-V5GX].

<sup>104</sup> *Id.*

<sup>105</sup> *Community Accountability*, INCITE!, <https://incite-national.org/community-accountability/> [https://perma.cc/Z9YE-WX6K].

shifting education and resources back to families and communities.<sup>106</sup> Kim believes that transformative justice and community accountability may be more effective than the criminal justice system for the following reasons: It “place[s] knowledge and power among those most impacted by violence . . . mak[ing] support and safety accessible, stop[ping] violence at early stages of abuse, and creat[ing] possibilities for once abusive individuals and communities to evolve towards healthy change and transformation.”<sup>107</sup> Creative Interventions created a toolkit for community action and works with other national organizations.<sup>108</sup>

There may be two major obstacles to widespread use of community accountability approaches today. One possible obstacle is the lack of community and connection that many people feel in an increasingly urbanized society. Separated from extended family connections, methods that may work well for cohesive and homogeneous groups who live in smaller geographic areas may be harder to implement in a diverse and fragmented society. It is hard to create accountability when a community is so diffused that it is easy to hide one’s activities from the group.

The other challenge is the lack of resources for alternative ways of addressing violence. Rehabilitative programs and counseling, which have perhaps the best chance of creating long-term change in actions and attitudes, are severely underfunded even within the criminal justice system.<sup>109</sup> Given the increased strength of the Black Lives Matter movement in 2020, the time to address funding mechanisms at the state and local level to support community accountability programs in areas where they have a probable chance of success may have finally come. Calls to reduce police budgets so that other ways of dealing with criminal acts that may be more effective can be funded mean restorative justice alternatives may finally receive budget consideration. The one caveat is that offender reintegration should not supersede survivors’ needs.

### III. USING THE RESTORATIVE OR THERAPEUTIC JUSTICE MODEL IN THE CRIMINAL JUSTICE SYSTEM

Restorative justice practices can mean different things to different people. It can mean an offender and a victim moving out of an adversarial courtroom setting into an organized and professionally facilitated meeting space that can

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<sup>106</sup> *Our Beginning*, CREATIVE INTERVENTIONS, <https://www.creative-interventions.org/about-ci/> [<https://perma.cc/LG3D-XVZT>].

<sup>107</sup> *Id.*

<sup>108</sup> *Toolkit*, CREATIVE INTERVENTIONS, <https://www.creative-interventions.org/toolkit/> [<https://perma.cc/9RNE-P868>].

<sup>109</sup> See Joan Petersilia, *Beyond the Prison Bubble*, NAT’L INST. JUST. J. (Nov. 2, 2011), <https://nij.ojp.gov/topics/articles/beyond-prison-bubble> [<https://perma.cc/S7FQ-8TKJ>]; see also *The Challenge*, CONVERGENCE, <https://reentryready.convergencepolicy.org/the-challenge/> [<https://perma.cc/HK3H-NWJ2>]; Martiga Lohn, *\$175,000 Per Offender? Get-Tough Sex Predator ‘Treatment’ Busts State Budgets*, ASSOCIATED PRESS (Jan. 12, 2019, 7:43 PM), [https://www.cleveland.com/nation/2010/06/175000\\_per\\_offender\\_get-tough.html](https://www.cleveland.com/nation/2010/06/175000_per_offender_get-tough.html) [<https://perma.cc/39V6-4AYU>].

provide some measure of healing, once the offender has acknowledged the harm caused.<sup>110</sup> The survivor, or a representative of the survivor, can describe the experience of the harm they endured and its consequences. The perpetrator acknowledges the harm they caused. Offenders can apologize without fear of legal retribution for the apology, although an apology is not the goal of the process. The system can then explore the appropriate remedies to hold the perpetrator accountable. Diversion programs generally try to rehabilitate an individual with the aim of delaying or avoiding conviction.<sup>111</sup> Restorative justice programs can also work in tandem with a criminal sentence.

Most people convicted of sex offenses, even those who receive a prison sentence, will be released back into the community at some point.<sup>112</sup> In California, the penalty for forcible rape is only three to eight years' imprisonment, which is often shortened by good behavior credits.<sup>113</sup> The penalty for sexual battery, which is intimate touching against the will of the person, is two to four years' imprisonment.<sup>114</sup> Where limited or no sex offender-specific treatment options are available during incarceration, there is no reason to believe that the underlying reasons that led to the crime in the first place will have been addressed or changed by the time of prison release.

Restorative justice is an alternative that provides a different pathway to accountability, meaning taking responsibility for wrongdoing. In the context of a restorative justice approach to sexual offending, this means setting boundaries, laying out clear expectations, and providing sex offender specific-treatment and specialized supervision. It means multiple stakeholders working together—for example, as in California's Containment Model approach, described below.<sup>115</sup> It

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<sup>110</sup> Mills et al., state as follows:

Restorative justice can include various approaches to bringing parties together, including victim-offender mediation, family group conferencing, peacemaking, sentencing circles as well as circles of peace . . . . [Circles of peace], the restorative-informed approach used in this study, are administered by trained circle keepers, for a designated number of sessions, following each jurisdiction's required length of [domestic violence] offender treatment."

Mills et al., *supra* note 31; see also OUDSHOORN ET AL., *supra* note 8, at 72.

<sup>111</sup> A diversion program essentially takes a case out of the formal justice system. *What is Diversion?*, VERA INST. OF JUST. (June 21, 2016), <https://www.vera.org/the-human-toll-of-jail/judging-without-jail/what-is-diversion> [<https://perma.cc/93S8-RLRJ>]. Often, the program is a form of sentence in which an offender joins a rehabilitation program instead of being sent to prison. *Id.* In some cases, the offender avoids conviction or hides a criminal record. *Id.* Diversion programs have grown in recent decades, in part because research has indicated these courts reduce recidivism. *Id.*

<sup>112</sup> For example, in one federal study, the average sentence given to the 4,295 child molesters in the survey was approximately seven years, with three of seven years typically being served. LANGAN ET AL., *supra* note 14, at 1. An older study (1980-86) found the average sentence for a person convicted of a federal sex offense was ninety-one months, and the average probation term for someone sentenced to probation was approximately forty-two months. BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., SENTENCING AND TIME SERVED 2 (1987).

<sup>113</sup> CAL. PENAL CODE §§ 261, 264 (Deering, LEXIS through 2021 Reg. Sess.).

<sup>114</sup> PENAL § 243.4.

<sup>115</sup> Sliva, *supra* note 12, at 537.

means empathy for past trauma, because it is likely that many, but not all, men who commit sexual offenses have experienced violence or sexual abuse as children.<sup>116</sup> It requires belief in the offender's ability to change, but with community safety having priority. Most of all, it means giving a voice to the survivor and a chance to have the whole focus of the process shifted to address the survivor's needs for validation and to be heard.

Not every person is an appropriate candidate for participation in a process outside the traditional justice system. Criteria for determining which offenders should be considered for alternative justice systems, such as restorative justice, are discussed below.

Incorporating restorative justice principles within the existing criminal justice system is viewed as imperative by some, while others who embrace transformative justice see it as the opposite of what is needed. Recent scholars have attempted to offer a framework for reforming various attempts by the states to create restorative justice options within their own criminal justice systems.<sup>117</sup> These scholars note that many attempts at legislating restorative justice by the states illustrates an imperfect or even incorrect understanding of restorative justice itself, creating ineffective and incomplete statutory systems.<sup>118</sup> Even Colorado, which has the most extensive statutory scheme incorporating restorative justice elements,<sup>119</sup> has failed to create a true restorative justice option. The Colorado system views it as simply a sentencing option, operating in the discretion of the judicial system and prosecutors.<sup>120</sup>

The main point of restorative justice, which is shifting the focus to the survivor and broadening the avenues of accountability to include others harmed, may still be absent in a system that focuses on restorative justice only at the end of the criminal justice process. For example, the Colorado focus is on victim healing rather than reparations. One scholar argues that "a prosecutor can and should agree to offer restorative justice to an offender whenever a victim requests it."<sup>121</sup> In Colorado, the courts cannot order use of restorative justice as a sentencing option in the areas of intimate partner violence, sexual assault, stalking and protective order violations unless the prosecutor agrees.<sup>122</sup> This leaves the use of restorative justice as a sentencing option in the discretion of prosecutors rather than survivors in most contexts.

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<sup>116</sup> Jill S. Levenson, Gwenda M. Willis & David S. Prescott, *Adverse Childhood Experiences in the Lives of Male Sex Offenders: Implications for Trauma-Informed Care*, 28 *SEXUAL ABUSE* 340 *passim* (2016).

<sup>117</sup> See, e.g., Lynn S. Branham, "Stealing Conflicts" No More?: *The Gaps and Anti-Restorative Elements in States' Restorative-Justice Laws*, 64 *ST. LOUIS U. L.J.* 145 (2020); Shannon M. Sliva, Elizabeth H. Porter-Merrill & Pete Lee, *Fulfilling the Aspirations of Restorative Justice in the Criminal System? The Case of Colorado*, 28 *KAN. J.L. & PUB. POL 'Y* 456 (2019).

<sup>118</sup> Branham, *supra* note 117, at 166; Sliva et al., *supra* note 117, at 503.

<sup>119</sup> See Sliva et al., *supra* note 117, at 479–85 & nn.139–79.

<sup>120</sup> *Id.* at 500.

<sup>121</sup> *Id.* at 485.

<sup>122</sup> *Id.* at 484–85.

Debate in Colorado still revolves around to what extent, if any, victims of violent crime should have a say in the process used to address the harm.<sup>123</sup> Thus, restorative justice as used there is mainly focused on one potential component of restorative justice, victim/offender dialogue after sentencing, rather than a comprehensive restorative justice framework. Further weakening its effect, victims were informed of the victim/offender dialogue sentencing option only through bulk mailing and only recently have further efforts at outreach been made to inform victims of facilitated dialogue options.<sup>124</sup>

Restorative justice is poorly understood by the majority of those who mold the criminal justice system, including prosecutors.<sup>125</sup> Until this group is better educated about the uses of a true restorative justice system and convinced of its effectiveness in holding offenders accountable, we will continue to see legislation hampered by objections to enactment of restorative justice alternatives. An imperfect understanding of restorative justice and its effectiveness results in piecemeal alternatives that do not result in comprehensive reform. For example, attempts to legislate restorative justice alternatives will fail as long as prosecutors continue to block laws creating confidentiality for statements made by defendants within a restorative justice framework.<sup>126</sup>

While most states have tried various means of incorporating some restorative justice components in their statutes,<sup>127</sup> very few have endorsed its use

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<sup>123</sup> *Id.* at 488.

<sup>124</sup> *Id.* at 488–89.

<sup>125</sup> Admittedly, this observation is only in the experience of the author, whose legal career was mainly spent as a state deputy attorney general handling criminal appeals and drafting criminal justice legislation.

<sup>126</sup> Sliva et al., *supra* note 117, at 493–94 (noting that Colorado’s attempt to provide confidentiality is hampered by prosecutorial objections to a statutory extension of confidentiality in a variety of situations within their restorative justice framework). For the same reason, other jurisdictions had to come up with creative workarounds to prosecutors’ objections. Illinois tried to enact a state supreme court rule to this end and was later pursuing a legislative solution. *Id.* The San Francisco District Attorney’s Office entered into a memorandum of understanding with the San Francisco Public Defender’s Office to protect statements made not only for restorative justice purposes but for other collaborative programs. *Id.* Colorado was forced to consider less direct alternatives after confidentiality legislation was blocked, “including implementing district attorney policy, developing memoranda of understanding between district attorney offices and the state public defender’s office, drafting immunity agreements and other case-by-case agreements, and gaining buy-in on statewide best practices.” *Id.*

<sup>127</sup> Thalia González, *The Legalization of Restorative Justice: A Fifty-State Empirical Analysis*, 2019 UTAH L. REV. 1027, 1030–31 (2019) (noting that some form of restorative justice is being implemented in nearly every state, at state, regional and local levels as statutes or regulations). However, an examination of the California statutes cited as evidence of this trend reveals that the statutory references in California to use of restorative justice principles are permissive and not mandatory. *See generally* CAL. PENAL CODE § 3450 (West, Westlaw through Ch. 770 of 2021 Reg. Sess.); CAL. EDUC. CODE § 48900 (West, Westlaw through Ch. 770 of 2021 Reg. Sess.). Its use in California is very limited and depends on programs being available at the local level. *Id.* There is no state investment in restorative justice, nor any system set up to train facilitators in its use. *Id.* In essence, it is lip service to an undefined concept and is either not being utilized at all or possibly is

to address sexual or gendered violence.<sup>128</sup> Some view only one U.S. program to have truly experimented with the use of restorative justice in this context.<sup>129</sup> In 2004, the RESTORE Program used feminist and restorative justice principles in sexual violence cases.<sup>130</sup> The RESTORE Program operated within the criminal system because it was initiated through prosecutor referrals.<sup>131</sup> An offender could avoid prosecution and a felony classification by completing the program.<sup>132</sup> The program operated in four stages: (1) referral and intake, (2) preparation, (3) conference and (4) accountability and reintegration.<sup>133</sup> RESTORE Program “[e]ligibility was limited to first time offenders, acquaintance rapes, and non-penetrative sex offenses with minimal force.”<sup>134</sup> Although the RESTORE Program ended in 2007, “it has had a strong influence on the establishment of other programs . . . .”<sup>135</sup>

#### A. *Diversion as a Form of Restorative Justice Within the Criminal Justice System*

A diversion program essentially takes a case out of the formal justice system, although it is done in partnership with the criminal justice system.<sup>136</sup> Often, the program is a form of sentence in which an offender participates in a

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being used in local contexts that may or may not be truly restorative justice programs. *Id.*

<sup>128</sup> See, e.g., 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); Clare McGlynn, Nicole Westmarland & Nikki Godden, “*I Just Wanted Him to Hear Me*”: *Sexual Violence and the Possibilities of Restorative Justice*, 39 J.L. & SOC’Y 213, 216 (2012); DAVID R. KARP, JULIE SHACKFORD-BRADLEY, ROBIN J. WILSON & KAAREN M. WILLIAMSEN, CAMPUS PRISM, A REPORT ON PROMOTING RESTORATIVE INITIATIVES FOR SEXUAL MISCONDUCT ON COLLEGE CAMPUSES 2–5 (2016), [http://www.skidmore.edu/campustj/documents/Campus\\_PRISM\\_Report\\_2016.pdf](http://www.skidmore.edu/campustj/documents/Campus_PRISM_Report_2016.pdf) [<https://perma.cc/4CJE-S4XY>]; Mary P. Koss, Jay K. Wilgus & Kaaren M. Williamsen, *Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance*, 15 TRAUMA VIOLENCE ABUSE 242, 242 (2014); Katherine Mangan, *Why More Colleges Are Trying Restorative Justice in Sex-Assault Cases*, CHRON. HIGHER EDUC. (Sept. 17, 2018), <https://www.chronicle.com/article/Why-More-Colleges-Are-Trying/244542> [<https://perma.cc/6ASH-HFK6>]; Deborah M. Weissman, *The Personal is Political-and Economic: Rethinking Domestic Violence*, 2007 BYU L. REV. 387, 443–44 (2007).

<sup>129</sup> Randall, *supra* note 37.

<sup>130</sup> *Id.* at 470.

<sup>131</sup> Koss, *supra* note 26, at 1626.

<sup>132</sup> *Id.* at 1651–53 (accountability was accomplished through the restorative justice process rather than prosecution and conviction).

<sup>133</sup> *Id.* at 1628–30.

<sup>134</sup> Amy Kasparian, *Justice Beyond Bars: Exploring the Restorative Justice Alternative for Victims of Rape and Sexual Assault*, 37 SUFFOLK TRANSNAT’L L. REV. 377, 395–96 (2014).

<sup>135</sup> *Id.* at 396 (2014). One other program in Canada has incorporated true restorative justice principles within the criminal justice system to address sexual violence. Randall, *supra* note 37, at 489; see generally B.C. ASS’N OF SPECIALIZED VICTIM ASSISTANCE & COUNSELLING PROGRAMS, RESTORATIVE JUSTICE, DOMESTIC VIOLENCE AND SEXUAL ASSAULT IN CANADA: A SUMMARY OF CRITICAL PERSPECTIVES FROM BRITISH COLUMBIA (2002).

<sup>136</sup> *What is Diversion?*, *supra* note 111.

rehabilitation program instead of being sent to prison.<sup>137</sup> Sometimes the offender avoids conviction or can have a criminal record expunged after completion of the required consequences assigned.<sup>138</sup> Diversion programs have grown in recent decades, in part because research has indicated these programs reduce recidivism.<sup>139</sup> Diversion programs have a team of probation workers, prosecutors, defense workers, social workers and therapists working together for the benefit of both the person harmed and the one who caused the harm.<sup>140</sup>

In a few jurisdictions, a therapeutic justice approach has been incorporated in the criminal justice system via diversion.<sup>141</sup> The perpetrator can choose to avoid the most stringent penalty—incarceration—if they agree to participate in a program with strictly defined parameters to address that person’s specific issues. In the criminal justice system, if the requirements of a diversion program are successfully completed, the criminal conviction will be removed from the criminal history.<sup>142</sup> In a therapeutic justice model, the survivor may opt not to participate, while a restorative justice model often requires both parties’ participation.<sup>143</sup>

Of course, this type of proceeding cannot be adversarial or confrontational. For that reason, it is at odds with the constitutional requirements of the rights to confront and cross-examine witnesses.<sup>144</sup> It may also conflict with the right not to incriminate oneself.<sup>145</sup> Similar to a waiver of rights when accepting a plea deal,<sup>146</sup> accused perpetrators who choose to opt into a therapeutic justice model

<sup>137</sup> *Id.*

<sup>138</sup> Many states have expungement laws allowing for dismissal of the criminal charge once diversion is successfully completed, and quite a few new expungement statutes were added in 2021. See *Dozens of New Expungement Laws Already Enacted in 2021*, COLLATERAL CONSEQUENCES RES. CTR. (July 7, 2021), <https://ccresourcecenter.org/2021/07/07/dozens-of-new-expungement-laws-already-enacted-in-2021/> [<https://perma.cc/8GE8-7G8S>].

<sup>139</sup> Rebecca Neusteter, Megan O’Toole & Mawia Khogali, *Emerging Issues: Alternatives to Enforcement*, CALIBRE PRESS (Aug. 30, 2018), <https://calibrepress.com/2018/08/emerging-issues-alternatives-to-enforcement/> [<https://perma.cc/M5UX-LAMZ>].

<sup>140</sup> Lauren Sonnenberg, *Can Restorative Justice Go Mainstream?*, CRIME REP. (Nov. 13, 2019), <https://thecrimereport.org/2019/11/13/can-restorative-justice-go-mainstream/> [<https://perma.cc/8LZV-UWK3>] (interviewing Robert Weisberg, co-director of the Stanford Criminal Justice Center). California’s Containment Model statutory system requires probation or parole officers, therapists and polygraph examiners to work together after the person who has committed sexual harm is on probation or parole. See *Containment Model*, CAL. SEX OFFENDER MGMT. BD., <https://casomb.org/index.cfm?pid=1231> [<https://perma.cc/S5XK-PLY3>].

<sup>141</sup> Richmond & Richmond, *supra* note 61, at 444–56 (describing the few programs in the United States that incorporate elements of therapeutic justice in their diversion systems).

<sup>142</sup> *Dozens of New Expungement Laws Already Enacted in 2021*, *supra* note 138.

<sup>143</sup> See generally KABA & HASSAN, *supra* note 64.

<sup>144</sup> See Mary Ellen Reimund, *The Law and Restorative Justice: Friend or Foe? A Systemic Look at the Legal Issues in Restorative Justice*, 53 DRAKE L. REV. 667, 682–87 (2004) [hereinafter Reimund, *The Law and Restorative Justice*]; see also Mary Ellen Reimund, *Is Restorative Justice on a Collision Course with the Constitution*, 3 APPALACHIAN J.L. 1 *passim* (2004) [hereinafter Reimund, *Is Restorative Justice on a Collision Course*].

<sup>145</sup> Reimund, *The Law and Restorative Justice*, *supra* note 144, at 685.

<sup>146</sup> *Boykin v. Alabama*, 395 U.S. 238, 242–44 (1969) (the Court set forth rules to ensure a defendant’s guilty plea is knowing and voluntary: the trial court judge is required to inform the

must clearly understand the rights they are giving up in doing so. The perpetrator must agree to waive those rights to proceed with the alternative sanction. They must be informed of the possible uses of acknowledging their misconduct in the future. For example, in a subsequent criminal prosecution for sexual assault, a prior admission of sexual misconduct even in the therapeutic justice context would be admissible as evidence against the person.<sup>147</sup> Civil liberties must be considered when considering a therapeutic justice approach: “The advantages of treatment and release may come at the cost of a reduction in adversarial protections, but defendants and the legal community seem willing to accept this price.”<sup>148</sup>

One such approach was established by legislation in Washington in the late 1970s, before it became political suicide for officials to appear soft on offenders.<sup>149</sup> It was used in Clark and Snohomish Counties for a number of years.<sup>150</sup> Offered only to certain first-time offenders, including people convicted of sex offenses, the district attorney would screen new cases for possible referral to a diversion program.<sup>151</sup>

Selected probation officers were trained as diversion counselors.<sup>152</sup> A pre-sentence evaluation was done by probation officers and a treatment professional did a psycho-sexual evaluation, which occurred prior to the filing of charges.<sup>153</sup> The district attorney then made the following offer to those who met the prerequisites:

[The district attorney’s office] will defer further processing of the legal case if [the offender] sign[s] a confession. A contract was offered: follow the treatment recommendations in the psycho-sexual evaluation and a list of rules related to containing further offending behavior. [If there are] no violations of the contract and, in three years, the charges will be dropped. If [the offender] fail[s] to adhere to [their] contract, [they] will be charged and the confession [they] signed will be used in the prosecution.<sup>154</sup>

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defendant of three constitutional rights—right to a jury trial, right to cross-examine witnesses, and right to remain silent—and obtain a waiver of each.).

<sup>147</sup> Reimund, *The Law and Restorative Justice*, *supra* note 144, at 686.

<sup>148</sup> Richmond & Richmond, *supra* note 61, at 469.

<sup>149</sup> E-mail from Michael A. O’Connell, Michael A. O’Connell & Assocs., to author (Aug. 11, 2019) (on file with author) [hereinafter O’Connell]. O’Connell was involved as a treatment professional at the time that this Washington system was operating from the 1980s to mid-1990s, when he says it became politically unpopular and was discontinued by the district attorneys’ offices, due in part to loss of funding. *Id.* O’Connell said the program worked very well. *See generally* MICHAEL O’CONNELL, CRAIG R. DONALDSON & ERIC LEBERG, *WORKING WITH SEX OFFENDERS: GUIDELINES FOR THERAPIST SELECTION* (1990).

<sup>150</sup> O’Connell, *supra* note 149.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*



Some offenders who were offered diversion under the Washington program had committed offenses with minors that involved voluntary conduct, as opposed to forcible acts.<sup>155</sup> Sometimes the offenses were committed with the consent of the parties' families, e.g., in cultures sanctioning underage relationships.<sup>156</sup> In other words, what is labeled statutory rape under a state's law may be activity that is condoned or even encouraged by the offender's culture. The diversion counselors were trained about the dynamics of sexual offending, managed the cases well and collaborated with treatment providers and victim advocates.<sup>157</sup> Family reunification was often part of the process.<sup>158</sup>

The Model Penal Code has described such an approach: "This diversionary approach uses actuarial information to identify low-risk, prison-bound defendants and sentence them to community supervision or jail (meaning a sentence less than twelve months) in lieu of prison."<sup>159</sup> The Model Penal Code instructs the sentencing commission to "develop actuarial instruments or processes to identify offenders who . . . are subject to a presumptive or mandatory sentence of imprisonment" but present an "unusually low risk to public safety."<sup>160</sup> It "recommends that the sentencing judge have discretion to sentence such offenders to a 'community sanction rather than a prison term.'"<sup>161</sup>

Restorative justice approaches have been used successfully in the juvenile justice setting in various jurisdictions, including Australia.<sup>162</sup> Evidence behind restorative justice has been robust when it comes to juveniles: "Research evidence demonstrates that restorative justice, compared to court processes, can better reduce recidivism, reduce victims' post-traumatic stress symptoms, increase all parties' satisfaction with the justice process, and increase offender learning and development."<sup>163</sup>

California has also successfully incorporated restorative justice in its juvenile justice system.<sup>164</sup> The system being used in juvenile cases in California can be traced back to Indigenous peoples: "Rooted in the indigenous Maori justice process in New Zealand and in Native American dispute resolution practices, restorative justice principles have proven useful in California juvenile, civil, and even criminal cases."<sup>165</sup> One form of restorative justice is now used in

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<sup>155</sup> *Id.*

<sup>156</sup> *Id.* (O'Connell noted that this was not an uncommon arrangement in Hispanic families, where at times the boyfriend of an underage daughter might live with her parents).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> Erin Collins, *Punishing Risk*, 107 GEO. L.J. 57, 70 (2018).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> KARP ET AL., *supra* note 128, at 11.

<sup>163</sup> *Id.*

<sup>164</sup> *Restorative Justice: Healing California's Youth*, CAL. CTS. NEWSROOM (Aug. 2, 2018), <https://newsroom.courts.ca.gov/news/restorative-justice-healing-californias-youth> [<https://perma.cc/PRG4-TSGY>] (noting that the restorative approach seeks to address harm to victims while weighing the circumstances and life of the offender).

<sup>165</sup> *Id.*

California's seventy-five peer courts—also called teen or youth courts.<sup>166</sup> Students are sentenced to engage in community service, write letters of apology and take part in programs such as counseling or alcohol treatment.<sup>167</sup>

In Alameda County, California, a restorative justice youth program used community conferencing to address both felony and misdemeanor juvenile offenses. Between January 2012 and December 2014, 102 youth completed the Restorative Community Conferencing (“RCC”) program.<sup>168</sup> The recidivism rates for this program proclaimed its success:

[O]f those youth, only 13.7% were subsequently adjudicated delinquent within [six] months of completing the program, 18.4% within [twelve] months, and 19.6% within [eighteen] months. Such low recidivism rates stand in stark contrast with the County's youth subsequent adjudication rate of 20.8% within [six] months, 32.1% within [twelve] months, and 36.7% within [eighteen] months. This difference is statistically significant ( $p = 0.05$ ). In other words, within [twelve] months of completing the RCC program, youth were 44% less likely to get a new sustained charge than youth who were processed through the juvenile legal system.<sup>169</sup>

The recidivism rate for the RCC participants remained significantly lower than juveniles who participated in the traditional juvenile justice system.<sup>170</sup>

As noted above, a model diversionary program incorporating restorative justice concepts was successfully used for adult sexual assault offenders in Pima County, Arizona.<sup>171</sup> Survivors chose the restorative justice approach when a felony was charged against an acquaintance or intimate partner, but when the felony was committed by a stranger the standard criminal justice route was chosen.<sup>172</sup> Survivors chose the restorative justice process for misdemeanors involving perpetrators who were strangers to the survivors.<sup>173</sup> The two major reasons for choosing the restorative justice process were (1) “making sure the

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<sup>166</sup> Merrill Balassone, *In Teen Courts, A Second Chance*, CAL. CTS. NEWSROOM (June 9, 2017), <https://newsroom.courts.ca.gov/news/teen-courts-second-chance> [<https://perma.cc/CSL8-DY9T>].

<sup>167</sup> *Id.*

<sup>168</sup> SUJATHA BALIGA, SIA HENRY & GEORGIA VALENTINE, IMPACT JUST., RESTORATIVE COMMUNITY CONFERENCING: A STUDY OF COMMUNITY WORKS WEST'S RESTORATIVE JUSTICE YOUTH DIVERSION PROGRAM IN ALAMEDA COUNTY 1 (2017), [https://impactjustice.org/wp-content/uploads/CWW\\_RJreport.pdf](https://impactjustice.org/wp-content/uploads/CWW_RJreport.pdf) [<https://perma.cc/AG7E-A64R>].

<sup>169</sup> *Id.* at 7.

<sup>170</sup> *Id.*

<sup>171</sup> “Prosecutors’ referral criteria excluded repeat sexual offenders, persons with police reports for domestic violence, or individuals with arrests for any crimes involving non-sexual forms of physical assault.” Koss, *supra* note 26, at 1632. Pima County designed this program for survivors who consented to the restorative justice process and for offenders who admitted guilt. *Id.* at 1634. The program excluded those denying guilt out of concern that they might intimidate, verbally abuse, or retaliate against survivor-victims. *Id.*

<sup>172</sup> *Id.* at 1637.

<sup>173</sup> *Id.*

responsible person doesn't do what he did to anyone else" and (2) "making sure the responsible person gets help."<sup>174</sup> Facilitators were trained to follow a set agenda, including guiding discussion of reparations.<sup>175</sup> Overall, survivors—or their representatives—and perpetrators were satisfied with the process.<sup>176</sup>

Texas and Colorado recently considered legislative efforts in this area which generated bipartisan support. These states addressed "how new practices will be funded, who would be eligible to initiate and participate in restorative practices, and what roles prosecutors and judges would take in overseeing programs and participants."<sup>177</sup> The needs of survivors became part of the solution:

If restorative justice strategies are to be successfully promoted as a policy solution, research indicates that the role of victims in restorative justice must be a point of focus for advocates. Policy development should account for victims' rights concerns by implementing protections for victims and setting training requirements. In addition, policy makers and advocates should work closely with victims' protection organizations and lobbyist groups to develop a shared understanding of the concerns and needs of crime victims as they relate to the use of restorative justice practices as state-sanctioned criminal justice processes.<sup>178</sup>

In Colorado, "victims' rights advocates became allies rather than oppositional forces."<sup>179</sup> Other marginalized populations with the potential to benefit from more widespread use of restorative justice practices should be consulted as well during the legislative process.<sup>180</sup>

In Canada, the Restorative Opportunities Program is offered post-sentencing and uses various victim-offender mediation models.<sup>181</sup> In a similar program in New Zealand, panels formed by restorative justice facilitators, survivor and offender specialists and clinical psychologists facilitated communication.<sup>182</sup> This gives survivors a chance to tell their story and participate in developing options to address the harm caused. Research on the Canadian post-sentencing program showed that when restorative justice meetings were done "in the community post-release, participants were significantly more likely to spend a longer period of time under community

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<sup>174</sup> *Id.* at 1642.

<sup>175</sup> *Id.* at 1638.

<sup>176</sup> *Id.*

<sup>177</sup> Sliva, *supra* note 12, at 537.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> See *Analysis of the Impact of the Restorative Opportunities Program on Rates of Revocation*, CORR. SERV. CAN. (Nov. 15, 2016), <https://www.csc-scc.gc.ca/research/r-364-eng.shtml> [<https://perma.cc/D7HA-JCU7>].

<sup>182</sup> Kasparian, *supra* note 134, at 397–98.

supervision and were less likely to be revoked than their matched counterparts.”<sup>183</sup> Specifically, offenders who did not participate “were six times more likely to be revoked post-release.”<sup>184</sup>

### ***B. Sex Offense Courts Using a Modified Therapeutic Justice Model***

Using a different approach, several New York counties established sex offense courts by 2006.<sup>185</sup> These operate under a modified therapeutic justice model, relying on risk assessments to allow the court to balance rehabilitation with community and victim protection.<sup>186</sup> As some scholars observe, “The hallmark practices of sex offense courts are early intervention, post-disposition monitoring, consistency, and accountability.”<sup>187</sup> Seven key elements of successful sex offense courts are: “(1) criteria for diversion; (2) risk assessments; (3) monitoring; (4) victim outreach; (5) judicial-offender relationships; (6) community of stakeholders; and (7) specialized training, assistance, and evaluation.”<sup>188</sup> One reason for sex offense courts, like the use of drug and domestic violence courts, is that specialization may result in efficiency and cost savings.<sup>189</sup>

Although the New York system uses victim outreach—meaning notifications are given to the victim about the offender’s whereabouts<sup>190</sup>—as a component, the focus remains on the offender, rather than giving the survivor a voice in the process. A true therapeutic justice approach would have a formalized way to incorporate the survivor’s related experience in the process, whether or not the process becomes more like restorative justice. A specialty court is more likely to know about available counselors or victim support centers, such as rape crisis centers.<sup>191</sup> Such referrals are helpful but referring a survivor to counseling should not be the end of their input in the therapeutic justice process.

### ***C. Jurisdictions Focusing on Treatment and Risk Assessment Outside the Context of Therapeutic or Restorative Justice Systems***

Regular meetings of involved stakeholders, i.e., courts, probation officers, treatment providers, risk assessment specialists and Global Positioning System tracking personnel, to monitor an offender’s progress have been said to be

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<sup>183</sup> *Analysis of the Impact of the Restorative Opportunities Program*, *supra* note 181.

<sup>184</sup> *Id.*

<sup>185</sup> *Sex Offense Courts: The Next Step in Community Management?*, CTR. FOR CT. INNOVATION (Jan. 25, 2007), <https://www.courtinnovation.org/articles/sex-offense-courts-next-step-community-management> [<https://perma.cc/2CXS-B9C7>]. Pennsylvania and Ohio have also established a limited version of sex offense courts. Richmond & Richmond, *supra* note 61, at 461.

<sup>186</sup> Richmond & Richmond, *supra* note 61, at 459.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 461.

<sup>189</sup> *Id.* at 459.

<sup>190</sup> *See id.* at 464.

<sup>191</sup> *Id.*

critical to the New York sex offense court model.<sup>192</sup> In California, some offenders receive probation without first serving jail time.<sup>193</sup> These offenders, as well as offenders released after jail or prison, must participate in community-based treatment programs as part of a system known as the “Containment Model.”<sup>194</sup> Sex offender-specific treatment is a mandatory component of this model.<sup>195</sup> The model requires communication, at least monthly, between probation officers and treatment providers.<sup>196</sup> Many jurisdictions require monthly or quarterly in-person meetings as well, and those meetings may include other stakeholders, including victim advocates and polygraph examiners.<sup>197</sup> This regular communication is essential to the success of the model.<sup>198</sup>

Virginia and California currently use risk assessment to identify low-risk offenders. Virginia uses the assessment to determine who may then qualify for community supervision in lieu of longer prison or jail sentences.<sup>199</sup> California, on the other hand, excludes most offenders from consideration for release to community supervision in lieu of prison, regardless of risk level.<sup>200</sup> This is true even if the current offense is not a sex offense, but the offender has a prior conviction for a sex offense.<sup>201</sup> Community supervision is an alternative to probation or parole. California does permit early release from prison to community supervision of low-risk offenders.<sup>202</sup>

The problem with California’s current system for early release of offenders from prison to community supervision in lieu of requiring them to serve a term of parole is that the statutory scheme allows very little time for sex offender-specific treatment during the community supervision term because that term is limited. Sex offender-specific treatment is mandated to occur for at least a year, and up to the entire probation or parole period.<sup>203</sup> But a term of community

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<sup>192</sup> *See id.* at 465.

<sup>193</sup> CAL. PENAL CODE §§ 1203, 1203.016 (West, Westlaw through Ch. 770 of 2021 Reg. Sess.).

<sup>194</sup> *See Containment Model*, *supra* note 140.

<sup>195</sup> PENAL §§ 290.09, 1203.067, 3008.

<sup>196</sup> PENAL § 290.09(c).

<sup>197</sup> Observation of the author, who has conducted numerous trainings for probation officers, parole agents, judges, attorneys, and treatment providers in California about the containment model.

<sup>198</sup> *Id.*

<sup>199</sup> Collins, *supra* note 159, at 70–72.

<sup>200</sup> *See* PENAL § 1170(h)(3); J. RICHARDS COUZENS & TRICIA A. BIGELOW, FELONY SENTENCING AFTER REALIGNMENT app. 2, at 173 (2017), [https://www.courts.ca.gov/partners/documents/felony\\_sentencing.pdf](https://www.courts.ca.gov/partners/documents/felony_sentencing.pdf) [<https://perma.cc/7VBX-TM3N>] (only those offenders who are not required to register—mainly those who have committed statutory rape, or voluntary intercourse with a minor age 14 or older—are eligible, because this group is not required to register unless the offender is court-ordered to register at sentencing).

<sup>201</sup> *People v. Sheehy*, 169 Cal. Rptr. 3d 899, 900 (App. Ct. 2014).

<sup>202</sup> Low-risk offenders who obtain early release from prison may be sentenced to community supervision by the county’s probation department, while high-risk offenders must remain on parole after release. CAL. PENAL CODE § 3000.08(b), (d) (West, Westlaw through Ch. 362 of 2021 Reg. Sess.).

<sup>203</sup> PENAL §§ 1203.067(b)(1), 3008(d)(1).

supervision ends at one year after release from prison, regardless of treatment completion or success.<sup>204</sup> This means treatment often ends before any possibility of rehabilitation can be realized.

Community supervision following incarceration is not, however, a form of therapeutic justice. Whether resolved by plea or trial, the system still focuses on the offender, not the survivor. Incarceration may do little, if anything, to rehabilitate the offender. While post-incarceration treatment may help, the offender still carries the stigma of being a convicted offender, with concomitant results such as duty to register with police, difficulty obtaining employment and housing and barriers to developing prosocial relationships.<sup>205</sup>

If a three-year diversion program for low-risk offenders was utilized instead, program completion would mean the person did not spend the first years after offending in the company of other criminals, but in working with a treatment provider and probation officer on the issues that led to the offense in the first place. In such a system, the survivor should have a place to be heard, whether directly in a restorative justice setting, or indirectly, as when represented by a victim advocate who is a formal part of a therapeutic justice system. At the end of the successful completion of the three-year program, the offender would not carry the lifelong burden of a criminal history that includes conviction and registration as a sex offender. And the survivor would have had a chance to be heard either directly, in a facilitated restorative justice setting, or vicariously, by the victim advocate's participation in the therapeutic justice process.

#### IV. THERAPEUTIC JUSTICE OR RESTORATIVE JUSTICE APPROACHES FOR CAMPUS SEXUAL ASSAULT & HARASSMENT

After issuance of the Dear Colleague Letter<sup>206</sup> by the Department of Education in 2011 to IHEs in the United States, calling for action to deal with the troubling and high incidence of sexual assault upon college students, campuses sought to address sexual and gender-based misconduct.<sup>207</sup> Various

<sup>204</sup> PENAL §§ 3451(a), 3456(a)(3).

<sup>205</sup> See KRISTEN M. ZOGBA, MICHAEL MINER, RAYMOND KNIGHT, ELIZABETH LETOURNEAU, JILL LEVENSON & DAVID THORNTON, A MULTI-STATE RECIDIVISM STUDY USING STATIC-99R AND STATIC-2002 RISK SCORES AND TIER GUIDELINES FROM THE ADAM WALSH ACT 10 (2012) ("A growing body of research shows such laws interfere with community re-entry and adjustment."). In multiple studies, sexual offenders reported

adverse consequences such as unemployment, relationship loss, denial of housing, threats, harassment, physical assault, or property damage as a result of public disclosure. . . . Because public identification can lead to social exclusion and underemployment for sex offenders, many end up living in socially disorganized, economically depressed neighborhoods that have fewer resources for mobilizing community strategies to deter crime and protect residents.

*Id.* (citations omitted).

<sup>206</sup> U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER (2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/SJ8X-4HYT>].

<sup>207</sup> See Robin Wilson, *How a 20-Page Letter Changed the Way Higher Education Handles Sexual*

campuses used varying ways to raise awareness of the issue. The national movement fostered policy and procedural changes, often leading to campus investigations and hearings that today nearly resemble a criminal justice approach than the more informal campus student conduct process of yesterday.<sup>208</sup> New policies to address campus sexual assault “may have, unintentionally, reinforced adversarial and retributive responses that may actually lead to prolonged trauma for victims, adverse educational outcomes for both parties, and a contested campus climate that reduces reporting and trust in administrators.”<sup>209</sup>

Adversarial systems often do not meet the needs or expectations of survivors. In response, some campuses began to consider therapeutic or restorative justice alternatives to traditional student conduct hearings and sanctions.<sup>210</sup> Restorative justice emphasizes a collaborative rather than adversarial approach to campus misconduct involving the survivor, the responsible party and the campus and larger community. Hopefully, such a system will encourage increased reporting and make campuses safer. Currently, only about thirteen percent of campus sexual assault is ever reported.<sup>211</sup>

Some legal scholars believe that restorative justice processes on campus should be made part of the formal system used by the school to address Title IX violations. One scholar argues that efforts to reform the school-to-prison pipeline and reverse the damage done by zero-tolerance school policies with restorative justice practice can only be done by implementing legal rules to govern the process.<sup>212</sup> In her view, lack of uniformity in understanding what restorative justice should be, how it should be implemented and in training those

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Assault, CHRON. OF HIGHER EDUC., (Feb. 8, 2017), <https://www.chronicle.com/article/how-a-20-page-letter-changed-the-way-higher-education-handles-sexual-assault/> [<https://perma.cc/RS6B-FJ9S>]; see also Max Larkin, *The Obama Administration Remade Sexual Assault Enforcement on Campus. Could Trump Unmake It?*, WBUR NEWS (Nov. 26, 2016), <https://www.wbur.org/news/2016/11/25/title-ix-obama-trump> [<https://perma.cc/LMY7-4LNQ>] (“So as the OCR began to announce investigations into the mishandling of reported sexual harassment and violence — 344 since 2011, by the count of the Chronicle of Higher Education — colleges and universities began to change their ways, sometimes dramatically.”). The Trump administration did rescind the 2011 Dear Colleague letter which led to so many changes on college campuses after 2011. U.S. DEP’T OF EDUC., *supra* note 206. The current Biden administration is reviewing the regulations implemented during the Trump administration with intent to amend them. Announcement of Public Hearing: Title IX of the Education Amendments of 1972, 85 Fed. Reg. 27,429 (May 20, 2021).

<sup>208</sup> See KARP ET AL., *supra* note 128, at 11.

<sup>209</sup> *Id.* at 10.

<sup>210</sup> Nancy Chi Cantalupo, *Decriminalizing Campus Institutional Responses to Peer Sexual Violence*, 38 J. COLL. & U. L. 481 *passim* (2012); Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 TEX. TECH L. REV. 147 *passim* (2016); KARP ET AL., *supra* note 128, *passim*.

<sup>211</sup> KARP ET AL., *supra* note 128, at 9 (“[O]nly [thirteen percent] of campus rape victims make any kind of report to police or campus officials, including health services, counseling, and conduct administrators. This low reporting rate inhibits a college’s ability to effectively respond to campus sexual violence.”).

<sup>212</sup> Lydia Nussbaum, *Realizing Restorative Justice: Legal Rules and Standards for School Discipline Reform*, 69 HASTINGS L.J. 583 *passim* (2018).

who must implement it cry out for legislation to set a framework for the use of restorative justice in schools.<sup>213</sup> This is the opposite of the approach argued for by proponents of transformative justice, which shuns any control by the state.<sup>214</sup>

#### A. *Keys to Using Restorative Justice on Campus*

There are four keys to restorative justice: inclusive decision-making, active accountability, repairing harm, and rebuilding trust.<sup>215</sup> In the context of sexual assault, inclusive decision-making means the survivor choosing this option and a perpetrator willing to acknowledge the harm caused would sit in a circle with trained facilitators.<sup>216</sup> The focus is not on the offender, but on the harm created and what should be done about it.<sup>217</sup> The survivor is able to articulate the harm they experienced. The offender is not a spectator at their own trial, relying on an attorney to speak, but a participant in determining their own sanction.<sup>218</sup>

For this system to work, such an offender must agree to take active responsibility for their actions. These offenders must be willing to fully engage in this process with the aim of making amends for the harm caused. If sanctions are developed with the voluntary engagement of the offender, it is more likely the offender will follow through with the requirements imposed.<sup>219</sup> Imposition of sanctions without offender buy-in is likely to be viewed as coercive and elicit a lesser level of participation.<sup>220</sup>

David Karp describes the functioning of restorative justice in the example of a drunken student who harassed his ex-girlfriend by climbing into her car and refusing to get out of it.<sup>221</sup> When she drove to the police station it took several officers to remove him.<sup>222</sup> The officers were involved in the restorative justice conference on campus as members of the community harmed by the offender's actions.<sup>223</sup> They were skeptical about letting the offender remain on campus.<sup>224</sup> To meet their concerns, the student agreed to do counseling to address anger, relationship and substance abuse issues.<sup>225</sup> The student "agreed to collaborate with the police officers to present a campus workshop on the legal ramifications of alcohol abuse."<sup>226</sup>

In a restorative justice model, an offender either understands that they

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<sup>213</sup> *Id.*

<sup>214</sup> See discussion *supra* Section II.B.

<sup>215</sup> KARP ET AL., *supra* note 128, at 3.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 32.

<sup>219</sup> *Id.* at 31.

<sup>220</sup> See, e.g., *id.* at 12, 21.

<sup>221</sup> KARP, *supra* note 63, at 46.

<sup>222</sup> *Id.*

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

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*



committed serious harm and can feel remorse or is rational enough to follow through on a commitment to change because they understand that future misbehavior will negatively impact their life. When it becomes apparent that the perpetrator has neither a moral compass nor the will to change for personal reasons, e.g., attaining one's own goals, restorative justice is not the solution. In that case, as when the perpetrator does not admit fault, a criminal trial or traditional campus hearing with evidence presented by both sides is the only possible route.

The focus of restorative justice is on repairing harm rather than punishment. This is a more victim-centered approach than the traditional one, in which all eyes are focused on the offender. In the restorative justice setting, the offender must actively consider how they can make amends to those they hurt—not only the survivor, but others, including the community or campus, friends or colleagues.<sup>227</sup> Making amends extends beyond an apology to the survivor or even monetary reimbursement. It could include things like specific community service or participation in campus events about alcohol use and abuse. Ideally, it includes mandatory treatment specifically designed for those who commit campus sexual assault, such as that developed in the Science-Based Treatment, Accountability, and Risk Reduction for Sexual Assault (“STARRSA”) Project.<sup>228</sup>

The final step, rebuilding trust, may be the hardest. It is easier to incarcerate or expel someone than to allow them to remain in the community where they have harmed others. Even with close monitoring, it is hard to trust them to follow through with agreed-on steps for repairing harm. Dialogue that allows all harmed parties—the survivor, those involved from the campus or community, friends or colleagues—to understand that the offender is a complex individual is key. Such a dialogue allows the offender to comprehend the extent of the injuries inflicted, is more likely to lead to genuine remorse and willingness to change than the imposition of punishment without a chance to be heard in a supportive and trauma-informed environment by either survivor or offender.

Restorative justice allows victims to define the harm done to them. Offenders must acknowledge the harm they have caused. The idea is to bring victims, their supporters, and offenders together to craft a plan that holds these offenders accountable and address the harm done. Survivors may choose in the process to confront their perpetrators about how they have been affected, a much more direct form of accountability than that which is available through the

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<sup>227</sup> *Id.* at 38; see Mills et al., *supra* note 31, *passim*.

<sup>228</sup> See Lamade et al., *supra* note 54, at 140; see also ROBERT PRENTKY, MARY KOSS, RAINA LAMADE & ELISE LOPEZ, STARRSA COGNITIVE BEHAVIORAL TREATMENT PROGRAM (CBT) MANUAL *passim* (2018), <https://www.dropbox.com/sh/cm5n7n38qn2ispl/AACIRS8VxaKwQswX6NqWSN2Wa?dl=0&preview=CBT+Manual+FV.pdf> [<https://perma.cc/5EPU-H3YP>]; see generally ROBERT PRENTKY, MARY KOSS, RAINA LAMADE & ELISE LOPEZ, FINAL REPORT CAMPUS SEXUAL MISCONDUCT: USING PERPETRATOR RISK ASSESSMENT AND TAILORED TREATMENT TO INDIVIDUALIZE SANCTIONING (2018) (unpublished manuscript) (on file with author) [hereinafter STARRSA FINAL REPORT].

criminal legal system. As Goodmark observed:

Restorative justice has been widely used in criminal cases, most often with juvenile offenders, with very positive results. Both victims and offenders report high levels of satisfaction with both restorative processes and outcomes. Victims who opt for restorative justice “have more information, are more likely to meet with and confront their perpetrator, are more likely to have some understanding of the reasons behind the offending, are more likely to receive some kind of repair for the harm done[,] . . . are more likely to be satisfied with the agreements reached, are more likely to feel better about their experience and are less likely afterwards to feel angry or fearful than those victims whose perpetrators were dealt with by the courts.” Perpetrators, in turn, are more likely to understand the impact of their actions, be held accountable in meaningful ways, and provide the kinds of redress requested by victims.<sup>229</sup>

Using trained facilitators is essential to a restorative justice approach to sexual harm.<sup>230</sup> Facilitators should be trained in an apprenticeship model where practice begins with simpler cases and progresses, with support and supervision, to more complex cases. Facilitators must be skilled in all the key stages of a restorative process: pre-conference preparation and assessment, restorative facilitated dialogue and post-dialogue agreement monitoring and support.<sup>231</sup> For sexual misconduct cases, it is necessary to have training in restorative practices, student development in higher education and especially trauma-informed gender-based harassment and violence.<sup>232</sup>

Trained facilitators know what the indications of a true apology look like:

- Genuine remorse[;]
- Body language[;]
- Word choice[;]
- Taking responsibility and not making excuses[;]
- Choosing to act differently (walk the talk/actions speak louder than words)[;]
- Being able to observe behaviors over time and explore whether the change is consistent with the apology[;]
- Willingness to come back to the conversation over and over again if necessary[; and]

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<sup>229</sup> Goodmark, *supra* note 30, at 94–95.

<sup>230</sup> KARP, *supra* note 63, at 64–66.

<sup>231</sup> *See id.* at 25.

<sup>232</sup> *See Campus PRISM: Promoting Restorative Initiatives for Sexual Misconduct on College Campuses*, UNIV. OF SAN DIEGO, <https://www.sandiego.edu/soles/restorative-justice/campus-prism.php> [<https://perma.cc/72GJ-HHAA>]; *see also* KARP ET AL., *supra* note 128, *passim*.

- Importance of being consistent when discussing the issues.<sup>233</sup>

Clinicians who are facilitators may also bring a clearer understanding of the feelings of others and recognize whether the conversations, the insights and the changes are genuine.<sup>234</sup> If there is an apology, they may be able to discern whether “it is from the heart and authentic, not scripted based upon what is expected” of the perpetrator.<sup>235</sup>

Indications that an offender is invested in the restorative justice approach may occur when concrete ideas for repairing harm are offered and embraced. These can include an agreement to participate in counseling, activities that pertain to the harm caused, e.g., alcohol abuse awareness training, Alcoholics Anonymous meetings or community service. Students returning to campus after a suspension for sexual misconduct might agree to participate in some form of Circles of Support and Accountability (“CoSA”), a model created to reduce the risk to the community following the release of high-risk offenders from prison.<sup>236</sup>

Baltimore, Maryland pioneered a restorative justice approach to school violence that has proven “an effective alternative to suspension and expulsion.”<sup>237</sup> Trained facilitators use community conferencing as “an inclusive way to address conflict between individuals . . . .”<sup>238</sup> Restorative Response Baltimore’s “[c]ommunity conferences . . . include those directly involved and affected by an incident and their family members and/or supporters.”<sup>239</sup> Community conferencing “offers participants the opportunity to discuss 1) what occurred, 2) how they were affected by it, and 3) ways to repair any harm and move forward so that it does not happen again.”<sup>240</sup> About “[ninety-five percent] of the community conferences in Baltimore have resulted in a written agreement created by all participants, with over [ninety-five percent] compliance with those agreements.”<sup>241</sup> As a result, “[o]ver [ninety-seven percent] of the young [sex] offenders diverted from the juvenile justice system have been minorities, thereby

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<sup>233</sup> Joan Tabachnick & Cordelia Anderson, *Accountability and Responsibility in the Era of #MeToo*, 31 F. NEWSL., Spring 2019, <http://newsmanager.commpartners.com/atsa/issues/2019-03-13/2.html> [<https://perma.cc/GP82-HU6X>].

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> See, e.g., Robin J. Wilson, Franca Cortoni & Andrew J. McWhinnie, *Circles of Support & Accountability: A Canadian National Replication of Outcome Findings*, 21 SEXUAL ABUSE 4 *passim* (2009).

<sup>237</sup> See *Restorative Practices*, RESTORATIVE RESPONSE BALT., <https://www.restorativeresponse.org/restorative-practices/> [<https://perma.cc/3T7Z-NTTA>] (describing how Restorative Response Baltimore provides trained facilitators who oversee restorative justice services directly on site at schools in Baltimore).

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *The Impact of Community Conferencing*, RESTORATIVE RESPONSE BALT., <https://www.restorativeresponse.org/impact-of-community-conferencing/> [<https://perma.cc/4C8R-QMH2>].

providing youth of color with the same alternatives available to many Caucasian young offenders.”<sup>242</sup>

Using the community conference techniques developed for schools, Baltimore Restorative Response offers a similar training program for facilitators who can address workplace conflict.<sup>243</sup> By training people in the workplace or on campuses to conduct regular dialogue sessions with staff or faculty, Baltimore Restorative Response offers training which ensures “ongoing-access to a powerful social technology that helps build team cohesion, and can prevent minor conflicts from escalating into formal grievances or legal battles.”<sup>244</sup>

Schools in the Oakland Unified School District that used a restorative justice approach reduced suspensions for African-American students by forty percent in the first year.<sup>245</sup> The Keeping Kids in School Initiative (“KKIS”) developed for California schools maintains that helping young people understand the role the courts play in their lives is an important step in ensuring they do not end up permanently involved in the justice system.<sup>246</sup> Restorative justice is an important tenet of KKIS, as well as California Chief Justice Tani Cantil-Sakauye’s Civic Learning Initiative, which launched in 2011 to recognize state public schools for their efforts to engage students in civic learning.<sup>247</sup>

### ***B. Treatment Programs for Students Found Responsible of Committing Sexual Harm***

The traditional system of sanctioning for campus sexual assault does little to prevent future reoffending. The typical disciplinary response is for schools to either suspend students or assign them to write a so-called reflection paper, depending on the seriousness of the misconduct.<sup>248</sup> If counseling is available, it is unlikely to be evidence-based and designed to target the individual risk and needs factors associated with sexual offending behaviors.<sup>249</sup> Sex offender-

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<sup>242</sup> *Id.*

<sup>243</sup> *Workplace Dialogue Training Workshop*, RESTORATIVE RESPONSE BALT., <https://www.restorativeresponse.org/workplace-dialogue-training-workshop/> [<https://perma.cc/W5Q7-HE6R>].

<sup>244</sup> *Id.*

<sup>245</sup> SONIA JAIN, HENRISSA BASSEY, MARTHA A. BROWN & PREETY KALRA, RESTORATIVE JUSTICE IN OAKLAND SCHOOLS IMPLEMENTATION AND IMPACTS: AN EFFECTIVE STRATEGY TO REDUCE RADICALLY DISPROPORTIONATE DISCIPLINE, SUSPENSIONS AND IMPROVE ACADEMIC OUTCOMES 4 (2014), [https://www.ousd.org/cms/lib07/CA01001176/Centricity/Domain/134/Exec\\_Summary\\_-\\_RJ\\_OUSD\\_Report\\_2014.pdf](https://www.ousd.org/cms/lib07/CA01001176/Centricity/Domain/134/Exec_Summary_-_RJ_OUSD_Report_2014.pdf) [<https://perma.cc/Z985-EPCQ>]; *see also* BALIGA ET AL., *supra* note 168, at 8 (“Recidivism rates of Black and Latinx youth who went through the [Restorative Community Conferencing] program were lower at [six], [twelve], and [eighteen] months from program completion compared to the control group.”).

<sup>246</sup> *Keeping Kids in School and Out of Court*, JUD. COUNCIL OF CAL., <https://www.courts.ca.gov/v38380.htm> [<https://perma.cc/Z985-EPCQ>].

<sup>247</sup> *Cf. generally Civil Learning Initiative*, JUD. COUNCIL OF CAL., <https://www.courts.ca.gov/20902.htm> [<https://perma.cc/85J9-CRB8>].

<sup>248</sup> Lamade et al., *supra* note 54, at 139.

<sup>249</sup> *Id.*

specific counseling is rarely subsidized by the school.<sup>250</sup> When the sexual misbehavior is serious the student is simply expelled.<sup>251</sup>

While expulsion makes one school safer, the next school will suffer, especially if the problems of the student offender who transfers are never addressed. That student will still have the same risk factors that led to the initial sexual misbehavior, and perhaps anger about the way they were treated by the first school. Schools must ensure that the root causes of such behavior are addressed. Without finding a way to meet the student's needs by ensuring participation in a structured counseling setting that uses an approach proven effective to treat offenders, it is all too probable that similar offending behavior will reoccur.<sup>252</sup>

Researchers and treatment providers have long known that generic counseling does not target the risk factors demonstrated by sex offenders.<sup>253</sup> As a result, jurisdictions like California that mandate treatment for people convicted of sex offenses also require that the treatment programs meet evidence-based guidelines to provide specific treatment modalities that have been proven effective.<sup>254</sup> In California, treatment providers and programs must be certified to do this kind of treatment and agree to follow curriculum certification guidelines set by the California Sex Offender Management Board.<sup>255</sup> In Texas, treatment providers for students who are adjudicated responsible for sexual harm must also be certified.<sup>256</sup>

Campuses need treatment interventions applicable to a variety of sexual misconduct behaviors that are adapted to all students, regardless of sexual orientation or gender identity. Options for treatment locations could include the campus counseling center or clinic, off-campus treatment through an independent provider or off-campus treatment by a licensed or certified therapist affiliated with the university. Some campuses prefer outside providers due to limited counseling center staff capacity, the requirement that students receive

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<sup>250</sup> *Id.* Except for STARRSA, only one other institution of higher learning that had developed a treatment program for students found to have sexually offended. *Id.* It follows that students at other campuses may have access to mental health services, but these services are not targeted to address their specific needs.

<sup>251</sup> See BRETT A. SOKOLOW, W. SCOTT LEWIS, SAUNDRA K. SCHUSTER & DANIEL C. SWINTON, ATIXA SEX/GENDER-BASED HARASSMENT, DISCRIMINATION AND SEXUAL MISCONDUCT MODEL POLICY (2015), [https://cdn.atixa.org/website-media/o\\_atixa/wp-content/uploads/2012/01/18122345/ATIXA-Model-Policy\\_07-02-15\\_Final.pdf](https://cdn.atixa.org/website-media/o_atixa/wp-content/uploads/2012/01/18122345/ATIXA-Model-Policy_07-02-15_Final.pdf) [<https://perma.cc/3CQC-3F7G>] (listing the following as possible sanctions: warning, probation, suspension, expulsion, withholding diploma, revocation of degree, transcript notation, and organizational sanctions).

<sup>252</sup> Lamade et al., *supra* note 54, at 137 (citing R. Karl Hanson, Guy Bourgon, Leslie Helmus & Shannon Hodgson, *The Principles of Effective Correctional Treatment Also Apply to Sexual Offenders: A Meta-Analysis*, 36 CRIM. JUST. & BEHAV. 865 (2009)).

<sup>253</sup> *Id.* at 139.

<sup>254</sup> CAL. PENAL CODE § 290.09 (West, Westlaw through Ch. 362 of 2021 Reg. Sess.).

<sup>255</sup> *Id.*; see *Certification*, CAL. SEX OFFENDER MGMT. BD., <https://casomb.org/index.cfm?pid=1215> [<https://perma.cc/2YTW-FXX3>].

<sup>256</sup> 22 TEX. ADMIN. CODE § 810.3 (West, Westlaw through 46 Tex. Reg. No. 6306); Lamade et al., *supra* note 54, at 136.

treatment during a period of suspension when they are no longer near the campus and concerns about survivors and perpetrators receiving treatment at the same location.<sup>257</sup>

In response to these concerns, Robert Prentky, Mary Koss and colleagues at Fairleigh Dickinson University developed the STARRSA Project.<sup>258</sup> This project researched the risk factors and treatment needs of perpetrators of campus sexual assault, with the goal of developing a specific curriculum for offenders who were college students.<sup>259</sup>

The STARRSA Project's goal was to design a risk and needs assessment protocol and an evidence-based treatment curriculum for college students found responsible for sexual assault, most of whom will be considered low-risk offenders.<sup>260</sup> Research showed that prevention and educational programs were helpful to provide general knowledge and facilitate skills but insufficient as intervention strategies with responsible perpetrators.<sup>261</sup>

The intervention developed for this population included two Risk-Needs-Responsivity ("RNR") treatment programs and a cognitive behavioral treatment option.<sup>262</sup> One program was for low-risk students with protective factors.<sup>263</sup> The other was for high-risk students with behavioral/emotional dysregulation, anger management/impulsivity problems or personality pathology.<sup>264</sup> Treatment was deemed more likely to facilitate lasting behavioral and attitudinal change.<sup>265</sup> The project found that treatment provides a way to challenge distorted beliefs in a safe environment, as well as to manage complex feelings, "e.g., depression, anger, shame, and guilt," while maintaining respect and rapport.<sup>266</sup>

STARRSA found "assessing risk factors and needs related to sexual misconduct and [tailoring] treatment accordingly" is the key to successful treatment.<sup>267</sup> One example cited in STARRSA's Final Report related to dealing with alcohol abuse:

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<sup>257</sup> STARRSA FINAL REPORT, *supra* note 228, at 16.

<sup>258</sup> Lamade et al., *supra* note 54, at 140 (describing the STARRSA program).

<sup>259</sup> *Id.*

<sup>260</sup> STARRSA FINAL REPORT, *supra* note 228, at 16.

<sup>261</sup> See Lamade et al., *supra* note 54, at 136; see generally STARRSA FINAL REPORT, *supra* note 228; ROBERT PRENTKY, MARY KOSS, RAINA LAMADE & ELISE LOPEZ, STARRSA ACTIVE PSYCHOEDUCATION (AP) MANUAL (2018), <https://www.dropbox.com/sh/cm5n7n38qn2ispl/AACIRS8VxaKwQswX6NqWSN2Wa?dl=0&preview=AP+Manual+FV.pdf> [<https://perma.cc/RA5U-NER3>] [hereinafter STARRSA ACTIVE PSYCHOEDUCATION].

<sup>262</sup> Lamade et al., *supra* note 54, at 135.

<sup>263</sup> *Id.* at 140.

<sup>264</sup> *Id.*

<sup>265</sup> See R. Karl Hanson & Kelly E. Morton-Bourgon, *The Accuracy of Recidivism Risk Assessments for Sexual Offenders: A Meta-Analysis of 118 Prediction Studies*, 21 PSYCH. ASSESSMENT 1 *passim* (2009); Friedrich Lösel & Martin Schmucker, *The Effectiveness of Treatment for Sexual Offenders: A Comprehensive Meta-Analysis*, 1 J. EXPERIMENTAL CRIMINOLOGY 117, 127 (2005).

<sup>266</sup> Lamade et al., *supra* note 54, at 140; see generally STARRSA FINAL REPORT, *supra* note 228; STARRSA ACTIVE PSYCHOEDUCATION, *supra* note 261.

<sup>267</sup> Lamade et al., *supra* note 54, at 140.

For example, if the student has a problem with alcohol use and alcohol is related to sexual misconduct, then exploring alcohol use will be a relevant treatment need. Responsivity is built into the program, focusing on optimizing the individual's response to treatment by recognizing ethnic, cultural and sexual identity/orientation needs, as well as targeting specific program resources. For example, some students are more readily engaged and responsive to experiential exercises; others more responsive to multimedia videos or Power[P]oint presentations. Recognizing resistance, motivational enhancement techniques are built in to help facilitate engagement and to explore how treatment might be helpful for the particular individual.<sup>268</sup>

To address campuses' liability concerns, the STARRSA report recommends that the treatment programs it developed for high-risk students occur during a period of suspension, with a treatment provider near the student's home rather than on the campus.<sup>269</sup> The materials for providing cognitive behavioral therapy, as well as a psychoeducation manual, are available to treatment providers online.<sup>270</sup>

In recent years, courts and administrative bodies have begun importing some of the procedural protections and rights afforded to accused persons in the criminal justice system to campus disciplinary proceedings.<sup>271</sup> However, the regulations adopted in 2020 for Title IX expressly authorize the use of a restorative justice process in lieu of a formal Title IX hearing, if the parties so choose.<sup>272</sup> Similarly, legislation adopted by California in 2020 governing campus sexual misconduct in IHEs does not foreclose the use of restorative justice facilitated processes, although mediation is banned.<sup>273</sup>

If the accused perpetrator opts-in to an alternate restorative justice system, however, they should be able to waive any rights accorded by law to obtain a sanction that is more nuanced and better designed to address the behavior that occurred. It is likely that a treatment program for low-risk or first-time offenders that replaces incarceration, expulsion or employment termination will reduce the odds of reoffending and increase public and campus safety.

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<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at 140–41.

<sup>270</sup> See *supra* note 228 for a Dropbox URL to access these online resources.

<sup>271</sup> See, e.g., *Doe v. Allee*, 30 Cal. App. 5th 1036, 1066 (Cal. Ct. App. 2019); *Doe v. Univ. of S. Cal.*, 29 Cal. App. 5th 1212, 1233 (Cal. Ct. App. 2018); *Doe v. Regents of Univ. of Cal.*, 28 Cal. App. 5th 44, 60 (Cal. Ct. App. 2018) (these cases imported due process rights from the criminal justice system into the campus disciplinary system); *but see* CAL. EDUC. CODE § 66281.8 (West, Westlaw through Ch. 362 of 2021 Reg. Sess.) (in an effort to abrogate the effect of these rulings, the California Legislature enacted a new statute intended to reinstate rules more commensurate with informal campus disciplinary proceedings).

<sup>272</sup> 34 C.F.R. § 106.45 (West, Westlaw through Oct. 21, 2021).

<sup>273</sup> S.B. 493, 2019-2020 Reg. Sess. (Cal. 2020).

## V. RESTORATIVE JUSTICE APPROACHES TO ADDRESS SEXUAL HARASSMENT IN THE WORKPLACE

The underreporting of sexual violence is well-documented: “[E]mpirical research . . . shows rates of sexual harassment and sexual violence that are much higher than the number of [official] reports . . . .”<sup>274</sup> That “sexual harassment is a significantly and consistently underreported problem, whether on a campus or not, is well-established.”<sup>275</sup> Yet it is estimated that only “[one percent] of victims participate in litigation” against employers for sexual harassment in the workplace.<sup>276</sup> Our legal system is geared toward settlement and fewer than five percent of all cases filed in court reach verdict.<sup>277</sup> Thus, “the really egregious sexual harassment cases are rarely, if ever, adjudicated by the courts.”<sup>278</sup>

There are varying definitions of sexual harassment. One is a “series of behaviors that interfere[s] with the victim’s academic or professional performances, limit[s] the victim’s ability to participate in an academic program, or create[s] an intimidating, hostile, or offensive social, academic, or work environment.”<sup>279</sup> This definition was intended to be somewhat congruent “with the ‘hostile environment’ prong of federal Title IX legal guidelines and campus policies.”<sup>280</sup>

The United States Supreme Court has held that “harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.”<sup>281</sup> Regardless of its legal definition:

the bottom line is that harassment is more about upholding gendered status and identity than it is about expressing sexual desire or sexuality. Harassment provides a way for some men to monopolize prized work roles and to maintain a superior masculine position and sense of self. . . . [W]here unwanted sexual misconduct occurs, it is typically a telltale sign of broader patterns of discrimination and inequality at work such as sex segregation and gender stereotyping.<sup>282</sup>

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<sup>274</sup> Cantalupo & Kidder, *supra* note 20, at 683.

<sup>275</sup> *Id.* at 683–84.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* The conservative estimate seems to be that over ninety percent of cases in general end in guilty pleas. *Criminal Cases*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/types-cases/criminal-cases> [<https://perma.cc/7FFL-D7EX>]; see also Erica Goode, *Stronger Hand for Judges in the ‘Bazaar’ of Plea Deals*, N.Y. TIMES (Mar. 22, 2012), <https://www.nytimes.com/2012/03/23/us/stronger-hand-for-judges-after-rulings-on-plea-deals.html> [<https://perma.cc/RUW3-DNYK>] (showing that ninety-seven percent of federal cases and ninety-four percent of state cases end via plea bargain).

<sup>278</sup> David Sherwyn & Paul Wagner, *We Can Thank Harvey Weinstein for Doing What Congress and the Supreme Court Failed to Do*, 59 CORNELL HOSP. Q. 174, 182 (2018).

<sup>279</sup> Cantalupo & Kidder, *supra* note 20, at 690.

<sup>280</sup> *Id.*

<sup>281</sup> *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

<sup>282</sup> U.S. COMM’N ON HUM. RTS., FEDERAL #METOO: EXAMINING SEXUAL HARASSMENT IN



Even where there is acceptance of the legitimacy of a restorative justice approach as a potential alternative to incarceration for drug offenses,<sup>283</sup> there may be skepticism about its use when the offense is sexual harassment. There are historical reasons why this may be true. Because sexual harassment has been swept under the rug by many institutions and employers for so long, the backlash of #MeToo often advocates a zero-tolerance approach.<sup>284</sup> For example, in the higher education arena, students are demanding “more stringent regulation of bad behavior. They want to broaden the scope of what’s forbidden. They want perpetrators to suffer lasting consequences. And they want accountability not just to the person harmed but to the community.”<sup>285</sup>

Zero tolerance for sexual harassment is the aim of any system of accountability, especially restorative justice. Talking about ways to hold harassers accountable short of termination may at first seem to perpetuate the old approach of ignoring the harassment or minimizing it by administering the equivalent of a slap on the wrist. However, restorative justice does just the opposite. According to Mary P. Koss, the pioneer behind the Arizonan RESTORE Program: “People think restorative justice is ‘soft’ . . . .”<sup>286</sup> Koss adds, “But the reality is, it’s hard. It’s hard accountability.”<sup>287</sup>

The other objection to offering restorative justice as an alternative to termination in the workplace is liability. Employers are understandably concerned that civil liability for monetary damages will result if they do not respond by terminating the person responsible for the harassment.<sup>288</sup> At the same time, government entities and IHEs may have tenure systems that make

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GOVERNMENT WORKPLACES (2020), <https://www.usccr.gov/pubs/2020/04-01-Federal-Me-Too.pdf> [<https://perma.cc/W66S-PGME>] (quoting Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17, 19 (2018)).

<sup>283</sup> See Jessica M. Eaglin, *Against Neorehabilitation*, 66 SMU L. REV. 189, 206–08 (2013).

<sup>284</sup> See, e.g., CASE, ZERO TOLERANCE PLEDGE (2018), [https://www.case.org/system/files/media/inline/ZeroTolerancePledge\\_2018%20CASE\\_DV\\_0.pdf](https://www.case.org/system/files/media/inline/ZeroTolerancePledge_2018%20CASE_DV_0.pdf) [<https://perma.cc/34Z2-UUCQ>] (detailing the Council for Advancement and Support of Education’s (CASE) adoption of a zero-tolerance pledge in the wake of #MeToo); Cynthia L. Cooper, *#MeToo Shakes the Legal Landscape on Sexual Harassment*, AM. BAR ASS’N (Aug. 31, 2018), <https://www.americanbar.org/groups/diversity/women/publications/perspectives/2018/summer/metoo-shakes-legal-landscape-sexual-harassment/> [<https://perma.cc/8MGW-8UKL>] (describing how the ABA Commission on Women in the Profession released a manual of resources on sexual harassment policies and procedures).

<sup>285</sup> Emma Pettit, *Next Wave of #MeToo*, CHRON. OF HIGHER EDUC. (Feb. 16, 2020), <https://www.chronicle.com/article/the-next-wave-of-metoo/> [<https://perma.cc/52KV-7CCE>].

<sup>286</sup> *Id.*

<sup>287</sup> *Id.* (quoting Mary P. Koss).

<sup>288</sup> See Charles H. Fleischer, *Employment Law 101: Employer Liability for Sexual Harassment, Part 2*, SHRM (Aug. 22, 2018), <https://www.shrm.org/resourcesandtools/hr-topics/behavioral-competencies/business-acumen/pages/employer-liability-for-sexual-harassment.aspx> [<https://perma.cc/2W7F-ANSW>]; see, e.g., THE COST OF SEX-BASED HARASSMENT TO BUSINESSES: AN IN-DEPTH LOOK AT THE WORKPLACE, INT’L CTR. FOR RSCH. ON WOMEN 7 (2018), [https://www.icrw.org/wp-content/uploads/2018/08/ICRW\\_SBHDonorBrief\\_v4\\_WebReady.pdf](https://www.icrw.org/wp-content/uploads/2018/08/ICRW_SBHDonorBrief_v4_WebReady.pdf) [<https://perma.cc/SU54-R24M>].

termination a lengthy and difficult pursuit.<sup>289</sup> These entities often have mandatory trainings for employees about sexual harassment.<sup>290</sup> But as one administrator at Colorado State University observed, “I just don’t think there is an educational workshop or other sanction that can duplicate sitting in front of the person you harmed and hearing how it affected them. I believe it is actually much more difficult to do this than simply showing up to a workshop.”<sup>291</sup>

Today, employers’ fears of allegations of sexual harassment in their organizations extend beyond civil liability, to reputational harm and harm to business interests. As one business reporter observed, “Executives and boards are beginning to look at harassment ‘the same way you think about other risks to your organization’ like security or hacking.”<sup>292</sup>

Employees or students who are not satisfied with the outcome when they speak out about sexual harassment are also the people most likely to sue the employer or college. The advantage of a restorative justice approach is that it operates only when chosen by the survivor. Research suggests that harmed

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<sup>289</sup> See Aisha S. Ahmad, *Why is It So Hard to Fire a Tenured Sexual Predator?*, CHRON. OF HIGHER EDUC. (Oct. 14, 2020), <https://www.chronicle.com/article/why-is-it-so-hard-to-fire-a-tenured-sexual-predator/> [<https://perma.cc/7UZ3-E9PW>]; see also Timothy B. Lovain, *Grounds for Dismissing Tenured Postsecondary Faculty for Cause*, 10 J. COLL. & U. L. 419, 419 (1984) (“One of the most difficult personnel actions that a college or university can take is to terminate the employment of a tenured faculty member for cause.”). Even a non-tenured faculty member with longstanding service or an understanding with the college may have a due process interest in his employment. See *Perry v. Sinderman*, 408 U.S. 593, 603 (1972) (holding that a non-tenured employee had right to employment subject to termination only for cause).

<sup>290</sup> Sexual harassment prevention training:

along with other reasonable internal policies geared at preventing and quickly responding to sexual harassment complaints, provides a company with a defense to claim for sexual harassment under Title VII and a way to ensure that no punitive damages will be found. Thus, whether or not training actually works to prevent sexual harassment, it generates a legal benefit that is otherwise unavailable.

Carolina Avellaneda, *Should Your Company Offer Sexual Harassment Prevention Training*, AM. MGMT. ASS’N (Jan. 24, 2019), <https://www.amanet.org/articles/should-your-company-offer-sexual-harassment-prevention-training/> [<https://perma.cc/S6VF-ZV5S>]. Many states mandate sexual harassment prevention training. See *2021 Sexual Harassment Training Requirements by State*, ONPAY, <https://onpay.com/hr/basics/sexual-harassment-training-requirements> [<https://perma.cc/7BTv-7Y6A>]; see also *Sexual Harassment Training Requirements by State*, INSPIRED EARNING (Apr. 26, 2021), <https://inspiredelearning.com/hr-compliance/state-specific-compliance-training/sexual-harassment-training-requirements-by-state/> [<https://perma.cc/9HHX-4ZED>]. Employers are sometimes urged to voluntarily provide such training even in states that do not require it. See EMP. GRP., *Sexual Harassment—Draw the Line*, EMP. GRP.: KNOWLEDGE CTR. (Aug. 9, 2021), <https://theemployergroup.com/blog/sexual-harassment-draw-the-line/> [<https://perma.cc/P69R-6HEA>]. Advocacy organizations may offer free training to employers about sexual violence in the workplace. See, e.g., *Sexual Violence and the Workplace: Making the Connections*, NAT’L SEXUAL VIOLENCE RES. CTR., <https://campus.nsvrc.org/course/index.php?categoryid=13> [<https://perma.cc/TGZ9-ED66>].

<sup>291</sup> KARP, *supra* note 63, at 53 (quoting Paul Osincup, Associate Director of Conflict Resolution and Services at Colorado State University).

<sup>292</sup> Jodi Kantor, *#MeToo Called for an Overhaul: Are Businesses Really Changing?*, N.Y. TIMES (Mar. 23, 2018) (quoting Kaye Foster-Cheek), <https://www.nytimes.com/2018/03/23/us/sexual-harassment-workplace-response.html> [<https://perma.cc/UW95-83V3>].

parties “consistently and strongly” appreciated the opportunity to participate in a well-structured restorative justice process.<sup>293</sup>

When participants believed they had a voice, offenders took responsibility, parties were able to talk out what happened and the outcome and process was fair, findings suggest that the survivor was ready afterward to move on with their life.<sup>294</sup> This outcome means a win-win for all parties, not just the survivor. The employer is less likely to be sued, the perpetrator has agreed to a process that will ultimately make amends to all persons harmed and society benefits because the chance of a pass-the-harasser scenario is reduced.

When survivors and responsible parties are satisfied with the restorative justice process, employers are less likely to face a lawsuit over their handling of the harassment. Most people resort to civil lawsuits when they are dissatisfied with the way their situation has been handled initially, whether in the criminal justice system or the student conduct disciplinary process. This applies to both the person harassed and the harasser.

An example of how this can work is the Dalhousie dental school case. A group of women dental students discovered that thirteen of their fellow male classmates had created a private Facebook page that contained “misogynistic, sexist and homophobic” material about them.<sup>295</sup> They opted to pursue a restorative justice process available at the school.<sup>296</sup> They explained:

We were clear from the beginning, to the people who most needed to hear it, that we were not looking to have our classmates expelled as 13 angry men who understood no more than they did the day the posts were uncovered. Nor did we want simply to forgive and forget. Rather, we were looking for a resolution that would allow us to graduate alongside men who understood the harms they caused, owned these harms, and would carry with them a responsibility and obligation to do better.<sup>297</sup>

The restorative justice process involved a thorough investigation of the claims, regular meetings between facilitators and participants, restorative circles with various groups of participants and a day at the end of the five-month process during which the male students presented what they had learned as a result of the process.<sup>298</sup> At the outset, the male students noted, “when we realized the hurt and harm our comments caused for our classmates, faculty and staff we wanted to convey our overwhelming regret.”<sup>299</sup> During the restorative process, however:

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<sup>293</sup> KARP, *supra* note 63, at 49.

<sup>294</sup> *Id.* at 51.

<sup>295</sup> JENNIFER J. LLEWELLYN, JACOB MACISAAC & MELISSA MACKAY, REPORT FROM THE RESTORATIVE JUSTICE PROCESS 2 (2015), <https://cdn.dal.ca/content/dam/dalhousie/pdf/cultureofrespect/RJ2015-Report.pdf> [<https://perma.cc/GM7L-XP5F>].

<sup>296</sup> *Id.*

<sup>297</sup> *Id.* at 9.

<sup>298</sup> *Id.* at 8.

<sup>299</sup> *Id.* at 10.

we learned that saying sorry is too easy. Being sorry, we have come to see, is much harder. It takes a commitment to hear and learn about the effects of your actions and an ongoing and lasting commitment to act differently in the future. We have hurt many of those closest to us. We do not ask for our actions to be excused. They are not excusable.<sup>300</sup>

One commentator observed of the Dalhousie case:

[b]y the end of the process, the men involved took responsibility for their actions, understood how their actions created and reinforced gender-based harms and stereotypes, and committed to addressing those issues. The students have gone on to present their experiences in a number of forums. The learning and change that occurred in this case would most likely not have happened in a punitive process. The justice goals of the female students who had been harmed were met because the process was deliberately designed to help the male students understand the harm caused, rather than simply punishing the behavior.<sup>301</sup>

The restorative justice response to sexual harassment may be the only viable weapon to effect behavioral change in those who sexually harass others. Termination may simply lead to the pass-the-harasser scenario previously discussed in this Article.<sup>302</sup> Prevention education, at least as it has traditionally been used, has not been shown effective to end future harassment either.<sup>303</sup> While harassment is hard to measure, and thus program effects are hard to gauge, some studies suggest that grievance procedures and training may not reduce harassment.<sup>304</sup>

Prevention education of the federal work force provides one clue. By 1987, three-quarters of federal workers had completed training, and, by 1994, four-fifths knew how to file a grievance.<sup>305</sup> Yet forty-two percent of women reported in both 1980 and 1987 that they had been harassed in the preceding two years.<sup>306</sup> In 1994, forty-four percent reported the same.<sup>307</sup> These federal statistics are indicative: "Much of the subsequent research also suggests that sexual harassment grievance procedures and training may be managerial snake oil."<sup>308</sup>

Typical prevention training reviews the law of sexual harassment, identifies illegal behavior and describes complaint processes and punishments.<sup>309</sup> The

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<sup>300</sup> Goodmark, *supra* note 30, at 96.

<sup>301</sup> *Id.* at 96–97.

<sup>302</sup> See discussion *supra* Section I.C.

<sup>303</sup> Frank Dobbin & Alexandra Kalev, *The Promise and Peril of Sexual Harassment Programs*, 116 PROC. NAT'L ACAD. SCI. 12255, 12255 (2019).

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

<sup>309</sup> *Id.* at 12256.

focus is on how “employees are potential perpetrators, not victims’ allies.”<sup>310</sup> While this type of training can improve recognition of harassment and knowledge about employer policy and complaint processes, “men who score high on ‘likely harasser’ and ‘gender role conflict’ scales—the men trainers hope to reform—frequently have adverse reactions to this sort of ‘forbidden behavior’ training . . . .”<sup>311</sup> The research shows this type of employee training “can exacerbate gender role hostility and propensity to harass among men.”<sup>312</sup> In fact, they were found to score higher afterward.<sup>313</sup> Thus, any positive training effects may be reversed. The takeaway from this study on sexual harassment programs is that manager training, not employee training, may be key.

The type of training that best approximates manager training—bystander intervention training—suggests that it increases the intention to intervene, confidence about intervening and actual intervention.<sup>314</sup> Research shows that new manager training programs are followed by increases in white, Black, Hispanic, and Asian-American women in management—which ultimately leads to a work environment that takes complaints of harassment seriously.<sup>315</sup> Women are more likely to believe harassment complaints and less likely to react negatively to training.<sup>316</sup> The downside is that placing too many women in management, especially white women, is likely to trigger a backlash in and of itself.<sup>317</sup> At some point, the positive effects of manager training disappear, and negative effects of grievance procedures and employee training appear, in workplaces with the most women managers—especially when those managers are white women.<sup>318</sup>

The April 2020 study on sexual harassment in the federal workplace by the United States Commission on Civil Rights had four takeaways:

1. Implementing department-wide, uniform penalties to be used in disciplinary actions[;]
2. Banning serious perpetrators from receiving promotions and performance awards[;]
3. Ending the practice of reassigning perpetrators to other divisions[;]

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<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

<sup>312</sup> *Id.* at 12258.

<sup>313</sup> *Id.* at 12556.

<sup>314</sup> See Dominic J. Parrott, Kevin M. Swartout, Andra Teten Tharp, Danielle M. Purvis & Volkan Topalli, *Speak Up! Prosocial Intervention Verbalizations Predict Successful Bystander Intervention for a Laboratory Analogue of Sexual Aggression*, 32 *SEXUAL ABUSE* 220, 220–43 (2019); Sidney Bennett, Victoria L. Banyard & Katie M. Edwards, *The Impact of the Bystander’s Relationship with the Victim and the Perpetrator on Intent to Help in Situations Involving Sexual Violence*, 32 *J. INTERPERSONAL VIOLENCE* 682, 682–702 (2017).

<sup>315</sup> Dobbin & Kalev, *supra* note 303, at 12258.

<sup>316</sup> *Id.* at 12259.

<sup>317</sup> *Id.*

<sup>318</sup> The tipping point seems to be about twelve percent for white women in managerial positions. *Id.*

and]

4. Embracing and training employees regarding bystander intervention.<sup>319</sup>

The study went on to recommend that Congress “should establish a federal ombudsperson, empowered to investigate alleged sexual harassment claims of complainants who may not have adequate recourse through available channels where existing agency structures may be compromised by conflicts.”<sup>320</sup> Private employers could embrace a similar structure by appointing an ombudsman either outside the organization, or one within the organization without ties that might compromise neutrality, to handle sexual harassment complaints when it appears the existing complaint structure is not working. Such an ombudsperson should have the facilitator training required for one doing restorative justice work because this is ultimately the process that will need to be used, in addition to any penalties assigned following disciplinary findings.

Research involving surveys of survivors show “that grievance procedures incite retaliation and rarely satisfy victims. Even in workplaces with manager training, which is generally effective, grievance procedures do no good.”<sup>321</sup> In addition, “the [United States Equal Employment and Opportunity Commission]’s Select Taskforce on the Study of Harassment in the Workplace recommended that employers offer alternative complaint systems” which share some features with restorative justice processes.<sup>322</sup>

Companies may be afraid to make their efforts public, fearing that new initiatives to address harassment will be used against them as an admission of past indifference. But some have announced new measures. Microsoft eliminated forced arbitration for employees making sexual harassment claims and offered other choices because it did not want to pressure women to stay silent.<sup>323</sup> The Screen Actors Guild introduced a clear code of conduct on harassment, detailing prohibited behavior.<sup>324</sup> Facebook publicized its sexual harassment policy.<sup>325</sup> New York University banned romantic relationships between faculty members and undergraduates or anyone over whom they exercise supervisory authority.<sup>326</sup> Even cities have joined this trend: “. . . Seattle

<sup>319</sup> U.S. COMM’N ON HUM. RTS., *supra* note 282, at 6.

<sup>320</sup> *Id.*

<sup>321</sup> Dobbin & Kalev, *supra* note 303, at 12259.

<sup>322</sup> *Id.*

<sup>323</sup> See Samantha Cooney, *Microsoft Can’t Make Women Settle Sexual Harassment Cases Privately Anymore. Here’s Why That Matters*, TIME (Dec. 19, 2017, 5:19 PM), <https://time.com/5071726/microsoft-sexual-harassment-forced-arbitration/> [<https://perma.cc/HM74-XHQY>].

<sup>324</sup> See generally SAG-AFTRA, CODE OF CONDUCT ON SEXUAL HARASSMENT (2018), [https://www.sagaftra.org/files/sag-aftra\\_code\\_of\\_conduct\\_f2\\_2.pdf](https://www.sagaftra.org/files/sag-aftra_code_of_conduct_f2_2.pdf) [<https://perma.cc/A857-YVAE>].

<sup>325</sup> See generally Sheryl Sandberg & Lori Goler, *Sharing Facebook’s Policy on Sexual Harassment*, FACEBOOK, (Dec. 8, 2017), <https://about.fb.com/news/2017/12/sharing-facebooks-policy-on-sexual-harassment/> [<https://perma.cc/TY7T-Q6VD>].

<sup>326</sup> See generally *Policy on Consensual Intimate Relationships*, N.Y. UNIV. (Jan. 21, 2018),

enacted new city rules and procedures to ensure respectful behavior on construction sites.”<sup>327</sup>

In 2018 it was reported that entrepreneurs were developing new systems for women to report their experiences and for businesses to understand what is transpiring.<sup>328</sup> TEQuitable is a platform that “connects workers with real-world support and can send companies anonymized alerts about complaints.”<sup>329</sup> Other platforms also allow survivors to share their stories: “Callisto, which is used on campuses to report sexual assaults, is being adapted for workplace use.”<sup>330</sup> Similarly, “Vault . . . helps women save evidence and, like Callisto, shows users if others have named the same offender.”<sup>331</sup>

Dealing with harassment of women in white-collar businesses may look different than women who work in industries like food service and cleaning.<sup>332</sup> These blue-collar industries have typically offered workers fewer protections.<sup>333</sup> Union organizers recognize the challenge: “Organizers who work with female janitors, fast food workers, hotel housekeepers, nannies and eldercare providers say that women in those fields have become more willing to speak up. But it’s not clear whom they should tell.”<sup>334</sup>

One alternative is using an independent ombudsperson who can hear complaints confidentially and talk through victims’ options.<sup>335</sup> Tech start-ups have led the way:

Tech start-ups have devised their own alternatives, including virtual ombudspersons and reporting systems. Online reporting may address a common #MeToo and #WhyIDidn’tReport criticism—employer confidentiality clauses prevent victims from learning that their harasser has done it before. Online, victims can report harassment when they choose to but embargo reports until others complain about the same harasser.<sup>336</sup>

It is not clear whether the ombudspersons being used in these newer

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<https://www.nyu.edu/about/policies-guidelines-compliance/policies-and-guidelines/policy-on-consensual-intimate-relationships.html> [<https://perma.cc/3UHC-NZPZ>].

<sup>327</sup> Kantor, *supra* note 292.

<sup>328</sup> *Id.*

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

<sup>332</sup> See Catrin Einhorn & Rachel Abrams, *The Tipping Equation*, N.Y. TIMES (Mar. 12, 2018), <https://www.nytimes.com/interactive/2018/03/11/business/tipping-sexual-harassment.html> [<https://perma.cc/62F4-HXZH>].

<sup>333</sup> See generally Krista Lynn Minnotte & Elizabeth M. Legerski, *Sexual Harassment in Contemporary Workplaces: Contextualizing Structural Vulnerabilities*, 13 SOCIO. COMPASS 1 (2019); Marita P. McCabe & Lisa Hardman, *Attitudes and Perceptions of Workers to Sexual Harassment*, 145 J. SOC. PSYCH. 719 (2010).

<sup>334</sup> Kantor, *supra* note 292.

<sup>335</sup> See Dobbin & Kalev, *supra* note 303, at 12259.

<sup>336</sup> *Id.*

systems have the extensive training required for facilitators doing restorative justice work. To the extent that their training is rigorous, and the process viewed as fair by all parties, there is some hope for reduction in workplace harassment. If this can be accomplished by changing behavior and even attitudes rather than by terminating the employee who has committed sexual harassment, so much the better for society.

## VI. CHALLENGES TO ADOPTION OF RESTORATIVE JUSTICE OPTIONS FOR SEXUAL HARASSMENT AND ASSAULT

The use of restorative justice options depends in part on the choices of the parties involved. Viewed in a larger context, campus communities must be ready to acknowledge that alternatives to expulsion or employment termination can be acceptable. There are challenges to adoption of options that permit responsible parties to remain on campus, either as students or academics. Even if there is no verified incident of past harassment, the current political climate on campus may be in no mood to tolerate retention of educators found responsible for sexual harassment.<sup>337</sup> Public education about restorative justice options may be necessary before students and others are ready to accept remedies for sexual harassment short of employment termination.

One survivor, who ultimately found that forgiveness of her rapist was the one thing that set her free, experienced a wave of community anger and disapproval over her choice.<sup>338</sup> What happened in her case illustrates that society at-large may still have a hard time with the concept of restorative justice, at least in the context of sexual assault.

As the international #MeToo movement against sexual predators and sexual harassment exposes the misconduct of men in positions of authority, a new theme is resisting the tendency of survivors to want to forgive. In one case, the survivor contacted her rapist and after eight years of communicating by e-mail they met to explore reconciliation and forgiveness.<sup>339</sup> Their book prompted protests that it glamorized a rapist;<sup>340</sup> their TED talk garnered over four million views.<sup>341</sup> One reporter noted:

[Society] can't require every rape survivor to not just talk with but collaborate with her rapist. Yet the interest in their story is a testament to people's hunger for a new approach[: restorative justice]. . . .

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<sup>337</sup> See Pettit, *supra* note 285.

<sup>338</sup> Thordis Elva & Tom Stranger, *Can I Forgive the Man Who Raped Me?*, GUARDIAN (Mar. 5, 2017, 4:30 PM), <https://www.theguardian.com/books/2017/mar/05/can-i-forgive-man-who-raped-me-thordis-trust-elva-thomas-stranger-south-of-forgiveness-extract> [<https://perma.cc/7ASY-5T3K>].

<sup>339</sup> Katie J. M. Baker, Opinion, *What Do We Do with These Men?*, N.Y. TIMES (Apr. 27, 2018), <https://www.nytimes.com/2018/04/27/opinion/sunday/metoo-comebacks-charlie-rose.html> [<https://perma.cc/9F55-JKQG>].

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*



Restorative justice is complex and imperfect. It relies on perpetrators to first admit wrongdoing—facilitators aren't always neutral parties—and it often requires victims to communicate with their assailants. But its emphasis is on repairing and preventing harm, not on indefinite, often ineffective punishment.<sup>342</sup>

The rape described above occurred when the survivor was a sixteen-year-old high school student.<sup>343</sup> Thordis Elva tells how her decision to confront and forgive her rapist engendered societal backlash:

Victim-blaming deepens the shame that many survivors feel and lessens the likelihood that they speak up about their experiences. The reality is that there is no 'right' reaction to having your life ripped apart by violence. I knew that my collaboration with Tom [(the rapist)] would be controversial, and the reactions of internet trolls didn't surprise me. But I am concerned with how quick some people were to judge the 'wrong' way in which I worked through my experience. I wasn't 'angry enough', I should've pressed charges, I was setting a 'dangerous precedent', I should be 'ashamed'. Although I made it clear that my forgiveness wasn't for my perpetrator but for myself and that without it, I wouldn't be alive, I was still told that I should not have forgiven.<sup>344</sup>

Forgiveness is not the object of restorative justice. Sometimes it occurs but it is not the goal:

Forgiving under government pressure is not really forgiveness, and it places further burdens on people already victimized. Legal procedures that require apologies also undermine genuine expression of remorse. . . . Making legal room for individuals to forgive those who have harmed them should not mean pressuring them to forgive. . . . Accountability for others is a crucial step before forgiveness can be possible.<sup>345</sup>

As one commentator said, "We should guard against turning to forgiveness solely because more robust justice is unavailable."<sup>346</sup>

Restorative justice options must go hand in hand with systems that hold offenders accountable in other ways, e.g., the criminal justice system and the campus disciplinary system, and systems, like mediation, put in place to deal with sexual harassment in the workplace or academia. Survivors must be free to choose to stay outside formal justice processes and opt for community accountability if that is a viable option.

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<sup>342</sup> *Id.*

<sup>343</sup> Elva & Stranger, *supra* note 338.

<sup>344</sup> *Id.*

<sup>345</sup> See MINOW, *supra* note 4, at 161–62.

<sup>346</sup> *Id.* at 162.

Another challenge to adoption of new workplace policies and processes related to sexual harassment in the workplace is backlash. In a study aimed at determining whether the #MeToo movement had made a difference in reports of sexual harassment in the workplace, researchers found that fewer women reported sexual coercion and unwanted sexual attention following the #MeToo movement.<sup>347</sup> The statistics are compelling: “In 2016, [twenty-five percent] of women in their survey had reported being sexually coerced, and in 2018 that number had declined to [sixteen percent.]”<sup>348</sup> Likewise, reports of “unwanted sexual attention declined from [sixty-six percent] of women to [twenty-five percent.]”<sup>349</sup> Nonetheless, despite this gradual decline, researchers observed “an increase in reports of gender harassment, from [seventy-six percent] of women in 2016 to [ninety-two percent] in 2018.”<sup>350</sup> According to a recent review of the statistics, “data suggests that while blatant sexual harassment — experiences that drive many women out of their careers — might be declining, workplaces may be seeing a ‘backlash effect,’ or an increase in hostility toward women.”<sup>351</sup>

Dealing with this type of backlash requires businesses to prioritize eliminating gender bias. They can offer bystander intervention training, adopt zero-tolerance policies on sexual harassment and respond promptly to complaints.<sup>352</sup> Again, this may come down to making sure that managers or ombudspersons have the disposition and proper training to handle complaints of sexual harassment. Companies can use training that focuses on identifying microaggressions and unconscious bias.<sup>353</sup> Such an approach might not only encourage respectful behavior but also empower peers and managers to step in when they see bullying or harassing behavior.<sup>354</sup>

Community education about restorative justice options related to sexual assault and harassment will be necessary to shift thinking about punishment and its alternatives. The current national climate is looking for ways to deal with wrongdoing short of broad mass incarceration.<sup>355</sup> But extending current thinking about restorative justice options to sexual abuse and harassment will be more

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<sup>347</sup> Stefanie K. Johnson, Ksenia Keplinger, Jessica F. Kirk & Liza Barnes, *Has Sexual Harassment at Work Decreased Since #MeToo?*, HARV. BUS. REV. (July 18, 2019), <https://hbr.org/2019/07/has-sexual-harassment-at-work-decreased-since-metoo> [https://perma.cc/RAH2-KMPX].

<sup>348</sup> *Id.*

<sup>349</sup> *Id.*

<sup>350</sup> *Id.*

<sup>351</sup> *Id.*

<sup>352</sup> *Id.*

<sup>353</sup> See generally Joelle Emerson, *Don't Give up on Unconscious Bias Training—Make It Better*, HARV. BUS. REV. (Apr. 28, 2017), <https://hbr.org/2017/04/dont-give-up-on-unconscious-bias-training-make-it-better> [https://perma.cc/26FV-ZT6L].

<sup>354</sup> *Id.*

<sup>355</sup> Michael Waldman, Adureh Onyekwere, Inimai M. Chettiar & Priya Raghavan, *Ending Mass Incarceration: Ideas from Today's Leaders*, BRENNAN CTR. FOR JUST. (May 16, 2019), <https://www.brennancenter.org/our-work/policy-solutions/ending-mass-incarceration-ideas-todays-leaders> [https://perma.cc/ZM3N-MCQB]; *Ending Mass Incarceration*, VERA INST. OF JUST., <https://www.vera.org/ending-mass-incarceration> [https://perma.cc/SCT3-ZGMB]; see generally Eaglin, *supra* note 283; McLeod, *supra* note 21.

challenging due to outrage over the way past allegations of sexual assault and harassment were swept under the rug. It will take dialogue for communities to understand that restorative justice is not another way of pretending that sexual assault or harassment did not happen. Instead, it is one viable and effective way of dealing with the behavior and preventing recurrence when the survivor chooses that option, and the perpetrator is willing to admit fault.

## VII. SECOND CHANCES: WHO SHOULD BE OFFERED ALTERNATIVE SANCTIONS?

### A. *Sanctions for Low-Risk Offenders Who Have Committed Sexual Harm*

The use of alternatives to the ultimate sanctions of incarceration, expulsion or employment termination should be limited to situations in which the perpetrator has not previously been sanctioned for sexual misconduct or reliably identified as a serial offender, e.g., by testimony of a witness under oath in a criminal case. In other words, the perpetrator is at this point presumably still at lower risk for reoffending.<sup>356</sup> The hope is that offering meaningful alternatives for rehabilitation that allow someone to avoid prison, stay in college or keep their job will motivate such offenders to participate in a meaningful way in cognitive based therapy or educational curriculums designed to address the individual's particular issues.

Some argue that rehabilitation of low-risk offenders is neorehabilitation, meaning that these offenders might have done better without intervention, while those most in need of rehabilitating, high-risk offenders, are not offered the same chance.<sup>357</sup> In this view, rehabilitative criminal justice efforts should focus on high-risk offenders. In the context of sexual offending, however, the repercussions of even minor sexual assault is so profound for many survivors that communities are not prepared to take a chance on releasing high-risk offenders to community-based rehabilitative programs. Even though harsher sanctions may not be the most effective way to prevent recidivism, punishment may be viewed as more appropriate due to the psychological damage often caused by sexual assault.<sup>358</sup>

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<sup>356</sup> See generally AMY PHENIX, YOLANDA FERNANDEZ, ANDREW J. R. HARRIS, MAAIKE HELMUS, R. KARL HANSON & DAVID THORNTON, *STATIC-99R CODING RULES REVISED – 2016* (2016). When scoring for risk on a widely used risk assessment instrument, the Static-99R, one ignores offenses which were committed prior to the most recent offense if the offender was not caught and sanctioned for the earlier offenses. See *id.* at 38. The reason is that the person's risk does not increase until they are caught and sanctioned for the sexual offense(s), and then they repeat that behavior. *Id.* at 39.

<sup>357</sup> Eaglin, *supra* note 283, at 211–12.

<sup>358</sup> See Jill S. Levenson, Yolanda N. Brannon, Timothy Fortney & Juanita Baker, *Public Perceptions About Sex Offenders and Community Protection Policies*, 7 *ANALYSES SOC. ISSUES & PUB. POL'Y* 137, 154–55; Hanson et al., *supra* note 80, at 48–63; CAL. SEX OFFENDER MGMT. BD., *RECOMMENDATIONS REPORT* (2010) (finding that serious traumatization of survivors impacts public policies on those who have sexually offended but urging evidence-based public policies be considered, noting even high-risk offenders who do not reoffend become low-risk over time).

Research focusing on people convicted of sexual offenses reveals that the number of offenses committed is not important in classifying those likely to reoffend.<sup>359</sup> Rather, research shows that offenders who are sanctioned for sexual offenses yet go on to commit another sexual offense, despite being previously sanctioned, are the ones at higher risk for reoffending.<sup>360</sup> Those who commit more than one, or even a cluster of sexual offenses, before they are caught and sanctioned are at no higher risk to commit another offense than those who are caught and sanctioned after the first offense.<sup>361</sup>

In other words, being high risk is related to having been sanctioned and then committing another sexual offense.<sup>362</sup> Thus, in considering who should qualify for alternative treatment as a low-risk offender, the standard should not be whether this is the person's first such offense, but whether it is the first offense for which the person will have received a meaningful sanction.

That said, sometimes a first offense is so egregious that society is not willing to tolerate offering a second chance. In other words, the harm rendered was so violent or extreme that even if the offender's empirically determined risk of reoffending is not demonstrably high, society is unwilling to offer that person any alternative to incarceration, expulsion or termination from employment. According to one scholar, "One may earn the label of a 'high-risk' offender simply because they (or more accurately, people who share their characteristics) are statistically more likely to commit or be arrested for a low-level offense in the subsequent years."<sup>363</sup>

The decision about whether a particular offender merits placement in an alternative therapeutic justice model must be left to the decider of fact. It must be informed by risk assessment as well as factors about the nature of the offense itself. In the higher education or employment setting, the survivor should also have a voice. In the criminal justice system, allowing survivors' wishes to influence punishment is more problematic.

Studies have verified the utility of treatment in rehabilitating persons who have sexually offended, thus reducing the incidence of reoffending: "Hanson and his colleagues conducted a meta-analysis on treatment and found that [seventeen] percent of untreated subjects reoffended, whereas [ten] percent of treated subjects did so. When recidivism rates for sex and nonsexual violent crimes were combined, [fifty-one] percent of untreated and [thirty-two] percent of treated subjects reoffended."<sup>364</sup>

However, most such studies have looked at samples of high-risk

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<sup>359</sup> See PHENIX ET AL., *supra* note 356, at 12.

<sup>360</sup> This concept, known as pseudo-recidivism, is explained in the Coding Rules for the Static-99R, an assessment instrument used by trained professionals to assess risk of future sexual offending. *Id.*

<sup>361</sup> *Id.* at 38–40.

<sup>362</sup> *See id.*

<sup>363</sup> Collins, *supra* note 159, at 95.

<sup>364</sup> Hal Arkowitz & Scott O. Lilienfeld, *Once a Sex Offender, Always a Sex Offender? Maybe Not.*, SCI. AM. (Apr. 1, 2008), <https://www.scientificamerican.com/article/misunderstood-crimes/> [<https://perma.cc/BZ5A-XRKS>].

offenders.<sup>365</sup> Because “[l]ow-risk offenders have such a low base rate of reoffending, it is difficult to use recidivism as a marker of change for this population.”<sup>366</sup> Thus, if a new model of treatment is to be used with low-risk offenders in lieu of incarceration, expulsion or termination from employment, other measures of treatment success may need to be developed. A new treatment modality may be evaluated by focusing on whether a person has met the goals of treatment. Examples of treatment goals include development of empathy, increased awareness of personal boundaries or offensive behavior, decreased use of inappropriate sexually related speech or increased awareness of bases of power and power differentials, e.g., between employer and employee or clergy and parishioner.<sup>367</sup>

Research about those convicted of sexual offenses has shown that high-risk offenders benefit most from treatment.<sup>368</sup> Simply put, this means that high-risk offenders had further to go and therefore made more dramatic, and demonstrable, changes. It does not mean that low-risk offenders cannot benefit from treatment—when treatment follows evidence-based guidelines and the dosage, i.e., length of treatment, is calibrated to each offender’s risk. As an example of how treatment that does not follow research-based guidance can backfire, one study found recidivism rates of low-risk offenders who participated in intensive treatment in a halfway house setting with high-risk offenders actually increased.<sup>369</sup>

A program designed to prevent recidivism by imposing a sanction short of incarceration, expulsion or employment termination must focus on the low-risk individual’s needs and risk potential. Such programs must not mix high-risk offenders with low-risk offenders. The rate of change for low-risk offenders may be more subtle since their offending patterns have not been as egregiously obvious.<sup>370</sup> Nevertheless, rehabilitation for low-risk offenders is clearly necessary. Change in ways of thinking about the world and how we relate to others is hard and takes time for anyone.

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<sup>365</sup> E-mail from Lea Chankin, Consulting Psych., Cal. Sex Offender Mgmt. Bd. & Cal. State Authorized Risk Assessment Tools for Sex Offenders (“SARATSO”) Comm., to author (July 8, 2019) (on file with author) [hereinafter Chankin].

<sup>366</sup> *Id.*

<sup>367</sup> *Id.*

<sup>368</sup> Craig Dowden & D.A. Andrews, *Effective Correctional Treatment and Violent Reoffending: A Meta-Analysis*, 42 CANADIAN J. CRIMINOLOGY 449, 460 (2000); Mark W. Lipsey & Francis T. Cullen, *The Effectiveness of Correctional Rehabilitation: A Review of Systemic Reviews*, 3 ANN. REV. L. & SOC. SCI. 297, 312 (2007); D.A. Andrews, Ican Zinger, Robert D. Hoge, James Bonta, Paul Gendreau & Francis T. Cullen, *Does Correctional Treatment Work? A Clinically Relevant and Psychologically Informed Meta-Analysis*, 28 CRIMINOLOGY 369, 374 (1990).

<sup>369</sup> ROGER PRZYBYLSKI, U.S. DEP’T OF JUST., *THE EFFECTIVENESS OF TREATMENT FOR ADULT SEX OFFENDERS* (2015); Brian Lovins, Christopher T. Lowenkamp & Edward J. Latessa, *Applying the Risk Principle to Sex Offenders: Can Treatment Make Some Sex Offenders Worse?*, 89 PRISON J. 344 *passim* (2009).

<sup>370</sup> See Chankin, *supra* note 365.

### **B. Identifying Low-Risk Offenders**

Empirical risk assessment instruments for offenders are designed to work only within the criminal justice context. In that context, risk levels are heavily based on factors relating to prior criminal offending. Even then, risk assessment instruments are not designed to determine sentencing choices. Rather, they are designed to measure risk in order to target treatment strategies and supervision terms and conditions.

In California, a judge is provided with an offender's static risk assessment score prior to sentencing, without being told how to use it.<sup>371</sup> California has a determinate sentencing law with set sentencing triads and specified factors relating to which triad a judge must choose—upper, middle or lower.<sup>372</sup> As a result, the risk assessment score is really only relevant to whether an offender is offered probation instead of prison, when that is a possibility based on the nature of the offense.<sup>373</sup> It may also be relevant to whether an offender is ordered to register as a sex offender.<sup>374</sup>

Some jurisdictions are using empirical risk assessment to determine a variety of non-penal options for those who have sexually offended. One commentator found at least three different uses of risk assessments in various jurisdictions:

Jurisdictions have integrated risk predictions into at least three different sentence-location decisions: (1) whether to sentence a defendant to probation or incarceration, (2) whether to divert otherwise prison-bound offenders to jail or probation, and (3) whether to suspend part or all of a prison sentence for one spent in the community.<sup>375</sup>

This approach, using risk assessment to determine who can safely be placed back in the community, whether it be the community at large, the college campus or the workplace, has significant advantages. Rather than expelling the offender from the community, whether it be in the general public, freedom versus prison or campus or workplace, the person is allowed to remain there in order to receive the treatment or education required to become a safe and functional member of that community. Community safety must also be considered, so recidivism rates are important: “Meta-analytic research demonstrates that on average, completion of treatment is associated with reduced sexual recidivism. However, this effect depends on the quality of treatment, and likely on the dosage [(amount of time in treatment)].”<sup>376</sup>

Virginia uses risk assessment scores to determine who is granted local

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<sup>371</sup> CAL. PENAL CODE § 1203c(a)(2) (West, Westlaw through Ch. 362 of 2021 Reg. Sess.).

<sup>372</sup> PENAL § 1170(b).

<sup>373</sup> See PENAL § 1203(b)(1).

<sup>374</sup> See PENAL § 290.006.

<sup>375</sup> Collins, *supra* note 159, at 69–72.

<sup>376</sup> PHENIX ET AL., *supra* note 356, at 8.

incarceration—jail—in lieu of prison.<sup>377</sup> While this type of diversion shortens the incarceration as well as changing its placement, it does nothing to rehabilitate, treat or educate. California allows a judge to impose a split sentence, incarceration followed by community supervision, based on actuarial information.<sup>378</sup> Again, while such a sentence may make it more feasible for an individual to participate in treatment or educational curriculum, those components do not seem to be a mandatory part of a split sentence. In contrast, an offender sentenced in California to probation or prison is mandated to participate in sex offender-specific treatment.<sup>379</sup>

Social science research about offenders led to the development of the RNR principle.<sup>380</sup> This type of risk assessment “identifies who should be targeted for correctional intervention.”<sup>381</sup> It also found that while sex offender-specific treatment “decreases recidivism amongst higher risk offenders, . . . [it may actually] increase recidivism rates amongst low-risk offenders.”<sup>382</sup> Because of these findings, “the risk principle dictates that recidivism reduction efforts should target those with the higher risk of recidivism, whereas low-risk offenders should be ‘identified and excluded . . . from intensive correctional programs.’”<sup>383</sup> As a consequence, low-risk offenders should not be mixed with high-risk offenders in treatment groups even outside prison because the result may be to elevate the risk of those who were initially low risk for recidivism.

Two risk assessment instruments are being used to identify low-risk offenders who qualify for alternative sentencing in some jurisdictions. The Level of Services Inquiry-Revised (“LSI-R”) and the Correctional Offender Management Profiling for Alternative Sanctions (“COMPAS”) are risk assessment tools designed to identify both risk of reoffending and criminogenic

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<sup>377</sup> Collins, *supra* note 159, at 70–71.

<sup>378</sup> Collins states as follows:

Since 2015, California Rules of Court have allowed courts to consider risk assessment information in determining the length and conditions of an individual’s period of mandatory supervision. Mandatory supervision, like probation, is a period of supervised release in the community. However, ‘[m]andatory supervision . . . is not probation.’ Whereas probation is a period of community supervision that replaces a period of incarceration, mandatory supervision is a period of community supervision that follows incarceration. When sentencing individuals convicted of specified lowlevel crimes, California courts ‘must suspend execution of a concluding portion’ of the sentence ‘as a period of mandatory supervision.’ Notably, however, California judges do not consider imposing a split sentence until they have already ruled out a sentence of probation.

*Id.* at 71–72 (alterations in original).

<sup>379</sup> CAL. PENAL CODE § 290.09(a)(1) (West, Westlaw through Ch. 362 of 2021 Reg. Sess.).

<sup>380</sup> See generally JAMES BONTA, PUB. WORKS & GOV’T SERVS. CAN., OFFENDER REHABILITATION: FROM RESEARCH TO PRACTICE (1997), [https://www.d.umn.edu/~jmaahs/Delinquency%20and%20Juvenile%20Justice%20Community%20Corrections/bonta\\_effective\\_intervention.pdf](https://www.d.umn.edu/~jmaahs/Delinquency%20and%20Juvenile%20Justice%20Community%20Corrections/bonta_effective_intervention.pdf) [<https://perma.cc/3Y5Z-NWYL>].

<sup>381</sup> Collins, *supra* note 159, at 81 (emphasis omitted).

<sup>382</sup> *Id.*

<sup>383</sup> *Id.*

needs of offenders.<sup>384</sup> The LSI-R describes itself as “a quantitative survey of offender attributes and their situations relevant to level of supervision and treatment decisions.”<sup>385</sup> The COMPAS “provide[s] decisional support for the Department of Corrections when making placement decisions, managing offenders, and planning treatment.”<sup>386</sup> California uses both of these instruments after sentencing—not before—to inform treatment and placement decisions.<sup>387</sup>

### *C. Sex Offender Specific-Treatment Should Be an Essential Element of Alternative Sanctions*

Jurisdictions that are using risk assessment to inform alternative sanctions, such as diversion, tout the community safety aspects of that approach.<sup>388</sup> However, unless such alternative sanctions involve more than merely shortening sentences or lengthening community supervision periods, the chance of these approaches increasing public safety and reducing recidivism through rehabilitation is not optimal.

The most effective system would not just lessen traditional sanctions. It would require a mandatory evidence-based treatment program designed to lessen the risk of reoffending by someone who is a first-time offender. This would include an assessment of the individual risk and needs of that offender so recidivism risk could “be reduced through appropriate and effective rehabilitative programming.”<sup>389</sup>

The same principle applies to sanctions imposed in the campus discipline system. Instead of suspension or lesser sanctions that alone do not address the individual issues that prompted the wrongdoing, the sanction should include a specialized treatment program along the lines of the one developed by the STARRSA Project.<sup>390</sup>

Additionally, for those in the criminal justice system, the emphasis of supervision should be using terms and conditions that target a particular individual’s risk factors. As one observer noted, “Studies suggest that treatment-based supervision strategies targeting a probationer’s particular risk factors are more effective than sanctions in reducing recidivism, yet most probation officers

<sup>384</sup> See Merry Morash, *A Great Debate Ove Using the Level of Service Inventory-Revised (LSI-R) With Women Offenders*, 8 CRIMINOLOGY & PUB. POL'Y 173, 174–75 (2009).

<sup>385</sup> *Id.*

<sup>386</sup> Tim Brennen, William Dietrich, & Beate Ehret, *Evaluating the Predictive Validity of the COMPAS Risk and Needs Assessment System*, 36 CRIM. JUST. & BEHAV. 21, 21 (2009).

<sup>387</sup> See *Rehabilitative Process*, CAL. DEP'T OF CORR. & REHAB., <https://www.cdcr.ca.gov/rehabilitation/about/process/> [<https://perma.cc/9NYV-QMEA>]; see also *Risk Assessment Instruments*, SARATSO, <https://saratso.org/index.cfm?pid=1360> [<https://perma.cc/3568-FK4E>] (California utilizes the LS/CMI version of LSI-R).

<sup>388</sup> See *Diversion Programs*, U.S. ATT'Y'S OFF. D.C. (Mar. 3, 2021), <https://www.justice.gov/usao-dc/diversion-programs> [<https://perma.cc/4G25-GA99>]; see also *Pretrial Diversion*, NAT'L CONF. OF STATE LEGS. (Sept. 28, 2017), <https://www.ncsl.org/research/civil-and-criminal-justice/pretrial-diversion.aspx> [<https://perma.cc/GP55-X2BT>]; *What is Diversion?*, *supra* note 111.

<sup>389</sup> Collins, *supra* note 159, at 84.

<sup>390</sup> See discussion *supra* Section IV.B.



spend their time in control-related activities—taking urine samples, searching homes.”<sup>391</sup>

California requires sex offender-specific treatment for every person convicted of a sex offense, even though there is no specified curriculum for low-risk offenders that differentiates them from high-risk offenders.<sup>392</sup> The programming used for offenders who are required, in California, to participate in sex offender-specific treatment after conviction for a registrable sexual offense, is based on the RNR principle:

The need principle identifies what to target in the offender to reduce [the] risk of recidivism. The principle dictates that correctional intervention should be directed toward the offender’s “criminogenic needs,” also referred to as “dynamic” (or changeable) risk factors. The “crime producing needs” that are most commonly targeted for correctional intervention are substance abuse; antisocial attitudes and association with antisocial peers; and lack of empathy, problem solving, and self-control.

The responsivity principle dictates how such correctional intervention should be delivered. It suggests that treatment should be delivered in a way that is the most accessible and engaging to the offender based on her mental and emotional condition, level of motivation, and cognitive functioning. In sum, the RNR principle aims to “assess[] an offender’s risk of reoffending, match[] supervision and treatment to the offender’s risk level, and target[] the offender’s criminogenic needs or dynamic risk factors with the social learning and cognitive-behavioral programs most likely to effect change in the offender’s behavior.”<sup>393</sup>

There are challenges to requiring treatment as an alternative sanction. First, general mental health counseling is inadequate to address the risk of future offending.<sup>394</sup> Rather, treatment must be aimed at controlling behaviors and follow a protocol proven successful in reducing sexual recidivism.

Second, cost is an issue. If treatment is part of sanctioning, whether in the criminal justice, campus or employment setting, it must be available to all—not just to those who can afford it. For example,

there may be an impermissible power imbalance if courts start ordering . . . [sex offender-specific treatment] for which the state’s legislature has not provided adequate funding. Yet if the judiciary needs the permission or help of the legislature to effectively administer . . . [such a program, e.g., sex offense-specific courts which use sex

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<sup>391</sup> Goodmark, *supra* note 30, at 107.

<sup>392</sup> See *Certification*, *supra* note 255.

<sup>393</sup> Collins, *supra* note 159, at 81–82.

<sup>394</sup> See Lamade et al., *supra* note 54, at 139.

offender-specific treatment as part of their sanctioning, there are] the obvious problems of underfunding and legislative inertia.<sup>395</sup>

#### ***D. Practicalities in Determining Risk and Dangerousness***

To qualify for placement in a treatment program addressing the needs of low-risk offenders, the offender should not have been previously arrested or convicted for a sexual offense. This is easily verifiable in the criminal justice setting. Investigators may find it more difficult, however, to determine if a person suffered a prior sanction for sexual violence or harassment when addressed outside the criminal justice system.

Records pertaining to students are protected under the Family Educational Rights and Privacy Act (“FERPA”), the federal privacy law protecting student records.<sup>396</sup> Records of reasons for discipline or termination in employment are usually kept confidential by employers for liability reasons.<sup>397</sup> Thus, relying on official records is unlikely to tell the whole story even if they are available. A respondent’s statement that they had not previously suffered such a sanction would need independent verification.

In the educational context, the burden could be placed on the responsible party. In order to qualify for placement in a program that would enable the party responsible for sexual assault to remain as a student at an IHE, the person would have to provide evidence that they were never previously sanctioned by suspension or expulsion for sexual misconduct as a student. This would mean requesting their own academic record at previous IHEs and sharing them with campus investigators. The responsible party would simply agree to sign a waiver allowing past IHEs or employers to divulge such information.

Another way would be to have the responsible party voluntarily take a single-issue polygraph examination to determine if they were sanctioned in the past for such behavior. The polygraph would not ask for an admission of past behavior, to avoid issues of self-incrimination. Instead, it would ask if the person had been sanctioned in the past for such conduct, either in the context of higher education or in the workplace.

Finally, a different solution would require IHEs to make such information

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<sup>395</sup> Richmond & Richmond, *supra* note 61, at 469.

<sup>396</sup> 20 U.S.C.A. § 1232(b)(1) (West 2013). The Family Educational Rights and Privacy Act (“FERPA”) is a federal law that protects the privacy of student education records. *See id.* The law applies to all schools that receive funds under an applicable program of the United States Department of Education. *See id.*

<sup>397</sup> *See* Gerard Morales & Barbara McCloud, *Workplace Disciplinary Investigations and Confidentiality: Striking the Right Balance*, 50 PRAC. LAW. 25, 25 (2004) (“[Employers] need to implement workplace harassment and conduct policies to avoid serious and potentially crippling exposure. And to encourage employee cooperation—and avoid additional tort liability—they have to make sure that investigations into disciplinary matters are kept confidential.”); *see also* Alison Doyle, *What Can Employers Say About Former Employees?*, BALANCE CAREERS (Nov. 18, 2020), <https://www.thebalancecareers.com/what-can-employers-say-about-former-employees-2059608> [https://perma.cc/WN68-MZZQ].

available to a student's subsequent IHE in the event of a student misconduct matter involving sexual misconduct. A law requiring schools to note on transcripts when a student was sanctioned for sexual misconduct would still be subject to FERPA,<sup>398</sup> however, it is unclear whether that note would be accessible in a subsequent student conduct proceeding. The California State Legislature passed a bill in 2015 to require colleges in California to note student discipline for sexual misconduct on college transcripts, but it was vetoed by the governor.<sup>399</sup>

A person accused of sexual harassment in the workplace would need to provide evidence to the employer that they have never been disciplined, fired or allowed to resign for past sexual harassment in order to keep their job. Particularly in the employment context, this evidence might be hard even for accused perpetrators to obtain from past employers. Employers often disclose only dates of prior employment upon inquiry. A single-issue polygraph examination would be the easiest solution when past employers refuse to divulge such information even at the request of the perpetrator.

### VIII. CONCLUSION

It is possible that solutions based in transformative justice concepts of community accountability can coexist with restorative justice and criminal justice systems. One key principle should be the deciding factor in determining how a transformative justice approach for sexual and domestic violence could function alongside criminal justice and restorative justice alternatives. That key issue is whether the person in the instant case under consideration has sexually offended before and been sanctioned for it. In both sexual assault and domestic violence, which are often co-extant, research shows only a small percentage are serial convicted offenders.<sup>400</sup>

For that high-risk group of serial offenders, criminal justice solutions may be the only alternative that can protect the community. Similarly, in the campus and workplace, sanctions such as expulsion and employment termination could be reserved for those at highest risk of reoffending, which usually means those whose record shows repeat offending resulting in sanctions. Before more extreme sanctions are imposed on first-time offenders there can be an escalating system of community accountability solutions or restorative justice options available to the parties in lieu of criminal justice alternatives. Embracing alternatives to traditional and ineffective ways of changing the culture of sexual

<sup>398</sup> See FAM. POL'Y COMPLIANCE OFF., U.S. DEP'T OF EDUC., BALANCING STUDENT PRIVACY AND SCHOOL SAFETY: A GUIDE TO THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT FOR COLLEGES AND UNIVERSITIES (2007), <https://permanent.fdlp.gov/gpo14871/postsec.pdf> [<https://perma.cc/FJ44-PK79>]; Fain, *supra* note 53.

<sup>399</sup> Assemb. B. 968, 2015-2016 Reg. Sess. (Cal. 2015) (vetoed by the governor).

<sup>400</sup> See Hanson et al., *supra* note 80, at 59; see also EVE BUZAWA, GERALD T. HOTALING, ANDREW KLEIN & JAMES BYRNE, U.S. DEP'T OF JUST., RESPONSE TO DOMESTIC VIOLENCE IN A PRO-ACTIVE COURT SETTING: FINAL REPORT 93-94 (1999), <https://www.ojp.gov/pdffiles1/nij/grant/s/181427.pdf> [<https://perma.cc/A8SU-4PH9>].

and domestic violence may be the only way to effect meaningful change and protect communities.