'THE ROAD NOT TAKEN': RESTORATIVE CONFERENCING FOR SEXUAL MISCONDUCT IN CRIMINAL AND CAMPUS TITLE IX FRAMEWORKS

*Lieutenant Colonel Taren E. Wellman and Major Kyle R. Ratliff**

Restorative justice and, in particular, the alternative dispute resolution (ADR) practice of restorative conferencing are not commonly considered viable paths in criminal prosecutions or college campus sexual assault cases. By its adversarial nature, the criminal justice system—and Title IX adjudication by extension—encourages silence by the accused and can exacerbate the harm to victims. This is true of the military justice system as well. Traditional negotiation methods and evidentiary rules in the criminal prosecutorial context create obstacles to engaging in restorative conferencing. This paper examines the barriers and benefits of restorative conferencing in sexual assault cases. The authors share lessons learned from the application of restorative conferencing and ADR principles in a military sexual assault criminal case. Positing that restorative conferencing generates beneficial options for all parties, the article then explores the legal mechanisms that hinder and promote ADR in the criminal and Title IX contexts. Finally, the authors propose a revision to Federal Rule of Evidence 410 (and its military equivalent Military Rule of Evidence 410) to reduce current barriers to creative, solution-based negotiations in sexual assault criminal investigations and administrative Title IX college campus sexual assault cases.

CONTENTS

INTRODUCTION

> *I remember waking up and just not knowing where the heck I was . . . I was still drunk. And I tried to sit up, and the room was spinning, and I just laid back down and went back to bed. I remember waking back up and I don't have my shirt on anymore. We're on the bed, and he is on top of me . . . having sex . . . .*
>
> —"Amanda," describing her sexual assault experience to investigators.

This is what "Amanda" told federal investigators during her initial interview following an alleged sexual assault in the early morning hours after a Halloween party.[1] The party was at a house with a lot of people, games, and

* Lieutenant Colonel Taren E. Wellman, U.S. Air Force (B.S., United States Air Force Academy; J.D., University of Montana School of Law; LL.M., The George Washington University) is an Associate Professor of Law and Director of the Air Force Academy's Leadership and Conflict Resolution Program. Major Kyle R. Ratliff, U.S. Air Force (B.A., Angelo State University; J.D., University of Notre Dame

alcohol. One of Amanda's last memories at the party was playing "flip cup," a drinking game, in the garage. Amanda believed she "blacked out" shortly after she played flip cup.

In a case like so many sexual assault allegations on college campuses, in the military, and elsewhere, where alcohol is a major issue, Amanda wanted answers. But answers were not readily available to her because of impaired memory and the adversarial nature of sexual assault investigations and adjudication. Like the traveler in Robert Frost's poem, "The Road Not Taken," Amanda's apparent choices (to pursue accountability for her assailant or not) would alter her life, and she could not "travel both."[2] Fortunately for Amanda, counsel forged a new road mid-process that enabled responsibility for harm and information for healing: restorative conferencing. The road was not easily forged, however, in light of systemic barriers.

Prevailing adjudicative systems inherently incentivize the accused and victim in a sexual assault to stop communicating and sever the relationship, making victim-offender reconciliation nearly impossible.[3] As such, prevailing systems often increase psychological harm and prevent healing. The stakes in sexual assault cases are extremely high. Accordingly, attorneys and representatives typically advise silence by and between the people most affected, reinforcing a focus on guilt and punishment rather than harms, needs, and obligations.[4] Available adjudicative paths encourage a hyperfocus on distributive "winning" or "losing" by the parties and their representatives, as well as a focus on retributive "winning" based on the severity of the punishment. Often, the end result is that neither party truly "wins," given the taxing nature of the adversarial process. The criminal justice system, and by extension Title IX adjudicative hearings, are built upon the assumption that either the victim is "right" (and the accused is at fault) or "wrong" (and the

---

Law School) is an Assistant Professor at the U.S. Air Force Academy. The authors thank Major Carman A. Leone for providing the inspiration and expert negotiation skills necessary for the case leading to this article, who always encouraged his people to defend each client with compassion and humility. The views expressed in this article are those of the authors and do not reflect the official policy or position of the United States Air Force Academy, the Air Force, the Department of Defense, or the United States Government.

[1] The name of the victim in this demonstrative case has been changed to protect her identity.

[2] Robert Frost, *The Road Not Taken*, ACAD. AM. POETS, https://poets.org/poem/road-not-taken [https://perma.cc/86LH-CEYN]; *see also* David Orr, *You're Probably Misreading Robert Frost's Most Famous Poem*, LITERARY HUB (Aug. 18, 2016), https://lithub.com/youre-probably-misreading-robert-frosts-most-famous-poem/ [https://perma.cc/WSD4-9P5D].

[3] Adriaan Lanni, *Taking Restorative Justice Seriously*, 69 BUFFALO L. REV. 635, 645 (2021) (citing HOWARD ZEHR, CHANGING LENSES: RESTORATIVE JUSTICE FOR OUR TIMES 45–47 (Herald Press 25th Anniversary ed. 2015); DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR 92–94 (The New Press 2019)) ("In contrast to the restorative approach's focus on accountability, the adversarial criminal process encourages offenders . . . to deny responsibility."); *see also* ZEHR, CHANGING LENSES: RESTORATIVE JUSTICE FOR OUR TIMES 45–47 (Herald Press 25th Anniversary ed. 2015).

[4] Howard Zehr, *Restorative Justice: Beyond Victim-Offender Mediation*, 22 CONFLICT RESOL. Q. 305, 306 (2004).

accused is rightfully exonerated). Thus, the plenary needs of victims and offenders—for notice, validation, information, accountability, closure, and healing—are ignored or subsumed to the legal system's primary goals of fairly discerning who is "right" and punishing who is "wrong."

This Article demonstrates an alternative path in sexual assault cases with transformational benefits—healing through restorative conferencing.[5] The authors evaluate this option from the lens of advocates within the current landscape of adjudicative systems including criminal prosecution and Title IX[6] adjudication. As former military prosecutors and defense counsel and current teachers of law and ADR at the U.S. Air Force Academy, the authors are well-positioned to evaluate restorative conferencing within existing campus and prosecutorial parameters. This Article specifically examines a case study of the successful use of restorative conferencing within a military sexual assault prosecution,[7] discusses the obstacles of its use, and offers a potential solution to provide victims and offenders the option of utilizing restorative conferencing in sexual assault prosecutions or Title IX campus adjudication.

Part I summarizes the current state of restorative conferencing practices in the American criminal justice and higher education systems. Barriers to restorative conferencing's use in sexual assault cases are then explored, particularly in campus Title IX adjudication and the military legal system. A thorough analysis of restorative conferencing in the military justice system is offered as background for "Amanda's" case study and as a corollary to other American criminal legal systems. Looking specifically at military sexual assault prosecutions through the lens of the various stakeholders and their interests—namely the victim and victim's counsel,[8] the military prosecutor

---

[5] Howard Zehr, *Reflections on Lenses*, 3 RESTORATIVE JUST. 460, 461–462 (2015) (for purposes of this Article, the term "restorative conferencing" includes all derivative terms found in scholarship, including "victim-offender mediation," "victim-offender conferencing," "victim-offender dialogue," among others. The labels of "victim" and "offender" are used throughout this Article for simplicity, but the authors acknowledge the dangers and limitations of the labels because "the lines between those who cause harm and those who are harmed are sometimes quite blurred."); *see also*, Clynton Namuo, *Victim Offender Mediation: When Divergent Paths and Destroyed Lives Come Together for Healing*, 32 GA. ST. U.L. REV. 577, 578 (2016) (footnotes omitted) (describing a mother's experience of traumatically losing her daughter to a drunk driver and how the use of victim-offender mediation transformed both parties into advocates against drunk driving). Additionally, the term "victim" is used synonymously with "complainant," "complaining witness," "accuser," "person harmed," and "survivor." Similarly, "offender" is used synonymously with "accused," "responsible party," and other derivatives.

[6] Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–88 [hereinafter Title IX].

[7] Relevant aspects of the military's prosecutorial system, for purposes of this Article, largely mirror the federal prosecutorial system and federal rules of evidence. Key differences are explained *infra* where material.

[8] Within the military justice context, the term "victim" is defined as "an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense . . . ." Article 6b, Uniform Code of Military Justice, 10 U.S.C. § 806b.

and the entities exercising prosecutorial discretion,[9] the accused and defense counsel—as well as the major stakeholder in Title IX cases—the university—obstacles and workarounds for use of restorative conferencing practices are illuminated in light of traditional prosecutorial negotiation methods.

Part II evaluates "Amanda's" military sexual assault restorative conferencing case study, illustrating a workable means to achieve answers for victims despite current systemic barriers. Finally, Part III explores paths forward and proposes an amendment to Military and Federal Rules of Evidence 410, the rule addressing confidentiality in plea bargaining. Lack of confidentiality in the process is perhaps the tallest hurdle to implementing pre-trial restorative conferencing in sexual assault cases. The proposed amendment would allow greater protection and assurance of confidential conversations between the accused and victim, making restorative conferencing more accessible. This confidentiality is necessary for the path taken in "Amanda's" case to be more easily replicated. In the absence of changes to the rules of evidence, the authors offer considerations for contractual workarounds in order to secure some level of confidentiality to incentivize restorative conferencing as a viable option.

Removing incentives for complete silence in both criminal prosecution and Title IX adjudicative systems by offering a voluntary path toward perspective-sharing through confidential restorative conferencing is a means to achieve justice from the lens of those most harmed by sexual assault. Reducing distributive and retributive behaviors affords the victim and accused (in certain cases with distinct characteristics)[10] the opportunity to better understand what occurred, gives the accused the chance to understand

---

[9] As of December 27, 2023, the initial disposition decision for all military sexual assault offenses resides with the Office of Special Trial Counsel, an independent military prosecutor. Rule for Courts-Martial 303 [hereinafter RCM]; *Manual for Courts-Martial*, *United States* pt. II, ¶ 303A(a) (2024 ed.) [hereinafter *MCM 2019*]. Prior to December 27, 2023, disposition authority resided with the General Court-Martial Convening Authority, a high-level commander with jurisdiction over the accused; *see* RCM 504(a)(1); *MCM 2019,* pt. II, ¶ 504(a); Articles 18(c), 22(a), and 56(b), Uniform Code of Military Justice, 10 U.S.C. §§ 818(c), 822(a), 856(b).

[10] *See also* Amy Kasparian, *Justice Beyond Bars: Exploring the Restorative Justice Alternative for Victims of Rape and Sexual Assault*, 37 SUFFOLK TRANSNAT'L L. REV. 377, 382 (2014). These cases are ones in which the evidence is likely insufficient to sustain criminal conviction beyond a reasonable doubt, the perceived harm is much greater than what the evidence reasonably supports, or the individual(s) harmed are unwilling to engage in the full criminal investigatory or administrative adversarial processes. These conditions may be due to impaired memory caused by alcohol or other factors, lack of physical evidence, desire by the victim to preserve privacy, contradictory evidence, lack of clarity as to who was the aggressor or instigated the harm between the parties involved, or a host of other potential reasons.

the harm suffered, and provides the opportunity for the accused to acknowledge and accept some level of responsibility to facilitate healing.

I. THE ROLE OF RESTORATIVE CONFERENCING FOR SEXUAL ASSAULT CASES IN AMERICAN JURISDICTIONS

Prior to delving into the mechanics of restorative conferencing and its unrealized potential and applicability in sexual assault adjudicative systems, a brief overview of its history and position within the broader umbrella of restorative justice is necessary.

A. Definitions and Background of Restorative Justice and Restorative Conferencing

According to Howard Zehr, whom many consider to be the architect of the restorative justice movement today,[11] restorative justice in its simplest form is a "process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible."[12] Restorative justice is contemporarily understood to be a justice mechanism taking the form of a meeting, or several meetings, of individuals affected by crime, disputes, or bounded community conflict, facilitated by one or more impartial people.[13] Restorative justice reflects the basic assumptions that crime violates people and violations create obligations to right the wrongs[14] (more important than and separate from guilt).[15] Building upon these assumptions, restorative justice focuses on the harms and needs of victims, addresses obligations of the offender, uses collaborative processes to right wrongs, and includes the people with a stake in the process.[16]

Restorative justice practices, values, and principles are deeply rooted within communities and indigenous cultures around the world.[17] Restorative

---

[11] *See*, *e.g.*, Mark S. Umbreit et al., *Restorative Justice in Action: Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251, 256 (2005).

[12] HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE 37 (Good Books 1st ed. 2002).

[13] Kathleen Daly, *What is Restorative Justice? Fresh Answers to a Vexed Question*, 11 VICTIMS & OFFENDERS 9, 21 (2016).

[14] Zehr, *supra* note 4, at 307.

[15] Umbreit et al., *supra* note 11, at 257.

[16] *Id.*

[17] Kasparian, *supra* note 10, at 379; *see also* Umbreit et al., *supra* note 11, at 255 (describing history of restorative justice). Communities with historical restorative justice "values, principles and practices" include "Native American tribes with the United States, the Aboriginal or First Nation people of Canada, the Maori in New Zealand, Native Hawaiians, African tribal councils, the Afghani practice of jirga, the Arab or Palestinian practice of Sulha, and many of the ancient Celtic practices found in the Brehon laws." Umbreit et al., *supra* note 11, at 255 (citing ZEHR, *supra* note 12, at 19–20, 11; Thomas Quinn, *Restorative*

justice practices of making amends to the victim and community were well-established for centuries in the Western legal tradition, until a major shift occurred in the eleventh-century.[18] King Henry I, William the Conqueror's son, declared royal jurisdiction over certain violent offenses (e.g., robbery, murder, arson, theft, etc.) making such violent crimes against the state instead of the crimes against the victim or community, thereby quashing traditional, community-based, restorative justice approaches to serious crimes.[19] And yet, restorative justice resurfaced in North America in the 1970s[20] as a philosophy and set of practices as legal reformists sought to reimagine the justice system.[21] For more than four decades now, restorative justice practices have been growing and expanding in the American criminal justice system.[22]

Restorative justice practices take many forms,[23] including those inside and outside of the adjudicatory process, as well as during pre-trial and post-trial phases of litigation.[24] Restorative conferencing as a voluntary option for willing offenders and crime victims was first endorsed by the American Bar Association in 1994.[25] In practice, the process ordinarily takes the form of direct, face-to-face dialogue between the victim and offender[26] regarding a

---

Justice: An Interview with Visiting Fellow Thomas Quinn, 235 NAT'L INST. JUST. J. 10, 11 (1998)). In the Old and New Testaments, biblical examples describe a responsibility of an offender to repair the harm caused to victims because such harm is a "breach in the Shalom community." *Id.* at 256 (citing ZEHR, *supra* note 12).

[18] Kasparian, *supra* note 10, at 380 (citing Umbreit et al., *supra* note 11, at 255).

[19] Umbreit et al., *supra* note 11, at 255.

[20] Namuo, *supra* note 5, at 582 (citing Patrick Glen Drake, *Victim-Offender Mediation in Texas: When "Eve for Eye" Becomes "Eye to Eye"*, 47 S. TEX. L. REV. 647, 657 (2006)) (noting the first victim-offender mediation (VOM) in North America began with a teenage crime spree in Kitchener, Ontario, in 1974); *see also* Dean E. Peachey, *The Kitchener Experiment*, *in* MEDIATION AND CRIMINAL JUSTICE: VICTIMS, OFFENDERS AND COMMUNITY 14, 14–16 (Martin Wright & Burt Galaway eds., 1989).

[21] Thalia Gonzalez, *The State of Restorative Justice in American Criminal Law*, 2020 WIS. L. REV. 1147, 1148 (2020) [hereinafter Gonzalez, *State of Restorative Justice*].

[22] *Id.*; *see also* Thalia Gonzalez, *The Legalization of Restorative Justice: A Fifty-State Empirical Analysis*, 5 UTAH L. REV. 1027, 1057 (2019) [hereinafter Gonzalez*, Legalization of Restorative Justice*].

[23] In addition to victim-offender mediation, other forms of restorative justice interventions include family group conferencing, restorative community service, victim panels, neighborhood dispute resolution dialogue, and facilitated dialogue between severe violent crime convicts and their victims and families. Umbreit et al., *supra* note 11, at 262–63, 265, 269. The four most common types of restorative justice dialogue found within the American criminal justice system are victim-offender mediation, group conferencing, circles, and "other." *Id.* at 269. All focus on similar restorative principles but may vary on the format and who is in the room with the victim and the offender. *Id.* at 269–70. In fact, "distinctions across these categories have begun to blur, in particular between 'mediation' and 'group conferencing.'" *Id.* at 270.

[24] *Id.* at 269.

[25] U.S. DEPT. OF JUST., OFF. OF JUST. PROGRAMS, GUIDELINES FOR VICTIM-SENSITIVE VICTIM-OFFENDER MEDIATION: RESTORATIVE JUSTICE THROUGH DIALOGUE 4 (2000), https://www.ncjrs.gov/ovc_archives/reports/96517-gdlines_victims-sens/ncj176346.pdf [https://perma.cc/XAR5-XSRT].

[26] Legal practitioners within the military traditionally use the term "accused" to describe a defendant within the military justice process, this article will use the term "offender" to better align with the lexicon of scholarship in the area of restorative justice.

specific offense and at least one additional person serving as a facilitator, mediator, or convener.[27]

The restorative dialogue typically focuses on "naming what happened, identifying its impact, and coming to some common understanding . . . as to how any resultant harm would be repaired."[28] Such an open discussion serves to meet the needs of the victim, hold the offender accountable for the harm caused, formulate steps to repair as much as possible the harm suffered by the victim and the community, and address the offender's needs to prevent reoffending and promote reintegration.[29] Noticeably, the needs of the state—the central decision-maker in traditional retributive justice—are largely absent from the restorative lens.[30]

Regardless of the format used, states have rapidly expanded paths toward restorative justice since the mid-2000s into what may be considered a restorative justice scheme[31] or movement.[32] In fact, "[a]s of July 2020, 46 jurisdictions had codified 'restorative justice' into their juvenile and/or adult criminal justice systems."[33] Yet, no universal form, practice, or process of restorative justice exists across the country. This leaves each jurisdiction to craft for itself the "who," "what," "where," "when," and, perhaps most importantly, "how" restorative justice conversations are employed (e.g., the procedural protections afforded restorative justice participants).[34]

Instead, restorative justice dialogue is grounded in common principles and values like "inclusion, empowerment, accountability, reintegration, amends, healing, and self-determination" across jurisdictions.[35] Because restorative justice, and specifically restorative conferencing, is comprised of widely

---

[27] Umbreit et al., *supra* note 11, at 269.

[28] *Id.*

[29] Lanni, *supra* note 3, at 640 (citing ZEHR, *supra* note 12, at 25).

[30] Umbreit et al., *supra* note 11, at 256 ("From a restorative perspective, the primary stakeholders are understood to be individual victims and their families, victimized communities, and offenders and their families. The state and its legal system also clearly have an interest as a stakeholder but are seen as more removed from direct impact. Thus, the needs of those most directly affected by the crime come first. Wherever possible, opportunities for direct engagement in the process of doing justice through various forms of dialogue are central to the practice of restorative justice.").

[31] Gonzalez, *State of Restorative Justice*, *supra* note 21, at 1149.

[32] Annalise Buth & Lynn Cohn, *Looking at Justice through a Lens of Healing and Reconnection*, 13 NW. J.L. & SOC. POL'Y 1, 3 (2017) (citing Lorenn Walker, *Restorative Justice: Definition and Purpose*, *in* RESTORATIVE JUSTICE TODAY: PRACTICAL APPLICATIONS 4 (Katherine S. van Wormer & Lorenn Walker eds., 2013); *see also* David R. Karp et al., *Campus PRISM: A Report on Promoting Restorative Initiatives for Sexual Misconduct on College Campuses*, UNIVERSITY OF SAN DIEGO CENTER FOR RESTORATIVE JUSTICE 11 (Apr. 2016), https://digital.sandiego.edu/cgi/viewcontent.cgi?article=1044&context=soles-faculty [https://perma.cc/YCN9-VWLK].

[33] Gonzalez, *State of Restorative Justice*, *supra* note 21, at 1156–57 ("These jurisdictions include 45 states and the District of Columbia for a total of 264 laws, including statutes, court rules, and regulations."). This number can be compared to only 14 states before 2020. Gonzalez, *Legalization of Restorative Justice*, *supra* note 22, at 1029.

[34] Gonzalez, *State of Restorative Justice*, *supra* note 21, at 1160–61.

[35] Buth & Cohn, *supra* note 32, at 4 (citing Kay Pranis, *Restorative Values*, *in* HANDBOOK OF RESTORATIVE JUSTICE 60–62 (Gerry Johnstone & Daniel W. Van Ness eds., 2007)).

varying processes characterized by "an aspirational view of relationships and shared values," it is best examined with a focus on practical experiences[36] like the one addressed in Part II *infra*.

B. Barriers to Restorative Justice and Conferencing in Sexual Assault Cases Generally

Notwithstanding its expansion, jurisdictions have been reluctant to expand restorative justice practices to sexual assault cases.[37] Jurisdictions have more often applied restorative avenues to pre-trial, diversionary programs for minor offenses, veterans court, and offenses of juvenile offenders[38] or a means of promoting criminal justice reform to reverse mass incarceration.[39] However, due to the prevalence of sexual assault, the crime's unique privacy concerns, and difficulties of proof, the area is ripe for restorative conferencing as a more mainstream option, and the conversation is emerging,[40] particularly in campus sexual assault cases.[41]

Critics have expressed concern about expanding restorative justice to sexual assault offenses for different reasons. Some deem sexual offenses too

---

[36] *Id.* at 5 (citing James Coben & Penelope Harley, *Intentional Conversations About Restorative Justice, Mediation and the Practice of Law*, 25 HAMLINE J. PUB. L. & POL'Y 235, 245 (2004)).

[37] Lanni, *supra* note 3, at 649 (citing ALLAN MACRAE & HOWARD ZEHR, THE LITTLE BOOK OF FAMILY GROUP CONFERENCES 13–17 (2004); Carolyn Hoyle, *The Case for Restorative Justice, in* DEBATING RESTORATIVE JUSTICE 1, 29 (Chris Cunneen & Carolyn Hoyle eds., 2010)); Clare McGlynn, *Feminism, Rape, and the Search for Justice*, 31 OXFORD J. LEGAL STUD. 825, 827 (2011); Margo Kaplan, *Restorative Justice and Campus Sexual Misconduct*, 89 TEMPLE L. REV. 701, 716 (2017) (citing Mary P. Koss, *The RESTORE Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcomes,* 29 J. INTERPERSONAL VIOLENCE 1623, 1625 (2014)).

[38] Lanni, *supra* note 3, at 649 (citing Mary Louise Frampton, *Finding Common Ground in Restorative Justice: Transforming our Juvenile Justice Systems*, 22 U.C. DAVIS J. JUV. L. & POL'Y 101, 104–105 (2018)); *see also* Kathleen Daly & Heather Nancarrow, *Restorative Justice and Youth Violence Toward Parents*, *in* RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN 150, 150–174 (James Ptacek ed., 2010).

[39] Lanni, *supra* note 3, at 638.

[40] *See*, *e.g.*, Donna Coker & Ahjane D. Macquoid, *Alternative U.S. Responses to Intimate Partner Violence*, *in* COMPARATIVE PERSPECTIVES ON GENDER VIOLENCE: LESSONS FROM EFFORTS WORLDWIDE 169, 171–176 (Rashmi Goel & Leigh Goodmark, eds., 2015); Clare McGlynn et al., *I Just Wanted Him to Hear Me: Sexual Violence and the Possibilities of Restorative Justice*, 39 J.L. & SOC'Y 213, 216–221 (2012); Alexa Sardina & Alissa R. Ackerman, *Restorative Justice in Cases of Sexual Harm*, 25 CUNY L. Rev. 1, 50–51 (2022).

[41] *See*, *e.g.,* Kaplan, *supra* note 37, at 719–20; Mary P. Koss et al., *Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance*, 15 TRAUMA, VIOLENCE & ABUSE 242, 254 (2014); Karp et al., *supra* note 32, at 2–5; Mary P. Koss, *The RESTORE Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcomes,* 29 J. INTERPERSONAL VIOLENCE 1623 (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-restorative-justice-in-sex-assault-cases/.

sensitive or serious to be handled by the restorative justice process.[42] Some assume the victim would suffer more from a face-to-face encounter with the offender than testifying against the offender at trial, while others believe an offender may engage in victim blaming or victim intimidation.[43] With the idea of "'justice' being so intimately bound up in the conventional justice system,"[44] and manifested by conviction and punishment, some critics fear "diverting [sexual assault] cases away from the criminal justice system sends the message that society is not taking sexual offenses seriously."[45] Yet others raise concerns about discrimination and coercion due to the natural power imbalances within adjudicative systems and universities.[46]

Some concerns relate more to the process than to the nature of sexual assault itself. Criminal justice's adversarial nature and looming risks prevent offenders from acknowledging responsibility for the offense—"a fundamental prerequisite of restorative practices."[47] Other process-related critiques of restorative justice include failing to guarantee the accused's right against self-incrimination, confidentiality, access to counsel, and the right to a fair trial.[48] Due to being less formal than criminal trial or civil adjudication, restorative justice for some is perceived as a loss of basic legal rights, such as the presumption of innocence or the right to a defense.[49]

If restorative justice options are to be employed as pre-trial diversions, or off-ramps to criminal prosecution, or even as alternatives to college

---

[42] Kasparian, *supra* note 10, at 391 (citing Kathleen Daly, *Restorative Justice and Sexual Assault: An Archival Study of Court and Conference Cases*, 46 BRIT. J. CRIMINOL. 334 (2006); KATHLEEN DALY, CONVENTIONAL AND INNOVATIVE JUSTICE RESPONSES TO SEXUAL VIOLENCE 1 (Lauren Di Salvia ed., 2011), https://apo.org.au/sites/default/files/resource-files/2011-09/apo-nid26507.pdf [https://perma.cc/L7ZM-CELB]); *see also* Kathleen Daly, *Restorative Justice and Sexual Assault: An Archival Study of Court and Conference Cases*, 46 BRIT. J. CRIMINOL. 334, 334 (2006) [hereinafter Daly, *Restorative Justice and Sexual Assault*] (acknowledging the absence of restorative justice in sexual assault prosecutions).

[43] Kasparian, *supra* note 10, at 391–92 ("Not enough research or empirical data has been collected on restorative justice in adult rape cases for any specific practice to be endorsed on this basis."). *See also* Daly, *Restorative Justice and Sexual Assault*, *supra* note 42, at 334; Mary P. Koss, *Restorative Justice for Acquaintance Rape and Misdemeanor Sex Crimes*, *in* RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN 218–238 (James Ptacek ed., 2010) (describing criticisms of restorative justice and noting weaknesses in such arguments).

[44] McGlynn, *supra* note 37, at 835.

[45] Kasparian, *supra* note 10, at 392 (citing McGlynn, *supra* note 37, at 825).

[46] Kaplan, *supra* note 37, at 706.

[47] McGlynn, *supra* note 37, at 829 (citing Sarah Curtis-Fawley & Kathleen Daly, *Gendered Violence and Restorative Justice: The Views of Victim Advocates*, 11 VIOLENCE AGAINST WOMEN 603, 607 (2005)). It is worth noting that even in cases where an accused pleads guilty, they rarely take full responsibility unless doing so is a term of an agreement. Guilty pleas offer victims some validation but also deprive victims of knowing what actually happened in light of the bare nature of guilty pleas.

[48] K. Hope Harriman, *Regulating Restorative Justice: What Arbitration Teaches Us about Regulating the Restorative Process in Criminal Courts*, 34 GEO. J. LEGAL ETHICS 1005, 1010–1012, 1016 (2021); s*ee also* Tina S. Ikpa, *Balancing Restorative Justice Principles and Due Process Rights in Order to Reform the Criminal Justice System*, 24 WASH. U. J.L. & POL'Y 301, 311–17 (2007).

[49] Ipka, *supra* note 48, at 311–14; Mary Ellen Reimund, *Is Restorative Justice on A Collision Course with the Constitution?*, 3 APPALACHIAN J.L. 1, 12, 18 (2004).

disciplinary adjudication, confidentiality is paramount yet procedurally underdeveloped.[50] Restorative justice is necessarily relationship-centered, requiring participant vulnerability that cannot be achieved without assurance that the parties can share freely.[51] Strict confidentiality is essential while the threat of criminal prosecution looms because an accused could incur additional charges or make admissions that could be used against him or her in court or administrative determinations of responsibility, such as under Title IX.[52]

Despite the criticality of confidentiality, very few jurisdictions in the United States have any statutory, common law, or ethical protections concerning confidentiality in restorative justice proceedings.[53] "Though a strict set of uniform guidelines is generally antithetical to the restorative justice process, such safeguards are necessary when the process occurs as part of an official court of record" or increases the accused's risk of liability or jeopardy because it has the potential to become an official record.[54] And the risk of non-confidentiality extends beyond the accused to all involved, including the victim and practitioners, particularly at the pre-adjudication stage.[55] For example, restorative conference facilitators might receive a subpoena to testify about what was said by a party in a conference and face contempt of court for non-compliance.[56] While restorative justice purists may assert mutual exclusivity between party autonomy and coercive power—that such protections degrade the essential characteristics that give merit to restorative processes—evidence is growing that hybrid systems can be immensely beneficial even with basic procedural safeguards such as confidentiality.[57]

---

[50] Harriman, *supra* note 45, at 1012 (citing 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, 151–52 (2020)).

[51] *Id.*

[52] *Id.* at 1013.

[53] *Id.* at 1013–1015; *see also* 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, 152 (2020). Another study noted that "[m]ore than 84% of the jurisdictions examined do not protect statements made prior to or during restorative justice processes." Gonzalez, *State of Restorative Justice*, *supra* note 21, at 1163, 1189–1190. Furthermore, "only 7% of all restorative laws in the United States address confidentiality," with only nine states "that affirmatively protect statements made during restorative justice processes." *Id.* at 1190–1192 (footnote omitted).

[54] Harriman, *supra* note 45, at 1016.

[55] Gonzalez, *State of Restorative Justice*, *supra* note 21, at 1163, 1192; *see also* Mary Ellen Reimund, *Confidentiality in Victim Offender Mediation: A False Promise?*, 2 J. DISP. RESOL. 401–02 (2004) (discussing a "framework by which victim offender programs can delve into the complexities of mediation confidentiality and avert potential disaster"). For example, restorative justice facilitators without proper confidentiality may be subject to subpoenas and could be held in contempt of court if they refuse to comply, including refusing to disclose statements of others in the dialogue. *Id.*

[56] Reimund, *supra* note 55.

[57] Harriman, *supra* note 48, at 1011.

Confidentiality as a procedural safeguard is necessary because the restorative conference practice typically requires the offender to explicitly accept responsibility for their actions (however perceived) and describe their actions, perceptions, and motivations.[58] Applying restorative justice and conferencing in the sexual assault context, the pre-trial or pre-hearing off-ramp into facilitated conversation would have to be entirely voluntary. Because the accused would choose to participate, they would be deemed to have voluntarily waived many constitutional rights; thus, the protections we raise become a matter of policy and fairness as opposed to rights violations.[59] A similar consideration exists for victim's rights. The victim would voluntarily waive statutory rights to privacy, to be heard, and other statutory and administrative protections that may be implicated, such as notice of various actions that might be taken with respect to the accused.

In light of these concerns, the restorative justice model most often used in sexual assault cases is conferencing, or victim-offender mediation.[60] No common set of rules for restorative conferencing exists, but models such as those applicable to mediators lend general principles and guidelines.[61] Other models within restorative justice generally incorporate the following set of common principles: punitive shaming fails to rehabilitate offenders or meet victims' needs, offenders' supporters can encourage responsibility-taking, restorative conferencing increases social supports for victims and offenders, and victims gain the opportunity to confront offenders directly with harms to enable admitting responsibility and making amends.[62]

C. Status of Restorative Conferencing in College Campus Sexual Assault and Harassment

Sexual assault on college campuses is pervasive. One in four undergraduate women, one in sixteen undergraduate men, and 13% of all graduate and undergraduate students experience rape or sexual assault

---

[58] Lanni, *supra* note 3, at 654. For a discussion of how restorative justice may endanger defendants' rights, *see* Richard Delgado, *Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice*, 52 STAN. L. REV. 751, 760–61 (2000); Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 1288–90 (1994); Ipka, *supra* note 48, at 311–17.

[59] Lanni, *supra* note 3, at 654 (citing Ann Skelton, *Human Rights and Restorative Justice*, *in* ROUTLEDGE INTERNATIONAL HANDBOOK OF RESTORATIVE JUSTICE 32, 35–36 (Theo Gavrielides ed., 2019)).

[60] Reimund, *supra* note 46, at 10–11.

[61] *See, e.g.,* AMERICAN BAR ASSOCIATION, MODEL STANDARDS OF CONDUCT FOR MEDIATORS 1 (2005), https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/dispute_resolution/model_standards_conduct_april2007.pdf [https://perma.cc/9RKG-E262].

[62] Coker & Macquoid, *supra* note 40, at 171.

through force, violence, or incapacitation during college.[63] Nearly one in four transgender, genderqueer, and nonconforming college students are sexually assaulted.[64] Additionally, sexual assault on college campuses is severely underreported.[65] As the prevalence of the problem has become more apparent, the need to fairly and appropriately address sexual misconduct in college has garnered much attention by campus administrators, legislators, and the public.

Title IX prohibits sex discrimination in all educational settings. College sexual assault cases fall within the reporting and enforcement of Title IX's purview over sex discrimination because sexual assault creates a hostile environment on campus.[66] This was not always the case, however. Title IX was initially viewed as expanding gender equality in college admissions and athletics,[67] but its application expanded to include sexual assault and harassment during the 1990s and beyond.[68] Title IX administrative adjudication, carried out by college campus administration and often taking the form of disciplinary panels, does not supplant criminal prosecution but

---

[63] DAVID CANTOR ET AL., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND MISCONDUCT IX (2020), https://www.nsvrc.org/sites/default/files/2021-04/aau-report_rev-01-17-2020.pdf [https://perma.cc/W37Z-BZ2J] (finding that 25.9% of undergraduate women, 6.8% of undergraduate men, and 13% of all graduate or undergraduate students reported nonconsensual sexual contact by physical force or inability to consent).

[64] *Id.* at 14.

[65] "The American Civil Liberties Union (ACLU) estimates that at least 95% of campus rapes in the United States go unreported." Katie Vail, *The Failings of Title IX for Survivors of Sexual Violence: Utilizing Restorative Justice on College Campuses*, 94 WASH. L. REV. 2085, 2086 n.4 (2019) (citing Suzanne Ito, *New Report Shows 95% of Campus Rapes Go Unreported*, ACLU (Feb. 25, 2010, 12:10 PM), https://www.aclu.org/blog/smart-justice/mass-incarceration/new-report-shows-95-campus-rapes-go-unreported?redirect=blog/speakeasy/new-report-shows-95-campus-rapes-go-unreported [https://perma.cc/UX5N-GG53]); CANTOR ET AL., *supra* note 63, at 28 (finding that reporting of sexual assault on college campuses ranged from 16.5–65.6%). Another study found that only 20% of female student victims, aged 18–24, report to law enforcement. *See also* SOFI SINOZICH & LYNN LANGTON, RAPE AND SEXUAL VICTIMIZATION AMONG COLLEGE-AGE FEMALES, 1995–2013 1 (2014), https://bjs.ojp.gov/content/pub/pdf/rsavcaf9513.pdf [https://perma.cc/5XQ5-YJNZ].

[66] Shannon Harper et al., *Enhancing Title IX Due Process Standards in Campus Sexual Assault Adjudication: Considering the Roles of Distributive, Procedural, and Restorative Justice*, 16 J. SCH. VIOLENCE 302, 302 (2017).

[67] Amy B. Cyphert, *The Devil Is in the Details: Exploring Restorative Justice as an Option for Campus Sexual Assault Responses Under Title IX*, 96 DENV. L. REV. 51, 55 (2018) (citing Anne D. Byrne, *School District Liability Under Title IX for Sexual Abuse of a Student by a Teacher: Why Has the Supreme Court Allowed Schools to Put Their Heads in the Sand?* Gebser v. Lago Vista Independent School District*, 118 S. Ct. 1*, 22 HAMLINE L. REV. 587, 604 (1999)); *see also* Dara Penn, *Finding the Standard of Liability under Title IX for Student-against-Student Sexual Harassment: Confrontation, Confusion, and Still No Conclusion*, 70 TEMP. L. REV. 783, 789 (1997).

[68] Cyphert, *supra* note 67, at 55–56; *see also* Franklin v. Gwinnett Cty. Pub. Sch., 503 U.S. 60, 75 (1992) (citing Meritor Sav. Bank, FSB, v. Vinson, 477 U.S. 57, 64 (1986)); Davis *ex rel.* LaShonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 632–33 (1999).

rather runs parallel to any potential criminal prosecution by government authorities.[69]

Title IX adjudication involves administrative procedures, often involving a formal hearing, in which colleges and universities endeavor to appropriately adjudicate complaints of sexual misconduct and discipline offenders.[70] Documents issued by the U.S. Department of Education, including rules codified in federal regulations, in 2020, and amended in 2022 and 2024,[71] specifically outline the steps schools must take to prevent and address sex discrimination, including sexual assault.[72] The resulting investigation and adjudication strive to discern by at least a preponderance of the evidence whether instances occurred such that appropriate disciplinary measures, including disenrollment, should be applied.[73]

College campus sexual assault adjudication became increasingly litigious in the first two decades of the 21st century, [74] which likely had the effect of reducing openness to restorative justice for many schools.[75] By declaring mediation inappropriate for sexual assault and merely a possibility for harassment,[76] colleges likely conflated restorative justice and restorative

---

[69] *See* Harper et al., *supra* note 66, at 304–05 (citing Matthew R. Triplett, *Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection*, 62 DUKE L.J. 487, 487–527 (2012)).

[70] 34 C.F.R. §§ 106.44(a), 106.45 (2024).

[71] *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026 (May 19, 2020) (codified at 34 C.F.R. pt. 106); Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390 (July 12, 2022) (codified at C.F.R. pt. 106); Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33474 (Apr. 29, 2024) (codified at 34 C.F.R. pt. 106).

[72] 34 C.F.R. §§ 106.44(a), 106.45 (2024).

[73] *Id*. §§ 106.45(h)(1), 106.45(h)(3) (2024).

[74] *See* Sheila M. McMahon et al., *Addressing Individual and Community Needs in the Aftermath of Campus Sexual Misconduct: Restorative Justice as a Way Forward in the Re-entry Process*, 25 THE J. OF SEXUAL AGGRESSION 49, 50 (2019).

[75] For example, the U.S. Department of Education's Office for Civil Rights (OCR) published guidance in 2011 ("Dear Colleague Letter") that declared mediation inappropriate for sexual assault. Letter from Russlynn Ali, Assistant Sec'y for Civ. Rts, U.S. Dep't of Educ., to Colleague 8 (Apr. 4, 2011), https://www.ed.gov/about/ offices/list/ocr/letters/colleague-201104.pdf [https://perma.cc/UD6K-2WHY] [hereinafter Dear Colleague Letter]. Despite key differences between mediation and restorative conferencing, such as the absence of a neutral and the accused's acknowledgment of responsibility and harm, the guidance understandably had a chilling effect on the use of restorative conferencing in campus sexual assault cases. Cyphert, *supra* note 67, at 54 (citing Donna K. Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 Tex. Tech L. Rev. 147, 199–200 (2016)).

[76] U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 21 (2001), https://www.ed.gov/about/offices/list/ocr/docs/shguide.pdf [https://perma.cc/3Y6T-ZE6C] ("In some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary basis."); Dear Colleague Letter, *supra* note 75, at 8 ("Grievance procedures generally may include voluntary informal mechanisms (*e.g.*, mediation) for resolving some types of sexual harassment complaints . . . in cases involving allegations of sexual assault, mediation is not appropriate even on a voluntary basis."); U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS., Q&A ON CAMPUS SEXUAL VIOLENCE 4 (2017),

conferencing with mediation and shied away from its use to hedge the risk of litigation.[77] However, in 2017, the Trump administration's U.S. Secretary of Education, Betsy DeVos, rescinded prior Obama administration guidance and, in 2020, codified a voluntary "informal resolution" option as an alternative to a "full investigation and adjudication."[78] Signals of support for restorative conferencing or facilitated conversation ("informal resolution" under the Final Rule) by Title IX's enforcement arm may serve to counteract, if not fully remedy, the hesitation by some colleges to offer facilitated restorative conferencing as permitted by the regulations.[79] Prior to the clarification by the Department of Education that sexual assault could be ripe for informal resolution, some universities were already finding success with restorative justice options in campus sexual assault cases.[80]

---

https://titleixreference.weebly.com/uploads/7/8/8/5/78856372/q_a_on_campus_sexual_misconduct_september_2017.pdf [https://perma.cc/6YB3-Y74H]) [hereinafter 2017 Q&A] ("If all parties voluntarily agree to participate . . . after receiving a full disclosure of the allegations and their options for formal resolution and if a school determines that the particular Title IX complaint is appropriate for such a process, the school may facilitate an informal resolution, including mediation.").

[77] Vail, *supra* note 65, at 2087 (citing Karp et al., *supra* note 32, at 28).

[78] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30083 (May 19, 2020) (codified at 34 C.F.R. § 106); *see also* Shauntey James & Melanie D. Hetzel-Riggin, *Campus Sexual Violence and Title IX: What is the Role of Restorative Justice Now?*, 17 FEMINIST CRIMINOLOGY 407, 409 (2022) (quoting 2017 Q&A, *supra* note 76, at 4).

[79] The Department of Education highlighted the following comment at the outset of the discussion regarding changes to 34 C.F.R. § 106.45(b)(9), *Supporting and Expanding Informal Resolution*:

> Restrictions on informal resolution have had several problematic consequences. Would-be complainants often declined to come forward with complaints because they were offered only two roads forward: The full formal process leading to possibly severe punishment for the respondent, or counseling for themselves. These students often said: "I don't want the respondent to be punished; I just want them to realize how bad this event was for me." Students fully prepared to confess, apologize, and take their sanction were sometimes ground through the formal process for no good reason. Additionally, often both parties would have preferred informal resolution; a rule that pushed them to adopt an adversarial posture vis a vis each other meant that the conflict persisted, and even escalated, when it could have been settled.

Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30399.

[80] Katherine Mangan, *Why More Colleges are Trying Restorative Justice in Sex-Assault Cases*, CHRON. OF HIGHER EDUC. (Sept. 17, 2018), https://www.chronicle.com/article/why-more-colleges-are-trying-restorative-justice-in-sex-assault-cases/ [https://perma.cc/4LZG-XB37]; Vail, *supra* note 65, at 2088 (citing SWARTHMORE COLL., PROCEDURES FOR RESOLUTION OF COMPLAINTS AGAINST STUDENTS 7, 17 (2019-2020), [https://perma.cc/EB4X-JUD7]; Katherine Mangan, *Why More Colleges are Trying Restorative Justice in Sex-Assault Cases*, CHRON. OF HIGHER EDUC. (Sept. 17, 2018), https://www.chronicle.com/article/why-more-colleges-are-trying-restorative-justice-in-sex-assault-cases/ [https://perma.cc/4LZG-XB37]; *Restorative Responses to SVSH*, U. CAL. BERKELEY RESTORATIVE JUST. CTR., [https://perma.cc/YQF5-V43N]) (referring to procedures for resolutions of complaints against students and restorative options available to students at Swarthmore College and the University of California Berkeley).

In assessing options for case processing, campus administrators necessarily consider liability risk and cost to the university.[81] These concerns are naturally a factor that universities currently consider or will consider in deciding whether to offer informal resolution as well. The final regulations, beginning in 2020 and culminating in the 2024 Final Rule, provide clarity and consistency for postsecondary schools opting to offer, and students willing to engage in, informal resolution such as restorative conferencing.[82]

Informal resolution can be engaged any time prior to a determination whether sex discrimination occurred.[83] Schools must take prompt and effective steps to ensure that sex discrimination does not continue or recur.[84] Before initiating an informal resolution process, schools must give the parties notice of the allegations, the "requirements of the informal resolution process," that either party can withdraw from the informal process (and pursue a formal grievance) up until the parties agree to a resolution, and even potential terms the parties may agree to binding only on the parties.[85] Additionally, informal resolution is facilitated by a trained neutral party who must be "free from conflicts of interest, bias, and trained to serve impartially"[86] and not the investigator or decision-maker in grievance procedures.[87]

Facilitators within Title IX's newly codified informal resolution process appear to be modeled after widely accepted norms of confidentiality and impartiality governing mediation generally and those contained within the Department of Education's own Office for Civil Rights Case Processing Manual.[88] On the issue of confidentiality, the rules reserve discretion to

---

[81] *See, e.g.,* Ashley Hartmann, *Reworking Sexual Assault Response on University Campuses: Creating a Rights-Based Empowerment Model to Minimize Institutional Liability,* 48 WASH. UNIV. J.L. & POL'Y 287, 314 (2015) (footnote omitted) ("As students file complaints with the Department of Education, bring Title IX suits with increasing frequency, and turn to the media for resolution in the court of public opinion, universities are often forced to prioritize complaints that have the potential to be most costly to the institution…open[ing] the university to liability from either perspective, creating a zero-sum game in which university response caters to the student who has more social, political, or economic capital. A reformed process of how universities respond to sexual assault should work to meet the needs of all students while minimizing university liability.")

[82] *See* 34 C.F.R. § 106.44(k) (2024). The determination whether to offer an informal resolution option rests with the school. 34 C.F.R. §§ 106.44(k)(i)–(ii) (2024).

[83] *Id.*

[84] *Id.* Such steps might include taking measures to prevent the students' interaction on campus with tools available to campus administrators. However, specific guidance to schools from the Office of Civil Rights is not yet available.

[85] 34 C.F.R. §§ 106.44(k)(3)(i)–(v) (2024).

[86] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30401 (May 19, 2020).

[87] 34 C.F.R. § 106.44(k)(4) (2024).

[88] Sections 201–202 of the Manual provide procedures for mediation in which the OCR provides an unbiased neutral to mediate a dispute between a complainant or respondent and a university. OCR provides mediation as an off-ramp to litigation between a student and a college. The mediation is subject

universities as to whether informal resolution facilitators may potentially serve as witnesses in subsequent formal grievances that may result from a failed restorative conference.[89] While universities are explicitly prohibited from requiring students to waive their right to a formal hearing, or any other right, as a condition of engaging in restorative conferencing,[90] the regulations also do not mandate that universities explicitly allow or consider in a formal hearing statements offered by a party but originally made under a promise of confidentiality in an informal conference. On the contrary, the regulations leave this discretion to universities.[91]

---

to confidentiality, and the mediator is walled from any staff members assigned to investigate the allegations. U.S. DEPT. OF ED., OFF. FOR CIV. RTS., CASE PROCESSING MANUAL (CPM) 13–15 (2022), https://www.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf [https://perma.cc/45TH-CA6V]. OCR provides mediation as an off-ramp to litigation between a student and a college. *Id.* at 13. The mediation is subject to confidentiality, and the mediator is walled from any staff members assigned to investigate the allegations. *Id.* at 14–15.

[89] Initially, in 2020, the Department responded to the proposed confidentiality provisions with the following response: "With respect to informal resolution facilitators potentially serving as witnesses in subsequent formal grievance processes, we leave this possibility open to recipients. If recipients were to accept such witnesses, then the Department would expect this possibility to be clearly disclosed to the parties as part of the § 106.45(b)(9)(i) requirement in the final regulations to provide a written notice disclosing any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared." Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30400–01 (May 19, 2020) (codified at 34 C.F.R. § 106). In 2024, the Department deleted two proposed paragraphs, 34 C.F.R. 106.44(k)(3)(vii), regarding disclosure and paragraph (viii) regarding facilitators as witnesses, due to confusion as to what level of confidentiality would or could apply to informal resolution conferences. The Department opted to modify paragraph (vi) to state that the recipient must provide notice of what information the recipient will maintain and whether and how the recipient could disclose such information for use in grievance procedures. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33474, 33630 (Apr. 29, 2024).

[90] 34 C.F.R. § 106.44(k)(2) (2024); *see also* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30401.

[91] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30400–01; *see also* 34 C.F.R. §§ 106.45(b)(6)–(7)(i) (2024) (requiring "an objective evaluation of all evidence that is relevant . . . and not otherwise impermissible"; impermissible evidence includes "[e]vidence that is protected under a privilege as recognized by Federal or State law or evidence provided to a confidential employee, unless the person to whom the privilege or confidentiality is owed has voluntarily waived the privilege or confidentiality."); 34 C.F.R. § 106.44(k)(3)(vi) (2024) (requiring schools, prior to engaging in informal resolution, to disclose "[w]hat information the [school] will maintain and whether and how the recipient could disclose such information for use in grievance procedures . . . if grievance procedures are initiated or resumed.").

The regulatory changes will hopefully shepherd new openness to beneficial restorative justice practices on college campuses, but it is too early to tell the effects at the time of this article.[92]

D. Barriers to Restorative Conferencing in the United States Military Justice System, a Corollary for Other Criminal Legal Systems

The United States military justice system is distinctive.[93] It serves traditional objectives of justice, as found in civilian criminal justice systems, such as punishment, rehabilitation, deterrence, incapacitation, and reintegration. But it is also specifically designed "to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."[94]

Concerns about restorative justice exist within the military justice system, similar to those that exist for both criminal cases generally and administrative campus sexual assault. The military system is a distinctive legal system with its own history and sensitivity concerning sexual assault. In addition to criminal jurisdiction over its members, the military exercises administrative disciplinary authority over sexual misconduct similar to that required of universities under Title IX.[95]

Over the past three decades, the military justice system has been widely criticized for failing to adequately address sexual assault within its ranks, "prosecuting too few sexual cases and achieving too few convictions."[96] The military has also been criticized for prosecuting too many cases.[97] Because the military simultaneously houses both a criminal prosecutorial system and administrative disciplinary function, scrutiny over the handling of sexual misconduct cases extends into administrative responses as well.[98] The

---

[92] *See* Vail, *supra* note 65, 2086–88.

[93] Dan Maurer, *A Logic of Military Justice?*, 53 TEXAS TECH L. REV. 669, 672 (2021) (highlighting the role of commanders in exercising executive authority over servicemembers).

[94] *Manual for Courts-Martial, United States* (2024 ed.), pt. I, ¶ 3 [hereinafter *MCM 2024*].

[95] *Sexual Harassment Assault Response and Prevention (SHARP)*, U.S. ARMY, https://www.armyresilience.army.mil/sharp/?from=features (last visited Jan. 29, 2025).

[96] Jeremy Weber, *Court-Martial Nullification: Why Military Justice Needs A "Conscience of the Commander"*, 80 A.F. L. REV. 1, 2 (2019) (citing Heidi L. Brady, *Justice is No Longer Blind: How the Effort to Eradicate Sexual Assault in the Military Unbalanced the Military Justice System*, 2016 U. Ill. L. Rev. 193, 203–05 (2016); Sig Christenson & Bill Lambrecht, *Sex Assault Survey*, SAN ANTONIO EXPRESS NEWS, May 6, 2017, at A1).

[97] *See*, *e.g.,* Heidi L. Brady, *Justice is No Longer Blind: How the Effort to Eradicate Sexual Assault in the Military Unbalanced the Military Justice System*, 2016 U. Ill. L. Rev. 193, 218–223 (2016); Brian C. Hayes, *Strengthening Article 32 to Prevent Politically Motivated Prosecution: Moving Military Justice Back to the Cutting Edge*, 19 REGENT U. L. REV. 173, 178–79 (2007).

[98] For a discussion of how the military justice system struggles to balance discipline and justice, *see* David A. Schlueter, *The Military Justice Conundrum: Justice of Discipline?*, 215 MIL. L. REV. 1 (2013)*;*

military's administrative responsibilities, like the disciplinary role of institutions of higher education, include determining non-criminal consequences for its members and, at times, deciding to discontinue the membership of individuals within the organization. As such, the military justice system, the legal system operating in the backdrop of "Amanda's" case study in Part II, *infra*, serves as an appropriate lens by which to view challenges and opportunities for restorative conferencing for which the potential for legal consequences consistently looms.

Like sexual misconduct on college campuses, sexual assault remains a persistent and corrosive problem in the United States military. According to the Department of Defense, an estimated 29,061 service members experienced unwanted sexual contact or sexual assault during 2023, with an estimated reporting rate of 25%.[99] Given the high number of sexual assaults over the years, Congress, the media, and special interest groups have placed accumulating pressure on the military to stem the tide of sexual assault within its ranks.[100] As such, Congress enacted far-reaching changes to the military justice system,[101] including the creation of an independent prosecutorial function with the authority to decide initial disposition in all sexual assault cases.[102] Prior to this sweeping change, which took effect December 23, 2023, commanders long held the nearly unfettered role of decision-maker and enforcer of good order, discipline, and justice with broad discretion in

---

see also Heidi L. Brady, *Justice is No Longer Blind: How the Effort to Eradicate Sexual Assault in the Military Unbalanced the Military Justice System*, 2016 U. ILL. L. REV. 193 (2016).

[99] U.S. DEP'T. OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2023 3–4 (2024), https://www.sapr.mil/sites/default/files/public/docs/reports/AR/FY23/FY23_Annual_Report.pdf [https://perma.cc/5ZA5-G522]. The term "sexual assault" encompasses a "broad category of sexual offenses, including the UCMJ offenses of "rape, sexual assault, aggravated sexual contact, abusive sexual contact, forcible sodomy (forced oral or anal sex), or attempts to commit these acts." U.S. DEP'T. OF DEF., DEPARTMENT OF DEFENSE INSTRUCTION NUMBER 6495.02, VOLUME 1, SEXUAL ASSAULT PREVENTION AND RESPONSE: PROGRAM PROCEDURE 137 (2022), https://uat.tradoc.army.mil/wp-content/uploads/2024/08/DODI6495.02_vol1.pdf [https://perma.cc/L5LZ-2L5B].

[100] For a concise overview of the pressure on the military justice system concerning its alleged failure to adequately prosecute sexual assault allegations, *see* Brady, *supra* note 97, at 203–05.

[101] *See* NDAA FY22, Pub. L. No. 117-81, § 531(c)(4)–(5), 135 Stat. 1541, 1692–93 (shifting convening authority to special trial counsel for referral of charges for certain "covered" offenses, including sexual offenses). *See also* Weber, *supra* note 96, at 2 (citing NDAA for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 1636 (2018); NDAA for Fiscal Year 2018, Pub. L. No. 115-91 §§ 532–33, 131 Stat. 1283 (2017); NDAA for Fiscal Year 2017, Pub. L. No. 114-328 §§ 5001 *et seq.*, 130 Stat. 2000 (2016); NDAA for Fiscal Year 2016, Pub. L. No. 114-92, § 531, 129 Stat. 726, 814–15 (2015); NDAA for Fiscal Year 2015, Pub. L. No. 113-291, § 533, 128 Stat. 3292, 3366–67 (2014); *id.* § 536, 128 Stat. 3368; NDAA for Fiscal Year 2014, Pub. L. No. 113-66, § 1701, 127 Stat. 672, 952–54 (2013); *id.* § 1702, 127 Stat. 954–58; NDAA for Fiscal Year 2015, Pub. L. No. 113-291, § 533, 128 Stat. 3292) ("Each of the last several National Defense Authorization Acts (NDAAs) contained provisions mandating significant changes to the military justice system").

[102] RCM 303; *MCM 2024*, *supra* note 94, at pt. II, ¶ 303A(a); *see also supra* text accompanying note 9.

how to dispose of all misconduct.[103] This role also included protecting service members' rights[104] and caring for victims of crime.[105]

No method of restorative justice is codified within the Uniform Code of Military Justice, nor has any of Congress' modifications addressed implementing such practices. Rather, the vast statutory detail concerning military justice and discipline and the stark absence of informal resolution or restorative justice in that context seem to communicate little room for restorative options. Yet, even as the procedural landscape of sexual assault prosecutions in the military is evolving, restorative justice practices are a viable option in certain sexual assault cases when the interests of the parties involved align.

As the initial decision on prosecution has shifted to independent prosecutors in the military, commanders still play a role in determining most administrative consequences in the event of a declination to prosecute. Thus, the path to restorative justice in the military necessarily involves attentiveness to the interests of the Office of Special Trial Counsel and the military commander. One seeking to use restorative justice practices in the military justice arena should look to traditional negotiation methods of sexual assault prosecutions, keenly focus on the various stakeholders' perspectives, and understand their sometimes-competing interests in order to ascertain their openness or reticence to utilize restorative justice methods.

Negotiation and plea bargaining also take place in the military justice system. Due to recent changes in the Manual for Courts-Martial stemming from recommendations by the Joint Service Commission, military plea agreements have become far more similar to civilian federal and state plea bargaining.[106] The proverbial "negotiating table" is quite large in a military

---

[103] *See* United States v. Littrice, 13 C.M.R. 43, 47 (U.S. C.M.A. 1953) ("It was generally recognized [by Congress] that military justice and military discipline was essentially interwoven . . . . [C]onfronted with the necessity of maintaining a delicate balance between justice and discipline, Congress liberalized the military judicial system but also permitted commanding officers to retain many of the powers held by them under prior laws.").

[104] Schlueter, *supra* note 98, at 11–12 (service members being court-martialed through the military justice system receive many procedural due process rights—arguably more protections than its civilian counterpart); *see also* Lieutenant Homer E. Moyer, *Procedural Rights of the Military Accused: Advantages Over a Civilian Defendant*, 22 ME. L. REV. 105 (1970), *reprinted at* 51 MIL. L. REV. 1 (1971); Robert Poydasheff & William K. Suter, *Military Justice? Definitely!*, 49 TUL. L. REV. 588 (1975).

[105] THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, COMMANDER'S LEGAL HANDBOOK 7 (2019), https://www.jagcnet.army.mil/Sites/jagc.nsf/EE26CE7A9678A67A85257E1300563559/$File/CommandersLegalHandbook.pdf.

[106] Sean P. Flynn, *Ensuring Justice Without "Beating the Deal"*, 94 NOTRE DAME L. REV. ONLINE 128, 128–29 (2019); Jeff A. Bovarnick, *Plea Bargaining in the Military*, 27 FED. SENT'G REP. 95, 95 (2014) (estimating 90% of military courts-martial result in guilty pleas); *see also* Brian C. Hayes, *Strengthening Article 32 to Prevent Politically Motivated Prosecution: Moving Military Justice Back to the Cutting Edge*, 19 REGENT U. L. REV. 173 (2007); Brady, *supra* note 97, 218–223 (illuminating the "abnormal" number of sexual assault cases referred to courts-martial, suggesting that plea agreements are not a prevailing method of disposition in the military system for those types of cases); Mitsie Smith,

prosecution of sexual assault. Seated at the "table" are the prosecutor with initial criminal disposition authority; the commander with administrative authority; the local military base's Staff Judge Advocate (SJA); the General Court-Martial Convening Authority (GCMCA) and his or her SJA; the victim and his or her victim's counsel, as well as the accused and his or her defense counsel.

From best serving their respective clients' interests to holding views about the nature of the allegation, the quality of available evidence, the likelihood of conviction, and what constitutes a just outcome for the case, each party comes to the table with their own perspective. To understand the viability of restorative justice in this process, it is important to evaluate and understand the interests of these stakeholders. The following section explores stakeholder views in military sexual assault and college Title IX cases.

E. Stakeholder Views Toward Restorative Conferencing in Criminal and Campus Title IX Cases

Sexual assault is rife with complexity and divergent stakeholder views.[107] As we examine the viability of a restorative conferencing option as an off-ramp to adjudication, it is essential to consider the interests, concerns, and fears of each of the main stakeholders within the criminal and college adjudicative processes. The military prosecutorial system serves as a corollary to other criminal jurisdictions but possesses a few key additional stakeholders necessary for a full evaluation. An examination of stakeholder interests also helps elucidate considerations for full voluntary participation by victims and offenders to engage in restorative conferencing.

1. The Victim's Perspective on Restorative Justice

The current adversarial adjudicative system resulting from reporting leads to feelings of being doubted, requires recounting details of trauma, and imposes a lengthy period of awaiting resolution. Restorative justice options offer an alternative that places mutual understanding of harm at the center of the process.[108] The adversarial process "was designed so that the parties

Adding Force Behind Military Sexual Assault Reform: The Role of Prosecutorial Discretion in Ending Intra-Military Sexual Assault, 19 BUFF. J. GENDER L. & SOC. POL'Y 147, 148 (2010–2011) (discussing the differences in prosecutorial discretion between civilian prosecutors and military prosecutors, including the role of plea bargaining).

[107] *See* McMahon et al., *supra* note 74, at 49–57.

[108] J.S. HIRCH & S. KHAUHN, SEXUAL CITIZENS: SEX, POWER, AND ASSAULT ON CAMPUS 215 (2020).

involved argue before a neutral evaluator, each seeking to advance their own interest," forcing advocacy and contention due to the stakes involved.[109]

Concern for victims' plenary interests beyond retribution[110] is the major driver in support of restorative justice options in sexual misconduct cases, particularly in sheltered, highly social environments such as college and the military.[111] The privacy concerns in these environments are exacerbated because information spreads quickly and affects social standing.[112] In addition to privacy,[113] other important concerns include victim agency,[114] institutional distrust,[115] retraumatization,[116] accountability and responsibility

---

[109] *Id.*

[110] Kasparian, *supra* note 10, at 377–78 ("[V]ictims seek justice in many different ways."); *see* Paul Tullis, *Can Forgiveness Play a Role in Criminal Justice?*, N.Y. TIMES (Jan. 6, 2013), at MM28 (analyzing use of restorative justice for murder victims in United States suggesting other methods for making amends might be ideal for rape victims). "Most modern justice systems focus on a crime, a lawbreaker, and a punishment." *Id.*

[111] Harper et al., *supra* note 66, at 307 ("[S]heltered, highly social environments, where the spread of personal information can create a hostile environment for victims as well as respondents, regardless of the factual nature of the information.").

[112] *Id.*

[113] Kasparian, *supra* note 10, at 382 (citing NO SAFE HAVEN: MALE VIOLENCE AGAINST WOMEN AT HOME, AT WORK, AND IN THE COMMUNITY 221 (Mary P. Koss et al. eds., 1994)) ("Rape prosecution relies on information about the victims' status, character, and relationship with the defendant, to such an extent that a trial is often an invasive and harsh experience for the victim"); Lara Bazelon & Bruce A. Green, *Victims' Right from a Restorative Perspective*, 17 OHIO ST. J. CRIM. L. 293, 318 (2020) (citing Alison Menkes, *Rape and Sexual Assault*, 7 GEO. J. GENDER & L. 847, 849–50 (2006); Tess Wilkinson-Ryan, *Admitting Mental Health Evidence to Impeach the Credibility of a Sexual Assault Complainant*, 153 U. PENN. L. REV. 1373, 1374 (2005); Jeffrey Toobin, *The Consent Defense*, NEW YORKER (Aug. 25, 2003), https://www.newyorker.com/magazine/ 2003/09/01/the-consent-defense [https://perma.cc/J954-NXQC]) ("[V]ictims' privacy is subject to intrusion by both the prosecution and the defense. Rape shield laws are not an absolute barrier to the inspection and exposure of deeply private information. Even victims' medical and mental health records may be subject to discovery and introduced into evidence at trial, notwithstanding the ordinary expectation that communications with healthcare professionals are confidential.")

[114] Bazelon & Green, *supra* note 113, at 316–17 (footnotes omitted) ("[T]he criminal process denies the crime victim agency or autonomy; after suffering a criminal offense that left [him/her] feeling disempowered, the victim loses control over how the offense will be addressed. The victim cannot require the prosecutor to 'drop the charges' or refuse to testify if the prosecution goes forward. As long as there is sufficient evidence to justify a prosecution, the decision whether to bring charges and whether to compel the victim to testify is up to the prosecutor. . . . But while some victims' rights laws require prosecutors to confer with victims about these decisions, none require prosecutors to defer to victims."); *see also* Sardina & Ackerman, *supra* note 40, at 38.

[115] McMahon et al., *supra* note 74, at 49; s*ee also* Carly Smith & Jennifer Freyd, *Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma*, 26 J. OF TRAUMATIC STRESS 1, 119–124 (2013).

[116] Sardina & Ackerman, *supra* note 40, at 6 (citing Debra Patterson & Rebecca Campbell, *Why Rape Survivors Participate in the Criminal Justice System*, 38 J. CMTY. PSYCH. 191, 196–197 (2010); ANDREA J. RITCHIE, INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR ch.5 (Beacon Press 2017); Rebecca Campbell, *Why Rape Survivors Participate in the Criminal Justice System*, 38 J. CMTY. PSYCH. 191, 196–97 (2010)) (Victims have reported that they "encounter individuals who are skeptical about their claims, diminish their credibility, minimize their experience, are dismissive of them entirely, or are generally insensitive to their experience. This phenomenon has been termed 'secondary victimization,' or 'the second rape,' and includes behaviors by criminal legal professionals

by the offender,[117] and future protection for the victim and community. While criminal prosecution and formal administrative adjudication with fact-finding responsibilities are offender-centered processes, restorative justice options offer an alternative paradigm with victim-centered healing as the goal.[118]

Despite the theory of restorative justice as giving agency and choice to victims, few jurisdictions have codified victim decision-making into law.[119] Jurisdictions that do formalize victim input toward restorative justice have only done so relatively recently, and ultimate decision-making authority remains with the state.[120] This mirrors the lack of meaningful victim participation in plea bargaining in the criminal context,[121] despite numerous state constitutional and statutory guarantees of the right to participate by expressing their opinion about plea bargains in court.[122] Viewing plea bargaining as a form of alternative dispute resolution, there is a strong argument to include victims more meaningfully in the process than lodging their opinion after a deal (or a deal in principle) has been struck.[123]

In the military, victim concerns and participation in the criminal and administrative process have rapidly evolved over the past decade, particularly with the congressionally mandated creation of the special victims' counsel program in 2013.[124] Supplying an advocate to all sex offense

---

and others that exacerbate the trauma of rape and other types of sexual harm."); Rebecca Campbell & Sheela Raja, *Secondary Victimization of Rape Victims: Insights from Mental Health Professionals Who Treat Survivors of Sexual Violence*, 14 VIOLENCE & VICTIMS 261, 267 (1999).

[117] Kasparian, *supra* note 10, at 378 (footnotes omitted) ("For some, justice is simply the perpetrator's conviction and incarceration . . . . To others, it is having a meaningful opportunity to tell one's story to the community, or perhaps directly to the offender."); *see also* Mary P. Koss, *Restorative Justice for Acquaintance Rape and Misdemeanor Sex Crimes*, *in* RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN 218, 222 (James Ptacek ed., 2010) (recognizing alternative methods victims use to seek justice); *id*. (to some victims, justice is found in the ability to share one's story with others in a comfortable, open environment).

[118] HOWARD ZEHR, CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE, *passim* (1990).

[119] Gonzalez, *State of Restorative Justice*, *supra* note 21, at 1180.

[120] *Id.* at 1181 (footnotes omitted) ("Despite the presence of restorative justice as part of the criminal system since the 1970s, formalization of a victim decision-making role is relatively new," with most formalization taking the form of a state-controlled discretionary process in which the victim may request restorative conferencing or mediation.).

[121] Dana Pugach & Michael Tamir, *Nudging the Criminal Justice System into Listening to Crime Victims in Plea Agreements*, 28 HASTINGS WOMEN'S L.J. 45, 45 (2017) (citing Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in the United States Legal Practice*, 54 AM. J. OF COMP. L. 717, 717 n.2 (2006)) ("Victims' limited ability to compel public prosecution or to influence the terms of plea bargains are undoubtedly among the factors contributing to the entrenched position of plea bargains.").

[122] *E.g.,* the 2016 Crime Victims' Rights Act, 18 U.S.C. § 3771 (2006) (giving victims the "right to participate in the system"); Pugach & Tamir, *supra* note 121, at 45 (citing 150 CONG. REC. S4237, S4263 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein), https://www.congress.gov/crec/2004/04/22/CREC-2004-04-22-senate.pdf).

[123] Pugach & Tamir, *supra* note 121, at 54–55, 58.

[124] Evah K. McGinley, *Ten Years In: Special Victims' Counsel Practice in the Era of the Office of Special Trial Counsel*, 2023 ARMY LAW. 27, 27–28 (2023) (Special Victim's Counsel (SVC) program

and domestic violence victims has resulted in great strides in restoring victim agency and participation within military processes.[125]

Restorative justice as a matter of victim choice for a diversionary alternative offers the promise of better serving victims' interests by respecting their agency, avoiding the burdens and retraumatization of the criminal justice or formal adjudicative process,[126] and enabling a resolution that some victims may believe better serves their interests than societal punishment of the offender.[127]

2. The Defendant's Perspective on Restorative Justice

Where victims' interests can range widely and have nuanced priorities, criminal defendants and administrative respondents accused of sexual misconduct typically have one interest that overshadows all others: minimize their own criminal or civil exposure and consequences. Thus, by pure logic, restorative justice, in which an offender voluntarily agrees to their own potential consequence, is better than one involuntarily levied upon them. In restorative justice, the offender can withdraw from the process or a potential agreement up until the point an agreement is made, so the greatest risk arising from restorative conferencing stems from participation in or statements of the offender being used against them in a criminal, civil, or administrative proceeding. Thus, the alleged offender's paramount interest and biggest hurdle for engaging in restorative conferencing is the assurance of some level of confidentiality built into the process.

A secondary interest for those facing criminal, civil, or administrative adjudication for sexual misconduct is agency or choice in the process. In some jurisdictions, an offender may request restorative justice as a diversionary process, but the request must be approved by the state or institution responsible for the adjudication.[128] Jurisdictions that mandate an offender into restorative justice create tensions between the goals of

---

dedicated an attorney to all victims of sexual offenses across the military to represent their needs and interests).

[125] *Id.* at 28 (describing a "key aspect of SVC practice" as "assisting the client to understand and manage a situation resulting from an incident…where the client did not have agency and control" and restoring their ability to have a say helps the victim "regain that lost sense of control"); *see also* Mark D. Stoup, *What's New in the Law for Victims*, 43 REPORTER 32, 37–39 (2016).

[126] Bazelon, *supra* note 113, at 26 (citing Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15, 15. 22 (2003)).

[127] Bruce A. Green & Lara Bazelon, *Achieving Access to Justice through ADR: Fact or Fiction?: Restorative Justice from Prosecutors' Perspective*, 88 FORDHAM L. REV. 2287, 2300, 2316 (2020) (citing Eric Gonzalez, *Using the Power of Prosecutors to Drive Reform*, CRIM. JUST., Fall 2019, at 10).

[128] Gonzalez, *State of Restorative Justice*, *supra* note 21, at 1181–82.

restorative justice, such as accountability and reduced recidivism, and the constitutional rights intended to protect the accused.[129]

Offenders accused of sexual misconduct also have an interest in a fair process, whatever the outcome of that process may be.[130] "[T]he criminal process encourages the offender to deny or minimize responsibility."[131] Thus, by extension, the formal administrative adjudicative system similarly stymies the accused's voice by ramping up the risk of an accused sharing their perspective of the events,[132] and oversimplifies the complexity of the range of culpability,[133] leaving a stark feeling of unfairness.

If found responsible, in fairness offenders should have the opportunity to hear the full impact their actions had on the victim such that the consequences can be perceived as just.[134] In contrast to the stark punishing and alienating consequences often accompanying criminal trial (such as confinement in jail and sex offender registration) or formal administrative proceedings (such as disenrollment from their university or a stigmatizing discharge from the

---

[129] *See*, *e.g.,* U.S. CONST. amend. V (privilege against self-incrimination and due process right); U.S. CONST. amend. VI (rights to public trial by peers, effective assistance of counsel, and confrontation); U.S. CONST. amend. XIV, § 1 (incorporating fundamental constitutional rights against the states).

[130] "A related and complementary theory for why restorative justice works is procedural justice theory, which holds that citizens are more likely to comply with the law when they believe they are treated fairly in the criminal process." Lanni, *supra* note 3, at 647 (citing TOM TYLER, WHY PEOPLE OBEY THE LAW (1990)); *see also* TOM TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS (2002).

[131] Bazelon & Green, *supra* note 113, at 316.

[132] As the prosecutor primarily cultivates the version of the alleged offense through the lens of investigators and the victim, the defendant is realistically unable to provide their version of events to dispute or contextualize the allegation unless they engage in plea negotiations. Whether consciously or not, the prosecutor is left to surmise that the defendant's perspective is, at most, wrong, or at least, not worthy of consideration. *See* Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 416–20 (2008) (discussing defendants' perspective of plea bargaining in the criminal justice system and proposing procedural justice enhancements to further opportunities for defendants to tell their version of what happened).

[133] Brenda Sims Blackwell & Clark D. Cunningham, *Taking the Punishment out of the Process: From Substantive Criminal Justice through Procedural Justice to Restorative Justice*, 67 LAW & CONTEMP. PROBS. 59, 68–69 (2004) (footnote omitted) ("Literature . . . consistently speaks in terms of 'victims' and 'offenders,' terms that assume both that a crime has been committed and that the criminal—the 'offender'—has been conclusively identified. This terminology thus has excluded from the potential scope of restorative justice at least three categories of criminal defendants: (1) clearly innocent defendants who still need healing from the harm caused by accusation, arrest, incarceration and pretrial court procedures; (2) defendants whose legal guilt may be uncertain or unprovable and who may nonetheless recognize that their own bad decisions contributed to the situation leading to arrest; and (3) defendants who are prosecuted not in response to a complaint by an individual victim but rather by a regulatory state (e.g. traffic offenses, drug possession, providing a false name to a police officer, prostitution, gambling, bootlegging.").

[134] Offenders often feel that how they are treated in the criminal process and or sentence is unfair. Such "preoccupation with their own mistreatment distracts offenders from accepting responsibility for their actions and experiencing remorse for the harm they have caused." Lanni, *supra* note 3, at 645–46 (citing HOWARD ZEHR, CHANGING LENSES: RESTORATIVE JUSTICE FOR OUR TIMES 19–50 (2015)).

military[135]), restorative options allow an offender to more constructively move forward and reintegrate into the community.[136] It would be unfair to expect an offender to feel empathy and begin to address the underlying causes of harm without a full understanding of the harm itself.[137]

3. The Prosecutor's Perspective on Restorative Justice

In the criminal justice system, prosecutors wield enormous authority. Prosecutors are expected to seek justice, convict the guilty, protect the innocent, and exercise discretion justly. In pursuit of their duty, prosecutors make critical decisions about whom to investigate, when to press charges, the nature of those charges, plea bargain terms, and sentencing recommendations.[138] Such power underscores the importance of understanding prosecutors' perspectives when considering the utilization of restorative justice practices in sexual misconduct cases.

Many prosecutors are often hesitant to entertain restorative justice alternatives due to the perceived loss of control and influence over case outcomes—a concern exacerbated by their direct accountability to the

[135] In the military, a conviction of rape or penetrative sexual assault carries a minimum, mandatory dismissal or dishonorable discharge. *MCM 2024*, *supra* note 94, at pt. IV, art. 120, ¶ 60e(1)(b). Dismissal is a punitive separation that applies only to commissioned officers, commissioned warrant officers, cadets, and midshipmen and may be adjudged only by a general court-martial. Dishonorable discharge is a punitive separation that applies only to enlisted persons and warrant officers not commissioned and may be adjudged only be a general court-martial. A dishonorable discharge is reserved for those who should be separated under conditions of dishonor, after being convicted of offenses usually recognized in civilian jurisdictions as felonies. RCM 1003(a)(8)(A)–(B). Both a dismissal and dishonorable discharge will terminate a service member's military status, deprive the member of any retirement benefits, as well as substantially all benefits from the Department of Veterans Affairs, other military establishments, and other benefits normally given by other governmental agencies. Both dismissal and dishonorable discharge will adversely stigmatize the character of the service member's military career, limit future employment and schooling opportunities, and affect the member's future with regard to legal rights, economic opportunities, and social acceptability. DEP'T OF THE ARMY, MILITARY JUDGES' BENCHBOOK 179–80 (2020) [https://perma.cc/CV7V-MTVC].

[136] Lanni, *supra* note 3, at 635–36, 647 (discussing John Braithwaite's reintegrative shame theory in which "both the moral lessons learned in the restorative process and the feeling of being welcomed back into the community," rather than stigmatized, reduces the chance of reoffending); *see* JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION 74–78 (2002).

[137] Sardina & Ackerman, *supra* note 40, at 39 ("Creating processes that help [offenders] build empathy can be beneficial. Being fully responsible and accountable for one's behavior helps address these needs and the needs of the people who have experienced sexual harm. Restorative justice is one tool that can aid in this process, because remaining accountable for the harm someone has caused also allows that person to address the underlying causes of that harm.").

[138] Green & Bazelon, *supra* note 127, at 2305 (citing Susan M. Olson & Albert W. Dzur, *Revisiting Informal Justice: Restorative Justice and Democratic Professionalism*, 38 LAW & SOC'Y 139, 145–46 (2004)); *see also*, *e.g.*, Eric S. Fish, *Against Adversary Prosecution*, 103 IOWA L. REV. 1419, 1424, 1445 (2018) (describing the prosecutor's "unequal power" to "set the terms" of a case and any subsequent negotiation by using a variety of tools).

electorate.[139] While military lawyers operate without electoral pressures like their civilian counterparts, military lawyers face increasing congressional scrutiny on issues surrounding military sexual assault. Such scrutiny can influence a prosecutor's reluctance to embrace restorative justice initiatives in sexual misconduct cases.

Philosophically, prosecutors may favor the trial process for adjudication and punishment, viewing trials as integral to determining guilt or innocence under constitutional principles.[140] A prosecutor's predisposition to utilize the trial process is not one born solely out of tradition, ego, or self-interest. Criminal trials for serious or violent offenses can serve expressive and retributivist functions, such as deterring future crime, and upholding societal justice—functions some believe restorative justice may not adequately fulfill.[141] Even when victims express a preference for restorative justice, prosecutors may maintain that their primary duty is to serve the public interest rather than individual or victim preferences.[142]

Some prosecutors may also be concerned with the real or perceived obfuscation of justice in pressuring an accused to give up certain rights to participate in an alternative restorative process.[143] "The prosecutor may regard the threat of prosecution as an abuse of power that denies the constitutional protections afforded by the law."[144] Sensitive to other areas in which even the most subtle coercion can derail a prosecution, such as in the context of waiving the right against self-incrimination, prosecutors may shy away from similar coercion to participate in restorative justice. "One might take this concern with a grain of salt, however, since the same coercion is customarily used to induce offenders to plead guilty or to accept other

---

[139] Green & Bazelon, *supra* note 127, at 2305. For an argument in favor of prosecutors yielding power, *see* Jocelyn Simonson, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 296 (2019) ("[S]tate actors should take the bold step of *ceding power*, of deliberately facilitating power shifts down to the marginalized populations who traditionally have the least input into everyday justice."). *But cf.* Susan M. Olson & Albert W. Dzur, *Reconstructing Professional Role in Restorative Justice Programs*, 2003 UTAH L. REV. 57, 62–63 (arguing that restorative justice "attacks the whole logic of the criminal justice system" with processes and outcomes that mean "[e]xperts in substantive criminal law are not needed").

[140] *See* Green & Bazelon, *supra* note 127, at 2291 (citing Lafler v. Cooper, 566 U.S. 156, 170 (2012)).

[141] *Id.* at 2291, 2299.

[142] *Id.* at 2300; *see* Paul H. Robinson, *The Virtues of Restorative Justice Processes, the Vices of "Restorative Justice"*, 2003 UTAH L. REV. 375, 383 (2003) ("Indeed, criminal law is unique in embodying norms against violation of societal, rather than personal, interests. All crimes have society as the victim, not merely a single person.").

[143] When given the chance to avoid a criminal conviction by engaging in a restorative justice practice, there will be immense pressure to participate. Lanni, *supra* note 3, at 655 (noting that a defendant facing criminal prosecution and a potential severe punishment may be coerced by circumstance to engage in a restorative justice process). "Coercion may also pose a more fundamental threat to the integrity of the process, because free and voluntary participation would seem to be required to ensure that an apology and expression of remorse offered by the offender is sincere." *Id*.

[144] Green & Bazelon, *supra* note 127, at 2301.

dispositions, including participation in drug treatment and other diversion programs."[145]

Notwithstanding the adversarial nature of trials, plea bargaining remains the predominant method for resolving criminal cases in the federal and state systems,[146] reflecting the public's expectation that prosecutors exercise discretion in pursuing justice and toleration for efficiency influencing the process. Such discretion and public tolerance open the door to restorative practices.

While restorative justice has gained traction in misdemeanor cases,[147] traditional prosecutors have been slower to adopt it, especially for serious offenses,[148] citing concerns over resource-intensive implementation[149] and insufficient evidence of long-term effectiveness in reducing recidivism.[150] Though some data suggests restorative justice processes may be more effective than traditional adjudicative methods in certain contexts, the limited scope and variability of existing studies contribute to prosecutors' cautious approach.[151]

---

[145] *Id.*

[146] Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 409 (2008) (footnote omitted) (in the federal criminal justice system, more than 90% of convictions are obtained through a guilty plea); *see also* MARK MOTIVANS, FEDERAL JUSTICE STATISTICS, 2021 1 (2022), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/fjs21.pdf [https://perma.cc/GW6E-777V] (noting 92.2% of felony convictions adjudicated in U.S. district court were by guilty plea); Lafler v. Cooper, 566 U.S. 156, 170 (2012).

[147] Lanni, *supra* note 3, at 637 (citing JAMES FORMAN, LOCKING UP OUR OWN 220–21, 230–31 (2017); NAZOOL GHANDNOOSH, THE SENTENCING PROJECT, THE NEXT STEP: ENDING EXCESSIVE PUNISHMENT FOR VIOLENT CRIMES 8 (2019)); *see also* JAMES PTACEK, *Editor's Introduction*, *in* RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN ix, ix (2010) (noting restorative justice is generally applied to youth crimes, not crimes against women).

[148] Green & Bazelon, *supra* note 127, at 2296. *But see* Kasparian, *supra* note 10, at 383 (noting while only a handful of programs have attempted to use restorative justice practices in cases of sexual violence, there has been a recent increase in use and awareness of these programs with a few pilot programs debuting across the globe that implement restorative justice responses to sexual assault offenses during different phases of the criminal justice process); *see* Shirley Julich, *Critical Issues in Restorative Justice: Aotearoa New Zealand*, 14 VOMA CONNECTIONS 1, 4 (2003) (discussing restorative justice program in New Zealand); Karin Sten Madsen, *Mediation as a Way of Empowering Women Exposed to Sexual Coercion*, 12 NORA: NORDIC J. OF WOMEN'S STUD. 58, 60 (2004) (outlining Copenhagen program).

[149] Green & Bazelon, *supra* note 127, at 2297; *see also* Juleyka Lantigua-Willams, *Are Prosecutors the Key to Justice Reform?,* ATLANTIC (May 18, 2016), https://www.theatlantic.com/politics/archive/2016/05/are-prosecutors-the-key-to-justice-reform/483252/ [https://perma.cc/C6J2-9MAE] ("District attorneys do, however, have an incentive to prosecute and send people to state prison—because state prisons do not spend local county resources, so district attorneys' budgets stay intact.").

[150] *See* Green & Bazelon, *supra* note 127, at 2297; *see also* Paul H. Robinson, *The Virtues of Restorative Justice Processes, the Vices of "Restorative Justice"*, 2003 UTAH L. REV. 375, 377–78 & n.7 (noting the "real risk" of using restorative justice in place of traditional prosecution "will not work" and exhibiting doubt that it will be adequately punitive to deter and to render "just desserts").

[151] Green & Bazelon, *supra* note 127, at 2297–98; *see* Barton Poulson, *A Third Voice: A Review of Empirical Research on Psychological Outcomes of Restorative Justice*, 2003 UTAH L. REV. 167, 169,

Despite these reservations, a shift toward using restorative justice has begun in some large jurisdictions, driven by prosecutors willing to challenge conventional views on crime and punishment.[152] This evolving perspective acknowledges the societal benefits of alternative dispute resolution programs like drug courts, problem-solving courts, and cases involving minor or juvenile offenders, suggesting a growing openness within the criminal justice system to explore new approaches to resolving criminal cases.[153]

4. The Military Commander's Perspective on Restorative Conferencing

In the evolving landscape of military justice, jurisdiction over sexual assault cases, and soon sexual harassment cases,[154] has shifted decisively away from military commanders to the newly established Office of Special Trial Counsel.[155] This transition marks a pivotal development in the adjudication of sexual offenses within the military framework and makes the military justice system more analogous to civilian federal and state criminal systems. Historically, however, military commanders have exhibited notable reluctance, if not outright resistance, towards embracing restorative justice as a method to resolve allegations of sexual misconduct. The persistent spotlight on sexual assault within the military fostered an environment where commanders felt compelled to proceed with sexual assault cases through traditional avenues, such as general court-martial proceedings.[156] This approach was driven by significant career considerations, as higher-level commanders must navigate the intricate dynamics of public perception and

198–99 (detailing the results of seven studies using data from programs in the United States, Canada, England, Australia and concluding that traditional adjudicatory processes were outperformed by restorative justice under every metric but also mentioning that the analysis "relied exclusively on a limited number of quantitative indicators of success and failure in administering justice" and that it lacked consistent longitudinal data).

[152] Green & Bazelon, *supra* note 127, at 2310; *see* Jeffrey Bellin, *Defending Progressive Prosecution*, 39 YALE L. & POL'Y REV. 218, 221–22 (2020) (identifying elected prosecutors from Baltimore, Chicago, Dallas, San Francisco, and Philadelphia as "progressive prosecutors," who represent millions of people); *see generally* Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1 (2019).

[153] *See* Lanni, *supra* note 3, at 637; *see also* Ptacek, *supra* note 147, at 52.

[154] *See Sexual Assault Now Tried Outside Military Chain of Command*, U.S. DEP'T OF DEF., (Dec. 28, 2023), https://www.defense.gov/News/News-Stories/Article/Article/3627107/ sexual-assault-now-tried-outside-military-chain-of-command [https://perma.cc/B27T-VS6W] ("Sexual harassment will become a covered offense [under Special Trial Counsel jurisdiction] on Jan. 1, 2025, for crimes committed after that date where a formal complaint is made and substantiated.").

[155] National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 531, 135 Stat. 1541, 1692 (2021) (codified as amended at 10 U.S.C. § 824a).

[156] Weber, supra note 96 at 3.

Congressional approval for promotions, particularly at the esteemed ranks of general or flag officers.[157]

While authority involving the prosecution of sexual assault cases has been removed from military commanders, commanders still hold vested interests in the resolution of such cases, including the well-being of the victim and accused, the protection of constitutional rights, and the maintenance of good order and discipline within their ranks.[158] If a sexual misconduct investigation does not materialize in a formal trial, military commanders maintain authority over retaining or separating members from their organizations through administrative separation procedures. As such, opting against administrative discharge proceedings of an alleged offender for restorative conferencing alternatives could potentially expose commanders to similar scrutiny and risks associated with public and Congressional perception discussed. Thus, incentivizing a cautious approach centered on traditional administrative discharge proceedings.[159]

In this context, the perspectives and decisions of military commanders are pivotal as they navigate the complexities of implementing restorative justice within the military's administrative system historically grounded in formal trials, formal administrative hearings, and judicial scrutiny. While a formal administrative discharge proceeding results in fact-finding as to whether sexual misconduct occurred, restorative justice offers greater flexibility for the command, particularly when a victim desires not to participate. When evaluating a commander's duty of maintaining good order and discipline, restorative conferencing opens new avenues that align with the strategic objectives of the military, namely the care and restoration of the parties, the health and welfare of the unit, and the ability to maintain a force that is fit and ready to fight our future wars.

5. Campus Administrators' Perspective on Restorative Conferencing in Title IX Adjudicative Systems

Campus administrators' primary concerns under Title IX lie in crafting campus policies that allow them to best determine whether sex discrimination occurred, administer appropriate responses, and offer support and accommodations to their students.[160] Many aspects of campus policy are mandated by Title IX and its regulations, among other federal laws and

---

[157] *Id*. (citing 10 U.S.C. § 624(c)).
[158] *Id.* at 29 (quoting United States v. Lacy, 50 M.J. 286, 287–88 (C.A.A.F. 1999)).
[159] Brady, *supra* note 98, at 247.
[160] McMahon et al., *supra* note 74, at 50.

regulations.[161] Colleges are also concerned, of course, with clarity and stability of parameters and requirements levied by the Department of Education Office of Civil Rights ("OCR") with regard to Title IX administration. Unfortunately for administrators, stability has not been the hallmark of Title IX regulations over the past decade.[162] The latest Final Rule, taking effect August 1, 2024, provides much-needed stability and clarity that facilitated restorative conferencing is permitted in sex discrimination cases.[163]

If campus concerns center around the balance between the strategic institutional goals of education and the operational concerns of litigation risk, case management, and institutional trust or reputation, restorative responses may offer a road not often taken but, in some cases, most aligned with campus goals.[164] Informal resolutions, now codified at 34 C.F.R. § 106.44(k), are specifically non-binding on anyone but the parties, thus making it difficult for a university to have any liability from the outcome of an informal resolution.[165]

Campus administrators are concerned with administering their respective processes in a way that leads to healing, not additional harms that damage institutional trust. However, emerging data demonstrates that most students who experience sexual misconduct and report to their Title IX office have a deeply negative experience.[166] Only half of college students, among a survey of 150,000, believed their university's Title IX office would conduct a fair investigation.[167] While this data is disconcerting for universities, it may offer an opportunity for students to find less institutional betrayal and responsibility in a student-centered restorative conference. Even more, based

---

[161] *See* Clery Act, 20 U.S.C. § 1092 (1990); The Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g (1974); The Violence Against Women Act Reauthorization Act of 2022, 34 U.S.C. ch. 121 (2022); The Drug-Free Schools and Communities Act (DFSCA), 20 U.S.C. § 3182(a) (1990) (repealed 2022) (all federal statutes with overlapping requirements or intersection with Title IX).

[162] *See* discussion of Title IX changes in Section I.C *infra* (OCR first outlined how schools should respond to sexual harassment via guidance documents in 1997, and revised guidance in 2001 and 2011. Obama-era guidance was rescinded under the Trump administration and replaced with greater limits on institutional responsibility and far greater due process protections for those accused of sexual misconduct); Aliya Webermann, et al., *Student Experiences Reporting Sexual and Gender-Based Misconduct to the Title IX Office at a Public State University*, 30 VIOLENCE AGAINST WOMEN 1564, 1565 (2024).

[163] 34 C.F.R. § 106.44(k) (2024); Nondiscrimination on the Basis of Sex in Educational Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33474, 33890 (Apr. 29, 2024) (codified at 34 C.F.R. § 106.44(k)).

[164] McMahon et al., *supra* note 74, at 51.

[165] *See* 34 C.F.R. § 106.44(k)(3)(v) (2024); Nondiscrimination on the Basis of Sex in Educational Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. at 33891 (codified at 34 C.F.R. § 106.44(k)).

[166] Webermann et al., *supra* note 162, at 1566 (citing multiple studies in which researchers found victim-blaming, lack of care, confusion, letdown, minimization of their experience, additional trauma, and unhelpfulness are common experiences of reporting students).

[167] CANTOR ET AL., *supra* note 63, at 60.

on recent changes to Title IX regulations,[168] by supplying a neutral facilitator for the process, the university may indirectly help to restore institutional trust via a less formal approach to grievances. Of course, universities must be intentional about how they exercise their discretion regarding confidentiality of such informal resolution conversations in order not to exacerbate institutional betrayal. Section III.B., *infra*, discusses how schools might administer the informal resolution process to guard against exacerbation and help repair perceived institutional harm.

II. RESTORATIVE CONFERENCING FOR AMANDA: A MILITARY JUSTICE CASE STUDY

"Amanda" was an active-duty Air Force officer who experienced an event in which she believed she was sexually assaulted by another Air Force member. She knew she was heavily intoxicated at the time of the event and, therefore, experienced large gaps in memory from the previous evening. She explained under oath to federal investigators that she did remember the accused on top of her having sex but did not have any memory of manifesting consent to sexual intercourse or any manifestation of non-consent beyond her intoxication.

Amanda was faced with two roads—(1) do not disclose what occurred (or disclose in a "restricted" way such that no investigation would result[169]) or (2) inform military authorities, triggering a full investigation and participation in an adversarial trial or hearing. Neither option would give her what she needed most: information that would help her understand and process what occurred so that she could begin the healing process. In the absence of her own memory, Amanda wanted to know how she behaved, how the accused behaved, and how the accused viewed the event.

Amanda chose to file a report of sexual assault. After doing so, the challenges of securing a criminal conviction beyond a reasonable doubt became apparent to her very early on in the investigation due to her memory impairment, evidence substantiating a strong motive to fabricate, and the accused's right to remain silent pending criminal charges. During an investigatory interview, Amanda shared that she believed a restorative conversation with the accused might be a better path than continuing toward trial. Such a conversation would allow her to learn from the accused what occurred during periods of her lack of memory, share how she felt about the

---

[168] 34 C.F.R. § 106.44(k)(4) (2024).

[169] *Restricted Reporting*, U.S. DEP'T OF DEF. SEXUAL ASSAULT PREVENTION AND RESPONSE, https://sapr.mil/restricted-reporting [https://perma.cc/VV6J-U7PV]; *see* Katherine A. Krul, *The Sexual Assault Prevention and Response (SAPR) Program—in Need of More Prevention*, 2008 ARMY LAW. 41, 41–44 (2008).

event, and avoid further traumatization that would surely result from pre-trial and trial questioning and scrutiny.

When Amanda asked whether such a conversation was possible in lieu of trial, she was fortunate that the accused's counsel was informed of the benefits of ADR and restorative conferencing, particularly in a case such as hers. The defense attorney began negotiating with criminal and administrative stakeholders to create a path toward this conversation.

The negotiation started with the concern for jeopardy for the accused. In exchange for engaging in a conversation potentially criminally exposing the accused, he would need a promise of confidentiality. Thus, the accused's counsel secured limited testimonial immunity from the prosecutor, a promise to dismiss criminal charges, a promise not to use statements made during the conference in any disciplinary actions or proceedings, and the presence of one counsel for each party at the conference. Additionally, the parties and prosecutor's office agreed to include the presence of one impartial attorney from the prosecutor's office to treat the conversation as protected under Military Rule of Evidence Rule 410, the rule protecting plea agreement negotiations from being used against an accused in criminal proceedings.[170] Importantly, the attorney from the prosecution's office had no prior involvement in the investigation and was further walled from any post-conference processing in order for the prosecution to avoid a later claim of bad faith or conflict of interest.

During the in-person restorative conference, counsel for the accused and the victim each gave brief introductions and summarized the ground rules for the conversation as laid out in a written agreement.[171] Counsel then turned the conversation over to the victim and then to the accused to each share their perspective of the event. The conversation was limited to three hours in length. Counsel for both parties and the impartial prosecutor remained present throughout the conversation, and from time to time, the parties' counsel prompted additional discussion between the parties by suggesting questions related to perspective-sharing and harm.

After the conversation was complete, Amanda expressed sentiments that voluntary restorative conferencing with procedural protections for the accused was "an empowering process that centered on compassion, empathy, and healing." She further informed military authorities that it was her hope that the military would continue to grow its concept of "justice" and consider restorative conferencing for other appropriate cases in the future.

---

[170] MIL. R. EVID. 410.

[171] The contents of such a written agreement are discussed in greater detail in Section III.B *infra*.

III. A PATH FORWARD: A PROPOSED AMENDMENT OF FRE 410 AND SIMILAR RULES OF EVIDENCE

A. Proposed Amendments to Rules of Evidence to Facilitate Restorative Conferencing

The inclusion of restorative justice practices within sexual misconduct cases, exemplified by Amanda's case, underscores a potential pathway to enhance the resolution of certain sexual assault and sexual harassment cases. Current evidentiary rules, however, pose significant obstacles to effective engagement in restorative conferencing. Amendments to Federal Rule of Evidence 410, Military Rule of Evidence 410, and analogous state rules (hereinafter Rule 410) would alleviate these barriers, fostering creative, solution-oriented negotiations in sexual assault criminal investigations and Title IX proceedings on college campuses.[172]

1. Challenges Under Current Evidentiary Schemes

As discussed in Section I.C, *supra*, whether a restorative conferencing conversation in campus sexual misconduct could be used as evidence in a later formal hearing is within the discretion of colleges and universities offering informal resolution under the current Title IX regulatory framework. Even with some assurance of confidentiality in university proceedings, critical concerns remain for alleged offenders regarding subsequent criminal, civil, or formal administrative proceedings if statements made during a restorative justice conference become admissible evidence.[173] This possibility creates a deterrent effect, dissuading accused individuals from participating in open discussions crucial to achieving the objectives of restorative conferencing. [174]

Confidentiality guarantees are essential. The confidentiality gap in current rules undermines the willingness of the parties involved, particularly

---

[172] *See* FED R. EVID. 410 (governing admissibility of evidence from plea agreements); *see also* MIL. R. EVID. 410 (governing admissibility of evidence from plea agreements).

[173] Cyphert, *supra* note 68, at 74; *see also* Kaplan, *supra* note 37, at 733.

[174] Green & Bazelon, *supra* note 127, at 2301 (noting that within a restorative justice conversation, "[o]ffenders may make undesirable concessions or damaging admissions, [sometimes] without the benefit of advice from counsel or other procedural protections afforded by the Constitution and statutes"); *see generally* Mary Ellen Reimund, *Confidentiality in Victim Offender Mediation: A False Promise?*, 2004 J. DISP. RESOL. 401 (2004).

defendants and their legal counsel, to fully engage in these transformative processes.[175]

Absent protections for statements made by alleged offenders, defense attorneys will hesitate to permit their clients' participation because, in doing so, the attorney may open themself up to allegations of ineffective assistance of counsel should their client's statements be admitted in a later court to establish guilt.[176]

Similarly, facilitators could face legal repercussions, including contempt of court, for refusing to disclose statements made during restorative sessions, as highlighted by concerns expressed in Colorado and other jurisdictions.[177] Legislative and procedural safeguards, akin to those protecting plea negotiations, are essential to mitigate these concerns and promote the fair and balanced administration of justice.

2. Proposed Amendments to Rule 410

Rule 410 ensures statements made during plea negotiations are not used against a defendant.[178] Although restorative conferencing may not, at first glance, appear congruent with plea negotiations, important parallels exist. Restorative conferencing must allow the opportunity for discussion between the victim and accused, including the accused having the opportunity to take responsibility for the harm inflicted, mirroring the hypothetical discussion of the accused pleading guilty in a plea agreement. Just as plea negotiations are shielded from subsequent use in trials under existing rules, the proposed amendment extends similar protections to statements and participation in

---

[175] Blackwell & Cunningham, *supra* note 133, at 69–70 (citing Douglas Ammar & Tosha Downey, *Transformative Criminal Defense Practice: Truth, Love and Individual Rights – the Innovative Approach of the Georgia Justice Project*, 31 FORDHAM URB. L.J. 49, 59–62 (2003); Robert F. Cochran, Jr., *The Criminal Defense Attorney: Roadblock or Bridge to Restorative Justice*, 14 J.L. & RELIGION 211, 213 (1999–2000)) ("The apparent requirement that a defendant be found an 'offender,' either through confession or adjudication, also tends to exclude (or at least alienate) a key player in the criminal justice system, the defense attorney. The defense lawyer is likely the only person the defendant can speak to freely without risking criminal liability and is the most competent person to help the defendant navigate the criminal justice system. But if the defendant has not yet been adjudicated guilty, the defense lawyer is understandably reluctant for his or [sic] client to enter into an encounter that requires admission of guilt without knowing in advance the likely sentencing consequences (or the likelihood of a dismissal or acquittal if the presumption of innocence is maintained). Further, the culture of criminal defense practice often discourages conversation between lawyer and client about either legal guilt or moral culpability.").

[176] Shannon M. Sliva et al., *Fulfilling the Aspirations of Restorative Justice in The Criminal System? The Case of Colorado*, 28 KAN. J.L. & PUB. POL'Y 456, 492 (2019) (citing Strickland v. Washington, 466 U.S. 668 (1984); U.S. CONST. amends. VI, V, XIV; *accord* COLO. CONST. art. II, § 18) (Strickland concluded that criminal defendants have a Sixth Amendment right to effective assistance of counsel; the Fifth Amendment is the privilege against self-incrimination).

[177] *Id.* at 492–93.

[178] *See* FED. R. OF EVID. 410, Notes. Withdrawn pleas of guilty were first held inadmissible in federal prosecutions in Kercheval v. United States, 274 U.S. 220 (1927).

restorative justice conferences.[179] The necessity for confidentiality in restorative justice parallels the protections afforded in plea negotiations under Rule 410, underscoring the need for comparable safeguards in restorative processes.

Drawing from Cyphert's comprehensive analysis, policymakers have occasionally recognized the benefits of shielding certain statements from investigation or admission in criminal or administrative proceedings, emphasizing victim empowerment and reduced litigation.[180] For example, in creating the military's restricted reporting program—a program allowing sexual assault survivors to choose whether their assault is automatically investigated by authorities—Congress prioritized the benefits of respecting sexual assault survivors' wishes over the possibility of fewer trials and fewer convictions.[181] This philosophical underpinning supports the proposed rule amendments aimed at excluding from admissibility any statements made during formally recognized and organized restorative justice conferences focused on sexual violence or harassment.[182] Moreover, it is essential that the proposed rule explicitly exclude evidence regarding participation in restorative conferencing, as the mere act of engaging in a restorative justice conference may be construed inherently as an admission of involvement or culpability.[183]

While legislative bodies, including Congress, may initially hesitate due to concerns about perceived leniency toward offenders, the proposed amendments to such evidentiary rules would bolster the implementation of restorative conferences in criminal and Title IX settings while safeguarding the rights of both victim and accused. Legislative efforts on this issue in various states demonstrate a strategic alignment between victim empowerment and upholding an accused's constitutional rights. For instance, Colorado's attempts to reconcile offender accountability with restorative processes have sparked legislative discussions aimed at safeguarding confidentiality and protecting statements made during such proceedings.[184]

---

[179] Cyphert, *supra* note 67, at 84–85.

[180] *Id.* at 76, 83. "[A]nalogous situations include medical apology laws, statements made to truth and reconciliation commissions, restricted reports of sexual assault in the military, and Queen for a Day proffer sessions." *Id*. at 76.

[181] *Id.* at 82–83.

[182] *Id.* at 83.

[183] *Id.* at 83–84.

[184] Sliva et al., *supra* note 176 at 493–94 (citing Press Release, Colorado Office of State Court Administrator, Agencies Sign Agreement To Expand Restorative Justice Practices In Colorado (July 31, 2018), *available at* https://www.denverda.org/wp-content/uploads/news-release/2018/Restorative-Justice-Expansion-Agreement.pdf [https://perma.cc/RJ7PUKVN]; Doug Chartier, *DAs and Public Defenders Work for Restorative Justice*, L. WK. COLO. (Aug. 17, 2018), https://lawweekcolorado.com/2018/08/das-and-public-defenders-work-for-restorative-justice/ [https://perma.cc/FW7R-B2EH]).

Therefore, the full text of the proposed Rule 410 is as follows:

Proposed Rule 410:

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

(1) a guilty plea that was later withdrawn;

(2) a nolo contendere plea;

(3) a statement made during a proceeding on either of those pleas under Federal Rule of Criminal Procedure 11 or a comparable state procedure;

(4) *any statement made by any party in a restorative justice conference that (a) involved a sexual offense or harassment and was (b) formally recognized and approved by the appropriate, prosecuting authority;*

(5) *any evidence of participation in a restorative justice conference* that *(a) involved a sexual offense or harassment and was (b) formally recognized and approved by the appropriate, prosecuting authority;*

(6) any statements made by a party in a restorative justice conference that (a) involved a sexual offense or harassment, and was (b) formally recognized and organized by an accredited college or university;

(7) any evidence of participation in a restorative justice conference that (a) involved a sexual offense or harassment and was (b) formally recognized and organized by an accredited college or university; or

(8) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.[185]

Amending Rule 410 represents a progressive stride towards integrating restorative justice practices into the criminal justice and Title IX adjudicative systems. By establishing clear guidelines that exclude statements from, and even participation in, restorative conferences from subsequent legal proceedings, this amendment promotes victim healing, facilitates offender

[185] Language proposed to the amendment is italicized. *See also* Cyphert, *supra* note 68, at 84–85.

accountability, and enhances the overall transparency and fairness of criminal justice and administrative proceedings. This initiative builds upon existing legal frameworks, paving the way for a more inclusive and responsive approach to addressing sexual assault and sexual harassment.

B. Contractual Workaround Absent Changes to the Rules of Evidence

The need for restorative justice options in criminal, civil, and administrative sexual misconduct cases is urgent. Expanding the likelihood of parties being willing to engage in such options cannot wait for an amendment to Rule 410. Promises by the parties and dialogue facilitators to honor confidentiality, whether in the form of a formal written contract such as a "memorandum of understanding" [186] or good faith adherence to ground rules, can go a long way to reassure parties and reduce the feeling of risk inherent in engaging in restorative conferencing. Practitioners—whether prosecutors, administrators, facilitators, representatives, or parties—may consider the following contractual and promissory mechanisms in deciding whether and how to engage in restorative conferencing for their own practice.

At the heart of restorative justice is trust in relationships. "Trust is the nature of believing that what is committed to will be done in good faith."[187] Parties willing to engage, and facilitators willing to assist, restorative justice conversations necessarily must be willing to extend some amount of trust in the other participants that they are entering into the restorative process in good faith and intend to honor ground rules and agreements. No contractual workaround to a Rule 410 amendment is ironclad,[188] but some mechanisms

---

[186] Gonzalez, *State of Restorative Justice*, *supra* note 21, at 1193 (footnotes omitted) ("[T]he use of MOUs is not a model without uncertainty. That is, unless an MOU contains legally enforceable promises, it cannot carry the same weight as a contract. So, in the absence of explicit statutory provisions, legally binding MOUs, or the importation of privilege from other alternative dispute resolution processes, the use of restorative justice carries the risk of feeding back into formal punitive processes or triggering new criminal or civil processes. This could occur in multiple scenarios: if either party withdraws during the process; if the facilitator determines the process to be inadequate, incomplete, or a failure; or if a prosecutor, [convening authority,] or judge denies approval of the agreement resulting from the process. This approach raises ethical and constitutional concerns that should not be overlooked by those who seek to expand the current restorative justice scheme or attorneys whose clients face the choice of whether or not to participate in restorative justice."). MOUs, as an ad hoc solution outside of clear evidentiary rules protecting confidentiality of such conversations, may have several downfalls in the military context: (1) the reluctance of commanders to engage in a non-traditional process; and (2) the length of time to negotiate such a MOU with the various stakeholders (i.e., victim, victim's counsel, trial counsel, Staff Judge Advocate, SPCMCA, GCMCMA, defendant, and defense counsel). *See* Cyphert, *supra* note 68, at 75–76 (noting pitfalls of using ad hoc, MOUs in sexual assault cases on college campuses).

[187] Erik S. Wessel & Kaaren M. Williamsen, *Introduction*, *in* APPLYING RESTORATIVE JUSTICE TO CAMPUS SEXUAL MISCONDUCT: A GUIDE TO EMERGING PRACTICES 1, 4–5 (Kaaren M. Williamsen & Erik S. Wessel, eds., 2023).

[188] "[T]he use of MOUs is not without uncertainty. That is, unless an MOU contains legally enforceable promises, it cannot carry the same weight as a contract." Gonzalez, *State of Restorative Justice*, *supra* note

or combinations of mechanisms can assist in obtaining sufficient enforceability and follow-through.

As discussed in Amanda's military case study discussed in this article, the investigation had a real possibility of resulting in criminal prosecution, but that outcome was not ideal based on the strength of evidence and the desires of the victim. The convening authority, who still possessed prosecutorial discretion at the time, was unwilling to sign a promise not to prosecute. Even if criminal prosecution was unlikely or impossible, the military still maintained an obligation to pursue an administrative discharge of the accused.[189] Thus, assurance of confidentiality attaching to the restorative dialogue was paramount.

To secure the protection of confidentiality for what was stated by the accused in the restorative conference, the defense attorneys proposed a memorandum of understanding with key terms. First, the discussion would be in-person between the accused, victim, defense counsel, victim's counsel, and one impartial prosecutor without prior knowledge or future involvement in the case. This composition allowed the parties to consider the conversation reasonably within Military Rule of Evidence 410, the corollary to the federal rule of evidence protecting conversations as part of plea bargain negotiations. Second, the prosecutor (and, in this case, the military convening authority) agreed to provide limited testimonial immunity for the conversation that would also apply via the explicit agreement to any administrative discharge proceeding that might follow. Third, the agreement included a promise by the prosecutor (again, in this case, the military convening authority) to fund an expert witness for the defense in the event of trial—a benefit the accused was not guaranteed. While this particular case did not involve a promise to forego prosecution, administrative discharge, or a cap on exposure, such as a worst-case discharge characterization, agreements could include such terms depending on the circumstances.

While the agreement featured here was between prosecuting authorities and the defendant through counsel, it included the written indorsement and support of the victim prior to engaging in the restorative process. Demonstrating the victim's agreement, supported by and upon advice of

---

21, at 1163, 1193. *Cf.* Samantha Buckingham, *Reducing Incarceration for Youthful Offenders With a Developmental Approach to Sentencing*, 46 LOY. L.A. L. REV. 801, 876 (2013) (explaining that "without binding assurances that communications are confidential[,] . . . a defendant would be foolhardy to participate or would be chilled from participating in a meaningful and open way").

[189] If the accused's immediate commander believed by a preponderance of the evidence that sexual assault occurred, the commander would be required to pursue administrative discharge. Sexual offenses typically warrant discharges characterized by under other than honorable conditions, warranting an administrative evidentiary hearing. *See*, *e.g.*, *Department of the Air Force Instruction 36-3211*, DEPT. OF THE AIR FORCE E-PUBLISHING, DEPARTMENT OF THE AIR FORCE INSTRUCTION 36-3211 127–129 (2022), https://static.e-publishing.af.mil/production/1/af_a1/publication/dafi36-3211/dafi36-3211.pdf [https://perma.cc/4VPS-CJYE].

counsel, was an important factor in securing support of the convening authority (the entity with prosecutorial discretion).

In the Title IX campus sexual misconduct context, any agreement made in the informal resolution process is only binding for the parties.[190] However, the university may void an agreement between the parties if warranted.[191] Thus, a contractual workaround in the Title IX context has different mechanics. Safeguards of confidentiality for a respondent would take the form of ground rules secured in advance with the university that supplies the facilitator for the conversation.[192] Despite public comment encouraging the Department of Education to issue supplement guidance on how to create agreements that prohibit future use of statements and records obtained solely through an informal resolution process, the Department opted instead to require universities to give notice of what information it will maintain and whether and how the university could disclose such information if formal grievance procedures are initiated or resumed.[193] Thus, respondents should ensure prior to engaging in restorative conferencing that the university's procedures give a promise of at least some level of confidentiality for the restorative dialogue.

Any informal resolution agreement could not secure a promise by the victim or university to waive pursuit of a formal grievance; however, once an informal agreement is reached between the parties, the same conduct cannot form the basis of a formal grievance.[194] This reduces some risk for respondents but still leaves open the possibility that an informal dialogue will fail, and the complainant could use admissions by the respondent from the restorative conference in a later formal grievance. Thus, respondents should ensure that university procedures address how information offered by a party

---

[190] "[A] recipient must advise the parties that an informal resolution agreement is binding only on the parties, which will prevent a facilitator from offering, and a party from agreeing to, a term in informal resolution that cannot be enforced because it depends on a non-party's action (such as requiring in an informal resolution that a non-party undergo training)." Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33474, 33630 (Apr. 29, 2024).

[191] *Id.* at 33625–26 ("If a party breaches the resolution agreement or if the recipient has other compelling reasons, such as if it learns of any fraud by a party in entering into the agreement, the recipient may void the informal resolution agreement and initiate or resume grievance procedures. *See* 87 Fed. Reg. 41455. However, this is only one example, and there may be other situations in which a recipient could similarly decide to initiate or resume its grievance procedures, as long as the recipient exercises its discretion in a manner that is equitable to the parties and otherwise complies with these final regulations.").

[192] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. at 33630; *see also* text accompanying *supra* note 88.

[193] *Id.*

[194] "If a party pursues an informal resolution process without having made a complaint, § 106.44(k)(3)(iii) specifies that they retain the right to withdraw from the informal resolution process prior to agreeing to a resolution and to initiate or resume the recipient's grievance procedures." Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. at 33625.

in violation of confidentiality ground rules or safeguards will be treated in any later formal grievance. The flexibility offered by the Title IX regulatory framework hopefully allows, and we encourage, universities to address this contingency such that the promise of restorative justice in campus sexual misconduct cases can be realized.[195]

IV. CONCLUSION

Sexual misconduct victims, respondents, their communities, and the institutions responsible for administratively caring for the members within their communities deserve the best options available for meeting their diverse needs. Restorative justice, and restorative conferencing in particular, shows great promise for improving outcomes for all involved in the right kind of cases.[196] However, to make the option available to the broadest pool possible, some protection must be given to respondents facing risk in the criminal, civil, and formal administrative process. The ideal solution involves modest changes to federal, military, and analogous state rules of evidence allowing the exclusion of any statements made during, or evidence of participation in, a restorative conference to receive the same protection as statements made under plea bargaining negotiations. But even absent such a change, contractual mechanisms exist to give assurances to those accused to make restorative conferencing a viable and productive option.

---

[195] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. at 33625 ("Additionally, the Department declines to mandate specific requirements for an informal resolution process beyond those stated in the regulations, to provide a recipient discretion to offer an informal resolution process that can be structured to accommodate the particular needs of the parties, the recipient, and the particular circumstances of the complaint in the most effective manner.").

[196] Cyphert, *supra* note 67, at 85 (citing Deborah L. Brake, *Fighting the Rape Culture Wars Through the Preponderance of the Evidence Standard*, 78 MONT. L. REV. 109, 151 (2017)).