CLE Materials: Day 1

Panel 1: Prevention

January 4, 2024

Berkeley Center on Comparative Equality & Anti-Discrimination Law

State of California Resources to Prevent Harassment

The Civil Rights Department (CRD) of the State of California makes numerous resources available to employers and employees to prevent harassment. These include:

- **Anti-harassment training** mandated by California law both for supervisors and non-supervisors, provided free by CRD. Trainings are provided in Vietnamese, Tagalog, Spanish, Korean, English, and Chinese. You can access the trainings here, https://calcivilrights.ca.gov/shpt/.
- **A FAQ sheet for employers about the training requirements** is available here: https://calcivilrights.ca.gov/shpt/.
- A link to **sexual harassment prevention training for employees**, available here: https://calcivilrights.ca.gov/shptfaq-employee/
- A **poster** which California employers are required to post informing their employees about the laws protecting them against harassment, where to complain if they experience harassment, and other provisions regarding training. The poster is being revised and the latest version will be available after January 1, 2024. Here's a link to the 2023 version: https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2023/01/Workplace-Discrimination-Poster_ENG.pdf
- For California's sexual harassment posting requirements, an employer can use either of these posters:
    - **CRD Sexual Harassment Fact Sheet**: https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2020/03/Sexual-Harassment-Fact-Sheet_ENG.pdf or
    - **CRD Sexual Harassment Poster**: https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2022/12/Sexual-Harassment-Poster_ENG.pdf
    - **CRD Poster on "The Rights of Employees Who AreTransgender or Gender Non-Conforming"**: https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2022/11/The-Rights-of-Employees-who-are-Transgender-or-Gender-Nonconforming-Poster_ENG.pdf

All of these materials are available, or soon will be, in five core California languages (Vietnamese, Tagalog, Spanish, Korean, Chinese), in accordance with California's language access plan. See https://calcivilrights.ca.gov/Posters/?openTab=1 for more details.

CLE Materials: Day 1

Panel 2: Non-Litigation Remedies

January 4, 2024

Berkeley Center on Comparative Equality & Anti-Discrimination Law

CODE OF ETHICS

PREAMBLE

The International Ombuds Association (IOA) is dedicated to excellence in Organizational Ombuds[1] practice. The Code of Ethics provides Practice Principles and Core Values that are the foundation for the IOA Standards of Practice.

This Code of Ethics reflects IOA's commitment to the establishment of consistently structured Ombuds programs, ethical conduct by Ombuds, and the integrity of the Organizational Ombuds profession.

CORE VALUES

The Ombuds role requires Ombuds to conduct themselves as professionals. The following Core Values are essential to the work of Ombuds:

Act with honesty and integrity;
Promote fairness and support fair process;
Remain non-judgmental, with empathy and respect for individual differences;
Promote dignity, diversity, equity, inclusion, and belonging;
Communicate accurate understanding through active listening;
Promote individual empowerment, self-determination, and collaborative problem-solving; and
Endeavor to be an accessible, trusted, and respected informal resource.

FUNDAMENTAL PRINCIPLES

INDEPENDENCE

The Ombuds is independent in structure, function, appearance, and decision-making. The Ombuds reports to the highest possible level within the organization and does not report to a function or entity that could affect, or be perceived as affecting, the Ombuds' independence.

IMPARTIALITY

The Ombuds is a designated neutral and impartial resource who does not take sides or serve as an advocate for any person or entity. The Ombuds avoids conflicts of interest and conduct that could be perceived as a conflict of interest.

INFORMALITY

The Ombuds does not participate in any evaluative, disciplinary, legal, or administrative proceedings related to concerns brought to the Ombuds' attention. The Ombuds is not authorized to make business and policy decisions or conduct formal investigations on behalf of the organization. The Ombuds is not an agent of the organization for purposes of receiving notice of claims against the organization and is not authorized to be a formal reporting channel for the organization on matters brought to the Ombuds' attention except when specifically and expressly mandated by law.

CONFIDENTIALITY

Confidentiality is the defining characteristic of Ombuds practice. The identity of those seeking assistance from the Ombuds and all communications with them are confidential to the maximum extent permitted by law. The Ombuds may, at their sole discretion, disclose confidential information when the person seeking assistance gives permission to do so; when failure to do so might result in an imminent risk of serious harm; or as necessary to defend against a formal complaint of professional misconduct.

[1] The term "Ombuds" includes all applicable nomenclature in use for an organizational ombudsperson.

STANDARDS OF PRACTICE

PREAMBLE

The Standards of Practice are based upon the fundamental principles and core values stated in the International Ombuds Association (IOA) Code of Ethics. These principles are independence, impartiality, informality, and confidentiality. They describe the essential elements and requirements for operating a sound ombuds program. The core values emphasize the professional qualities underlying ombuds work. The principles and core values guide the Ombuds[1] in fulfilling responsibilities such as assisting individuals at all levels of the organization; resolving conflict; facilitating communication; and assisting the organization by surfacing issues, and through feedback on emerging or systemic concerns. These can be applied in different settings and jurisdictions.

In combination with the core values embedded in the Code of Ethics, these Standards of Practice form the foundation necessary for the unique and valuable role of an Ombuds in the sponsoring organization.

1. GENERAL PRACTICE STANDARDS

1.1 The Ombuds is an independent, impartial, informal, and confidential resource for an organization. Compliance with these Standards of Practice is essential for any Ombuds program.

1.2 The Ombuds assists people through voluntary consultation and provides information, guidance, and assistance in developing options to address their concerns. When possible, the Ombuds facilitates outcomes that build trust, enhance relationships, and improve communication within the organization.

1.3 The Ombuds assists the organization by identifying procedural irregularities and systemic problems. This may include identifying emerging trends, policy gaps, and patterns of problematic behavior in ways that do not disclose confidential communications or information. The Ombuds may provide general recommendations to the organization for addressing these concerns.

1.4 Each Ombuds program shall have a charter, terms of reference, or a detailed program description approved by executive leadership of the organization that complies with the provisions of the IOA Code of Ethics and Standards of Practice and that articulates the basis on which the Ombuds operates.

1.5 The Ombuds keeps professionally current through relevant continuing education, and provides opportunities for Ombuds' staff professional development.

2. INDEPENDENCE

2.1 The Ombuds is independent in appearance, purpose, practice, and decision-making. The Ombuds operates independently of line and staff reporting structures and without influence from other functions or entities within the organization.

2.2 The Ombuds program reports to the highest authority possible within the organization. In executing the Ombuds' roles and responsibilities, the Ombuds does not report programmatically to any function that affects, or is perceived as affecting, the Ombuds' independence.

2.3 The Ombuds holds no other position that compromises, or could be reasonably perceived as compromising, the Ombuds' independence. If the Ombuds has non-ombuds duties, those duties must not interfere with their ombuds duties. The Ombuds must clearly communicate when they are and are not acting as the Ombuds.

2.4 The Ombuds has the authority to select Ombuds program staff and to manage the Ombuds program budget and operations without undue external influence or limitations. However, the Ombuds has no formal policy-making, enforcement, or disciplinary role except internally within the Ombuds program.

2.5 The Ombuds has sole discretion over whether or how to engage regarding individual, group, or systemic concerns. Acting on their own initiative, an Ombuds may bring a concern to the attention of appropriate individuals.

2.6 The Ombuds has access to relevant individuals and information within the organization as necessary to fulfill their informal role and as permitted by law.

[1] The term "Ombuds" includes all applicable nomenclature in use for an organizational ombudsperson.

3. IMPARTIALITY

3.1 The Ombuds functions as an impartial, neutral, and unbiased resource.

3.2. The Ombuds has no personal interest in, and incurs no gain or loss from, the outcome of a matter. The Ombuds declines involvement when the Ombuds determines that they may have a real or perceived conflict of interest.

3.3. The Ombuds fairly and objectively considers issues and people who may be affected. The Ombuds promotes equitably administered processes but does not advocate on behalf of anyone.

3.4. The Ombuds facilitates communication, dialogue, and collaborative problem-solving and helps identify a range of reasonable options to surface or resolve issues or concerns.

4. INFORMALITY

4.1 The Ombuds is an informal and off-the-record resource. The Ombuds does not make business or policy decisions, adjudicate issues, participate in disciplinary or grievance processes, or conduct formal investigations for the organization.

4.2 Consultation with the Ombuds is not a required step in any formal disciplinary process or grievance policy.

4.3 The Ombuds takes specific action related to an individual's issue only with the individual's express permission and only to the extent permitted, and even then, at the sole discretion of the Ombuds, unless such action can be taken in a way that safeguards the identity of the individual contacting the Ombuds Office.

4.4 Consistent with these standards, consulting with the Ombuds is completely voluntary. People who use the services of the Ombuds are understood to have agreed to abide by the terms, conditions, and principles under which the program was created and not call the Ombuds to testify or disclose confidential information in any formal, legal, or other matter.

4.5 The Ombuds is not an agent of the organization authorized to receive notice of claims, complaints, or grievances against the organization unless specifically and expressly required by law. The Ombuds may refer individuals to the appropriate place where formal notice of claims can be made.

4.6 The Ombuds creates no permanent records containing confidential information. The Ombuds has a consistent practice for the timely destruction of confidential information.

5. CONFIDENTIALITY

5.1 The identity of those seeking assistance from the Ombuds, as well as communications and information specifically relating to them is confidential information.

5.2 To the maximum extent permitted by law, the Ombuds shall protect confidential information, and others cannot waive this requirement. The Ombuds and the organization that established the program shall take reasonable measures to safeguard the security of confidential information.

5.3 Except as provided in these standards, the Ombuds does not disclose confidential information in any matter within the organization.

5.4 The Ombuds shall oppose disclosing confidential information in any formal, administrative, or legal matter external to the organization, unless an appropriate judicial or regulatory authority determines that disclosure is necessary to prevent a manifest injustice or that disclosure is required because the interests served by disclosure clearly outweigh the interests served by ombuds confidentiality.

5.5 The Ombuds may disclose confidential information as necessary if the Ombuds determines that the failure to do so could result in imminent risk of serious harm.

5.6 The Ombuds may disclose confidential information about a specific matter to the extent the ombuds determines it is necessary to defend themselves against a formal complaint of professional misconduct.

5.7 Confidential information relating to an individual may be disclosed with their permission to assist with informal resolution of a concern but at the sole discretion of the Ombuds.

5.8 The Ombuds may provide non-confidential information about the ombuds program in any appropriate forum. The Ombuds shares data, trends, or reports in a manner that protects confidential information.

Adopted 17 March 2022 by the Board of Directors of the International Ombuds Association. Effective 17 March, 2022.

What Is an Organizational Ombuds?

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We are trusted advisors leading the way toward more just, engaged, and inclusive organizations.

Download Our Ombuds Brochure

Organizational ombuds work with individuals and groups in an organization to (1) provide a safe space to talk or concern, (2) explore options to help resolve conflicts, and (3) bring systemic concerns to the attention of th for resolution.

An organizational ombuds operates in a manner to preserve the confidentiality of those seeking services, ma neutral/impartial position with respect to the concerns raised, works at an informal level of the organizationa (compared to more formal channels that are available), and is independent of formal organizational structure

There are a number of different titles or names for this position: “ombuds” [FN The term ombuds is used to c the widest possible community and is not intended to discourage others from using alternatives.] “organizatic “ombudsman”, and "ombudsperson” among others. Organizational ombuds work in all types of organizations government agencies, colleges and universities, corporations, hospitals and other healthcare organizations, and not-for-profit organizations, foundations, and associations. Organizational Ombuds have their own **standards of pra** **code of ethics** that guides their work.

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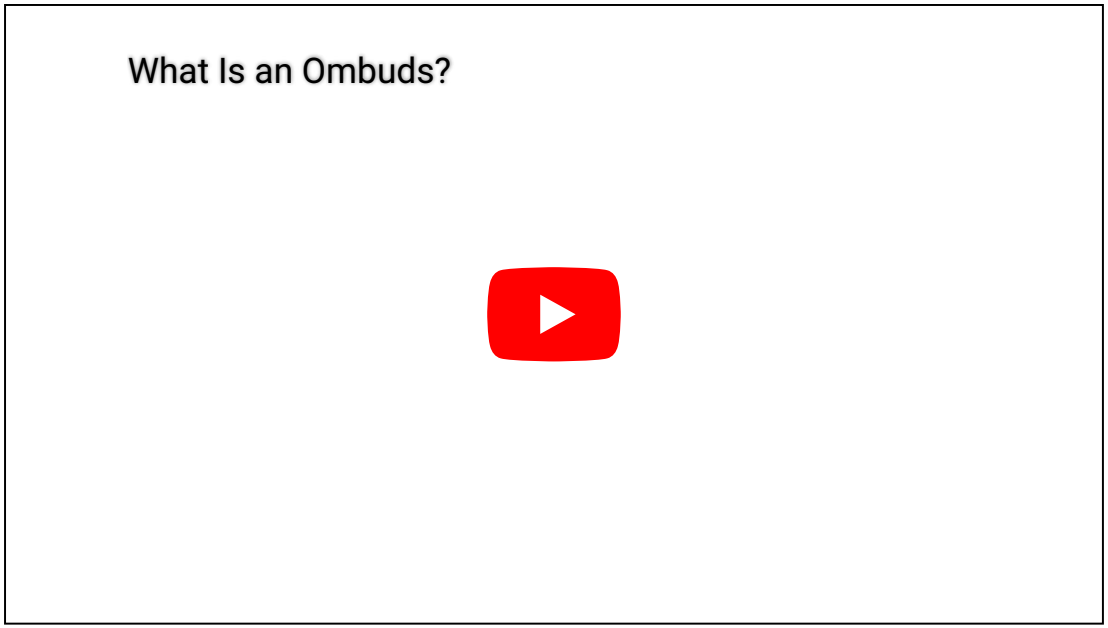
Mon Jan 8, 2024
Virtual Foundations Course | January 2024
Category: Foundations Courses

Wed Jan 31, 2024
National Equity Project Workshop Part 1
Category: Webinars

Mon Feb 12, 2024



The Organizational Ombuds—Role

An Organizational Ombuds engages in the following activities:

- Listens and understands issues while remaining neutral with respect to the facts. The ombuds doesn't li
  or to decide who is right or wrong. The ombuds listens to understand the issue from the perspective of
  This is a critical step in developing options for resolution.
- Assists in reframing issues and developing and helping individuals evaluate options. This helps individu
  interests of various parties to the issues and helps focus efforts on potential options to meet those inte
- Guides or coaches individuals to deal directly with other parties, including the use of formal resolution r
  the organization. An ombuds often seeks to help individuals improve their skill and their confidence in g
  their concerns directly.
- Refers individuals to appropriate resolution resources. An ombuds may refer individuals to one or more
  organizational resources that can potentially resolve the issue.
- Assists in surfacing issues to formal resolution channels. When an individual is unable or unwilling to su
  directly, the ombuds can assist by helping give voice to the concern and /or creating an awareness of th
  appropriate decision-makers in the organization.

Virtual Foundations Course | February 2024
Category: Foundations Courses

Tue Feb 27, 2024
February Community Connections: Internship & Volunteer Support
Category: Members Only

Thu Feb 29, 2024
National Equity Project Workshop Part 2
Category: Webinars

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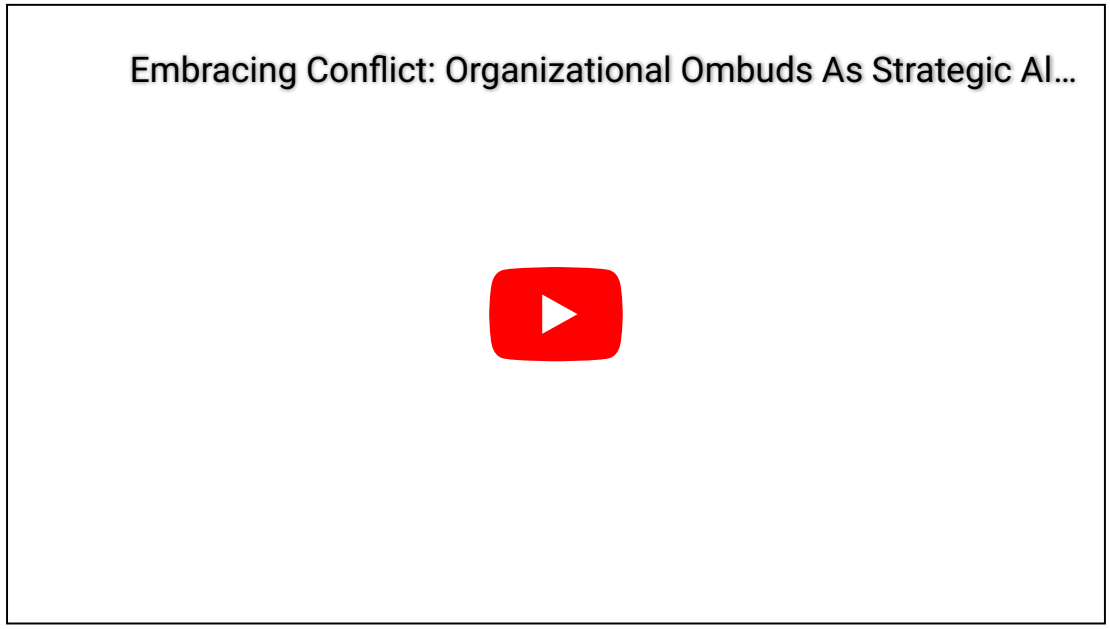
We "Belon…

Call for Papers and Panels -

- Facilitates informal resolution processes. An ombuds may help to resolve issues between parties through various types of informal mediation.
- Identifies new issues and opportunities for systemic change for the organization. The unique positioning of the ombuds serves to provide unfiltered information that can produce insight to issues and resolutions. The ombuds is a source of detection and early warning of new issues and a source of suggestions of systemic change to improve existing processes.

Embracing Conflict: Organizational Ombuds As Strategic Allies for Organizations



What an Ombuds Does Not Do

Because of the informal, neutral, confidential and independent positioning of an ombuds in an organization, they typically do not undertake the following roles or activities:

- Participate in formal investigations or play any role in a formal issue resolution process
- Produce any findings or make binding decisions
- Institute corrective measures
- Serve in any other organizational role that would compromise the neutrality of the ombuds role
- Receive notice or act as an office of notice for the organization
- Create policies
- Create or maintain records
- Form any type of formal relationship (i.e., attorney-client

Skills, Training, and Professional Requirements of Ombuds

The most important skills of an effective ombuds include active listening, communicating successfully with a diverse range of people, remaining nonjudgmental, having the courage to speak up and address problems at higher levels within an organization, problem-solving and analytical ability, and conflict resolution skills. Specific career background or academic degree is less important than acquiring and demonstrating the skill set described above.

Some organizational ombuds are hired internally, assuming this role after fulfilling previous roles in an organization where they have exhibited the above-mentioned skills and established a widely known reputation for integrity, confidentiality, and knowledge of organizational processes across functions. When hiring from the outside, an organization will often seek someone who has a background in conflict resolution and/or has established standing as an ombuds through prior organizational experience. Ombuds coming from outside the organization, with no history or relationships, may be able to provide fresh perspectives and the perception of neutrality may be enhanced. Organizations might also turn to an independent ombuds who contracts their services.

Formal training is invaluable in preparing for an organizational ombudsman role. IOA offers a series of professional training courses that include **skills training** as well as practical instruction in **establishing and maintaining an ombudsman office**. Formal training in mediation and/or other conflict resolution processes is also very valuable. In order to stay on the leading edge of critical ombudsman issues, such as confidentiality and privilege, and to maintain and enhance ombudsman skills, active membership in relevant professional associations, such as the International Ombuds Association, is vital.

Learn even more about the organizational ombuds role and why my organization should have an ombuds.

Learn More:

- Ombuds FAQ
- Creating an Ombuds Office
- Why Should My Organization Have an Ombuds?
- How Do I Hire an Ombuds?
- Outsourced Ombuds Directory

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The term ombuds is used to communicate to the widest possible community and is not intended to discourage others from using alternatives. IOA respectfully acknowledges that many practitioners use alternative forms of this word including organizational ombudsman, ombudsperson, and others.

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Journal of the International Ombudsman Association

Ombuds Work on Sexual Harassment Cases: The Power of Our Stories

SHEREEN G. BINGHAM

ABSTRACT

As illustrated by the #MeToo movement, sexual harassment remains a significant problem in society. The ombuds is a valuable resource for addressing this concern. In this special issue of the JIOA, experienced organizational ombuds anonymously share narratives of assisting with sexual harassment cases while protecting the identities of their visitors and organizations. The stories illuminate the nature of sexual harassment situations, a range of ombuds practices, and the principles and reasoning that guide ombuds work.

KEYWORDS

ombuds, sexual harassment, narratives, stories, confidentiality, standards, practice

ACKNOWLEDGMENTS

I am grateful for the opportunity to have guest edited this special issue of the JIOA and for the special people who supported and assisted with its production. My heartfelt thanks to Shannon Burton, Hector Escalante, Sarah Ghazal, the JIOA reviewers, and all the contributing authors. Many thanks also to Nora Bacon, Rhonda Frascotti, Howard Gadlin, Charles Howard, David Miller, and Mary Rowe for their helpful feedback on this article; and to Linda Brothers, Charles Howard, Bruce McCallister, and Mary Rowe for their support and suggestions at other important stages of the project.

The #MeToo movement has made the public aware of a reality that ombuds know all too well: Sexual harassment is a pervasive problem, one that occurs throughout the United States and in every country of the world. Steeped in inequitable power relations, the problem has long defied efforts to prevent it (Clair et al., 2019; Senthilingam, 2017). Nearly two thirds of the world's economies have legal protections against it, and a range of approaches to diminishing it, such as policies, grievance procedures, trainings, and social media campaigns, are in use around the globe (Cobb, 2014; Kurian, 2019; World Bank Group, 2018). Yet the problem persists, impairing people's psychological and physical health, fulfillment, productivity, and the organizations in which we work and learn (McDonald, 2012).

Within the ombuds profession, and increasingly beyond it, we know organizational ombuds can be a useful resource for assisting people with sexual harassment concerns. Many dedicated professionals have devoted their expertise and creativity to bring the ombuds role in sexual harassment cases into the light. They have provided legal analysis, research studies, articles, videos, webinars, tool kits, social media posts, conference presentations, and more. The International Ombudsman Association (IOA) and related professional associations, as well as commentators and researchers, have repeatedly explained how and why visiting the Ombuds Office is an appropriate option for people grappling with sexual harassment situations (e.g., Dobbin & Kalev, 2020; Howard, 2020; IOA, 2020; Rowe,1996, 1990). This is particularly the case when ombuds adhere to the IOA Standards of Practice, based in principles of confidentiality, informality, neutrality, and independence (Berman, 2016; Pappas, 2016).

However, the value of the organizational ombuds in addressing sexual harassment is still underrecognized. That's partly because ombuds' interactions with their visitors are confidential, off-the-record, and outside an organization's formal investigatory and grievance processes, as the IOA standards require. Remaining confidential, while essential to the ombuds role and effectiveness, complicates the task of raising awareness and understanding of both ombuds practices and the value they bring to organizations. Professionals who view sexual harassment and its remedies through a narrow legal or policy perspective of mandatory reporting and investigation have sometimes misunderstood, disregarded, or undervalued ombuds work. They have not grasped, for example, that ombuds can have an important role in creating the conditions that enable those who have been sexually harassed to come forward with formal complaints. Ombuds need as many ways as possible to publicly share what they do and why their work is useful in specific circumstances, while simultaneously protecting the identities and confidentiality of their visitors and organizations. This special issue of the JIOA helps to address these needs.

In this special issue, anonymous organizational ombuds share stories of their experiences working with visitors on sexual harassment cases and candidly reflect on their practices. The authors' narratives are educational, thought-provoking, and often intense; they reveal and particularize the role, challenges, and value of the organizational ombuds in responding to sexual harassment. The collection of stories not only shines light on sexual harassment situations; it illuminates a range of methods for addressing them. It also illustrates principles and reasoning that guide ombuds practices and shares lessons learned. The goal of this forum is to elevate understanding, reflection, and lively discussion about the nature of ombuds work both within and outside the profession.

Twelve experienced ombuds submitted stories for the forum and all twelve stories have been published here. The authors are a diverse group in terms of gender, age, ethnicity, and location in the world. These authors are all intentionally anonymous. They have altered or omitted names and other nonessential details as needed to protect the identities of their visitors, organizations, and other parties. Consequently, the authors are receiving no public recognition for publishing their stories. The individual authors and I are the only ones who know their identities, and I recognize this as both a privilege and responsibility. The ombuds who contributed stories are due

our wholehearted thanks and appreciation. Without their generosity and expertise, there would be no special issue at all.

The twelve narratives do not, of course, describe all the possible approaches and methods ombuds may use when responding to sexual harassment. For example, the stories do not describe use of mediation (Gadlin, 1991) or the "generic approach" (Rowe, 2021). Nor do they represent the whole range of sexual harassment situations that are brought to ombuds for assistance. However, by focusing on one important type of problem – sexual harassment – through the lens of twelve different experiences, the stories provide contextualized, multi angled, deep understanding of ombuds' responses to sexual harassment cases. A partial list of questions and issues addressed in the narratives includes:

- Why is ombuds confidentiality essential in sexual harassment cases? How is it different from allowing harassment to be "swept under the rug"?
- How do ombuds help visitors and bystanders who are uncertain or fearful about making a formal report?
- How do ombuds assist when visitors want to stop the harasser without notifying their organization?
- Why is ombuds neutrality important in sexual harassment cases? How does the ombuds express it?
- How do ombuds prevent their own emotions and biases from negatively influencing their work in sexual harassment cases?
- What can ombuds do to assist an alleged perpetrator of sexual harassment?
- How can ombuds help when different cultural understandings may be fueling the harassment?
- How do ombuds work with bystanders in sexual harassment cases?
- What can ombuds do to help the organization prevent "serial" harassers (who harass multiple people) and department cultures that foster sexual harassment?
- What is the impact on the ombuds of working with sexual harassment cases?
- If an organization's sexual harassment policy and procedures are inadequate or unfairly applied, how can an ombuds help?

This special issue arose in the context of narrative theory, research, and practice (e.g., Clair, et al., 1996; Muir & Mangus, 1994; Wood, 1992). Appreciation for the power of narratives to give voice to experiences, especially of marginalized individuals and groups, has flourished in recent decades, and especially in the wake of #MeToo. Publications, broadcasts, social media, and other forums have enabled victims and survivors of sexual harassment to publicly share their experiences, educating their communities about the nature of the problem. One such forum was a special issue of The *Journal of Applied Communication Research* (JACR), published in 1992. Predating #MeToo's recent surge in social media by over twenty-five years, JACR published a collection of communication academics' own sexual harassment experiences, demonstrating narrative's capacity to empower survivors and let their voices be heard (Eddie, 1992; "Our stories," 1992; Wood, 1992). That innovative publication in the field of communication was a model for this issue of the JIOA.

Many professions have published survey results, interviews, and stories of sexual harassment experiences written by victims and survivors within their own fields. In contrast, the focus of this special issue is not on ombuds' own experiences with being sexually harassed. However, that focus is not meant to imply that we should complacently assume the ombuds profession is a harassment-free zone. Like other professionals, ombuds may be victims or harassers in their own workplaces as well as at ombuds conferences and training events (Adams & Rasch, 2020). In fact, the Call for Papers for this issue drew inquiries from two ombuds who were each interested in submitting their own stories as survivors of sexual harassment on the job. As Adams and

Rasch advise, it is incumbent upon the ombuds profession to look thoroughly inward and establish exemplary sexual harassment policies, practices, and methods for reporting and receiving support.

While our forum is not designed to give voice to sexual harassment survivors, the authors' stories may be empowering in different ways. In the context of this anonymous forum, the authors were able to publicly share, perhaps for the first time, their own detailed stories of assisting in sexual harassment cases. These narratives are lived experiences that demonstrate the ombuds' expertise and ingenuity. However, these are not glossy, frictionless case studies with always tidy endings, intended to make the ombuds appear flawless and unflappable. To the contrary, the stories reveal the ombuds' human emotions, uncertainties, and internal struggles as they help visitors navigate the complexities, risks, and enigmas that often arise in sexual harassment cases.

The narratives also reveal how ombuds can empower people who are struggling with sexual harassment situations. Responding as an individual to sexual harassment can be fraught with fears, uncertainty, and stress. Power inequities and organizational cultures that tolerate sexual harassment make responding especially dangerous and complex for people whose status and power in the organization are low (Bingham, 1991; Bingham & Battey, 2005). Many organizations are not perceived as safe or trustworthy places for people to speak openly or publicly about their concerns. And despite an organization's intentions to be fair to all parties, many internal impediments dissuade people from seeking and receiving assistance (Rowe, Wilcox, & Gadlin, 2009).

However, ombuds offices serve to eliminate the barriers that deter people from seeking help by offering a context where it is safe to come forward (Rowe & Bendersky, 2002). By guaranteeing a confidential, off-the-record environment, ombuds provide a place for their visitors to talk about sexual harassment experiences without fearing they will forfeit privacy, lose control over actions taken on their behalf, or suffer retaliation. Ombuds can also help visitors understand the available organizational resources that obligate a harasser to cease harassment. Direct communication with a harasser may be more effective when organizations have clear policies, procedures, and consequences for wrongdoing that individuals know about and can readily utilize (Bingham & Burleson, 1989; Bingham & Scherer, 1993).

Ombuds follow the IOA Standards of Practice with all their visitors, whether they are victims or survivors, harassers, alleged harassers, or other parties. Bystanders, for example, may make referrals to the ombuds office, accompany a victim there, or visit with the ombuds on their own (Rowe, 2018, 2020). Because ombuds may work with parties in all these roles, ombuds develop a perspective from which they can better understand individual experiences. Regardless of their roles or circumstances, an ombuds listens to people, helps them analyze their situations and reactions, supports them in thinking through the available options and implications, and provides space for them to express feelings and make decisions about what to do.

Our collection of narratives may also be empowering to ombuds as a result of the authors' engagement in reflective practice. Reflective practice is a learning experience that professionals in a variety of fields use to increase their knowledge, skills, and quality of work. Lang (2019), for example, offers a guide to reflective practice for dispute resolution professionals that involves systematic reflection, questioning, insight, continuous learning, and improvement. The practice can occur alone or in reflective practice groups. As the authors in this forum tell their stories, they reflect on their communication with visitors and other parties and the reasoning behind their actions, and share significant lessons learned. In turn, this forum provides the opportunity for readers – new, aspiring, and experienced organizational ombuds and others outside the profession – to explore the ombuds stories and reap valuable lessons of their own.

Publication of these narratives is not the end of the story. Part two of the special issue is yet to unfold. The JIOA encourages readers to mull over these narratives, discuss them, critique them, apply what you learn from them and – perhaps most of all – use them as data for your own research. Part two of the special issue will comprise research studies written by ombuds and other researchers who venture to analyze this collection of stories using qualitative or quantitative (content analysis) methods. By identifying and interpreting patterns that emerge across the narratives, research can further elucidate organizational ombuds work with sexual harassment. I hope the narratives in this forum will inspire others as much as they have inspired me.

It is useful at the conclusion of any project to reflect on how it could be improved. I wish I had been able to persuade more ombuds to submit stories to this forum, including more stories involving male visitors, as well as visitors who experienced sexual harassment at the intersections of sexism, racism, heterosexism, homophobia, and other modes of oppression (e.g., Biaggio, 1997; Calafell, 2014; Richardson & Taylor, 2009; Robelo & Cortina, 2014; Scarduzio, et al., 2018). Future forums of this kind, whether focused on sexual harassment or another type of problem, should include more narratives portraying more diversity and additional approaches to ombuds work.

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Tales From the Front Line of Ombuds Work: Handling Sexual Harassment Cases

ABSTRACT
Twelve anonymous organizational ombuds tell true stories of their experiences assisting employees and students with sexual harassment concerns and reflect on their professional practices. The authors omit or alter unessential details to protect the identities and confidentiality of the people and organizations involved.

1. A VOICE RISES AGAINST SEXISM

"Well, what did he say?" I asked, in a follow up phone conversation with an undergraduate student who had recently complained to her departmental chair about inappropriate sexual comments made to her by one of her professors. She paused for a second before answering.

I could hear her draw a breath in, and with a mixture of both anger and trembling in her voice she said, "After I told the chair what the professor had said and done to make me feel uncomfortable, the chair said, 'Well, at least he has good taste.'" I don't think in my life I have ever done this before, but I did my first facepalm when hearing that response.

About a week or so prior to this conversation, the student had approached the Ombuds Office. She was afraid to talk because she did not want anyone knowing about the situation. I explained our principle of confidentiality and that our office was not a mandated reporter, and so what this meant was that unless there was a threat of harm to someone, we did not have a responsibility to report anything. Up until this point in the conversation I did not know the nature of the issue, but her discomfort was obvious. I reiterated that my focus was on providing a space for people to decide what to do in their situations and that I wasn't there to judge or blame anyone. I often mention that I'm not there to attribute blame because that's not my role, and perhaps more important, being judgmental won't help the person reaching out. She seemed to relax a bit more, but she wasn't sharing yet.

Over the years I've concluded that many individuals experiencing sexual harassment sometimes blame themselves and are afraid others will judge them and grill them (for example, what they were wearing, whether they were drinking, whether they had been flirting, whether there had been a prior intimate, romantic or sexual relationship with the person). I am aware, as an ombuds, that *any* individual contacting us might have a sexual harassment issue and as such, I know to be sensitive as to what I say, how I say it and how I invite the individual to trust in me. It wasn't lost on me either that I inhabited a male body and she was a female. My intuition told me that she wasn't yet comfortable with me or the office, and if this was indeed a sexual harassment issue, she might not at all be comfortable sharing her problem with me. Since my Ombuds Office does not have ombuds of different genders, orientations, and races, in this moment all I could do to make her comfortable was to rely on my words and sincerity. I explained to the visitor that she didn't have to provide names or details of what happened, and that she would only be listed on our intake sheet as "anonymous." I reiterated my invitation about her only needing to share information to the extent she felt comfortable sharing. This seemed to alleviate her hesitation in talking with me. By then I hoped she felt that she was in charge of the conversation and this was her story to tell.

When a story pours out it isn't always clear if it is going to be short, concise, and linear or whether it will weave in and out. Here, it was the latter. She shared her excitement about the opportunity to learn from this professor whom she had looked up to, and wondered in retrospect whether she had led him on in some way. She felt guilty that she hadn't spoken up initially when his comments, and looks, began. She had approached him during office hours when there was no one else to witness what had happened, so she wondered if maybe she was to blame.

The professor told her that he wished he was younger because she was a "heart breaker" and he would have been willing to take that risk if he were younger. She didn't respond to this first comment. She thought perhaps she overreacted in her mind, she explained. The second time she went to office hours, she was wearing a red sweater. He looked her up and down and told her she should wear red more often because it went with her blonde hair. She worried that this

comment was her fault; her sweater was tight-fitting and red did make her more noticeable. She told me repeatedly that the situation had not felt right. Uncomfortable moments would happen, and then quickly everything would be professional again. The final straw was the last visit she had with him. As she was leaving the meeting, with her back to him, he patted her on the shoulder. And then a stroke on her shoulder. She did not turn around, did not say anything, just left. And now, she didn't know what to do.

We talked about the situation and I shared information about policies that might apply. Here, I shared the sexual harassment policy. Part of the definition is that the behavior, the sexual advance, needs to be "unwelcome." She felt bad that she hadn't expressed to the professor her discomfort. We talked about her options. I asked what she thought about approaching the professor and communicating what she had experienced. I asked whether she wanted me to facilitate a conversation. I suggested she could draft a letter to the harasser in which she could explain her discomfort, ask for the behavior to stop and articulate what she expected in future interactions.[1] None of these ideas resonated with her.

As we talked it became clear that one of the power dynamics (he a professor and she a student) made her believe that he wasn't going to voluntarily change. She felt that he needed to be held accountable, so we talked about her ability to report the situation to the Title IX director. In the United States, Title IX of the Educational Amendments of 1972 (*20 U.S.C. §1681* et seq) refers to the law that protects people from discrimination based on sex in educational programs that receive federal financial assistance. I reiterated that our Ombuds Office was not an office of notice and as such, we would not report her situation to the university. She didn't want to become embroiled in an investigation, so we explored the idea of her approaching administration to talk about the situation. There was still the possibility that administration, the department chair in this case, might report the situation to the Title IX director, but she was willing to take that risk. And so initially, she left the Ombuds Office with a plan. She felt better and optimistic that perhaps if the department chair – someone with some authority – talked to the professor he would just stop.

Her optimism was gone a number of days later as she updated me during our phone conversation. "At least he had good taste" she repeated. These were the words the departmental chair had uttered when she had confided in him her experience. So the student and I talked some more. What now? Now, she was angrier. She wanted accountability. She didn't want this happening to others. She wasn't now as concerned about her grade; she would demand someone else grade her exams and projects. And so, she did not hesitate to report the situation to the Title IX director.

Last I heard from her she was happy with the outcome.

A semester or so later, I learned that this specific department had professors that, going decades back, reportedly hosted parties where the lines between faculty and students were often blurred. The parties had stopped years ago but apparently, the culture within the department was still questionable and, sadly, this student's situation was one of many indicative of a systemic problem. I was never sure if this particular student's decision to make a report caused the department to became more accountable, but I'm certain her situation made the institution take note.

[1] Since 1973, Mary Rowe has recommended offering to targets of sexual harassment the option of drafting a letter to the perpetrator as a possible way of helping offended individuals to prepare for and choose the next steps that seem right to them. Rowe, M. T. (2018). *Ideas to Consider If you Have Been Harassed.* [Working Paper.] https://mitsloan.mit.edu/shared/ods/documents/?PublicationDocumentID=4594:

Looking back at the situation, what I learned as an ombuds is that sometimes those who have the power to hold others accountable don't effectively execute their responsibility and might even need to be held accountable themselves. Additionally, I saw how the confidential, non-judgmental space created by an Ombuds Office can help visitors find courage when the institution's system has initially failed them. I witnessed a shift in my visitor from someone who was disempowered and questioning whether she had done anything wrong to a more empowered individual who was angry, and in that emotion, found the motivation to resist her injustice.

2. SUPPORTING A CONSIDERED RESPONSE TO HARASSING BEHAVIOUR

The #MeToo movement has had a far-reaching impact, providing a much clearer understanding of sexual harassment in the workplace, as well as highlighting the complexity of this issue. In this narrative I explore the role of the ombuds in supporting a young female staff member, whom I shall call Mary, as she tries to respond thoughtfully to the unwanted attention of a senior male colleague, whilst navigating her way through some of these complexities.

By way of background I am an ombuds in an organisation of less than five thousand employees. I practice according to the IOA Standards of Practice and whilst I am not subject to statutory mandatory reporting requirements in my jurisdiction, it is policy that the head of the organisation is made aware of all formal sexual harassment complaints.

Over the last couple of years my organisation has been active in improving its response to allegations of sexual harassment by reviewing policies and procedures, strengthening formal processes, and raising awareness internally about the issue. There is what I would describe as cautious optimism, as well as a realistic appreciation that significant work still needs to be done to improve the experience of victims who want to raise concerns about sexual harassment.

Mary approached the Ombuds Office at the beginning of the year to discuss concerns about a senior male manager who was not her direct line manager, but someone whose work closely intersects with the work of her team. She explained that at a work Christmas party she found herself in a long, social conversation with the manager. She detailed that the conversation included them both talking in some depth about aspects of their personal lives.

Mary indicated that she had reflected a great deal upon the nature of the conversation and was disappointed in herself, describing herself as 'naive' for not picking up on the cues concerning the 'intimacy' of aspects of the conversation. She further thought that she should have realised the potential for the conversation to be misinterpreted by her male colleague.

Since the Christmas party the senior manager displayed significant unwanted attention towards Mary, both in the work environment and in attempts to meet with her outside of work. She detailed work meetings which the senior manager attended, but which were only marginally related to his responsibilities. She further described how the manager would direct all his work-related queries through her, even though there are more appropriate people to direct his queries to. Because Mary is the most junior member of the team, all her colleagues have more seniority and experience than her.

Mary further detailed attempts by the manager to schedule meetings with her to talk about 'work' related matters or to initiate small projects that they could work together on. The manager was also turning up in different areas of the workplace, the tea room and the cafeteria, attempting to strike up a social conversation. This behaviour had spilled over to outside of work, with the

manager attempting to initiate a dialogue through Mary's social media accounts as well as inviting her to meet up outside of work hours.

As Mary became increasingly uncomfortable about the situation, she described her attempts to try to avoid being in situations alone with the manager, as well as politely declining his offers to socialize. As the manager's behaviour continued, Mary reported that she spoke more directly with him, advising him that she was not interested in anything other than a professional relationship, that she only wanted to relate to him about work related matters and that she wanted him to cease contacting her outside of work.

Following that more direct conversation Mary received an invitation from the manager to meet up outside of work to discuss these matters further. It was at this point that she approached the Ombuds Office, frustrated and upset that the manager was not listening to her, and very uncomfortable that these behaviours appeared to be escalating.

Mary advised the ombuds that she felt anxious, trapped, alone, and confused about what to do next. She explained that she had to be particularly careful about who she discussed this with, as the manager was experienced and well connected whereas she was junior, inexperienced and had only a small network of connections. Mary acutely felt her vulnerability. She wanted to be reassured that the ombuds understood her predicament and that the office would treat issues of confidentiality seriously.

My approach at the beginning was to focus upon listening to Mary empathically and without judgement. I endeavoured to create a safe and respectful environment where she felt that someone understood her experience, could connect with her feelings, and treated her concerns seriously. I wanted to create an environment that enabled Mary to tell her story in her words.

I was also very mindful to understand and explore the impact that this was having upon Mary. I am aware that victims often present in a high state of distress, and that responding to their emotional needs at the outset helps them to settle and enables them to tell their story in a thoughtful and considered way. I was also conscious of ensuring that Mary had adequate resources, both professional and personal, to manage the emotional impact upon her.

One of the dynamics I am aware of in sexual harassment matters, is where a victim feels responsible for what has occurred. When Mary described herself as 'naïve' and berated herself for not realising in the moment what was occurring with the manager, I gently supported her to reflect upon the power differential and her description of him as an experienced senior colleague, a manager, a husband, and a father. I wanted her to think about the fact that each of these roles conveyed a range of responsibilities for him.

Mary was further frustrated with herself, believing that it was a failure on her part that she could not get the senior manager to stop his pursuing behaviour. She also tried to take responsibility for the fact that the situation appeared to be escalating. I encouraged her to think about what was in her control, emphasising that she had taken assertive action to make her wishes clear and that she was limited in what she could do if the manager was not open to listening to her.

Mary was confused, lacking in confidence and apprehensive about what to do next. At this point I engaged with her around the options open to her. I was aware of the importance of not only ensuring that she felt in control of the direction that she wished to take this matter, but also that she had a realistic understanding of the pathways for resolution. To ensure this I explained to her that at times the organisation's rhetoric and good intentions did not match the reality of the experience of people, particularly for those who decided to use the formal complaint mechanisms.

I explored with Mary the option of making a formal complaint in some depth, including what the process entailed, how it works generally and how it might work given the issues that she wanted to raise. This exploration included consideration of subtle issues around power and influence, including the manager's seniority and connections and Mary's significant concerns about the potential impact upon her work life and longer-term career.

From the outset Mary was very clear that she did not want Human Resources involved, nor did she want to make a formal complaint. Part of the reason for this was that she did not want the head of the organisation to be aware of her concerns. Nor did she want to damage the manager's career or undermine his personal relationships. Her desired outcome was that the manager would listen to her and stop the unwanted attention.

I explored with Mary some informal pathways that may enable her to reach that outcome, including whether and how she could communicate further with the manager or begin a discussion with a more senior manager. I also discussed the role that the ombuds could play in either talking directly with the manager, or with more senior management.

While I took some time to explain how I would approach a direct conversation with either the manager or his superior, Mary was of the strong view that direct intervention by the ombuds had an undesirable potential to escalate matters. She held this view because while the Ombuds Office is informal, it has a standing in the organisation as an office of some importance, and any ombuds intervention was treated seriously. Whilst I respected Mary's concern and her assessment in relation to this issue, I would probably have explored her concerns in greater depth if the circumstances of the harassment that Mary had experienced had been different.

Mary decided that the option that she felt most comfortable with was to send a strongly worded email to the manager. She also wanted to develop strategies to confidently respond to him if she did find herself alone with him, or if her work called for her to be in close proximity with him on tasks. I felt that this was a considered, realistic, and proportionate response.

I assisted Mary to draft an email that detailed clear boundaries around work roles, including emphasising again that she did not intend to have any contact with the manager outside of the work environment. The email also suggested that if there was any aspect that the manager was unclear about, she would be comfortable to have a clarifying conversation about this facilitated by the Ombuds Office. Whilst Mary did not expect that the manager would take up the offer of the clarifying conversation, she wanted him to know that she was serious about her concerns and that she was prepared to escalate the matter if his behaviour continued.

I raised with Mary the possibility that the manager might get angry about including the option of engaging the Ombuds Office in her email; however, she did not believe that this would occur. Indeed, she thought that mentioning the Ombuds Office in this way would convey to the manager that she was aware of the office and prepared to use it should the behaviour continue. She thought it would also imply that she may have already consulted with the Ombuds Office, and more generally that it would convey to the manager the importance of responding constructively to her concerns.

I further coached Mary and undertook role pays to build her confidence about how she might respond to situations where she came in close contact with the manager. Following these role plays she indicated that she felt more confident to be able to respond in a measured, thoughtful, and more assertive way should this occur.

I followed up with Mary two months later and at that time she was happy with the outcome of the intervention. She reported that she had not heard further from the manager and that she felt the

strategies that she had implemented had worked. I believed that the ombuds intervention had been successful and was comfortable enough to close the case.

More recently Mary revisited the Ombuds Office, anxious that a vacancy for a manager had arisen in her work group, for which the senior manager was eligible to apply. She was concerned that if he did apply and was successful, that this would have a significant impact upon her safety, wellbeing, and career. Despite what I thought was a good initial outcome, Mary's return brought home to me the fact that informally intervening in sexual harassment matters can leave a victim vulnerable to further unwelcomed behaviour.

Consistent with my initial approach, I spent time listening to Mary's concerns, acknowledging her fears, and supporting her to think about her options. The options open to her were the same as when she first presented, including formally or informally taking her concerns further, with the support of the Ombuds Office. Some important new issues for her to consider were the fact that the manager had respected her last communication with him, and that there were a number of unknowns in relation to whether the manager was actually interested enough to apply for the role. Should he put in an application then he would be required to go through a merit-based interview process in which he may not be successful.

During these discussions I understood that an important part of my role was creating a containing environment to enable Mary to sit with the tension and anxiety of the current situation, and to think clearly about this new set of circumstances. All throughout this time I was conscious about what her response to this situation told me about her anxiety state and of the importance of ensuring that she had adequate resources and support from outside of the office to support her in managing her anxiety.

Mary was able to think clearly about the various scenarios and her options to respond to them. The containing environment enabled her to decide to wait to find out whether in fact the manager applies for the position and that even if he does, to wait upon the outcome of the recruitment process. Should the manager end up in the role then Mary and I agreed that we would meet again to consider her options.

Part of the complexity in Mary's matter related to the nature of the harassment that occurred. Much of the behaviour was nuanced and could be denied, deflected, and defended through the current bureaucratic and legalistic processes. Should she have made a formal complaint and the harassment was found to have occurred, it realistically would not have been found to be behaviour that would result in the dismissal of the manager. For Mary this would probably mean that a formal complaint would result in a pyrrhic victory leaving her to try to continue her career working near the manager against whom she had made a formal complaint. This would be very uncomfortable and have left her incredibly vulnerable.

To make an informed decision about different courses of action, victims deserve not only a realistic understanding of how formal processes operate, but also an awareness of what some of the research tells us about the experience of people who initiate a formal complaint about sexual harassment. The complexity of providing this type of information is that those who are responsible for formal complaint processes might consider that these conversations discourage the making of a formal complaint. Visitors might also believe that the ombuds is discouraging them from making a formal complaint.

I understand how these beliefs can arise and believe that this speaks to the tension for ombuds between the desire for justice, anger about the abuse of power, and the need to protect victims from the complex, challenging, and imperfect system. Whilst I believe that formal complaint processes are an important part of a comprehensive organisational response to sexual

harassment, they are not a constructive option for many situations that visitors present with. Given this, the approach to ensuring informed consent prior to a victim undertaking a formal complaint process should be approached thoughtfully and with these risks and tensions in mind.

If the visitor chooses to take formal action, there is a critical role for the ombuds to not only promote due process, but to ensure that victims are protected from negative consequences associated with exercising their rights, including retribution and reputational damage. These are significant challenges for ombuds to consider when supporting a considered response to allegations of harassing behaviour.

3. WHEN THE END IS NOT THE END

I can easily recall over a dozen Title IX-related cases that I have dealt with since coming to the university that currently employs me. It is a large, public institution, and my Charter with the university allows me to practice under the standards of the International Ombudsman Association (IOA). I am exempt from being a mandated reporter based on my institution's Title IX policy.

I have been visited by alleged victims who were reluctant to report for fear of retaliation, those who wanted to understand the extent to which a formal investigation would be intrusive, and others whose relationships were at some point consensual and they feared that there may be repercussions for that. Most of my Title IX-related cases, however, have come from those responding to allegations. Many of them felt that the investigation process was unfair. Some were provisionally sanctioned (no trespass order, removal from all or some part of campus, etc.) and felt that was unfair since they had not yet been provided due process. Many respondents felt that investigators and other university personnel were too quick to believe the alleged victim.

While most of the respondents who visited my office were men responding to the allegations of women, I have also met with a male visitor who was responding to another male student's allegations of sexual assault and one male who complained that a female student was harassing him. My institution is very diverse, but most of the visitors who have come to my office with Title-IX-related cases were white. I can think of three who were of color and two who were international students.

There was one particular case where I felt most helpful in my role as Ombuds. Because I believe it allowed me to engage directly in a way that was especially effective as an ombuds, I chose that one for this narrative.

A graduate student scheduled an appointment to see me about an issue he was experiencing with his program. When he arrived, I shared my opening statement to be sure he understood the confidential and informal nature of our meeting, and then he began telling his story. He was in a small academic program, and he had been accused of sexually harassing and assaulting another student with whom he had once lived. The formal investigation, which took months to complete, had been grueling for him. He was issued a no contact order and was forced to stop taking courses while investigators looked into the allegations. He was clearly still quite affected by the allegations, and he assured me again and again that he had not done anything wrong. While the investigation was underway, he lost weight, sought mental health counseling, and spent thousands of dollars seeking legal help. Because of the size and nature of the academic department, faculty and other students were well aware of the allegations, and many of them had taken sides with one student or the other. Emotions were highly charged, lines were drawn, and relationships across the department were damaged.

Eventually, the investigators determined that there was not enough evidence to support the allegations, and my visitor was cleared of fault. He was grateful for that – for those who conducted the process – and he looked forward to returning to classes and completing his degree. The "no finding" outcome released the no contact order, which likely was not a concern for the alleged victim since, during the time of the investigation, she had graduated from the program.

Once the Title IX office issued its findings, my visitor was cleared to return to his program. The first event he attended was a "lunch and learn," where many of the program's students and faculty met in one room to listen to a guest speaker. My visitor told me that he was very nervous about returning, but he was also eager to move forward. As he sat in my office, he described the palpable discomfort he experienced when he walked into that room.

Soon after, a senior administrator from his academic program wrote him an email and told him that he should not return to campus except to meet with his faculty advisor and that, when he did decide to return to campus, he should let that administrator know. The administrator noted that the student's presence on campus was unsettling to many, and that their role as an organizational leader was to make sure others felt safe. One of the junior faculty members learned of the communication and suggested the student visit my office.

As an ombuds, it really was a fascinating place to be engaged. Because of the informal nature of my office, there would have been little I could do while the investigation was taking place; however, at the time of his visit, there was no formal process underway. I was able to simply listen (for a long, long time), and then help him understand next steps. It became clear, throughout my conversations with him, that his desired outcome was to complete his academic program and restore the trust of his colleagues and faculty. While I spent many hours coaching him through the latter, there were immediate actions that could be taken to address the former.

I asked him if he was comfortable asking the Title IX investigator about any lingering sanctions, but he shuddered at the idea of engaging with that official again. He asked if I would be willing to ask on his behalf. I reminded him of the informal nature of my role; I do not want visitors to assume I can intervene and "fix" their problems in this role. I ultimately agreed to call my colleague in that office to find out if there were any restrictions on his engaging with the university.

Of course, in asking the Title IX officer about the outcomes associated with his case, I revealed my involvement. The officer and I had already established a positive working relationship, so they expressed neither surprise nor offense in response to my questions. The officer confirmed that the case had been closed and all provisional sanctions had been lifted. The student was free to resume his normal activities.

During a follow-up visit, I informed my visitor that the university had placed no restriction on his ability to engage and that, if he were further sanctioned for any reason, he would once again receive due process. He wanted me to explicitly say the senior administrator was wrong and that he was permitted to visit campus at any time. Instead of confirming his suggestion, which could have sabotaged the trust of university leadership and compromised my impartiality as ombuds, we discussed options:

1. He could choose to stay away from campus as much as possible. He can't control the perceptions of others and, if attending events on campus was unsettling to him, he may consider focusing on keeping himself well and disengaging in any events or activities that could exacerbate his anxiety.
2. He could confront the senior administrator directly. He could reply to their email or ask for a meeting and explain that he has confirmed that there are no restrictions, no sanctions,

and that he looks forward to returning to campus now that the investigation is over. I recognized the power differential and the perceived risk associated with appearing to challenge a senior administrator. I also tried to help him imagine a conversation that would be productive and helpful rather than challenging and disruptive.

3. He could report the senior administrator to the Title IX office. Those officers would have the authority to confront the administrator directly and then also monitor the administrator's further engagement as it related to his case. His reporting through the office would create a record, and at that point, there were benefits associated with creating a trail of action. We also discussed the risks of (perceived) retaliation if he "told on" the administrator. He had hoped to pursue a Ph.D. in the discipline and valued the support of the senior academic leader. We discussed how the Title IX office may be able to protect him from retaliation, as well.
4. I could contact the administrator by phone and have an offline conversation, expressing the visitor's concerns and helping the administrator to understand due process. This would, again, breach confidentiality – the administrator would know that he spoke with me. We discussed the risks associated with that, but also the benefits of allowing the leader to respond appropriately in a way that did not involve formal authorities.

In the end, the visitor and I addressed this using a combined approach. Before he reported the email to Title IX, he asked if I could inform them of it to see what they thought. The sheer notion of going back to that office created visceral fear in him, but he recognized that he may need more formal support in case the administrator (or other faculty) retaliated. Since the Title IX officer already knew I was involved, going back to them seemed low risk.

I visited the officer in a face-to-face meeting and let them know about the administrator's communications with the student, restricting him from access to campus, faculty, and events. I informed them of the options that the student and I had discussed, and I let them know that they might anticipate communication from him. I told the officer that the student was unsettled by the notion of re-visiting the Title IX office, and they understood. The officer offered to reach out to the student, hoping that may alleviate some of his anxiety, but we agreed that we would reserve his right to initiate a conversation if he chose to.

The student sent an email to the officer asking for a face-to-face meeting, and they scheduled it immediately. The Title IX officer contacted the academic administrator and let them know that they could not issue sanctions based on behavior that had already been reviewed in the hearing.

At some point, the academic administrator called me. I assume they learned of my involvement either from the student or from the Title IX office. In any case, it was an informal conversation, and I welcomed it. The administrator discussed their own conflict in feeling the need to protect their students and faculty without unduly restricting the student's freedom. I assured them that the university was supportive of their concern and encouraged them to report any inappropriate conduct (not perceptions) that were disconcerting to faculty or students.

The senior administrator withdrew the restrictions that they imposed, and the student has been granted free access to campus facilities. To my knowledge, there have been no further incidents.

I do not know what would have happened to this visitor if the ombuds office were not an option for him. He felt afraid and powerless, and he did not perceive the university as an ally. By providing impartial, informal, confidential space to ask questions, the visitor was able to navigate a reasonable outcome and successfully progress in his academic program. The university was also able to avoid the potential loss of additional resources such as time, money, and institutional reputation. I believe it is in these uneasy, nuanced spaces that ombuds should feel most valuable to their visitors and their organizations.

4. YOU'RE NOT ALONE...UNLESS THAT'S WHAT YOU WANT

When I answered my phone, I was met with a whisper. The voice on the other end was so soft my body leaned forward in order to listen more intently. Elizabeth (not her real name) was obviously trying to be as clandestine as possible, and the tinny reverb that accompanied her words gave me the impression that she was perhaps calling from a stairwell or a restroom. Many times, when people call the ombuds office to schedule an appointment, they do not resist the temptation to begin telling their story; however, it was obvious that Elizabeth only wanted to handle the logistics of scheduling an appointment and hang up as quickly as possible. Sensing this, I obliged and we agreed to meet the following day.

> "Oh wait, there was one thing..."
>
> "Sure, what is it?"
>
> "Does your office offer appointments only during regular business hours?"

It turns out Elizabeth wanted to meet after business hours not feeling able to leave her desk in the middle of the day for an extended length of time. This was another context clue of her fear or nervousness, and we agreed to meet at 5:30 the following day.

I begin every one-on-one visit with a description of the ombuds office which includes an explanation of the ombuds confidentiality, independence, informality, and impartiality standards of practice. The confidentiality and informality standards seemed to interest Elizabeth the most. I could see her relief when she heard that I would not reveal the fact that she was meeting with me or anything said to me, and that the office's informality meant that there was no record of the meeting and no paper trail connecting her to the ombuds. She would later tell me that hearing those two pieces is what allowed her to feel safe enough to say things she hadn't said out loud to anyone before—not even her partner or her close family or friends.

Elizabeth was experiencing severe and pervasive sexual harassment at work from a male colleague senior to her but not in her line of reporting. Ronald (not his real name) was a long-time and well-respected person in the office, and he held significant amounts of positional authority and social cachet at all levels.

Elizabeth described a series of events starting out somewhat banal and escalating over time. While her guard was raised from the very first event, she had reached her tipping point after Ronald crossed "the physical line" by grazing her buttocks with his hand while "squeezing past her" in the office break room. She froze. She ran through all the things she wanted to say to him; she thought about #MeToo and all of her feminist friends and family who would want her to confront Ronald and tell him that his behavior was vile and wrong. But she froze. She didn't say anything, and she watched in silence as Ronald walked away with a smug look on his face.

Over the next few days, the shame of her non-response would consume her. She was afraid to tell her partner about what happened. She didn't want to say anything to her co-workers, and she didn't trust Human Resources (HR). She wasn't currently seeing a therapist, and she didn't want to go to her friends and family for fear of being gaslit, being told what she should have done or what she should do now, or being blamed or judged.

Elizabeth knew about the ombuds from a training she had taken where she heard the line, “where to go when you don’t know where to go.” She cried a lot in our time together, and as our visit ended, she thanked me for being able to “wring myself out” of the fear, shame, and anger that had built up like a plaque over the course of several months. She left with an interim plan of reaching out to a trusted co-worker first and scheduled a follow-up visit in a week to work out a broader plan on how to move forward.

The phone rang again several days later. Janet (not her real name) wanted to schedule an appointment and mentioned that she was referred by a man named Jeffrey (not his real name). Jeffrey happened to be the name of Elizabeth’s friend, the one she had planned to speak with regarding Ronald’s behavior. This connection was confirmed when Janet described that someone in her office named Ronald, a manager above her in rank but a man to whom she does not report, made inappropriate comments to her of a sexual nature. Janet, however, made no mention of Elizabeth, and I did not say anything in accord with the confidentiality protecting my visit with Elizabeth.

Stephanie (not her real name) was the third person to visit with me with regards to Ronald. Her relationship to Ronald was identical to Elizabeth’s and Janet’s, however, Stephanie’s grievance was with HR’s non-response to her report to them. In contrast to Elizabeth or Janet, Stephanie had initiated a formal complaint process and was “pissed” about how it was going. She wanted justice, and she wanted to meet with an ombuds to figure out what justice looks like and how to go about making it happen.

One of the exceptions to ombuds confidentiality is when a visitor provides express, written permission for the ombuds to reveal anything discussed in a visit. Stephanie took me up on this exception and gave permission for me to disclose her visit with me to other people who have met or will meet with me, and to describe her being a victim of sexual harassment from Ronald.

Stephanie’s permission was granted just in time for my follow-up visit with Elizabeth. Elizabeth told me she had discussed her situation with Jeffrey, which she said was easier than she had expected because she had the chance to say it to me first. Jeffrey said he had heard similar things from at least one other person to her surprise (but also not to her surprise), and that maybe they should all get together and talk.

I told Elizabeth about Stephanie, and she told me she had talked with her the day before. She also connected with Janet and two other people whom Stephanie had known. After exploring some options, Elizabeth decided that the next best step would be for all five women to come as a group to the Ombuds Office to have a safe, confidential space to compare stories and work out what to do next now that they all knew about one another.

The following week, I greeted five women into the office, reiterated the ombuds standards (this time placing extra emphasis on confidentiality), and facilitated a conversation where these women who didn’t or barely know one another were able to connect through their shared experiences.

After some time, the conversation shifted to “So, what do we do about this creep?” Stephanie proposed a public shaming. She was, in her own words, “out for blood.” She wanted to post on social media, go to the paper, speak as a group to the executive committee and the director of the office, and file every possible formal complaint including considering lawsuits. The other women agreed that they wanted to do something, that they felt empowered as a group and especially with Stephanie’s verve, but hesitated on creating too many waves too soon. When the meeting ended, the group had not reached consensus on what do to next.

I intervened to encourage the group by mentioning that consensus didn't need to and often does not happen immediately. I acknowledged that this was their first substantive conversation as a group and that they may all be at different stages of processing what has happened to them. I proposed a plan: I asked each of them to meet with me individually to explore the question, "Now that you know other people have experienced something similar to you, and now that you know what some in the group want to do in order to move forward, what would you like to do?" I warned them that this proposal would slow things down, but they all agreed to have the individual visits. We discussed how they would stay safe during the process of the one-on-ones and other interim agreements and strategies.

Over the next several weeks, I met with each person to explore their answers to the aforementioned question. Stephanie was resolute and remained true to her desired courses of action. The two people Stephanie knew were on-board with her plan. Janet said that with Stephanie's strength, she too would have the strength to "go public with everything." Elizabeth, however, felt differently. She expressed gratitude for the group and appreciated knowing she was not alone, but she now felt burdened by a new set of duties and expectations. She didn't want to be "a wet blanket" on the group, and she was combating peer pressure to move forward in a way that "feels like someone else's fight." In confidence, Elizabeth said to me (but more to herself) that she wanted to move forward more quietly. Even more than that, she expressed that she wanted to move forward independently. She expressed concern for upsetting the others, and she didn't want to appear as if she was abandoning them. She felt deeply connected with these women and their experiences, but that was separate from how she wanted to figure things out for herself.

Elizabeth and I spent the rest of our visit working out strategies on how she would communicate her feelings to Stephanie and the others. We workshopped an email where she could simultaneously express solidarity and explain why she was going to go a different route. I reminded her that she could take advantage of the ombuds to invite the others or even Stephanie individually to have a difficult conversation, but in the end she left with the confidence that she could handle it on her own.

Elizabeth concluded our visit with a slight smirk, bemused at this unpredictable "ending." She had always envisioned that she would "be more like a Stephanie," but as soon as she saw that she realized she wasn't. She learned that the complexity of life events isn't binary, and that she can be independent and supportive at the same time. She thought she would find absolute solace in the company of others, and while she felt some, what she realized in the end was that she had everything she needed within herself and was now ready to rely on her inner voice to guide her.

I never heard from her or any of the women again.

Several months after my last visit with Elizabeth, the president sent out an email to the entire office announcing Ronald's departure from the company, thanking him for his service, lauding his talents and accomplishments over the years, and inviting everyone to a reception in his honor.

Part of the difficulty of the ombuds role is not knowing how things end. And part of the frustration of not being a part of the ending is questioning if the boundaries of the ombuds' Standards of Practice makes us complicit to the misdeeds of others and the baffling inactions of our institutions with regards to keeping bad actors accountable. I think of a quote authored by John Stuart Mill: "Bad men need nothing more to compass their ends, than that good men should look on and do nothing."

I felt my service to the women victimized by Ronald was to help them find their voices and determine how to use them—the words, the volume, the timing, and the timbre of their voices. But what about mine? Upward feedback perhaps? Promoting systemic change in some way? The

typical channels through which ombuds have voice all seemed so…indirect. Meek, even. Hiding behind informality and neutrality felt like the "nothing" of which Mill wrote.

The company leadership, I'm sure, felt pleased with the outcome. Ronald was gone. Nothing went public. An open-and-shut case. Who knows how the women felt. Sure, Ronald was no longer working with them, but the thoughts and emotions of post-harassment experiences are complex and layered. And what of Ronald? Does he simply get to move on to his next job suffering only a relatively minor inconvenience of finding a new job? Is that fairness? Or justice?

As an ombuds, just like with knowing how things end, the answers to those questions will continue to remain unknown and unresolved.

5. CAVEAT MENTOR

As an ombuds, I pay careful attention to my personal subjective reactions to the people with whom I interact in my role. Even while I am listening carefully, at another level of consciousness I ask myself questions: Is my body tense or relaxed? Am I receptive or skeptical? Is my first reaction to like or dislike the person? Is it easy to listen to them or is my mind wandering? Am I eager for the person to finish or am I patient and willing to follow their discourse wherever it is going? How does their identity – race, gender, sexual orientation, age, etc. – affect me and how I respond to them? This is one useful way to identify my biases, ferret out feelings that could affect my interactions with the person. It also allows me to evaluate critically whatever thoughts I have about how to proceed with the case. Am I giving them a fair shot? I also try to consider how I would handle the case if I were a different person. Sometimes, if I do not feel I am connecting well with the person, I ask this even during our initial meeting. With others these questions do not arise until after the session. I pay attention to that difference because it may tell me something about my feelings about a person. This type of question-based self-reflection is necessary if I am to treat people fairly. I always have subjective reactions to people, and I don't let myself pretend that I don't. For me being conscious of these reactions is the best way to keep them from biasing how I interact with others. If I am conscious of my reactions, I can at least try to control them. I don't believe impartiality and neutrality are actually achievable, but aspiring toward them is essential. That aspiration allows me to self-correct as I work on a case.

I've been an ombuds for a long time and worked with just about every sort of issue you can imagine, and a few that you probably couldn't imagine. Among the most challenging, interesting, rewarding, and painful are sexual harassment cases. Having spent a considerable part of my ombuds career in universities, I have handled hundreds of sexual harassment cases. Almost always they have a deep impact – these are not the cases I forget about when I go home at the end of the day. These are the ones I can't stop thinking about, that wake me up in the middle of the night. Interactions with people involved in sexual harassment cases (both harassers and victims) are among the most intimate, evocative, and painful connections one can experience while in the ombuds role. Sexual harassment cases, as well as cases that involved allegations about racism and discrimination, have elicited the most intense and ongoing self-reflective questioning of the sort described above.

Of course, at times enhanced self-consciousness can create problems by itself. This happened to me with a sexual harassment case. A female graduate student called for an appointment with me. She hadn't wanted to identify the issue on the phone, which was perfectly fine. Many people who come to an ombuds don't want to say what it is in advance of meeting face to face. Sometimes it's because they want to get a measure of the ombuds before deciding whether and what to reveal. When the student arrived at my office a few days later I was immediately taken by how beautiful she was. Not beautiful in a Hollywood way, but rather without self-consciousness. This was not exactly the best beginning to working a sexual harassment case; the ombuds, struck by the appearance of the woman who had been harassed. But my practice of self-reflection allowed

me to be conscious of my feelings, admit to myself, with some embarrassment, to having them and put them aside. Fortunately, there was no indication that my private reaction to her was visible because she described her situation without hesitation and we very quickly got into an extended, honest discussion. Her story was compelling and, in the same way I had learned to push aside negative reactions to people I found myself disliking, I focused my attention to what she was saying.

It was clear from the beginning that she was mature (mid-30's), articulate and very committed to her program of study (Literature) and deeply engaged in her dissertation. The situation she described was not all that unusual in my ombuds practice or in the experiences of fellow ombuds in the academic world. But it was still a challenging case. Her Ph.D. advisor, a major scholar and literary figure in her field of study, wanted a sexual relationship with her. He had made that clear, although mostly indirectly. She was not at all interested in him sexually, but she said she found him otherwise to be an excellent advisor and very much respected his scholarship and his writing. When she finished her account of her situation, I described to her the full range of options available to her under the university sexual harassment policy, explained how the process of bringing a charge worked, and presented alternatives such as a facilitated discussion or mediation with her advisor (I had lots of experience facilitating such discussions and conducting mediations). She knew almost immediately that she did not in any way want to pursue bringing a charge either formally or informally. She was also adamant that she would not participate in a direct conversation with her advisor, even if it was mediated. She felt that if the advisor learned she had spoken with someone else about the situation he would end their working relationship and possibly retaliate. We also talked about possibly switching to a different advisor, either at the same university or even at another university where there might be a faculty member with similar academic interests. Neither of those options was appealing. She wanted to continue working with her advisor and to complete her dissertation.

But describing the options we discussed and the policies we reviewed doesn't give a full sense of what that meeting was like. In the course of her account of her academic work I asked about her dissertation topic. When substantial matters are at stake, I always ask faculty and graduate students about their academic work because it reflects their interests and how they think. As it happened, I knew a bit about her area of study, so we were able to talk about that too. It was a good connection, and I came away with a fuller understanding of why she wanted to stick with her advisor even with all the complications raised by his interest in her sexually.

Toward the end of the session, we developed a strategic plan for how she would handle interactions and communications with her advisor. She indicated that she was well practiced in deflecting men's advances but, in this case, she wanted to maintain the relationship while managing his expressions of interest in her. I asked her to describe situations where he was more attentive to her work and less likely to come on to her. It turns out he was genuinely interested in her research topic and enjoyed extended discussions about various complexities of literary analysis. Together we decided to focus more on those positive interactions and to sidestep his propositions. The plan we developed was straight-forward: Before meeting with him she would identify a topic or problem that she wanted to discuss. At the beginning of each meeting with him she would bring up what it was she wanted to discuss. Also, she would abbreviate discussion of personal matters with him beyond the usual social niceties of inquiring "how are you doing." If he began to question her about goings-on in her life, she would provide only the most cursory answers and shift as quickly as possible to discussing matters related to her dissertation. In addition, she developed a repertoire of possible responses to his expressions of interest in her, all of them emphasizing that she did not want to have a sexual relationship with him but reiterating her respect for him and the importance of his guidance and mentoring. We agreed to meet on an as-needed basis to debrief how her dealings with the advisor had gone and refine her strategies for the upcoming weeks. On average we met every three or four weeks, discussing the advisor and her progress on the dissertation. In those conversations I could see how this approach was empowering her. When working with a visitor who is trying to manage an ongoing problematic situation, it is helpful for the ombuds to offer periodic check-ins.

After a bit less than a year, her dissertation completed, she came back for a final session to debrief and to say goodbye. When we finished talking, I got up to walk her to the door. Just before leaving she turned and gave me a warm hug. Not the recommended way to end a sexual harassment case, but in this case it was okay.

Although some sexual harassment cases have a satisfactory ending – for example the harassment ceases or the victim safely leaves the harassing situation – I still have a dilemma. In situations where the victim will not pursue formal charges and decides to deal with the situation alone, the harasser remains in place and unidentified. In these cases, the very advantage of being a confidential ombuds – people tell us about problems they will not disclose to anyone else – feels like a disadvantage. How can we prevent harassment from recurring? There are two steps that I have found helpful. The first, which seems obvious to me, is that ombuds should regularly report on the frequency of sexual harassment cases we are handling. This information should be included in annual reports and mentioned in regular meetings with leadership. If a large number of cases are coming from within a particular department I would go to the head of the department, explain that there have been a number of cases recently and suggest that I be invited to give a talk to that department about sexual harassment. Second, almost always when meeting with victims, who in my experience have typically been women, they have mentioned not wanting anyone else to experience the same thing. Consequently, in cases where I facilitate discussions or mediate between the harasser and the person harassed, I regularly raise the question of what should happen if I receive another complaint of sexual harassment about the same harasser? Almost always both parties agree that in such a circumstance, as Ombuds, I am free to report to the appropriate authorities that there was a settlement of a previous harassment case. It is also important to remember that sometimes the ombuds is the only campus resource a victim is willing to turn to. If it were not for the presence of a fully confidential ombuds, most victims who, for whatever reasons, are unwilling to notify university officials of the harassment or bring formal charges, would struggle and suffer alone.

6. HOW CONFIDENTIALITY AND INTEGRITY IGNITED OMBUDS ADVOCACY

Title IX of the Education Amendments of 1972, *20 U.S.C.* §*1681* et seq. (amending the Higher Education Act of 1965) is a federal gender equity law that prohibits discrimination based on sex in education programs and activities that receive federal funding. Sexual harassment, which includes sexual violence and other forms of nonconsensual sexual misconduct, is a form of sex discrimination and is prohibited under this law. In higher education, Title IX is the law that covers the #MeToo era in reporting and gender equality. Noncompliance with Title IX can affect the availability of federal funds, which can be deadly for most educational institutions. The Ombuds Office is a place of informality, which places ombuds decidedly outside of the formal Title IX process. In my office, we practice according to IOA standards and are not designated reporters under institutional policy, although we can provide clarity to visitors regarding Title IX and its reporting process.

A visitor came to discuss options and ask questions. The visitor found out about the Ombuds Office from another staff member and learned about the confidentiality that the ombuds offers. Confidentiality was the *main* reason this visitor came to the ombuds. She wanted a place where everything was off the record and nothing would move forward without her blessing. Mainly, she wanted a place to just talk first and see what could happen.

As an ombuds, I may not know exactly what a visitor wants to discuss before meeting with them and that was true in this case. That is okay for my practice as I like to be present with visitors as they share and not necessarily be solution oriented. Oftentimes, an issue brought up initially may not be the core concern of a visitor. So, I allow my visitors time to feel safe and share what is important to them with me. Aside from active listening, time is my best asset. It is my duty to provide not only a welcoming space, but the freedom to talk. Many administrators and decision-

makers do not always have that kind of time available for every employee, but I do. On average, I spend about 100 minutes with each visitor.

After I briefly explained to the visitor how a visit with the ombuds works and assured her of our confidentiality, I gave her the floor. She shared that her supervisor of two years came to her office and confessed his affection and admiration for her. Although he was married, he wanted her to know that he valued the time they could spend alone together and that he didn't like to "share her" with others in the department. He attempted to touch her shoulder, but she excused herself to get water (and to escape). My heart dropped. No one should be made to feel uncomfortable in their body anywhere, especially at her place of employment.

I asked the visitor what she thought should be happening to get a better sense of what she knew about the organization's formal reporting processes. She only knew that she had one option: report. I asked her what she wanted ideally, and she wanted assurances that she would keep her job and not be subject to retaliation. Identifying options is an exercise in walking a visitor through outcomes via actions and letting the visitor find the path that agrees with them. By goal setting and finding out interests, I can help a visitor identify those choices that maybe were not fully considered or realized before.

As I began to explore the option of reporting sexual harassment and explain the formal process to her, I saw her body language tighten. She looked away and began to fidget with her jacket. When I asked her about it, she shared that someone else in her department had mentioned something about sexual harassment and was immediately moved to a different department that was located 20 miles away. She did not want any different treatment for herself or any shuffling that would jeopardize her childcare arrangements.

I apprised her of another option – do nothing. Visitors tend to feel that something needs to happen and often ignore the do nothing/wait/hold option. I wanted her to understand that doing nothing was also a viable option, while also understanding the consequences of doing nothing. We talked about other options that would shine a small light, such as sending an anonymous letter or reaching out to another supervisor who is a mandated reporter.

I wanted to help her report, if only to illuminate the issue for administrators. I wished I could be a mandated reporter, but I also knew that being a mandated reporter could jeopardize my role as an ombuds. I wanted someone to report for the people who don't come forward at all. Someone needed to illuminate this bad behavior and root it out before it spreads. I was so devastated for her because she truly had no faith that the formal process would protect her. I could sense her shame because she shared other instances of sexual harassment that she witnessed, and she had written those occurrences off because they did not happen to her. She felt exempt until the unwanted attention was directed at her.

I was genuinely disturbed that the visitor was so afraid to use the formal process. She truly wanted anonymity, which is something the formal process can't offer. From a fairness perspective, it is unfair to accuse someone of sexual harassment and not allow the accused an opportunity to confront their accusers. However, when formal processes do not offer the protection and safety that should be built in, it creates a chilling effect on reporting. If fear limits the viable options that I can share with someone, it limits my ability to be an effective resource.

From feedback that I have received, it seems that many employees have lost faith in the institution's formal systems. There is a very real lack of trust and perceptions of retaliation abound. Essentially, people do not feel safe being self-advocates and reporting wrongdoing. As many times as I emphasize the law and its protections, many people don't want to risk needing legal counsel to defend their position, especially in a very close, tight knit community.

From a daily interaction view, I believe that this was a normal ombuds visit where the ombuds learns about an issue early and apprises someone of options that exist for them. One on one visits have been my primary method of gathering information. I believe it is valuable for a visitor to

have an impartial person to talk to who can help that visitor examine the many facets of their situation. But for this visitor, the confidentiality I could offer proved to be even more important because she admitted that she would have continued to suffer silently had she not been able to access a confidential listener. As much as I wanted to follow up to know what happened, one of the downsides of being an ombuds is that I may not always get to find out what someone ultimately decides to do or what options they take. I will often find out when an undiscussed path is taken, and the visitor needs help identifying more options.

But this time, the story does have an end. A year passed and the visitor reached out again. She shared that in a moment of desperation, she called Human Resources hoping to have a confidential conversation. After listening to her, the Human Resources representative informed the visitor that her statements would initiate a Title IX investigation into her allegations and all parties would be notified of the pending action. Once the investigator contacted her, she declared that she would not participate in the investigation and tried to withdraw from the Title IX process. However, the investigation continued, and the accused was found not in violation of Title IX provisions due to the visitor's lack of cooperation. She was reassigned to a different supervisor, but still has daily contact with the accused. She felt that the investigation happened to her without her consent and revictimized her all over again. I continued to be a listening ear for this visitor and confirmed that the Ombuds Office is the only place in our institution that can guarantee a confidential conversation for employees, with limits.

From a trend development perspective, I began to question if others were reluctant to come forward due to fear, and I became more vigilant about seeking opportunities to inform the institution's policy and personnel changes regarding Title IX issues and reporting. Since meeting with this visitor, I knew that I had a duty to address the lack of trust and protection from retaliation for those who do use formal reporting processes. I resolved to become more vocal and use my ombuds practice to do more. When the institution began incorporating new policies and guidance from the Department of Education, I demanded a seat at the table as an advisor to provide insight and mediation expertise. As a result, I was able to compare policies from other institutions and provide insight about the psychological safety of formal processes while simultaneously advocating for varied levels of informal resolution techniques that will hopefully address the needs of those who choose to report victimization.

As ombuds, we have a duty to confidentiality, independence, informality, and impartiality. I believe we also have a duty to integrity. The Merriam-Webster and Cambridge dictionaries define integrity as the quality of being honest and having a firm adherence to strong moral principles. For me, integrity means acting in moral fortitude and having the strength to speak up, to be an active participant in change instead of settling for the fringe. Ombuds are strategically positioned within our organizations to see things before they happen. This means that ombuds are often aware of issues well before the masses. Ombuds know about chronic problems that have plagued our organizations and ombuds often know about the solutions that have failed or are in need of a reworking. Ombuds see the successes of our organizations as well as areas of growth. And ombuds fail when we try to protect our organizations by only pursuing individual victories instead of widespread systematic change.

There are times when there is not much we can do as ombuds. Our role is often one of empowering our visitors to self-determination. But just like our visitors, we should focus on what we can do and the options that are available to us. Ombuds need to remain current by collaborating with other ombuds and conflict resolution peers. Ombuds need to use meetings and strategic conversations to regularly plant those seeds of innovation and change. Ombuds need to use annual reports and mid-year reports to highlight places that are overlooked and recommend fixes for those shortcomings. Ombuds need to use feedback surveys as data points and concrete measures to support our recommendations.

Most importantly, ombuds need to get comfortable with being uncomfortable – especially when it means challenging and pushing back against the status quo when it does not serve visitors. In the future, I resolve to be an active participant in change and not a passive observer. My integrity

means being a light, illuminating the path and casting away shadows. Walking in integrity means being an advocate. I choose to rethink my role as an ombuds and actively seek the place where my impartiality is not threatened by my advocacy.

7. HUMILITY HELPS IN MAINTAINING NEUTRALITY

It was toward the end of a long summer just before Labor Day. However, the whole research establishment was buzzing. Our laboratories were expanding; it looked as if several new drugs might be launching within the next three years. There were scientists coming in from all over (to check out new ways of looking at several famously hopeless problems). The atmosphere was alive, every day of every year. As an ombuds in this environment I loved the zany nature of the place and especially enjoyed the fact that I was dealing with at least four generations of employees, and people from all over the world. The summer had also been lively with trainees from everywhere.

One of these trainees came to see me to talk about her roommate. She said that her roommate had been excited about her work—but was suddenly depressed and perhaps ill. The roommate had stopped talking, for maybe ten days, did not respond to questions, and absolutely would not go to the nursing station. The trainee was very concerned; she decided to come to the Ombuds Office because she did not want to betray her roommate, and she knew we were confidential. Would I be willing to see her roommate?

I did see her; I will tell you the story using pseudonyms.

When the roommate came in, she did indeed seem drawn and upset. At first she did not seem to wish to talk; she just said “I am Anna.”

I decided to talk as little as possible but started out with one of my almost-universally-successful questions at that research establishment.

“I understand you are from far away; what made you think about coming here for the summer?”

After a few minutes of silence, this question seemed to catch Anna’s attention. Anna spoke of her long-standing interest in the work of one of the labs and her enormous respect for the lab director, Dr. S. During half an hour she discussed having read some dozens of Dr. S’s articles.

She seemed at one moment to allude to the fact that something had happened a few weeks ago – but I could not quite understand the sentence and did not want to pry. She then wanted to leave but agreed to come back the next day.

The next day Anna did return. Over the course of that day and the next I heard that she had stopped by Dr. S’s office on a Monday in mid-summer, to ask questions about two articles. She had prepared the questions in writing; she showed me the piece of paper. It had been very hot that day. Anna said that she had however gone to the office dressed quite conservatively. She had knocked at the door, knocking, she said, several times. She concluded that he might have been deeply engaged with someone else but then he came to the door. She then described – in the same quiet and careful detail – how he had invited her in and subsequently raped her. I listened with care for an hour, taking no notes, asking no questions, my heart sinking. This concern ranked among the most appalling assault complaints I had heard.

Finally I offered a number of options from which she might choose. In brief, she could choose an option now or think about it. The options included a number of informal and formal resources. Did she want to consult with family or local clergy or talk again with the doctor she had seen? She could pursue an option alone or with any of several, possible accompanying persons. She decided to write a formal complaint; could she work with me on it?

Over the course of the next appointment Anna read her complaint with the same, sad, careful attention to detail that I had noted earlier. She included the date in mid-July, and time of day and many other facts, such as Dr. S's demeanor and clothing, and her memories of their discussion. She recalled sadly looking at a famous photo on his wall during the assault. (The photo showed Dr. S accepting a famous award.)

I think I hardly spoke at all, thinking of myself as simply there for support. Anna seemed to have thought things through. When she finished, she gave me the complaint; it was addressed to the head of corporate security in accordance with one of the formal options we had discussed. Anna seemed very tired. Would I take it to the head of the security office?

I felt deeply sad (and I was deeply angry). I said that I would take the complaint immediately. I respected our security office and was relieved that Anna had chosen a formal complaint. I walked over to security wondering in pain how many other trainees had been assaulted.

In the event, the head of the security office was in. The head of security read Anna's letter with the respect and care I expected. I listened carefully to the ensuing plan. The head of security would need to go immediately to Dr. S. (For one thing we had no way of knowing whether Dr. S might pose a continuing danger to trainees or others.) I would get a call.

Late that evening I was glad to get a call at home; I had hardly been able to breathe.

It turned out that Dr. S had recently returned to the US from many weeks away; he had left in June on a long trip to several different countries. Dr. S had produced his passport and his schedule for each day on a long trip, with photos in a faraway place for the date in July. His office had been locked for almost all of his trip, for repairs to the ceiling and repainting. Dr. S had the repair records. In addition, the head of security had been able to establish that Anna had worked in another building entirely, all summer, and almost always on a team. The team's work and her hours had been recorded and dated. I saw the copy that had been made of her lab notebook, in her handwriting, in the ordinary custom of our labs. She had never missed a day or been late; she worked with her team on the fated Monday.

Only a very few people ever heard about this case. The details were considered definitive and no one else would need to know. I was told that Anna "had immediately been assisted by counsellors, and had left." Dr. S "wanted the matter forgotten." The record in security was placed in a special file.

I never heard again from her or her roommate, nor did I hear from Dr. S. But I have never forgotten the event. I have grieved ever since, about the distress and pain that Anna went through, the shock and grief that Dr. S. must have experienced, and perhaps the distress of others in their families. I was thankful that the bystander-trainee had felt she would be welcome, and Anna's privacy safe, in the ombuds office. If not, what might have happened? I thought Anna might have gotten more acutely ill and perhaps hurt herself. Anna might have left a suicide note or taken other routes to make public her story about Dr. S. I knew I was lucky that I had had the time, when Anna came in, just to sit and really *listen*; suppose Anna had not felt safe to tell me what she was thinking? I have reminded myself many times since, that listening attentively but *silently* may be essential.

I also learned very painfully, that week, a bit more about how "fair processes" may require (fair) investigations. I learned more about my need for humility about my own intuitive judgment; this case taught me that in many cases I simply will not have "all the facts." I learned that I can almost always offer *empathy,* but I need to be able to withhold judgment, sometimes for long periods, about the facts. I learned more about how important it is for all our constituents that ombuds are designated as neutrals (albeit often working with other professionals to find advocacy and justice for our visitors). And, I learned one more time, about how hard it is to be a neutral.

8. HONORING SELF-DETERMINATION DESPITE MORAL OUTRAGE

This narrative unpacks a challenging sexual harassment-related case that I experienced as an organizational ombuds. While the case details are striking and complex, I emphasize practice reflections and considerations. Details have been altered to further protect the anonymity of those involved.

CASE DETAILS PART I

A new visitor arrived at my office visibly anxious and timid. After some brief opening remarks, I asked her to help me understand what led her to contact the Ombuds Office. She immediately said "first, I need you to understand the history of my situation so that the issue I am here to talk about will make sense, but the history is *not* something I'm interested in addressing. I want to be very clear about that." Her pointed statement piqued my curiosity. It also signaled that this case could challenge my commitment to honoring my visitor's self-determination; that is, supporting her capacity to make her own choices regarding how she would like to proceed.

The visitor proceeded to tell me that she had been working in the organization for almost four years. Three years ago, while she was an intern, a senior member of the department forced himself onto her and raped her after a night out with colleagues. Before then, she considered the senior colleague to be a trusted friend and professional mentor. So much so that, in the midst of struggling with her sexuality at the time, she had confided in him that she was gay – something she had not yet disclosed to other very important people in her life. On top of the trauma she experienced as a result of the rape and the self-doubt and questioning that crept in afterwards, she felt betrayed and blackmailed. Personally, she feared he would retaliate by disclosing her sexuality if she confronted him or reported the incident and that was something she was not prepared to face. Professionally, as an intern looking to launch her career, she was terrified about the potential impact reporting the incident could have on her reputation and professional future in a relatively small field. He was someone with a significant amount of influence. Sadly, she also worried that in the absence of any witnesses or evidence, no one would believe her and the formal system intended to handle these issues would not help or protect her. So, she ultimately decided not to report the incident; however, after sharing some of her experience with a trusted peer, she learned that the same man had also sexually harassed another colleague who was suffering from severe depression. It too was not reported. She was disgusted by his willingness to target and pray on people who were psychologically vulnerable, had less power in the organization and were dependent on him in some way.

Despite not reporting the incident at the time it happened, she explained that she was able to physically stay away from him and successfully complete her internship. She also sought counseling in the last year of her program and eventually felt like she was emotionally able to move on.

Her purpose in reaching out to the Ombuds Office was not to discuss what had happened in the past. She had a new concern. She recently learned that the alleged perpetrator – who was still working in the organization and was since promoted to lead a department of his own – had just applied to be a mentor for an internship program that she was involved in. Now, she was on the committee that oversaw the program and reviewed applications for incoming interns and interested mentors. When she saw his application to be a mentor she panicked. She was concerned about her own well-being and the future well-being of any intern over which he would have power. She hoped that the Ombuds Office could help her explore ways to stop him from being a mentor without having to disclose the details of what happened to her in the past. She was adamant about not wanting to 1) disclose information from the past to anyone other than a confidential resource, 2) relive the trauma by going through a formal process and 3) reveal the name of the alleged perpetrator (including to me).

REFLECTIONS PART I

I begin my reflections by acknowledging the emotional toll I experienced listening to her story. I felt stunned and sad before eventually shifting to intense feelings of exasperation, disgust and even outrage. It was difficult to prevent critical questions from swirling around in my head. How can this be going on in our organization? How can someone like that continue to work here? What will happen if this goes undetected? My emotional journey tested my ability to demonstrate a deep sense of empathy, understanding and respect while also maintaining and managing the moral outrage that I felt. I imagine other ombuds have struggled to strike this necessary balance in their own cases. Here are some strategies I used to manage the emotional toll, maintain a comfortable sense of impartiality and keep the focus off of me and on the visitor.

- I stayed present and sat in the uncomfortable and difficult emotional space with the visitor. I did not rush, eliminate or move on from it.
- I decided that expressing my emotional reaction was not as much a threat to my impartiality as it was a signal of my caring and humanity, which is often needed to build connection and trust.
- I created space, listened and reflected back what I heard. I made sure to acknowledge her emotional experience, the reasoning for her decisions at the time and the critical issues, concerns and questions that she faced in the present situation.
- I acknowledged that I could never truly understand the impact of her experiences. I did not pretend to know what it was like to go through what she described.

When we (ombuds) hear from a visitor, we often hold open the possibility that there is another story or perspective to consider. Sometimes we may even voice that directly. There are good reasons for why we do that. For starters, it can strengthen our independence and impartiality. For instance, an ombuds may thoughtfully challenge a claim that a visitor makes about a coworker being disrespectful and intentionally trying to sabotage their work. In many cases, this practice does not present an issue or dilemma. In a sexual harassment case, however, introducing another perspective or challenging assertions a visitor makes is difficult and potentially dangerous. Although, simply holding open – in my mind only – the possibility that a visitor is not telling the “only” story or the full story can help me manage the moral outrage and allow me to maintain impartiality without sacrificing empathy, understanding and respect. It was important for me to remember that if the alleged perpetrator in this case contacted the ombuds because he felt falsely accused of something that was potentially damaging to his career or preventing him from accessing professional development opportunities, I would have provided him with the same access to impartial ombuds services.

As an ombuds I constantly remind myself that I am not positioned to know what is right or best for someone. I strive to set my human judgments aside, honor self-determination, and let people make their own decisions. This approach became incredibly important in this case. An important ombuds-practice value like self-determination can easily be ignored if an ombuds feels moral outrage or succumbs to the temptation to want to “help.” The assumptions we might make about what it means to help someone or fix their problem can get us in trouble. Our idea of help may not be what is most useful to the visitor. In fact, it can cause greater harm or cause ombuds to push the boundaries of their role. I think this dynamic can play out in two different ways. We might feel tempted to rescue the visitor or “fix” it for them. This could lead us to offer advice or overly assure, sympathize and try to console. We might also feel tempted to think critically of the visitor, especially if we think they “didn’t do the right thing” (such as reporting the case). This could lead us to engage in ways that come across as judgement, blame, lecturing or interrogating. None of which is helpful to the visitor.

In order to approach the rest of my discussion with the visitor from a place of genuine curiosity and respect for self-determination, I recalled a phrase that is used in the sexual and gender violence field: “safety is survivor defined.” That phrase grounded me and reminded me that I was in no position to determine what was best for my visitor in this situation. It is my job, instead, to

create a comfortable space for her to share her experience, work on understanding what is most important or concerning to her and explore, with her, ways she might be able to address those concerns and accomplish her goals.

As previously stated, one reason the visitor decided not to report the rape when it happened was her lack of trust in the organization's system for handing sexual assault cases. She did not feel confident that people would believe, protect or help her. Those comments stood out to me. I knew that regardless of how the visitor chose to moved forward, it would be important for me to understand, more specifically, what created the visitor's distrust. That information could be used to give feedback to the departments that design and implement that system. A better understanding of the distrust can help the organization make changes to addressing those concerns. In my opinion, the confidential and informal nature of the ombuds role places us in a great position to collect and use that information from our visitors. This case was no different. Therefore, after explaining that I was not surprised by her lack of trust in the system and explaining that my question was not coming from an underlying place of judgment, but instead genuine curiosity, I asked her to elaborate on what caused her to feel such distrust. I told her that I was asking because the Ombuds Office is in a unique position to be able to understand those concerns and give the organization feedback without having to violate commitments to confidentiality. She explained that she did not trust the system because she was aware of unfavorable experiences others had with the system. Those unfavorable experiences boiled down to 1) feeling misunderstood, unsupported, judged and labeled throughout the process, 2) mixed messages about what to expect in the process, 3) delayed processing of the case, 4) the potential for retaliation through ineffective, insensitive and flawed strategies of notifying the alleged perpetrator, 5) inadequate investigation strategies leading to "dismissed" cases or questionable information gathering and 6) limited protections for survivors during and after the process, regardless of the outcome.

CASE DETAILS PART II

As we proceeded, I decided to revisit the visitor's main question. How can information be shared in a way that prevents the alleged perpetrator from being a mentor without requiring the visitor to disclose her story and risk further emotional distress or trigger an unwanted formal report? Additionally, the visitor did not want any information that she would share to get back to the alleged perpetrator. With that question in mind, we started to explore options. We first explored whether there was anyone with influence over the intern program that she would feel comfortable speaking with. The visitor mentioned that she had a close and trusting relationship with the director of the intern program. Before coming into my office, she had thought about having a conversation with that director and remained interested in that option. In a way, she was looking for validation (from me) that it was a reasonable approach. While I was not prepared to simply validate that option, I did help her think about how that option could help achieve her goals. We also discussed the potential risks associated with the option. In the end, she expressed a desire to proceed with that option. We shifted the conversations to start talking about specific strategies for the conversation with the director. We talked about strategies that 1) conveyed a level of seriousness about the concerns, 2) stayed within what she felt comfortable disclosing and 3) did not run the risk of triggering a mandatory reporting action by the director. We also identified specific language and questions that she felt confident communicating. She left my office with the intention of approaching the director as soon as possible.

A few days later the visitor reached out to share that she had conversed with the director. She said it was well received. She felt confident that the alleged perpetrator would most likely not be accepted as a mentor in the program and she did not have to disclose the details of her situation. I never heard anything else.

REFLECTIONS PART II

I remember walking away from the initial meeting feeling torn. While I felt pleased with my commitment to self-determination and the standards of practice, I also felt like I had my hands

tied by my role and was, in some ways, feeling uncomfortable with not being able to do more. Could I walk away from this case knowing that someone in the organization was potentially committing such heinous acts and 'getting away with it?' As previously mentioned, the visitor did not feel comfortable sharing the name of the alleged perpetrator (which is fine). My commitment to honoring self-determination, confidentiality and maintaining impartiality was enough to prevent me from taking any sort of action without the permission of the visitor; but even if I wanted to disregard the standards of practice – or interpret them differently – I would have been limited in what I could have done without knowing who the alleged perpetrator was.

I also felt a sense of appreciation. The case offered a healthy reminder of the unique kind of experience the Ombuds Office can create for people in these situations and how empowering that can be. It is a space where visitors can feel heard and not judged or pressured. A space where they can feel reassured by knowing they maintain control over what happens with the information they share and decisions that are made.

I believe the standards of practice help ombuds stay in their "ombuds lane" during these critical cases. Deviation from our role can do further harm. In cases like the one I described, I feel strongly that any further action that would require an ombuds to step outside the boundaries of their role is best left up to professionals who are trained to provide advocacy, advice, or counseling for survivors. They are likely to be more effective than an ombuds who decides to disregard impartiality to pursue advocacy. Similarly, an employee who is legally responsible to report sexual assault allegations is better prepared to do that than an ombuds who succumbs to snap-judgements and decides to violate confidentiality when there is not an imminent risk of harm. Some readers might wonder why I did not do more with the little information I had. Some readers may interpret the issues as raising imminent risk of harm. While I stand by my practice decisions, I respect those different opinions and welcome further dialogue around those opinions within our field.

In the end, I was able to at least find various ways to use the information I received about distrusting the formal system to provide anonymized feedback to key stakeholders. Fortunately, the organization was already going through a process of assessing and redesigning their policies, processes and mechanisms for preventing and addressing sexual harassment complaints. The feedback I provided was well received and taken into consideration as those changes were made.

This case challenged me in many ways. I feel fortunate to have the opportunity to reflect on some of those challenges through this narrative. I hope my reflections help promote dialogue and debate in the ombuds field about how we handle these kinds of cases and how ombuds fit into the larger context of trying to prevent and address sexual harassment in organizations.

9. CULTURAL DYNAMICS IN A SEXUAL HARASSMENT CASE

This is a description of a real case of an ombuds visitor at a university in the USA. The case events took place prior to the "Me Too" era, but Title IX of the Educational Amendments of 1972 and the Civil Rights Act of 1964 were in place. Sexual Harassment is recognized as a form of sex discrimination under both Title IX and the Civil Rights Act.

The setting for this case was a university where the Ombuds Office reports to the Office of the Provost. The Ombuds Office was set up in 1996, prior to the establishment of the International Ombudsman Association's Standards of Practice. The ombuds was asked to handle collateral duties for the institution, and served students, faculty, and staff.

One fall day, Chrissie Molloy (a fictitious name) came with an appointment to the Ombuds Office. Chrissie was a graduate student, a white woman, about 27 years old, and somewhat petite in

stature. At our first meeting, she said she had come to know of the Ombuds Office when she attended an outreach presentation about the office.

Chrissie said she was extremely nervous as she began to describe her situation. She clenched her fist and frequently placed her hand against her mouth. She said she was a doctoral candidate; she had completed her course work and preliminary examinations. She had a scholarship which allowed her to teach a course and advise undergraduate students in a seminar. Chrissie had an issue with her professor, "Dr. P," who was of Asian origin and the chair of her doctoral committee. Earlier that fall, Chrissie had accepted an offer from Dr. P to rent a room in his house. She said Dr. P was over 60 years old, single, traveled often, and occasionally fell ill. Dr. P had proposed that she could live rent-free in a part of his house, and in lieu of rent, she was to watch his house when he travelled and run some small errands for him from time to time. The errands were sporadic, like grocery shopping and picking up mail at the post office. Chrissie offered that she liked to cook, and he said he would enjoy her cooking. He too offered to cook for them. This seemed like a good deal to her as his house was close to the campus and she could walk or bike over.

The arrangement was good for about two months. However, things changed. Dr. P sometimes dropped in to visit with her in her sitting area "for a chat," or stopped by to show her journal articles on topics of mutual interest. He asked for help in getting his tie knotted or finding that tweed jacket he wore last fall. There were some moments of closeness and Chrissie thought of these personal requests as something she would do for her father or uncle. Dr. P was a diabetic and there were times when he consumed too much alcohol. Upon drinking, he would be belligerent and ask her to do things that were uncomfortable: start his laundry, make his bed, or serve him dinner in bed. When she protested or sulked, he threatened her by saying that she would never finish her Ph.D., because she had "a bad attitude" or that she would face academic consequences. Chrissie was worried and stressed.

Chrissie said Dr. P touched her or tried to stroke her, especially when he was in a good mood. On occasion he held her hand or brushed her hand against his cheek, or caressed her hair. She did not think of his behavior as "sexual" or "romantic." Chrissie said she tried to see his behavior from his cultural point of view. She told me that in his native Asian culture, his behavior would be read as affection. She said men of his age and profession tended to dominate women and younger persons; they expected women, even older women, to do their bidding, anticipate their needs, even carry their luggage, and wait on them. Older men expected deference from everyone, especially younger women.

After some six months, Chrissie was more uncomfortable with the situation and told Dr. P that she had signed up for graduate student housing and she would soon move out. Dr. P was livid. He threatened that her scholarship funds would be taken away and she would not be given references. He would talk to his departmental colleagues to ensure they would not support her. She would be denied access to archives and collections in his native country that were essential to her dissertation research. Chrissie was shocked, scared, and immobilized. She did not know what to do; she felt that her situation was untenable. She was alone and thought few would understand her situation. Who could she turn to?

Chrissie's visit to the Ombuds Office gave her a chance to talk about the strange and difficult situation. She wanted to leave her rental arrangement with Dr. P, but she was afraid to do so. Her main concern centered on the consequences to her, if she moved out. What retaliation would she face and how could she finish her doctoral study?

Many questions surfaced during our conversations which ranged from social justice to interpersonal relations. Was Chrissie disadvantaged in this situation? Did the situation fall into the category of harassment? Was there an on-going risk or a risk of imminent harm? What were her boundaries and how would she know when she had lost sight of them? Was she taking responsibility for Dr. P's behavior? What was his responsibility as a professor? Did the

department chair, senior faculty, or other members of her committee know of this arrangement? Had she sought any advice? Had she spoken to her friends and colleagues?

I offered her the option to discuss her situation and dilemma with the Office of Prevention of Sexual Harassment, where she would have an option to begin a formal process, but she recoiled at the suggestion. She vehemently objected to the option, saying that a call from that office might engender an investigation and spin the problem out of control. She needed a plan whereby she could slip out of Dr. P's clutches without aggravating him, so that he would not retaliate against her.

In our discussions, Chrissie reflected on her feelings and discussed her perspective as well as that of Professor Dr. P. At times Chrissie would say Dr. P was sweet and kind to her and she was the one who was letting him down. She took responsibility for the initial decision she made in renting space from him. She said that perhaps, unconsciously, she sought secondary gains like access to resources and collections, and greater support from Dr. P. Yet, even as she took responsibility for her own actions, she was protective of Dr. P. She could not bring herself to point to his failure to live up to his side of the bargain and his use of threats to prevent her from moving out.

As our discussions went on, it became increasingly evident that Chrissie's sense of boundaries in this situation had blurred and she was immobilized. Ultimately, she would have to decide what she wanted to do and how she would go about it. We discussed the pros and cons of each course of action available to her. She said she could not enlist support from her doctoral faculty and colleagues, as they would be unwilling to rock the departmental boat.

Gradually, with empathy and support, Chrissie began to understand the interpersonal and systemic dynamics of power in harassment. She was able to understand the dynamics of power at an individual, interpersonal, cultural, and institutional level that led to the continuance of the problem behaviors. She understood her role and rights as a student in the USA, and her own behavior that was submissive to Dr. P's expectations of submissiveness. In addition, Dr. P's dependence on alcohol contributed at an interpersonal level. His gender dominance and her own adherence to his cultural expectations fostered and reinforced his negative behavior. Coaching and discussions on these hidden factors helped her to reconsider her initial assumptions about culturally driven behaviors. I pointed out that although her professor was foreign born, he had lived in the United States for over 45 years and was a sophisticated citizen of the world. Surely, he had learnt about boundaries for students and faculty in all these years in the academy. Chrissie was listening.

We had come from Fall to Spring. I urged Chrissie to use the upcoming spring break to get some distance from her situation and to prepare Dr. P for the eventuality of her moving out. In the meantime, Dr. P had suffered two episodes of "black outs," as his drinking and diabetes converged. Chrissie felt she could not abandon her professor and risk his death. She worried that she had used him. At this point I suggested she may benefit from some distance. Chrissie agreed and went to visit her aunt for a few days.

During the break, I worried if I too had lost my boundaries as an ombuds. I wondered if I had become her counselor or friend? I was beginning to feel frustrated that she was not taking any action, but I did not want to close her case or leave her stranded with an unresolved situation. I addressed this dilemma by setting some limits; I suggested three more meetings after spring break, after which we could "hold" her case until she figured out what she wanted.

When Chrissie returned after Spring break, we began the task of reframing the problem. I proposed that she was experiencing gender harassment and sexual harassment with a hostile environment. Initially, she could not see the "hostile environment," as it was she who sought to live in Professor P's home, as his tenant. Nor could she see professor Dr. P, who was head of her doctoral committee, as being neglectful. We progressed to framing the problem as fear of retaliation. Retaliation is widely known to be illegal today, but fear of retaliation is still one of the

reasons victims do not report harassment. Through our discussions, Chrissie became more familiar with the law and concepts such as gender-based harassment, sexual assault, and hostile environment. Central to all of these are issues of power and domination.

After the last discussion, I saw a shift. Chrissie agreed to a consultation with the head of the Office for Prevention of Sexual Harassment to better understand institutional policy and options for dealing with harassment. At a personal level, Chrissie had begun to define her boundaries, and assess where she had lost a definition of boundaries. Chrissie was about to begin her new journey and take some risks.

Chrissie and I developed a new action plan: she would speak to the chair of her department and voice her concern, including her fear of retaliation. She would request the department chair to appoint a new chair for her doctoral committee. The plan was to communicate the request to Dr. P as a transition that was warranted by Dr. P's health and the awkwardness of her situation. Next, she would visit the other two members of the doctoral committee and request their support. After this communication if there was a need for a neutral third party, I would step in, and if necessary, we would invite a consultation with the coordinator of the Office for the Prevention of Sexual Harassment.

Chrissie visited her department chair and he promised his support. However, when he spoke to the professor, he found that Dr. P had his heels dug in, did not see the need for Chrissie to move out of his house. He became anxious and belligerent. He threatened to remove her from his scholar's circle. At this point, the department chair called the Ombuds Office and invited a consultation. With Chrissie's permission and participation, we devised a modified plan that Chrissie was comfortable with.

The department chair convened a meeting with Dr. P, the ombuds, and the coordinator for the Office for the Prevention of Sexual Harassment. Chrissie was invited to the meeting but declined to be there. She gave us permission to speak to these issues with Dr. P. As an ombuds who had some experience with cross cultural issues in Asian communities, I thought Chrissie's decision to be absent at the meeting was based on her cultural understanding of Dr. P, and his approach to conflict resolution: her absence at the meeting would help Dr. P to "save face" in front of his student.

At the meeting with Dr. P, we discussed the range of behaviors that create an uncomfortable and unpredictable environment for students, the issues of harassment and the fear of retaliation. Dr. P was provided with a detailed appraisal of the university's policy on sexual harassment and received a complete educational discussion on the underlying issues of power. Dr. P was not accused of misconduct because it was apparent that he understood the concerns placed before him. The chair also understood that there was a delicate balance here. Helping Dr. P to maintain his dignity and save face was important to a constructive and informal resolution. Accusations of misconduct would escalate the conflict, adversely affect his sense of honor, and perhaps create a sense of shame. Toward the end of the meeting, Dr. P agreed that Chrissie would move out and he would not act against her, as that would appear to be retaliatory.

Chrissie was invited to a second meeting with Dr. P by the department chair. The head of the Office for Prevention of Sexual Harassment and I, as Ombuds, were also at the meeting. The purpose of this meeting was to communicate final understanding. Dr. P assured Chrissie that he would facilitate her moving out and would not retaliate in any way. The department chair appointed a new doctoral committee chair within her discipline, while Dr. P continued to be on the committee as a subject expert. The transition was managed by the department chair. Chrissie found new accommodations, moved out of Dr. P's house, and completed her doctoral thesis.

As an ombuds, one of the challenges I faced in this case was peeling back the individual, interpersonal, institutional, and cultural layers of the situation in which gender-based dominance and harassment were the central problems. While Dr. P might have expected deference and servile behavior from a male student, he would not have expected this level of subordination. It

was not clear if some of Dr. P's behaviors were of a sexual nature, as interpersonal behaviors such as touching are considered as sexual in some contexts and cultures. However, institutional rules and sexual harassment laws do not provide for cultural variations and explanations. Fortunately, Chrissie moved out and completed her thesis, and her professor's reputation was not jeopardized. This was a win: win outcome.

10. THE ACTIVE BYSTANDER

Years back a visitor approached my Ombuds Office because she was uncomfortable with the behavior of a male staff member towards another female employee in the department. According to the visitor, the male staff member, a married man, would say and do things that would make her colleague uncomfortable, like asking her to lunch, commenting on her looks, or when he thought no one was watching, "checking out" her colleague. The visitor shared that her colleague would just freeze when confronted with this behavior, and awkwardly smile. Though the conduct was not happening directly to the visitor, she was uncomfortable just seeing and hearing his behavior. As a bystander, my visitor felt that the behavior needed to be "nipped in the bud" before it escalated.

We talked about options and how there were actually two questions she was working through. One issue was how the situation impacted her; the second was what her colleague could do about the situation. Each question led to courses of action possibly separate and different from the other.

We discussed possible solutions. She disclosed that she had already talked to their supervisor, who somewhat brushed things off. I asked what she thought about raising the issue to the next supervisory level or Human Resources. The visitor didn't want to escalate things; she just wanted her colleague to get help. I explored with her the option that she could talk with her female colleague and encourage her to reach out to the Ombuds Office. The visitor wasn't comfortable doing this because she wanted to stay out of a messy situation. She wanted someone else to address the problem.

I then offered the visitor another option. I stated that I could reach out to her female colleague, let her know that an anonymous fellow employee had noticed the male employee's behavior towards her, and that the Ombuds Office could be a resource for her. The visitor felt comfortable with this option. She felt that enough people had overheard and seen the behavior so that her female colleague wouldn't necessarily suspect it was she who had raised the issue with me. It's not often that I use this somewhat indirect approach, but I have found it helpful on a few occasions where a visitor simply needs a message to be delivered.

I called the female employee. Although surprised by the call, she listened to what I had to share, acknowledged that the male colleague had said uncomfortable things to her, and stated that she would think about what if any action to take. She didn't seem to want to talk further, so I indicated that the space to talk would always be there if she chose to. When I checked with the active bystander about a month later, she indicated that whatever I had done worked because the male colleague was no longer making comments towards her colleague. I assumed that perhaps the male colleague got the message, and that maybe he had been confronted by someone (his supervisor, someone else, or even the female colleague he had been harassing). In my mind, case closed.

But, as sometimes happens, situations come back. A few months later a female visitor scheduled an appointment. I did not realize until midway through her narrative that this was the same female employee that the bystander in her department had contacted me about months back.

She was now reaching out because she was concerned that her male colleague's spouse was spreading rumors about her to her supervisor, accusing her of being a home-wrecker who should

not be employed by the institution. Apparently, the spouse had emailed a number of people at the institution alleging that the visitor was having an affair with her husband, the male colleague that the bystander visitor had complained about. She acknowledged to me that she and her male colleague had been drinking at a conference recently, but nothing improper was happening. She just wanted this "crazy spouse" to stop spreading rumors about her. We talked about her options, and the ways the Ombuds Office could help. Though she said she would keep me updated, she didn't respond to my follow up calls. This is not terribly unusual. Some visitors follow-up; others don't.

As ombuds, we sometimes are only trusted with bits and pieces of information. But because we hear from many individuals, we are sometimes able to piece together a bigger narrative. Sometimes we are the first to learn things, sometimes we are the last. In this case, I eventually learned that the female employee and her now husband (the male employee whom the bystander visitor had complained about) had begun an affair shortly after she joined the organization. I learned indirectly later that the supervisor knew about the romance and had tried to be discreet in not letting others know. The manager had concluded that so long as the affair did not become disruptive and no policy was being violated, management would stay out of it. The assumption there, of course, was that because the relationship was consensual, others in the department would not be troubled or impacted by the affair. However, at least one person in the department was impacted; the bystander became concerned about sexual harassment and had visited the Ombuds Office. Eventually the situation became more public with the spurned spouse and, presumably, even more disruptive to the department. I never learned how that situation turned out but hope all people involved in the situation eventually found some resolution.

For me, I had already found closure. Long ago, after many situations where I was frustrated in not knowing the outcome of matters, I decided I needed a new standard of success. Success wasn't to be defined by whether all parties to a matter reached resolution, or whether they notified me of the outcome. Instead, success would be found in knowing I had performed my duties in a way consistent with my code: that every individual I interact with has my undivided attention and, without judgment, I offer them ideas, options, techniques, and tools that might shift their situation. What they do with that offering is up to them. As an old Zen koan once taught me, "If you offer someone a gift and the recipient declines the gift, who does the gift belong to?" And so, for me, closure always comes in accepting and acknowledging that my relationship to maintaining a consistent practice is what defines resolution. It is the gift we, as ombuds, offer others and one that ultimately, though we share, always belongs to us.

It is also a gift that active bystanders give to the organization. One of the powerful lessons for me in this case was the importance of that first visitor, whom I've called the active bystander, who did something that unfortunately tends to be the exception: she took in what was happening around her, was mindful of how events were impacting others, and did something about it. It is so much easier for members of an organization to note there are problems and simply look the other way. Those individuals may think it's not their problem and may say to themselves, "we all have problems, so why take on more?" They don't want to be the one who tattles or snitches on co-workers. And even if a situation may not involve danger of physical harm, there is an emotional risk when bystanders have courage to step out of the shadows and share a concern. And so, inactive bystanders see what is happening and ignore it. Others, the active bystanders, are troubled by what they see and – as difficult as it might be – reach out for assistance. Here, the relationship that troubled the active bystander was consensual, but what if it hadn't been? In reaching out, the bystander created a positive chain reaction that was a gift to her coworker. By reaching out to me, the active bystander was empowered with options and felt comfortable with me reaching out to the alleged victim, who then felt comfortable with the Ombuds Office and reached out herself later when she had a concern.

Moments are all a gift; some we can accept, while others we can – and perhaps should – decline. Active bystanders are courageous colleagues who offer a gift that may be what someone needs

in the moment. Whether the person needs it or not, the active bystander shows they care and that they've got their colleague's back.

11. AN INFORMAL APPROACH TO A TITLE IX CASE

As an ombuds at a higher education institution, I do not typically facilitate conversations on issues that fall under the purview of the Title IX coordinator. However, one unusual case involving a student, whom I will refer to as Terrie, took a different turn. To be clear, "Terrie" is a pseudonym.

Terrie was finishing up her pre-med undergraduate requirements and was ready to move on to the next phase of her medical training. She was part of a small cohort of 30 students moving through the program. She had become close with two male pre-med students who were part of Terrie's cohort. She thought of them as "brothers" and had no sexual interest in them. This team of three spent hours studying together. All was well until they decided to attend an off-campus party on a Friday night. It was the end of finals week and she was ready to relax and enjoy some down-time with her friends. After being at the party for a few hours, Terrie noticed that her two male friends were extremely inebriated; Terrie decided to leave early and caught an Uber home. She later discovered that her friends stayed behind and continued drinking. She, however, was home by around 10:00 pm.

Later that night around 1:00 am, one of the male friends began texting Terrie. Initially, the texts were innocuous. The first text said, "Hey, where are you? Do you want to come back out and party with us?" She declined, stating she was already in bed and ready to sleep. What followed were a series of indecent pictures of a male's genitalia. The last text asked Terrie if she wanted to have sex.

Unsure what to do, Terrie turned off her phone, made sure all her windows and doors were locked and tried to sleep that night. She was very upset and confused, and she blamed herself; she didn't know what to do. She remembered a presentation on sexual harassment during orientation, and decided to contact the Title IX coordinator in the morning.

The next morning, Terrie made an appointment with the Title IX coordinator, and she met with her later that afternoon. Terrie brought the texts and pictures sent to her from her male friends and showed them to the coordinator. After Terrie described the incident, the coordinator asked Terrie what she wanted to happen. Terrie stated that she wasn't sure, but she was sure she wanted her friends to understand how much they hurt her and how disappointed she was in their behavior. Terrie wasn't sure which friend sent the pictures but she believed the two male friends were together when the pictures were sent. She received the texts from one number, but she also believed that her friends acted together.

The coordinator explained to Terrie that she had more than one option. Her first option was to file a Title IX incident report and follow the university process of an investigation, which included interviews and a panel. Terrie asked what would happen to her friends. The coordinator was unable to give her a definitive answer, but did say that her friends could face a variety of consequences, including the possibility of dismissal from the medical program. Terrie stated that she did not want that to happen to them.

The coordinator gave Terrie a second option: a mediated conversation between the male friends, the ombuds, and Terrie. The coordinator had often worked with the ombuds regarding bias and discrimination cases in the past and felt that an informal, confidential, impartial, and independent approach might help Terrie with her needs and requests in this situation. Terrie had never heard of an ombuds and asked for clarification about the role. It was clear to the Title IX coordinator that Terrie's goals were to be heard and understood. Terrie stated that she wanted her friends to understand how inappropriate the texts were, but she didn't want to hurt them or their future plans

to be medical doctors. Terrie agreed to meet with the ombuds, and the coordinator called the ombuds with Terrie in the room. An appointment was made for her then.

Terrie met with the me the next day and explained her situation, in detail, including what happened at the party and after the party. I asked Terrie if having a facilitated conversation with her two friends was what she wanted to happen. Terrie stated that she didn't want to get them in trouble but she did want them to listen to her and understand how much they had hurt her and their friendship. She also wanted to make it clear to them that she never wanted them to send her or anybody else inappropriate pictures ever again. With her permission, I reached out to the two friends separately, introduced myself as the university's ombuds, and explained that Terrie wanted to meet with them in my office. The Title IX coordinator had previously explained the role of the ombuds to both respondents and that the ombuds would be reaching out to them. Consequently, they were ready for the call. When I talked to both friends, I explained the informal nature of the ombuds role and asked both of them if they were willing to meet with me and Terrie. I made it clear that they could decline the meeting; however, a formal process would most likely be the next step if they didn't meet with me. They both agreed to meet with me and Terrie. I set a date to meet with all three of them in my office.

It is important to reiterate that I, as an ombuds, do not typically facilitate Title IX conversations, and all Title IX cases I handled in the past were effectively transitioned to the Title IX coordinator. This was an unusual case because the victim, Terrie, didn't want a formal process but did want to talk with her friends in a safe space. My office provided her with this option. To clarify the ombuds informal role, I confirmed with the Title IX coordinator that there would be no record regarding my informal meetings with these individuals. The Title IX coordinator understood and confirmed that this was going to be an informal and off-the-record process.

When I met with Terrie and the respondents, I first explained a few ground rules and stated that Terrie would begin the sharing today and that they were going to listen and not interrupt her. In this conversation, I explained that the male friends would not be defending themselves nor explaining their actions on the night they sent Terrie inappropriate pictures. They were there to listen to Terrie. I did share that they would have an opportunity to answer Terrie's questions and comment at the end of the conversation. I also explained that this was a confidential process and the conversation was informal and off-the-record. Normally, I am not this directive when I facilitate conversations. I always lay out ground rules, but this case was a little different. While I was not going to force the two male friends to be completely silent, I did feel that it was important that they were not there to defend themselves. They were mostly there to listen to their friend and to bring some restoration to their friendship. My directive approach may have pushed the limits of ombuds neutrality or impartiality as expressed in the IOA Standards of Practice; however, I was willing to take this chance because keeping Terrie safe was my priority.

The two male friends agreed to the ground rules, and for the next hour, Terrie described how she experienced that night and how damaging their actions were to their friendship. Terrie was articulate, emotional, and thoughtful while talking to her male friends. Terrie's male friends sat, listened, and cried. When Terrie was done, they both apologized for their behavior on that night and promised her that they would never do anything like that again.

This was a first for me. It was a unique example of how the Ombuds Office can informally and impartially help in Title IX cases. Often, people need a safe space to hold confidential and off-the-record conversations that do not lead to formal resolutions. As an ombuds, I was able to provide a safe space to a student who was unwilling to file a formal complaint but wanted to be heard and understood. It is my belief that handling this case informally provided a resolution for Terrie. It was a non-punitive, yet powerful learning experience for Terrie's friends.

12. THE CASE THAT CHANGED ALMOST EVERYTHING

A few years ago, our CEO started a Zero Tolerance campaign against sexual harassment and sexual violence. At that time, I had been in my position as Director of the Ombudsman Office for only some months, and was still getting my bearings to navigate the corporate culture. Midway in the campaign, a former employee contacted me, a woman who had been sexually harassed at work and now wanted to understand how to come forward and report formally. It was the "zero tolerance" and the promise of justice that this implied, as well as a promise of taking reports seriously and following due process, that made her decide to come forward. But immediately there was a huge and unsurmountable hurdle: the policy about abusive conduct included a 12-month time limit for reporting. In other words, you must report within 12 months from the moment the incident happened; if you report later your grievance would not be heard.

That time limit struck me as not quite in line with zero tolerance, and simply not a good practice of internal justice. Not only did the visitor want to report an incident that happened over six years ago; by now she was also a former employee. This was another unsurmountable hurdle because only current employees could report. Furthermore, it struck me that for years the visitor had felt it was unsafe to report. By now she had left not only the company but also the industry, and combined with the "zero tolerance" message, she had amassed the courage to make the step she had long wished to make. This background made the years-long impact and potential of trauma inflicted on survivors of sexual harassment apparent to me.

As our company's new ombudsman, I had explained to the leadership that I would identify systemic issues and provide upward feedback, because that is the strength of our profession to me. We don't only support individuals dealing with the issues they are facing and coach them in their own endeavours to do so effectively. We also prevent escalation, reoccurrence, reputational harm, and damage to more individuals by providing recommendations on how to change systems, practices, and policies in the company. We are forerunners in creating awareness on issues and trends that the leadership need to act on. Ombudsmen need to tell leaders what matters, even if they would rather not hear about it. I felt that here was exactly such an issue. Sexual harassment was not recognized as a problem within our company that praises itself for being at the top of the industry. Because sexual harassment doesn't happen in a top-rated company, right?

MY STRATEGY TO GET CHANGE

The policy needed to be changed. An ombudsman doesn't do that. I didn't want to limit my role to providing a written recommendation and then leave the rest to thoughts and prayers. I wanted more to be done for survivors to attain justice; I wanted systemic change to occur. Changing that policy would require more than making a recommendation to Human Resources (HR), the policy owner. It necessitated more experts, more diversity, and more disciplines to be involved to write a comprehensive policy. I was convinced of this because, paraphrasing Margaret Mead: "Never doubt that a small group of thoughtful, committed employees can change the company."

After thorough research, including talking with survivors outside my company, I brought together colleagues from different professional areas: HR, Investigations, Diversity & Inclusion, Legal, Security, Staff Support, and Audit. As an ombudsman I could not tell them what to do, and therefore I explained in what ways the current policy was problematic and why it needed revision. I presented them the research my office had conducted, with the recommendation to form a working group to rewrite and seriously update the policy.

Then #MeToo happened and several badly handled cases became public. The pressure was on to deliver this new policy. And because different disciplines had included their input, it became a benchmark policy within the industry. The new policy prompted more offices to work together, brought awareness to managers that sexual harassment existed, and lifted the taboo for survivors. Indeed, the number of visitors to my office with sexual harassment concerns quadrupled. The number of formal sexual harassment cases quadrupled too.

Fast-tracking formal sexual harassment reports meant quicker investigations and faster disciplinary measures. A senior internal panel was formed by HR, Investigations, Legal, and the Ombudsman Office. The purpose of the panel is to quickly tackle issues of (sexual) harassment, discrimination, and abuse; better protect affected employees; and provide recommendations for action in situations of abusive conduct. I took the opportunity to explain the Ombudsman Office Terms of Reference so the panel would understand and respect my principles of independence, confidentiality, informality, and neutrality, which they did without any problem or hesitation.

I also used my annual report as an opportunity to educate crucial stakeholders. In it I explained how the company had been unaware if not in denial of the occurrence of sexual harassment. Sexual harassment is something we would rather not know happens among us. There was a reluctance to face this shadow of an otherwise well-functioning and often praised corporation. There was disbelief and an "it's not me, it's not us" reaction. I found providing stories helped to bring reality closer to home. A website on reporting abuse (unfortunately no longer existing), which I had discovered during my initial research, included personal stories of sexual harassment. These stories were educational, because they were imaginable. Stories make the topic more human; they lift sexual harassment above statistics.

There were also collaborative efforts to improve the organization's culture. I had learned from investigators that sexual harassment often goes hand in hand with other abusive or even criminal behaviour such as fraud, embezzlement, and extortion. A culture of impunity, a high stress working environment, peer competition for secure jobs, and a tall corporate hierarchy can create a fertile ground for different forms of abuse. A culture like ours that values "getting things done" should not come at the cost of caring for, or looking out for each other and supporting each other's wellbeing and careers. Moreover, inequality in treatment, hierarchical status, contract security, and access to justice have been shown to lead to power imbalances which can easily lead to abuse. Inequality can stem from different contractual conditions for the same work, male dominance, racial dominance, and hierarchical structures, all of which make some of us less important than others.

I knew reducing the incidence of sexual harassment would require significant cultural change. It would involve looking very hard at the current values and behaviours that were endorsed within the corporate culture and determining the nature and the drivers of sexual harassment in the organization. As the ombudsman I recommended to dedicate a survey solely to sexual harassment, harassment, and abuse of authority, which was subsequently supported by the senior internal panel. This survey provided more insights, surfaced the current problems with abuse, and most interestingly led to the establishment of a corporate structure with the aim to create the necessary cultural change. We are working to cultivate a more inclusive work environment, free from abuse; where employees including managers are aware about sexual harassment, have skills and insights to prevent abuse, and know what to do about it and where to go for help.

WHAT I LEARNED ABOUT FORMAL REPORTS AND INFORMAL OPTIONS

Imagine an employee who was sexually assaulted by a colleague, groped, pushed against a wall, or raped after work. The messaging in the workplace is to report what happened, and "we take every report seriously." The employee tries to piece things together and indeed considers reporting. Reporting means writing up every detail of what happened and sending the story to a generic email address, like "complaints@companyX." Then they wait. Through this process, the employee is expected to submit a very private matter – one that perhaps keeps them up at night, that brings up many different emotions such as shame, doubt, and guilt – to a mostly unknown process and to unknown people.

In such processes, the employee has no control. I had been told of survivors waiting for weeks before hearing something back. Then they were told to rewrite everything again into a template, or they received an email saying they would be contacted "soon" without being given a timeline. They wondered what would happen if their report didn't meet the criteria for a formal

investigation, or if an investigation was opened but did not find enough evidence so the case got closed. They wondered why certain witnesses were not called or why a witness told a different story to the investigators. Were witnesses afraid to lose their jobs or afraid of retaliation? Did they just not find what happened to their colleague to be important enough?

Going formal is a tricky process. It requires stamina and patience at a time when the survivor probably doesn't have much stamina and feels very vulnerable. The messages of "zero tolerance" and "we take this very seriously" imply that the company cares, but the victim is frequently left in the cold. In my organization, the reporting process was formerly not as victim-centered as it has become. In a victim-centered process, the care and support for the victim are the determining factor in the steps to be taken, and the victim decides whether an investigation will take place. Even though the process is now more victim-centered, I still hear of instances of supervisors or colleagues implying blame on the victim. There have also been instances where the supervisor was initially understanding and supportive, but then later made decisions that were negative for the victim's career. From other companies I have heard the process was dominated by legal staff who ticked the boxes of due process but lacked empathy for the survivor.

However, if reporting doesn't bring justice, then what is the alternative? Providing options for informal resolution is very important. Several of my visitors, usually women, have wanted their male harasser to know how his behaviour had impacted them, and they wanted him to understand why it was hurtful. Some have wanted reconciliation or an apology. Others have wanted the harasser to listen to their story or to hear the harasser explain what brought them to do it. Here is where the ombudsman provides the options of mediation, facilitation, and a restorative justice process. When there is a safe space for conversation, dialogue, and listening, there is the potential to create learning and very importantly, healing. Another informal and victim-centered option for survivors is the opportunity to deposit their story. This means the survivor provides a written report without asking for a formal action such as an investigation. Instead, the survivor asks for the story to be deposited in a safe, confidential place and to be notified if another victim brings forward a similar case involving the same perpetrator. With strength in numbers and the chance of finding more evidence, the survivor can decide that an investigation be opened.

JUSTICE IS A JOURNEY, AND SO IS CHANGE

The changes taking place in the organization are encouraging. There is commitment from the leadership to create a better workplace, a dedicated senior post is established, and funds are committed to roll out a related programme. Curbing sexual harassment and other abusive conduct is now an important topic and there is improvement in how management are being held accountable. Because of the removal of the restrictions for reporting in the new policy, more survivors have been coming forward; and more managers are contacting me as the ombudsman for consultation on how to respond to claims of abuse within their teams.

The individual who had sexually harassed my initial visitor appeared to be a serial sexual harasser and had also been reported by someone else. This provided the opportunity to my visitor to tell her story to the investigators, the same story that started a journey of crucial organizational change. It is a journey that I, as Ombudsman, am glad to continue being a part of.

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RESTORATIVE JUSTICE IN CASES OF SEXUAL HARM

Alexa Sardina, Ph.D.† & Alissa R. Ackerman, Ph.D.‡

INTRODUCTION

In 1999, both authors of this paper were raped. As a freshman in college, Alexa was raped at knifepoint by a stranger that broke into her

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dorm and hid in the shared bathroom. Alissa was a junior in high school when she was raped by a young man after leaving a house party with him to walk on the beach. Alexa reported her rape to law enforcement and subsequently endured a trial that ended in a guilty verdict and a significant prison sentence for the man who raped her. Alissa never reported her rape and remained silent about her experience for 15 years. Despite their different journeys in the aftermath of sexual violence, the authors' experiences impacted both their lives in significant ways that ultimately led to their career paths as sex crimes experts and restorative justice practitioners.[1] Their individual and collective "survivor scholar" experiences inform this paper.[2]

Part I summarizes the impacts of the criminal legal system on individuals who have been sexually harmed, explaining under-reporting, police interactions, and case attrition. Part II frames the reasons why post-conviction sex crimes policies such as a registration and community notification are ineffective at reducing rates of sexual offending or addressing the needs of individuals who have experienced sexual harm. Part III explains the root causes of sexually harmful behavior, which range from individual-level to societal influences. Part IV sets the stage for an introduction to restorative justice. The authors focus on the use of restorative justice more broadly, before discussing how restorative justice is different from typical criminal legal options for addressing harmful behavior. The authors then briefly summarize the effectiveness of restorative justice based on the available literature. Part V expands on the authors' individual journeys to restorative justice as sex crimes experts and rape survivors, before addressing the often unmet needs of people

[1] *See Types of Sexual Violence*, RAINN, https://perma.cc/J4WP-6WU5 (last visited Jan. 23, 2022) ("The term 'sexual violence' is an all-encompassing, non-legal term that refers to crimes like sexual assault, rape, and sexual abuse."). However, throughout this paper the authors use two terms: "sexual violence" and "sexual harm." Sexual harm is a more inclusive term, as some people who have experienced sexual harm do not feel that they have experienced violence. Their experiences are still valid and must be included in conversations. The authors also use sexual harm when speaking about their work. They use the term sexual violence to be consistent with how these acts are referred to in specific research articles.

[2] The authors define "survivor scholar" as any individual who is both a person who has experienced sexual harm and a researcher who studies sexual harm and/or the people who commit sex crimes. The authors seek to always utilize person first language because it humanizes individuals who have experienced sexual harm and who have perpetrated harm. Person first language allows individuals to choose words for their experiences that suit them. Every effort is made to refrain from using terms like "victim," "survivor," or "perpetrator." The authors have chosen to use the term survivor for themselves, but throughout this article readers will see the terms "individual who experienced sexual harm" and "individual who perpetrated sexual harm." This language can be difficult to accept, but the authors maintain a restorative perspective that values the humanity of all people. The authors believe that no person can be defined by one experience or behavior.

who have also experienced sexual harm. The authors explain the justice needs of people who have perpetrated acts of sexual harm. Part VI focuses exclusively on restorative justice as a tool to use in these instances, including case studies and the limitations of restorative frameworks. Part VII concludes with a renewed hope for a restorative future.

I. THE IMPACT OF THE CRIMINAL LEGAL SYSTEM ON THOSE WHO HAVE BEEN SEXUALLY HARMED

Sexual violence is ubiquitous and impacts millions of people each year.[3] It cuts across every demographic, including age, gender, economic status, race, ethnicity, religion, sexual orientation, and education level.[4] According to the Federal Bureau of Investigation (FBI), a forcible rape occurs in the United States every 3.8 minutes.[5] Almost 20% of women and 8% of men are sexually abused before the age of 18.[6] One in four women and one in ten men will experience sexual harm or stalking in their lifespan.[7] Almost 50% of gender expansive people have experienced sexual harm in their lifetime.[8] While sexual violence is a pervasive social, legal, and public health issue, research indicates that certain groups are at a greater risk for sexual victimization.[9] Approximately one in five Black women, and one in seven Hispanic women in the U.S. have experienced

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[3] PREVENTING SEXUAL VIOLENCE, CTRS. FOR DISEASE CONTROL AND PREVENTION 1 (Feb. 5, 2021), https://perma.cc/FTM5-R9Y2; SHARON G. SMITH ET AL., NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY 2-3 (Ctrs. for Disease Control & Prevention ed., 2018) (reporting that nearly 52.2 million women (43.6%) have experienced sexual harm in their lifetime, with 4.7% of women experiencing it in the 12 months preceding the survey and that approximately 27.6 million men (24.8%) experienced some form of contact sexual violence in their lifetime, with 3.5% of men experiencing contact sexual violence in the 12 months preceding the survey) [hereinafter *Sexual Violence Survey*].

[4] *See generally Sexual Violence Survey*, *supra* note 3.

[5] *2018 Crime Clock Statistics*, FED. BUREAU OF INVESTIGATION, https://perma.cc/39YD-ZJ7J (last visited Jan. 23, 2022).

[6] Noemí Pereda et al., *The Prevalence of Child Sexual Abuse in Community and Student Samples: A Meta-Analysis*, 29 CLINICAL PSYCH. REV. 328, 334 tbl.4 (2009) (showing that the prevalence of child sexual abuse in the United States was 25.3% for women and 7.5% for men).

[7] *Sexual Violence Survey*, *supra* note 3, at 7.

[8] SANDY E. JAMES ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 15 (2016) (stating that 47% of transgender respondents had been sexually assaulted at some point in their life and 54% of transgender respondents experienced some form of intimate partner violence (IPV)).

[9] *See* Karen McQueen et al., *Sexual Assault: Women's Voices on the Health Impacts of Not Being Believed by Police*, BMC WOMEN´S HEALTH, May 22, 2021, at 1, 1, https://perma.cc/DM78-HQEH.

rape at some point in their lives.[10] More than one-quarter of women who identify as American Indian or Alaska Native and one in three women who identify as multiracial report victimization in their lifetime.[11] Furthermore, women employed in the military, who live and/or work in underprivileged environments, have a disability, identify as LGBTQ, or are a student are also at a greater risk for sexual assault.[12]

Acts of sexual harm against men do not get the same empirical attention and emphasis as acts involving female victims, which creates a false myth that men cannot be sexually victimized.[13] Therefore, there are fewer data sources to evaluate the extent of victimization against males. However, 1 in 71 men surveyed report being raped in their lifetime.[14] This figure is significantly underestimated, as men who are sexually harmed often do not disclose or report these experiences due to shame and embarrassment.[15]

Secondary Victimization: Underreporting, Police Interactions, and Case Attrition

Despite these alarmingly high rates of sexual violence, there is reason to believe that rates of sexual harm are much higher, as these acts are the least likely to be reported. For example, only about 36% of rapes and 34% of attempted rapes are reported to police.[16] Furthermore, approximately 60% to 70% of adults that experienced childhood sexual abuse never reported the abuse as children, and only a few, approximately 10% to 18%, reported their abuse to officials in their lifetime.[17] Collectively, only a small minority of people will report their experiences to law enforcement.[18]

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[10] MICHELE C. BLACK ET AL., NAT'L CTR. FOR INJURY PREVENTION & CONTROL & CTRS. FOR DISEASE CONTROL & PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 2-3 (2011), https://perma.cc/ET9Q-5KXM.

[11] BLACK ET AL., *supra* note 10, at 3.

[12] McQueen et al., *supra* note 9, at 1.

[13] *See* Scott M. Walfield, *"Men Cannot be Raped": Correlates of Male Rape Myth Acceptance*, 36 J. INTERPERSONAL VIOLENCE 6391, 6394 (2018).

[14] BLACK ET AL., *supra* note 10, at 1.

[15] *See* Marjorie R. Sable et al., *Barriers to Reporting Sexual Assault for Women and Men: Perspectives of College Students*, 55 J. AM. COLL. HEALTH 157, 159-60 (2006).

[16] CALLIE MARIE RENNISON, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., NCJ 194530, RAPE AND SEXUAL ASSAULT: REPORTING TO POLICE AND MEDICAL ATTENTION, 1992-2000 1 (2002).

[17] Kamala London et al., *Disclosure of Child Sexual Abuse: What Does the Research Tell Us About the Ways that Children Tell?* 11 PSYCH., PUB. POL'Y, & L. 194, 203 (2005).

[18] *See* Manon Ceelen et al., *Characteristics and Post-Decision Attitudes of Non-Reporting Sexual Violence Victims*, 34 J. INTERPERSONAL VIOLENCE 1961, 1962 (2019); *see* RACHEL E. MORGAN & JENNIFER L. TRUMAN, U.S. DEP'T OF JUST., NCJ 255113, CRIMINAL VICTIMIZATION, 2019 8 (2020), https://perma.cc/UG68-7W6U.

Underreporting may be the result of many individual and societal variables. Many survivors feel a sense of shame and isolation after their assault.[19] Shame is an emotion that is linked to a person's self-worth and identity.[20] Survivors of sexual violence are especially susceptible to shame when compared to people who have experienced nonsexual victimization.[21] One study found that 75% of women surveyed felt ashamed about themselves after their assault.[22] They were also more likely to say that they are ashamed or embarrassed by their victimization when compared to victims of other types of violence.[23] Many people who experience sexual harm also report feeling dirty or disgusted afterwards and sometimes blame themselves.[24] Negative emotions, like shame, may not only impact how individuals who have experienced sexual harm feel about themselves, but may also influence how they respond to the crime afterwards.[25]

People who have experienced sexual harm report that their victimization often begins a lengthy process that involves continuous interactions with various criminal legal professionals, including law enforcement and attorneys.[26] Unfortunately, this contact with the criminal

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[19] *See* Candace Feiring & Lynn S. Taska, *The Persistence of Shame Following Sexual Abuse: A Longitudinal Look at Risk and Recovery*, 10 CHILD MALTREATMENT 337, 345 (2005) (discussing the persistence of abuse-related shame and post-traumatic stress disorder ("PTSD") in survivors of child sexual abuse); *see also* Sable *supra* note 15, at 159; Judith Lewis Herman, *Justice from the Victim's Perspective*, 11 VIOLENCE AGAINST WOMEN 571, 598 (2005).

[20] Karen G. Weiss, *Too Ashamed to Report: Deconstructing the Shame of Sexual Victimization*, 5 FEMINIST CRIMINOLOGY 286, 293 (2010); world renowned shame researcher, Dr. Brené Brown defines shame as "the intensely painful feeling or experience of believing that we are flawed and therefore unworthy of love and belonging—something we've experienced, done, or failed to do makes us unworthy of connection." *See* Brené Brown, *Shame v. Guilt*, BRENÉ BROWN (Jan. 15, 2013), https://perma.cc/5PQH-5SSB.

[21] Weiss, *supra* note 20, at 287.

[22] *See* Maria E. Vidal & Jenny Petrak, *Shame and Adult Sexual Assault: A Study with a Group of Female Survivors Recruited from an East London Population*, *22* SEXUAL & RELATIONSHIP THERAPY 159, 159 (2007).

[23] *See* Richard B. Felson & Paul-Philippe Paré, *The Reporting of Domestic Violence and Sexual Assault by Nonstrangers to the Police*, 67 J. MARRIAGE & FAM. 597, 606 (2005).

[24] *See* Sarah E. Ullman, *Social Reactions, Coping Strategies, and Self-blame Attributions in Adjustment to Sexual Assault*, 20 PSYCH. WOMEN Q. 505, 508 (1996); *see also* Feiring & Taska, *supra* note 19, at 337, 340.

[25] *See, e.g.*, Maureen MacGinley et al., *A Scoping Review of Adult Survivors' Experiences of Shame Following Sexual Abuse in Childhood*, 27 HEALTH & SOC. CARE COMMUNITY 1135, 1140 (2019) (finding that adults who have experienced child sexual abuse and have shame associated with that abuse may experience shame related mental health consequences).

[26] *See generally* Rebecca Campbell, *Rape Survivors' Experiences with the Legal and Medical Systems: Do Rape Victim Advocates Make a Difference?* 12 VIOLENCE AGAINST WOMEN 1 (2006).

legal system often does more harm than good.[27] They often 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.[28] This phenomenon has been termed "secondary victimization," or "the second rape," [29] and includes behaviors by criminal legal professionals and others that exacerbate the trauma of rape and other types of sexual harm.[30]

The fear of secondary victimization may also influence reporting. For example, women who have experienced sexual harm are more likely to report their experience to formal support services when their experience conforms to that of a "real rape" (e.g., they were assaulted by a stranger): when they feel that they will be believed, when they think that the probability for conviction is high, when they have sustained injuries to corroborate their claims of forced intercourse, or if a weapon was used.[31] These findings align with Alexa's decision to report. She believed that, because she was assaulted by a stranger at knifepoint, her claims would be undisputable. A study using data from the National Violence Against Women Survey examined the reasons that survivors gave for not reporting acts of sexual harm to the police. The decision to not report was attributed to a belief that the police could not do anything about the crime, fear that they would not be believed, fear of retribution, and feelings of shame and embarrassment.[32]

Although many of the reasons given for not reporting experiences of sexual harm are common across most racial groups, research suggests minority women choose not to report for reasons that differ from those of White women. Factors that influence reporting decisions among Black women include economic status, "fear of White racism, degree of adherence to a Black cultural mandate to protect Black [men] from

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[27] *Id.* at 2.

[28] *See, e.g.*, Debra Patterson & Rebecca Campbell, *Why Rape Survivors Participate in the Criminal Justice System*, 38 J. CMTY. PSYCH. 191, 196-97 (2010) (discussing survivors' concerns that police would not believe their reports of victimization); *but see generally* ANDREA J. RITCHIE, INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR ch.5 (Beacon Press 2017).

[29] Rebecca Campbell & Sheela Raja, *Secondary Victimization of Rape Victims: Insights from Mental Health Professionals Who Treat Survivors of Sexual Violence*, 14 VIOLENCE & VICTIMS 261, 261 (1999).

[30] *Id.* at 267.

[31] *See* Janice Du Mont et al., *The Role of "Real Rape" and "Real Victim" Stereotypes in Police Reporting Practices of Sexually Assaulted Women*, 9 VIOLENCE AGAINST WOMEN 466, 470 (2003).

[32] PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUST., EXTENT, NATURE, AND CONSEQUENCES OF RAPE VICTIMIZATION: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 33 (2006).

criminal prosecution . . . and prior negative interactions with social service agencies."[33] Furthermore, in the aftermath of sexual harm, women of color are generally unlikely to seek assistance from predominantly White-run agencies and institutions, including the criminal legal system.[34]

Not only is sexual harm characterized by low reporting rates, but it is also characterized by high rates of case attrition. Out of every 1,000 sexual assaults committed only 25 individuals accused will end up incarcerated.[35] Though this is an estimation based on multiple sources of government data, less than 1% of all rapes and attempted rapes lead to a felony conviction.[36] Over the past several decades, there have been numerous legal interventions designed to address the challenges associated with effectively moving cases of sexual harm through the criminal legal system.[37] Of all the changes that have been made to address underreporting and case attrition, there has been minimal change as it relates to reporting, charging, prosecuting, or convicting the people that perpetrate sexual harm.[38]

Underreporting and case attrition are largely attributed to adherence to rape myths by those who have experienced sexual harm *and* various actors that are a part of the criminal legal system.[39] Rape myths are

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[33] *See* Patricia A. Washington, *Disclosure Patterns of Black Female Sexual Assault Survivors*, 7 VIOLENCE AGAINST WOMEN 1254, 1257 (2001); *see also* Shaquita Tillman et al., *Shattering Silence: Exploring Barriers to Disclosure for African American Sexual Assault Survivors*, 11 TRAUMA, VIOLENCE, & ABUSE 59, 64 (2010).

[34] *See* Washington, *supra* note 33, at 1257, 1274.

[35] *The Criminal Justice System: Statistics*, RAPE, ABUSE, & INCEST NAT'L NETWORK (RAINN), https://perma.cc/Q4D3-CYDF (last visited Jan. 23, 2022) [hereinafter *The Criminal Justice System: Statistics*, RAINN]. For every 1,000 sexual assaults committed, 310 are reported to the police, 50 reports lead to an arrest, 28 cases will lead to a felony conviction, and 25 of individuals will be incarcerated.

[36] Andrew Van Dam, *Less Than 1% of Rapes Lead to Felony Convictions. At Least 89% of Victims Face Emotional and Physical Consequences*, WASH. POST (Oct. 6, 2018), https://perma.cc/H7SV-KNV3.

[37] *See* Ethan Czuy Levine, *Sexual Scripts and Criminal Statutes: Gender Restrictions, Spousal Allowances, and Victim Accountability After Rape Law Reform*, 24 VIOLENCE AGAINST WOMEN 1, 3-4 (2017). By the 1970s and 1980s, all 50 states passed rape law reform although the efforts "varied considerably in their capacity to protect victims," especially in reducing the influence of the "real rape" stereotype. These changes included the removal or lessening of requirements around victim resistance and corroboration, changing definitions of rape or supplementing rape statutes with other offenses to address different forms of violence, and a range of admissibility regarding the sexual history of victims. Unfortunately, research suggests that these efforts have only minimally changed reporting, indictment, conviction, or incarceration rates.

[38] *See* Cassia Spohn & Katharine Tellis, *The Criminal Justice System's Response to Sexual Violence*, 18 VIOLENCE AGAINST WOMEN 169, 170 (2012).

[39] *See* Lucy Maddox, *The Impact of Psychological Consequences of Rape on Rape Case Attrition: The Police Perspective*, J. POLICE CRIM. PSYCH. 33, 33-34 (2012); *see also* Mary C.

commonly held beliefs that can be found in most cultures and are fundamentally gendered. They underscore the reality that sexual violence against women and children is, to an extent, condoned, and normalized.[40] Examples of common rape myths are "only bad girls get raped"; "any healthy woman can resist a rapist if she really wants to"; "women ask for it"; "women 'cry rape' only when they've been jilted or have something to cover up"; and "rapists are sex-starved, insane, or both."[41] Adherence to rape myths results in social and cultural stereotyping and silencing of survivors of sexual harm.[42] Rape myths may also impact people that experience sexual harm who may blame themselves for not preventing the harm or for not defending themselves.[43] In part, this is why Alissa never reported her rape to the police. She had lied to her parents about where she would be that night and had gone for a walk on a secluded beach with a young man she had just met at a party. She could not defend herself against a much bigger and stronger person and believed that she "let her rape happen." For all these reasons, Alissa remained silent. Her experience of non-reporting is common.[44]

Police play a key gatekeeping role in the progression of cases through the criminal legal system. They decide whether a crime has occurred, the number of resources to dedicate to suspect identification and apprehension, whether to make an arrest, and whether to refer the case to the prosecutor's office.[45] It is therefore important to understand the factors that influence police decision-making in cases of sexual harm. As

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Anders & F. Scott Christopher, *A Sociological Model of Rape Survivors' Decisions to Aid in Case Prosecution*, 35 PSYCH. WOMEN Q. 92, 93-94 (2011).

[40] *See* Kimberly A. Lonsway & Louise F. Fitzgerald, *Rape Myths in Review*, 18 PSYCH. WOMEN Q. 133, 135-38 (1994).

[41] *See* Martha R. Burt, *Cultural Myths and Supports for Rape*, 38 J. PERSONALITY & SOC. PSYCH. 217, 217 (1980).

[42] For example, researchers have found that many rape survivors may not disclose to anyone if they were under the influence of alcohol or drugs at the time of the offense. They remain hidden survivors often because of self-blame due to perceptions that they are somehow responsible for their victimization because they consumed alcohol or drugs. Additional research indicates that women often do not report their sexual victimization because they do not perceive themselves to be victims of rape. According to one study, only 27% of survivors whose incidents met the legal definition of rape defined themselves as having been raped. Mary P. Koss, *Hidden Rape: Sexual Aggression and Victimization in a National Sample of Students in Higher Education*, 55 J. CLINICAL PSYCH. 3, 22 (1987).

[43] *See* Eliana Suarez & Tahany M. Gadalla, *Stop Blaming the Victim: A Meta-Analysis on Rape Myths*, 25 J. INTERPERSONAL VIOLENCE 2010, 2011 (2010).

[44] In the authors' experience working with individuals who have been sexually harmed, more than half report that they have not or will not engage formal reporting channels because they fear they will not be believed, they do not think the criminal legal system can or will do anything to help, or they feel shame regarding the sexually harmful experience.

[45] *See* Jessica Shaw et al., *The View from Inside the System: How Police Explain Their Response to Sexual Assault*, 58 AM. J. CMTY PSYCH. 446, 446 (2016).

previously mentioned, many survivors choose not to report due to concerns that they will be retraumatized by the police, that they will not be believed, or that not much will come of the case.[46] These are not baseless concerns. One study found that almost half of those who reported their sexual assault expressed dissatisfaction with the police interview.[47] Women who have been sexually harmed also report feeling shocked and embarrassed when police officers treated them like they were the problem, were insensitive to the trauma they have experienced, and were insensitive to their personal needs.[48]

Rebecca Campbell, a psychology professor, interviewed rape survivors regarding their interactions with police and found that many survivors felt the questions were distressing and some believed that the questions they were asked implied that they deserved what happened to them.[49] Another study by Campbell and her colleagues showed that those who experienced sexual harm perpetrated by a non-stranger whose cases were *not* prosecuted and who experienced high levels of secondary victimization had the highest post-traumatic stress disorder ("PTSD") rates even when compared to those who did not report to the legal system at all.[50]

Evidence suggests that police may not treat all survivors of sexual harm the same, and much of this disparate treatment can be attributed to the adherence of rape myths.[51] Police culture, which is typically masculine and authoritarian, generally facilitates the continued acceptance of rape myths.[52] Therefore, it is not surprising that for

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[46] *See* Washington, *supra* note 33, at 1274.

[47] Laura M. Monroe et al., *The Experience of Sexual Assault: Findings from a Statewide Needs Assessment*, 20 J. INTERPERSONAL VIOLENCE 767, 770 (2005).

[48] *See* Jan Jordan, *Will Any Woman do? Police, Gender and Rape Victims*, 25 POLICING: AN INT'L J. POLICE STRATEGIES & MGMT. 319, 329-31 (2002).

[49] Rebecca Campbell, *What Really Happened? A Validation Study of Rape Survivors' Help-Seeking Experiences with the Legal and Medical Systems*, 20 VIOLENCE & VICTIMS 55, 65-66 (2005).

[50] Rebecca Campbell et al., *Community Services for Rape Survivors: Enhancing Psychological Well-Being or Increasing Trauma?* 67 J. CONSULTING & CLINICAL PSYCH. 847, 847 (1999).

[51] *See* Alondra D. Garza & Cortney A. Franklin, *The Effect of Rape Myth Endorsement on Police Response to Sexual Assault Survivors*, 27 VIOLENCE AGAINST WOMEN 552, 554-55 (2020); *see also* Molly Smith et al., *Rape Myth Adherence Among Campus Law Enforcement Officers*, 43 CRIM. JUST. & BEHAV. 539, 540 (2016); Amy D. Page, *Judging Women and Defining Crime: Police Officers' Attitudes Toward Women and Rape*, 28 SOCIO. SPECTRUM 389, 394-97 (2008) [hereinafter *Judging Women*] (explaining that police officers with lower levels of educational attainment were more accepting of rape myths whereas officers with higher levels of educational attainment were less likely to endorse rape myths).

[52] *See* Amy D. Page, Behind the Blue Line: Investigating Police Officers' Attitudes Toward Women and Rape 22-23, 108 (May 2004) (Ph.D. dissertation, University of Tennessee, Knoxville).

survivors whose assault falls outside of what is considered a "real rape" may not be taken seriously by the police. These include rapes committed against unconscious women, cases when the person is harmed by someone with whom they had a previous intimate relationship, and instances in which the person harmed does not conform to traditional gender roles.[53] One study found that police officers who ranked higher on rape myth acceptance were less likely to pursue an investigation when the situation did not fit the "real rape" paradigm.[54] Furthermore, findings suggest that specialized training on how to handle sexual assault survivors does not influence officers' adherence to rape myths or the level of blame they attribute to the person who was sexually harmed.[55]

One of the most critical decisions that police make is whether to unfound a case. Unfounding happens when a responding officer does not believe the account of the person that was sexually harmed and, on that basis, decides that it did not occur.[56] Police officers may, however, make the decision to unfound a case if they believe that a crime has occurred but also believe that the likelihood of arrest and prosecution are low.[57] When the person who caused the sexual harm was a stranger, the incident was "more likely to be thoroughly investigated by police officers and less likely to be considered unfounded."[58] Moreover, there is a significant relationship between the presence of physical injury and the decision to lay charges against an accused individual.[59]

Investigations can also be traumatizing for those who report sexual harm. Police investigators are often looking for gaps in a survivor's account, parts of the account that do not make sense, and any motivations there may be for giving a false report.[60] Thus, the ways in which these

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[53] DEP'T OF JUSTICE, IDENTIFYING AND PREVENTING GENDER BIAS IN LAW ENFORCEMENT RESPONSE TO SEXUAL ASSAULT AND DOMESTIC VIOLENCE 7, https://perma.cc/RL2B-6GE3 (last visited Jan. 23, 2022).

[54] *See Judging Women*, *supra* note 51, at 393, 396.

[55] *See* Emma Sleath & Ray Bull, *Comparing Rape Victim and Perpetrator Blaming a Police Officer Sample: Differences Between Police Officers With and Without Special Training*, 39 CRIM. JUST. & BEHAV. 646, 661 (2012).

[56] DONNA VANDIVER, ET AL., SEX CRIMES AND SEX OFFENDERS 78 (2017).

[57] Spohn & Tellis, *supra* note 38, at 173.

[58] Shaw et al., *supra* note 45, at 448.

[59] *See* Du Mont et al., *supra* note 31, at 478-79.

[60] LORI HASKELL & MELANIE RANDALL, DEP'T OF JUST. CANADA, THE IMPACT OF TRAUMA ON ADULT SEXUAL ASSAULT VICTIMS 8 (2019), https://perma.cc/ZVP3-ZYQ9. Namian writes:

> Rape myths are especially resilient because they are particularly susceptible to being re-constructed in different ways that serve the same purpose. To illustrate, current statistics easily debunk the rape is rare myth, but it seems to live on through the complementary belief that false rape accusations are common. So, as the myth that husbands could not rape their wives lost all statutory support, variations on the false

questions are asked can leave people feeling blamed, rather than supported and believed. Research supports the assertion that contact with the police often leads to negative social interactions and which were associated with an increase in symptoms of PTSD.[61]

Rape myths may also impact prosecutors' charging decisions, which are often based on legal factors, like the seriousness of the crime, the offender's criminal record, and the strength of the evidence.[62] However, several studies suggest that the rape myths and the stereotypes that influence the decision-making of police officers also influence the charging decisions of prosecutors.[63] As such, few rape cases are prosecuted and without the participation of survivors, prosecuting acts of sexual violence would be largely impossible.[64] Because so few cases make it to trial, there is little available research regarding the experiences of survivors as witnesses in the courtroom. However, some research has examined how the demands of the trial process affects rape survivors, focusing primarily on the emotional and psychological impact of the practices of courtroom actors.[65] After experiencing questioning and reporting to the police, a survivor may be fearful about retelling their story during a criminal trial.[66] Many survivors are particularly concerned that

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> accusation myth stepped in to uphold the pervasive stereotype that married women are theoretically incapable of being raped.

*See, e.*g., Morgan Namian, *Hypermasculine Police and Vulnerable Victims: The Detrimental Impact of Police Ideologies on the Rape Reporting Process*, 40 WOMEN'S RTS. L. REP. 80, 99-103 (2018); *see generally* Bonnie Stabile & Aubrey Grant, *From Rape 'Myths' to Roy Moore: We Can't Continue to Blame Victims*, THE HILL (Nov. 21, 2017, 5:00 PM), https://perma.cc/L4SU-UWQX.

[61] Sarah E. Ullman, *Correlates and Consequences of Adult Sexual Assault Disclosure*, 9 J. INTERPERSONAL VIOLENCE 554, 567 (1996).

[62] Patricia A. Frazier & Beth Haney, *Sexual Assault Cases in the Legal System: Police, Prosecutor, and Victim Perspectives*, 20 L. & HUM. BEHAV. 607, 609-11 (1996).

[63] *See* Cassia Spohn & David Holleran, *Prosecuting Sexual Assault: A Comparison of Charging Decisions in Sexual Assault Cases Involving Strangers, Acquaintances, and Intimate Partners*, 18 JUST. Q. 651, 653 (2001).

[64] *See* Cassia Spohn et al., *Prosecutorial Justifications for Sexual Assault Case Rejection: Guarding the "Gateway to Justice"*, 48 SOC. PROBS. 206, 220-21 (2001).

[65] Konradi explains that:

> [P]rosecutors may request significant psychological work from rape survivors to sustain the state's case. Producing some emotions to appear victimized, suppressing others to avoid the appearance of defensiveness or vindictiveness, and testifying with a particular emphasis can all involve substituting another reality for one's own. Denying their own reality is stressful for some rape survivors and leads them to feel guilty and angry with themselves. When prosecutors provide little preparation or primarily focus on rape survivors' self-presentations, they can unintentionally contribute to the second assault on and re-victimization of rape survivors.

See AMANDA KONRADI, TAKING THE STAND: RAPE SURVIVORS AND THE PROSECUTION OF RAPISTS 78-79 (2007)

[66] *See generally* KONRADI, *supra* note 65.

they will endure a traumatic and humiliating trial and still not receive justice. Oftentimes, trials are traumatic not only for the survivor but also for those that support them.[67] Moreover, when continuances are filed, plea bargains are offered, or when reduced sentences are negotiated, people who have been sexually harmed may feel revictimized.[68]

Given the severity of sexual harm, it is not surprising that survivors not only want to be believed, but they also want the significance of their experience to be recognized.[69] For many survivors, the need for formal acknowledgement of harm does not translate to a desire for harsh punishments. Survivors are not always interested in the punishment or suffering of the person that harmed them.[70] Rather, most survivors of sexual harm want to see the person that harmed them take responsibility for their behavior and to see that person "attempt to put things right."[71] Overall, research with survivors of sexual harm supports the notion that they want "meaningful consequences" for the perpetrators of these harms.[72]

Alexa's experience with testifying is similar to the findings mentioned above. After the prosecutor decided to file criminal charges against the man who raped her, Alexa had to recount the night of her rape in great detail many times to the prosecutor and others. Although this is often a part of the witness preparation process, Alexa felt even more anxious and fearful about testifying during the trial. While her doubts about testifying grew, she knew that the case would fall apart if she chose not to participate. During the trial, prior to her testimony, Alexa wanted to run away to avoid being in the courtroom with the man who raped her. During cross-examination, Alexa had to describe her experience again with excruciating detail in front of a courtroom and jury of strangers. Her parents were included on the defense's witness list and were not allowed in the courtroom. During defense questioning, she felt like her credibility

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[67] *See* Alissa Ackerman, *The Second Rape*, BEYOND FEAR (Aug. 12, 2020), https://perma.cc/3BRU-JX83 ("Stacey provides a unique perspective of this process [the trial] and also highlights how trauma due to the rape impacted Alexa's ability to recall certain events around that time.").

[68] Clare McGlynn, *Feminism, Rape and the Search for Justice*, 31 OXFORD J. L. STUD. 825, 834 (2011).

[69] Clare McGylnn & Nicole Westmarland, *Kaleidoscope Justice: Sexual Violence and Victim-Survivors' Perceptions of Justice*, 28 SOC. & LEGAL STUD.179, 188-89 (2019).

[70] *Id.* at 187. In the authors' practice, they often work with individuals who have been sexually harmed who are seeking an apology, the ability to ask questions, true accountability, and to ensure the behavior does not happen again.

[71] Shirley Jülich & Fiona Landon, *Achieving Justice Outcomes: Participants of Project Restore's Restorative Processes, in* RESTORATIVE RESPONSES TO SEXUAL VIOLENCE 192, 202 (Estelle Zinsstag & Marie Keenan eds., 2017).

[72] McGylnn & Westmarland, *supra* note 69, at 186.

was attacked and she was further traumatized. Overall, despite the positive outcome of the trial, Alexa was left without a sense of closure or justice that she hoped for.

While pre-conviction criminal legal processes can be traumatizing and ineffective at meeting the needs of those that experience sexual harm, post-conviction sex crimes policies can be equally problematic. In the next section, the authors present a brief history of these policies and document the research on why they are ineffective.

II. A BRIEF HISTORY OF POST-CONVICTION SEX CRIMES POLICIES

Modern day sex crimes policies typically refer to post-conviction polices that were created during the early to mid-1990s after a series of high profile, gruesome offenses were committed against young children by strangers.[73] Thus, while these cases constitute only a small fraction of all sex crimes cases, they prompted states and the federal government to enact a new era of laws designed to keep children safe from people who sexually offend.[74] There was a common belief that remains unsupported by research, but is nonetheless cited by lawmakers and judges, that rates of recidivism among people who sexually offend are "frightening and high."[75] In May 1989, Earl Shriner, a man from Tacoma, Washington who

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[73] Karen J. Terry & Alissa R. Ackerman, *A Brief History of Major Sex Offender Laws*, *in* SEX OFFENDER LAWS: FAILED POLICIES, NEW DIRECTIONS 50, 55 (Richard G. Wright ed., Springer Publishing Company 2d ed. 2015) (2009).

[74] *See id.* at 55-58. Several cases spurred lawmakers to enact sweeping legislation targeting individuals who had committed sexual offenses. This was in part because of a moral panic over a few highly publicized cases. Public outcry and fear prompted lawmakers to enact legislation aimed at reducing sexual harm. There is a cyclical nature to sex crimes legislation dating back to at least the 1930s and 40s. For example, the case of Albert Fish, a man who claimed to have abused over 400 children, sparked a change in policing practices and new "habitual sexual offender" laws. *See generally* Juliane Cunha, *Albert Fish, Pedophile and Serial Killer with Over 400 Child Victims*, CASO CRIMINAL (Nov. 10, 2021), https://perma.cc/83HN-VWLV; *see also* Lisa Marie Kruse, Sex offenders, Sexuality, and Social Control: A Case Study in the Social Construction of a Social Problem 54 (July 13, 2017) (Master's thesis) (on file with the Eastern Michigan University Digital Commons). In 1950, Paul Tappan wrote about the problematic nature of sex crimes legislation and fallacies about people who commit sexual offenses. His report holds true today, despite public paranoia and moral panic on this topic. *See* PAUL W. TAPPAN, THE HABITUAL SEX OFFENDER (1950).

[75] Ira Mark Ellman & Tara Ellman, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 CONST. COMMENT 495 (2015). Multiple court cases, including McKune v. Lile, 536 U.S. 24, 33 (2002) and Smith v. Doe, 538 U.S. 84, 93 (2003) cite high rates of recidivism among people who commit sexually offences. Similarly, lawmakers are on the record citing these statistics. For example, in 1996, U.S. Senator Kay Bailey Hutchison (R-TX) spoke on the senate floor and stated:

> We do know several unpleasant facts about sexual predators who prey on children . . . . The repeat crime rate for sex offenders is estimated to be as much as ten

was known for prior violent assaults, sexually assaulted and mutilated the genitals of a seven-year-old boy.[76] Later that year, another man from Washington, Westley Allan Dodd, raped and murdered three boys.[77] These cases were the catalyst for the Washington State Community Protection Act of 1990, which offered various ways to ensure community safety.[78] While Washington state lawmakers were focusing their efforts on state policy, another case prompted the implementation of federal legislation.

In 1989, an 11-year-old boy named Jacob Wetterling was kidnapped in St. Joseph, Minnesota and his body was not found until 2016, 27 years later.[79] After his kidnapping, Jacob's mother, Patty Wetterling, advocated for efforts to create and implement registration policies, both in Minnesota and on the federal level.[80] This ultimately led to the passage of the Jacob Wetterling Crimes Against Children and Sexually Violent

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> times higher than the recidivism rate of other criminals. Mr. President, we know that more than 40 percent of convicted sex offenders will repeat their crimes.

Amber Hagerman Child Protection Act of 1996: Hearing on S8638, Before the Comm. On Foreign Rels., 104th Cong. (1996) (statement of Kay Bailey Hutchison). Statements that suggest that people who commit sex offenses have high rates of recidivism appear to have stemmed from an article in *Psychology Today*, a mass market magazine. The article states that "nearly 80% of people who commit sexual offenses who remain untreated will go on to reoffend." Robert E. Freeman-Longo & R. Wall, *Changing a Lifetime of Sexual Crime*, PSYCH. TODAY, Mar. 1986, at 58.

[76] *See* Terry & Ackerman, *supra* note 73, at 55; Associated Press, *Man Gets 131 1/2-Year Term for Sexually Mutilating Boy*, N.Y. TIMES (Mar. 27, 1990), https://perma.cc/934M-84UD.

[77] *See* Terry & Ackerman, *supra* note 73, at 55; Timothy Egan, *Illusions Are Also Left Dead as Child-Killer Awaits Noose*, N.Y. TIMES, (Dec. 29, 1992), https://perma.cc/FXX5-9YMT.

[78] *See* Terry & Ackerman, *supra* note 73, at 55. While the Act is mostly known for allowing for the civil commitment of "sexually violent predators," it also increased sentencing lengths for all sexual offenses, mandated registration with law enforcement upon release from incarceration, authorized law enforcement to notify, on a need-to-know basis that someone on the registry was living in nearby, and required treatment for people who sexually offend and compensation for those who have been sexually harmed. Norm Maleng, *The Community Protection Act and the Sexually Violent Predator Statute*, 15 U. PUGET SOUND L. REV. 821, 822 (1992); Washington State's law, RCW 71.09–Sexually Violent Predators, also known as the Community Protection Act of 1990, included 14 different provisions to protect Washingtonians from the likes of Earl Shriner and Westley Alan Dodd. Through this Act, Washington State became the first in the nation to require community notification. WASHINGTON STATE'S COMMUNITY NOTIFICATION LAW: 15 YEARS OF CHANGE, WASH. ST. INST. PUB. POL'Y (2006), https://perma.cc/P9UW-L2G4.

[79] *About Jacob Wetterling Resource Center*, JACOB WETTERLING RESOURCE CTR., ZERO ABUSE PROJECT, https://perma.cc/HF2U-JAUQ (last visited Jan. 23, 2022).

[80] Richard G. Wright, *An Interview with Patty Wetterling*, *in* SEX OFFENDER LAWS: FAILED POLICIES, NEW DIRECTIONS, *supra* note 73, 69-77.

Offender Registration Act in 1994, which required every state to create police registries for all people convicted of sexual offenses.[81]

That same year, a seven-year-old girl, Megan Kanka, was lured from her home by a man with two previous convictions for sex crimes against children. He subsequently raped and murdered her.[82] Megan's parents believed that if they had known the man was living across the street from them, they could have better protected their daughter.[83] They advocated for a community notification statute that would require law enforcement agencies to notify the public about people with a sex offense conviction living in the community.[84] Less than three months after the murder, the state of New Jersey passed "Megan's Law."[85]

In 1996, the Jacob Wetterling Act was amended to include a community notification requirement which required states to enact both registration and community notification policies.[86] Federal guidelines provided states with the ability to implement these laws in ways each state saw fit.[87] For example, states could create their own procedures for everything from how they determined risk to who would be subject to public notification.[88] In the early days of public notification, community members could visit their local police precinct and request a compact disk that included everyone currently on the public registry.[89] However, by 2003 all states, U.S. territories, and tribal jurisdictions had their own internet registries. With states having broad latitude to decide what types of information to include on their registry sites and little oversight from

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[81] *See* Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. § 14071 (1994).

[82] Terry & Ackerman, *supra* note 73, at 50-65.

[83] *Our Mission*, MEGAN NICOLE KANKA FOUND., INC., https://perma.cc/EY7D-NH79 (last visited Jan. 23, 2022).

[84] *Id.*

[85] Megan's Law, N.J. Stat. Ann. §§ 2C:7-1 to 7-11 (West 1999); *see Megan's Law*, DEP'T OF L. & PUB. SAFETY OFF. OF THE ATT'Y GEN., https://perma.cc/HTV6-7VXG (last visited Jan. 23, 2022).

[86] *Legislative History of Federal Sex Offender Registration and Notification*, U.S. DEP'T OF JUST., OFF. OF SEX OFFENDER SENT'G, MONITORING, APPREHENDING, REGISTERING, & TRACKING, https://perma.cc/F888-SKZA (last visited Jan. 23, 2022).

[87] Alissa R. Ackerman et al., *Who Are the People in Your Neighborhood? A Descriptive Analysis of Individuals on Public Sex Offender Registries*, 34 INT'L J. L. AND PSYCH., 149, 149–59 (2011) [hereinafter *Who Are the People in Your Neighborhood?*]; *Tracking Sex Offenders: Federal Law, Resources Have Led to Marked Improvement of State Registries, But More Work Is Needed*, U.S. DEP'T OF JUST., NAT'L INST. OF JUST. (Nov. 13, 2020), https://perma.cc/SAX7-RTG7; Terry & Ackerman, *supra* note 73, at 50-65.

[88] Terry & Ackerman, *supra* note 73, at 50-65.

[89] RICHARD G. ZEVITZ & MARY ANN FARKAS, NAT'L INST. OF JUST., U.S. DEP'T OF JUST., SEX OFFENDER COMMUNITY NOTIFICATION: ASSESSING THE IMPACT IN WISCONSIN 1, (2000).

the federal government, there was a lack of uniformity across registry sites.

In an effort to standardize information across individual state registries and because of expanded interest in creating a national public sex crimes registry, the federal government passed the Adam Walsh Child Protection and Safety Act (AWA).[90] This broad, sweeping legislation created an offense-based classification system, mandated that all people with sex offense convictions be listed on state and national registries, expanded requirements for who must register and for how long, and required retroactive registration of certain individuals.[91] Little research has been conducted to assess the content and makeup of these registries.[92] However, those studies that have been conducted reveal inconsistencies between published statistics and actual registry content.[93] A 2011 study was the first of its kind to look at the content and using data from the majority of state registries.[94] The study found many inconsistencies both between the published count of people required to register and those who were actually publicly registered between individual states. For example, some states include individuals who are deceased, deported, incarcerated, or otherwise institutionalized, or living out of state, in their state counts. While some states publicly register every person convicted of a sexual offense, others only register those who are considered to be at a moderate to high risk of reoffending.[95] A series of studies that stemmed from this original 2011 study found similar results.[96] By 2018, the United States

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[90] *See generally* Adam Walsh Child Protection and Safety Act of 2006, 34 U.S.C. §§ 20901, 20911 (2006).

[91] *See id.*, §§ 20901-20931.

[92] *Who Are the People in Your Neighborhood?*, *supra* note 87, at 149.

[93] Alissa R. Ackerman et al., *How Many Sex Offenders Really Live Among Us? Adjusted Counts and Population Rates in Five U.S. States*, 35 J. CRIME & JUST., Nov. 2012, at 1, 1 [hereinafter *How Many Sex Offenders Really Live Among Us?*]; Andrew J. Harris et al., *Registered Sex Offenders in the United States: Behind the Numbers*, 60 CRIME & DELINQ. 3, 3 (2014).

[94] *Who Are the People in Your Neighborhood?*, *supra* note 87, at 151. Ackerman and her colleagues worked with a computer programmer to build a program that would "scrape" all of the publicly available registry data from each state website. They compared the raw count of their database to the most recent count provided by the National Center for Missing and Exploited Children ("NCMEC") and found that their count represented 66% of the NCMEC count.

[95] *Who Are the People in Your Neighborhood?*, *supra* note 87, at 155. The study also found differences in the types of information provided on registries.

[96] *See How Many Sex Offenders Really Live Among Us?*, *supra* note 93, at 8; Harris et al., *supra* note 93, at 11-21; *see also* Alissa R. Ackerman, *National Estimates of Registered Sex Offenders in the United States. Is Double Counting a Problem?*, 40 AM. J. CRIM. JUST. 75, 80, 83-84 (2014).

was approaching one million people on public registries.[97] These people and their families are subject to a complex web of ever increasing local, state, and federal policies that make living productive and healthy lives almost impossible.[98] For example, studies find that local and state residence restrictions relegate people into homelessness.[99] Other research findings suggest that modern sex crimes policies lead to non-sexual recidivism.[100] Perhaps most importantly, studies consistently report that modern sex crimes policies are ineffective at actually reducing the number of sex crimes that occur.[101] This is in part because these policies lead to increased stress and fear among those forced to register, but also

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[97] Andrew J. Harris et al., *States' SORNA Implementation Journeys: Lessons Learned and Policy Implications*, 23 NEW CRIM. L. REV. 315, 317 (2020).

[98] *See* Danielle J. S. Bailey, *A Life of Grief: An Exploration of Disenfranchised Grief in Sex Offender Significant Others*, 43 AM. J. CRIM. JUST. 64 *passim* (2018); *see also* Danielle J. S. Bailey & Lisa L. Sample, *An Examination of a Cycle of Coping with Strain Among Registered Citizens' Families*, 30 CRIM. JUST. STUD. 158 *passim* (2017).

[99] *See* Kelly M. Socia et al., *"Brothers Under the Bridge": Factors Influencing the Transience of Registered Sex Offenders in Florida*, 27 SEXUAL ABUSE: J. RSCH. & TREATMENT 559, 560 (2015); *see also* Jill S. Levenson et al., *Where for Art Thou? Transient Sex Offenders and Residence Restrictions*, 26 CRIM. JUST. POL'Y REV. 319, 321 (2015); *see also* Jill S. Levenson, *Hidden Challenges: Sex Offenders Legislated into Homelessness*, 18 J. SOC. WORK 348, 348-63 (2018); *see also* Gina Puls, *No Place to Call Home: Rethinking Residency Restrictions for Sex Offenders*, 36 B.C.J.L. & SOC. JUST. 319, 319 (2016). Residence restrictions prohibit where people with sex offense convictions can live in relation to schools, parks, and daycare centers. These restrictions range from 1000 feet to over 2500 feet. This means that many places that would otherwise be available for people with sex offense convictions to live become unavailable. Some states have created "tent cities" for people with sex offense convictions because there are no other available options for them. *See generally* UNTOUCHABLE (Blue Lawn Productions 2016) (documenting the homeless encampment in Miami-Dade County, Florida).

[100] Though not generalizable, the Ackerman and Sacks study found that the strain of being on the registry impacted self-reported non-sexual recidivism. Individuals with higher levels of anger and strain were more likely to report drug offenses, property offenses, and other violent offenses. This is consistent with General Strain Theory, which explains that people who are not able to cope with life stresses and strains may be more likely to act out in criminal and delinquent ways. Alissa R. Ackerman & Meghan Sacks, *Can General Strain Theory Be Used to Explain Recidivism Among Registered Sex Offenders?*, 40 J. CRIM. JUST. 187, 188-91 (2012) (noting that the general criminological literature suggests that successful reentry into the community requires stable housing, employment, and pro-social relationships); c*f.* ADIAH PRICE-TUCKER ET AL., HARV. INST. OF POL. CRIM. JUST. POL'Y GRP., SUCCESSFUL REENTRY: A COMMUNITY-LEVEL ANALYSIS 30 (2019) (highlighting that current sex crimes policies make maintaining stable housing, employment, and pro-social relationships very difficult for people to attain).

[101] *See* Alissa R. Ackerman et al., *Legislation Targeting Sex Offenders: Are Recent Policies Effective in Reducing Rape?*, 29 JUST. Q. 858, 858–87 (2012); *cf.* J. J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J. L. & ECON. 161, 161 (2011) (explaining that notification may increase recidivism); *see* Bob Edward Vásquez et al., *The Influence of Sex Offender Registration and Notification Laws in the United States: A Time-Series Analysis*, 54 CRIME & DELINQ. 175, 188 (2008).

because they create unnecessary obstacles (e.g., impeding employment, housing, and prosocial relationships) that people and their families must endure.[102]

Some proponents of these policies have argued that they were enacted to bring justice to individuals who have experienced sexual harm[103] —that somehow these policies will help survivors to heal. Some lawmakers even propose or support legislation targeting people who commit sex crimes in part because of a specific, highly publicized sexual offense.[104] Yet, little is known about how people who have experienced sexual harm think about current policy and practice, partially due to the fact that there is little available research investigating survivor perspectives.[105] One study that compared people who have experienced sexual victimization with those who had not been sexually victimized found that those who had experienced victimization were more likely to express more positive attitudes about people who commit sex crimes, and were *less supportive* of registration and notification policies than those who have not experienced sexual harm.[106]

As with most criminal legal system organizations, institutions, and policies, sex crimes registries disproportionately impact people of color, with Black men more likely to be impacted by current sex crimes policies.[107] This is of particular importance because some research suggests that White people commit more sex crimes than people of other

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[102] *See* Alissa R. Ackerman et al., *The Experiences of Registered Sex Offenders with Internet Offender Registries in Three States*, 52 J. OFFENDER REHAB. 29, 29-45 (2013); *see also* Keri B. Burchfield & William Mingus, *Not in My Neighborhood: Assessing Registered Sex Offenders' Experiences with Local Social Capital and Social Control*, 35 CRIM. JUST. & BEHAV. 356, 356-74 (2008); *see also* Jill S. Levenson & Leo P. Cotter, *The Effect of Megan's Law on Sex Offender Reintegration*, 21 J. CONTEMP. CRIM. JUST. 49, 49-66 (2005); *see also* Jill S. Levenson & David A. D'Amora, *Social Policies Designed to Prevent Sexual Violence: The Emperor's New Clothes?*, 18 CRIM. JUST. POL'Y. REV. 168, 168-99 (2007); *see also* Jill S. Levenson et al., *Meghan's Law and its Impact on Community Re-Entry for Sex Offenders*, 25 BEHAV. SCI. & L. 587, 591 (2007); *see also* Cynthia Calkins Mercado et al., *The Impact of Specialized Sex Offender Legislation on Community Reentry*, 20 SEXUAL ABUSE: J. RSCH. & TREATMENT 188, 188 (2008); *see also* Richard Tewksbury, *Collateral Consequence of Sex Offender Registration*, 21 J. CONTEMP. CRIM. JUST. 67, 67-81 (2005).

[103] *See generally* Michael Wenzel & Ines Thielmann, *Why We Punish in the Name of Justice: Just Desert Versus Value Restoration and the Role of Social Identity*, 19 SOC. JUST. RSCH. 450 (2006).

[104] Michelle Meloy et al., *The Sponsors of Sex Offender Bills Speak up: Policy Makers' Perceptions of Sex Offenders, Sex Crimes, and Sex Offender Legislation*, 40 CRIM. JUST. & BEHAV. 438, 442-43 (2013).

[105] Suzanne Spoo et al., *Victims' Attitudes Toward Sex Offenders and Sex Offender Legislation*, 62 INT'L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 3385, 3388 (2018).

[106] *Id.* at 3395.

[107] Alissa R. Ackerman & Meghan Sacks, *Disproportionate Minority Presence on U.S. Sex Offender Registries*, JUST. POL'Y J., Fall 2018, at 1, 5, https://perma.cc/HZH6-LNQH.

races.[108] A 2018 study by Ackerman and Sacks that examined the number and rate of minorities on U.S. registries found that 72% of people who are forced to register nationally were White, while fewer than 27% of individuals were Black.[109] Jurisdictions in the southern U.S. had the highest percentage of Black people on their registries.[110] Black registered citizens comprised less than 5% of people forced to register in twelve jurisdictions, but in each of those jurisdictions the percentage of Black people forced to register was still higher than the percentage of Black people in the state population.[111]

Simple percentages do not provide enough information to explain the extent of disproportionate minority presence, so per capita rates are used to paint a more accurate picture. In every jurisdiction but one, Black people had a higher rate of inclusion on registries.[112] The research is clear that post-conviction sex crimes policies place undue burdens on people forced to register, making reintegration into the community extremely difficult. This is exponentially harder for people of color, specifically because of the disparate impacts across criminal legal processes.[113]

Post-conviction sex crimes policies are typically used in a "one size fits all" fashion, which improperly consider all offenses and the people who commit them as if they are dangerous and will inevitably reoffend. This causes the public to erroneously conflate sexual offenses committed against children by strangers with all other forms of sexual offending.[114] While these kinds of crimes do occur, they are rare.[115] Perpetuating the myth that we must protect kids from strangers makes it more difficult to

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[108] *See* JAN M. CHAIKEN & LAURIE ROBINSON, Foreword to LAWRENCE A. GREENFELD, U.S. DEP'T. OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT., NCJ 163392, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT (1997), https://perma.cc/A9RQ-V7CY.

[109] Ackerman & Sacks, *supra* note 107, at 7-8 (explaining that while the raw count of people on the registry implies that the majority are White, Black individuals are disproportionately impacted). QUICKFACTS UNITED STATES, U.S. CENSUS BUREAU, tbl. (July 1, 2019), https://perma.cc/9ZQW-WFYZ (according to the U.S. Census Bureau, Black individuals made up approximately 13.4% of the population in 2019).

[110] Ackerman & Sacks, *supra* note 107, at 14.

[111] *Id.* at 8.

[112] *Id.*

[113] *Id.*

[114] *See* Lisa L. Sample & Timothy M. Bray, *Are Sex Offenders Different?: An Examination of Rearrest Patterns*, 17 CRIM. JUST. POL'Y REV. 83, 84-85 (2006) [hereinafter *Are Sex Offenders Different?*]; *see also* James F. Quinn et al., *Societal Reaction to Sex Offenders: A Review of the Origins and Results of the Myths Surrounding Their Crimes and Treatment Amenability*, 25 DEVIANT BEHAV. 215, 218 (2004).

[115] HOWARD N. SNYDER, U.S. DEP'T. OF JUST., NAT'L CTR. FOR JUV. JUST., NCJ 182990, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 13 (2000).

prevent the types of sex crimes that actually do happen on a regular basis, namely crimes between people known to each other: family members, acquaintances, teachers, colleagues, and friends.[116] Most importantly, upholding the stranger danger myth denies access to and participation in important conversations and educational opportunities regarding ways to effectively prevent sexual harm.

Another false assumption about registries is that they include all people who have sexually offended and will therefore keep society safe. With almost a million people on registries, this is easy to assume.[117] It is important to note that most new sexual offenses are committed by people who are not on registries.[118] First, this is because most people who are convicted of a sexual offense do not reoffend.[119] Studies consistently find that people who have committed a sexual offense, especially those who have been through treatment, typically do not reoffend.[120] A recent meta-analysis of treatment programs found that they reduced recidivism by

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[116] *See* Richard R. Zevitz, *Sex Offender Community Notification: Its Role in Recidivism and Offender Reintegration*, 19 CRIM. JUST. STUD. 193, 205 (2006).

[117] NAT'L CTR. FOR MISSING & EXPLOITED CHILD., *Map of Registered Sex Offenders in the United States*, (Dec. 4, 2018), https://perma.cc/TAT5-Y2FX. Publishing of these statistics no longer occurs publicly by this organization

[118] *See* PATRICK A. LANGAN ET AL., U.S. DEP'T. OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT., NCJ 198281, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 24 (2003).

[119] Alissa R. Ackerman & Marshall Burns, *Bad Data: How Government Agencies Distort Statistics on Sex-Crime Recidivism*, 13 JUST. POL'Y J. 1, 6 (2016); ALLEN J. BECK & BERNARD E. SHIPLEY, U.S. DEP'T. OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT., RECIDIVISM OF PRISONERS RELEASED IN 1983 6 (1989) (finding that only 7.7% of people who committed forcible commit the same offense within three years of release); R. Karl Hanson & Kelly E. Morton-Bourgon, *The Characteristics of Persistent Sexual Offenders: A Meta-Analysis of Recidivism Studies*, 73 J. CONSULTING & CLINICAL PSYCH. 1154, 1158 (2005) (finding that 13.7% of individuals with a previous sex crime conviction were convicted of a new sex crime); ANDREW J. R. HARRIS & R. KARL HANSON, PUB. SAFETY & EMERGENCY PREPAREDNESS CANADA, SEX OFFENDER RECIDIVISM: A SIMPLE QUESTION 2004-03 11 (2004) (finding that both individuals who had sexually harmed adult and children had low levels of recidivism. Overall recidivism rates were 14%, 20%, and 24% after 5, 10, and 15 years, respectively. Individuals who had been convicted of incest had the lowest recidivism rates which were 6%, 9%, and 13% after 5, 10, and 15 years, respectively); Lisa L. Sample & Timothy M. Bray, *Are Sex Offenders Dangerous?*, 3 CRIMINOLOGY & PUB. POL'Y 59, 73 (2003) (finding that only 6.5% of individuals who were convicted of a sex crime were rearrested for a new sex crime within 5 years) [hereinafter *Are Sex Offenders Dangerous?*]; *see* PATRICK A. LANGAN, ET AL., U.S. DEP'T. OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT., NCJ 198281, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 24 (2003); *see Are Sex Offenders Different?*, *supra* note 114, at 83.

[120] Hanson & Morton-Bourgon, *supra* note 119, at 1159; HARRIS & HANSON, *supra* note 119; LANGAN ET AL., *supra* note 119; *Are Sex Offenders Dangerous?*, *supra* note 119, at 64, 68; *Are Sex Offenders Different?*, *supra* note 114, at 86.

22%.[121] The second reason for this erroneous assumption lies in reporting patterns and pre-conviction criminal legal processing which funnels out most known offenses. As mentioned, for every 1,000 rapes committed, only 25 people will be convicted.[122] This translates into similar numbers for inclusion on registries. As such, only a small fraction of people responsible for inflicting sexual harm will ever end up on a registry.

Current post-conviction sex crimes policies and practices were enacted after several highly publicized cases where young, White children were abducted, sexually violated, and murdered by strangers.[123] Despite the literature that clearly indicates that the vast majority of people who have sexually harmed will not reoffend, these policies have burgeoned into a vast web of local, state, and federal policies that deny people who have been convicted of sexual offenses the ability to live productive lives in the community. Research has shown that these policies do not reduce sexual violence, that they create more risk than they prevent, that they disproportionately impact people of color, and that people who experience sexual violence are not proponents of these policies. In addition, they only include a small fraction of people responsible for committing acts of sexual harm. Still, post-conviction sex crimes policies remain a popular law enforcement tool.

Criminal legal processes that occur prior to conviction and post-conviction policies for people who have been convicted of sexual offenses both contribute to additional harm for survivors, their families, and broader communities. They often do not meet the justice needs of any person impacted by sexual harm, and have no impact on decreasing rates of sexual harm. One reason for this is that meeting the actual needs of all parties requires individualized or case-by-case practices and procedures that large systems are not amenable to. Another reason is a lack of understanding about the many reasons why sexually harmful or violent behavior occurs in the first place. Section III explains the reasons why sexual harm occurs.

III. THE ETIOLOGY OF SEXUAL HARM

There is no single variable that explains why a person commits acts of sexual harm. It is usually the result of a combination of psychological, developmental, and sometimes biological factors, including an inability to cope with life stressors (e.g., the loss of employment or marital problems), isolation and loneliness, lack of empathy, few or weak

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[121] Bitna Kim et al., *Sex Offender Recidivism Revisited: Review of Recent Meta-analyses on the Effects of Sex Offender Treatment*, 17 TRAUMA, VIOLENCE, & ABUSE 105, 109 (2016).

[122] *The Criminal Justice System: Statistics*, RAINN, *supra* note 35.

[123] Terry & Ackerman, *supra* note 73, at 64.

attachments to others, limited social skills, and cognitive distortions ("CDs").[124] CDs are a type of automatic thought process that develops and aids in minimizing the seriousness of an offense.[125]

Regardless of the underlying causes of sexual harm, people who perpetrate it make the decision to do so. Sometimes this involves a series of decisions and planning over a long period of time.[126] Other times, the opportunity arises and the decision is made quickly.[127] Often people who sexually harm are unaware of the series of decisions that lead to their behavior, but justify it through the use of CDs.[128] CDs allow a person to minimize or deny the harm done to victims, to minimize the violence used during an offense, to deny responsibility for an offense, and to deny planning it.[129] There are several CDs that are common among people that commit acts of childhood sexual abuse, including the belief that the abusive behavior is teaching the child about relationships, that the child enjoys it, that the behavior is not harmful, and the belief that the act of abuse is due to mutual interest.[130]

Individuals who commit rape and sexual assault also experience CDs. However, CDs exhibited in these instances often reinforce male superiority, negative views toward women, and adherence to rape myths.[131] For example, during the 1970s, Susan Brownmiller published a

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[124] KAREN J. TERRY, SEXUAL OFFENSES AND OFFENDERS: THEORY, PRACTICE AND POLICY 72-73 (2d ed. 2013).

[125] Tony Ward, *Sexual Offenders' Cognitive Distortions as Implicit Theories*, 5 AGGRESSION & VIOLENT BEHAV. 491, 502-03 (2000).

[126] TERRY, *supra* note 124, at 71-73.

[127] *Id.*

[128] *See* Gene G. Abel et al., *Complications, Consent, and Cognitions in Sex Between Children and Adults*, 7 INT'L J. L. & PSYCHIATRY 89 (1984) (highlighting a few of the common cognitive distortions and "explanations" held by adults who have caused sexual harm to children); *see also* Marvin B. Scott & Stanford M. Lyman, *Paranoia, Homosexuality, & Game Theory*, 9 J. HEALTH & SOC. BEHAV. (SPECIAL ISSUE) 179 *passim* (1968); Gresham M. Sykes & David Matza, *Techniques of Neutralization: A Theory of Delinquency*, 22 AM. SOCIO. REV. 664, 666-67 (1957).

[129] *See* JUDAH OUDSHOORN ET AL., THE LITTLE BOOK OF RESTORATIVE JUSTICE FOR SEXUAL ABUSE: HOPE THROUGH TRAUMA 28-29 (2015); *see also* Gresham M. Sykes & David Matza, *supra* note 128, at 667-68.

[130] Ward, *supra* note 125, at 493.

[131] Ruth Mann & Clive Hollin, *Self-reported Schemas in Sexual Offenders*, 21 J. FORENSIC PSYCHIATRY & PSYCH. 834, 846 (2010); Rebecca J. Milner & Stephen D. Webster, *Identifying Schemas in Child Molesters, Rapists, and Violent Offenders*, 17 SEXUAL ABUSE: J. RSCH. & TREATMENT 425, 434 (2005); *see* Neil M. Malamuth & Lisa M. Brown, *Sexually Aggressive Men's Perceptions of Women's Communications: Testing Three Explanations*, 67 J. PERSONALITY & SOC. PSYCH. 699 (1994); *see also* Devon L. L. Polaschek & Theresa A. Gannon, *The Implicit Theories of Rapists: What Convicted Offenders Tell Us*, 16 SEXUAL ABUSE:

book that analyzed rape within cultural and political contexts.[132] She asserted that acts of sexual harm, specifically the rape of adult women, exemplified men's oppression of them, and that sexual assault was a symptom of a patriarchal society that subjects women and reinforces male supremacy and domination.[133] Societal-level variables including social norms that support rape, male superiority, and maintain women's inferiority culminate in negative views toward women and adherence to rape myths.[134] Men who rape are more likely to condone violence and identify with a hypermasculine identity.[135] Most rapes are about power, control, and opportunity—not sexual attraction or gratification.[136] In essence, rape is often used as a means to control and dominate.[137]

Like those who commit acts of childhood sexual abuse, men who commit rape often experience feelings of worthlessness, isolation, feelings of inadequacy, few or weak peer relationships, and difficulty managing aggression.[138] In combination with psychological, societal, and behavioral factors, childhood trauma and abuse can also play a significant role in the etiology of harmful sexual behavior.[139] Childhood adversity and trauma are often significant predictors of myriad difficulties in

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J. RSCH. & TREATMENT 299, 310-13 (2004); Devon L. L. Polaschek & Tony Ward, *The Implicit Theories of Potential Rapists: What Our Questionnaires Tell Us*, 7 AGGRESSION & VIOLENT BEHAV. 385, 392-99 (2002).

[132] SUSAN BROWNMILLER, AGAINST OUR WILL 15-18 (1975).

[133] *Id.*

[134] Burt, *supra* note 41, at 229.

[135] Laura S. Abrams, Ben Anderson-Nathe & Jemel Aguilar, *Constructing Masculinities in Juvenile Corrections*, 11 MEN & MASCULINITIES 22, 26 (2008); Dominic J. Parrott & Amos Zeichner, *Effects of Hypermasculinity on Physical Aggression Against Women*, 4 PSYCH. MEN & MASCULINITY 70 (2003); Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777, 785 (2000) (defining hypermasculine identity as an "exaggerated exhibition of physical strength and personal aggression"); R.W. Connell, *Masculinities and Globalization*, 1 MEN & MASCULINITIES 3 (1998); A. Nicholas Groth, Ann Wolbert Burgess, & Lynda Lytle Holmstrom, *Rape: Power, Anger, and Sexuality*, 134 AM. J. PSYCHIATRY 1239, 1240 (1977).

[136] Groth, et al., *supra* note 135, at 1242.

[137] *Id.* at 1240.

[138] Gordon C. Nagayama Hall & Richard Hirschman, *Toward a Theory of Sexual Aggression: A Quadripartite Model*, 59 J. CONSULTING & CLINICAL PSYCH. 662, 665 (1991); *see* W. L. Marshall, *The Role of Attachments, Intimacy, and Loneliness in the Etiology and Maintenance of Sexual Offending*, 25 SEXUAL & RELATIONSHIP THERAPY 73, 76-77 (2010).

[139] Ashley F. Jespersen, Martin L. Lalumière & Michael C. Seto, *Sexual Abuse History Among Adult Sex Offenders and Non-Sex Offenders: A Meta-Analysis*, 33 CHILD ABUSE & NEGLECT 179, 188 (2009); Jill S. Levenson & Melissa D. Grady, *The Influence of Childhood Trauma on Sexual Violence and Sexual Deviance in Adulthood*, 22 TRAUMATOLOGY 94, 101 (2016) [hereinafter Levenson & Grady, *The Influence of Childhood Trauma on Sexual Violence and Sexual Deviance in Adulthood*].

adulthood, including sexual harm.[140] In a large-scale study conducted in partnership with the Centers for Disease Control ("CDC") and Kaiser Permanente, researchers examined the relationship of adverse childhood experiences ("ACEs") with health outcomes in adulthood. The study found that over 25% of participants had two or more ACEs.[141] They found that ACEs, including childhood abuse and neglect among others, were linked to obesity, increased rates of heart attacks and strokes, higher rates of cancer and chronic illnesses, increased risk of mental illnesses, higher rates of substance use and misuse, and higher rates of suicide.[142]

Researchers have also examined the relationship between childhood adversity and criminal behavior. One study has found that incarcerated people were more likely to have had experienced sexual and physical abuse as a child than people who are not incarcerated.[143] Clearly, not all people who experience childhood sexual abuse become adults that perpetrate acts of sexual harm, but there is a nuanced link between the two. More specifically, researchers have found that men who have offended sexually have higher odds of having experienced childhood sexual abuse, physical abuse, verbal abuse, and emotional abuse than men who have not.[144] Similarly, researchers have found that almost half of men who had sexually offended reported four or more ACEs.[145]

There are multiple reasons why people sexually offend that range from the inability to cope with life stressors, to cognitive distortions, poor attachments to others, and childhood trauma. Criminal legal processes do

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[140] Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults*, 14 AM. J. PREVENTATIVE MED. 245 *passim* (1998).

[141] *Id.* at 251 tbl.3.

[142] *Id.* at 251-54.

[143] The study found:

> Between 6% and 14% of male offenders and between 23% and 37% of female offenders reported they had been physically or sexually abused before 18 . . . . A review of 16 studies estimated that for the general adult population 5% to 8% of males and 12% to 17% of females are abused as children.

CAROLINE WOLF HARLOW, U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT., NCJ 172879, PRIOR ABUSE REPORTED BY INMATES AND PROBATIONERS 1 (1999).

[144] Jill S. Levenson et al., *Adverse Childhood Experiences in the Lives of Male Sex Offenders: Implications for Trauma-Informed Care* 26 SEXUAL ABUSE: J. RSCH. & TREATMENT 1 *passim* (2014) [hereinafter Jill S. Levenson et al., *Adverse Childhood Experiences in the Lives of Male Sex Offenders*]; Levenson & Grady, *The Influence of Childhood Trauma on Sexual Violence and Sexual Deviance in Adulthood*, *supra* note 140, at 94-103; Jill S. Levenson & Kelly M. Socia, *Adverse Childhood Experiences and Arrest Patterns in a Sample of Sexual Offenders*, 31 J. INTERPERSONAL VIOLENCE 1 *passim* (2015); *see* Wesley G. Jennings et al., *An Empirical Assessment of the Overlap Between Sexual Victimization and Sex Offending*, 58 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 1466, 1475 (2014).

[145] *See* Jill S. Levenson et al., *Adverse Childhood Experiences in the Lives of Male Sex Offenders*, *supra* note 144, at 13.

little to address the underlying factors that lead to sexually harmful behavior. Restorative justice requires that these underlying factors are addressed. It helps individuals who have perpetrated sexual harm to better understand what led to them causing harm in the first place and taking the necessary steps to be fully accountable for their behavior.[146] The remainder of this paper focuses on restorative justice, how it can be used to effectively address acts of sexual harm, and culminates with hopes for a restorative future.

IV. WHAT IS RESTORATIVE JUSTICE?

Restorative justice is a framework for addressing all forms of harm, from simple disagreements to violent crimes.[147] It focuses on the harms caused rather than violations of specific criminal laws or statutes.[148] This is because restorative justice honors that everyone is interconnected from communities to the environment; the main focus is always on healing and doing no further harm. Restorative frameworks offer a myriad of opportunities for acknowledgement, accountability, and harm-reduction.[149] These approaches focus on the ripple effects of harm. When someone is hurt, the hurt is also felt by partners, families, friends, and communities.[150] Restorative approaches are also concerned with the harms and consequences felt by those close to people who have perpetrated harm.[151] Restorative practices must remain multi-faceted because the needs of different participants can be in opposition to one another. As such, the approach is participant-driven and survivor-centered.

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[146] *Cf.* HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE: REVISED AND REVISITED 42 (2d ed. 2015) (noting that people who have harmed have "an obligation to address the causes of their behavior, but they usually cannot do this alone"). Based on the authors' experience, the pre-education process helps people who have harmed to develop an understanding of the causes of their behavior and the language to talk about those factors in an accountable and responsible way.

[147] *See id.* Criminal legal processes are concerned with whether a person is guilty of violating a specific criminal statute. This language is not utilized in restorative spaces, as the focus is on the impact of the harm caused. For example, in a criminal legal process someone could be convicted of perpetrating rape if the state could prove beyond a reasonable doubt that a rape had occurred. The adversarial process might focus on the minutiae of the case. In restorative processes the focus remains on the impact of the behavior and the breakdown of relationships. Restorative justice seeks to repair harm, while criminal legal processes seek to affirm guilt.

[148] HOWARD ZEHR & ALI GOHAR, THE LITTLE BOOK OF RESTORATIVE JUSTICE 33-36 (2003).

[149] ZEHR & GOHAR, *supra* note 148 at 83-85.

[150] ZEHR & GOHAR, *supra* note 148 at 18.

[151] This is particularly true for people who have committed acts of sexual harm. *See generally* Bailey, supra *note* 98.

Whenever harm occurs a relationship is broken. This might not be the breakdown of a relationship between two people, it could be the loss of relationship with oneself or the inability to connect in relationship with others.[152] The importance of relationships and healing were centered in the restoration and prevention of harm in historical and ancient traditions, from North American indigenous people, to the Māori in New Zealand, across the African continent, and among Ancient Hebrews.[153] These traditions were adapted to form the basis of modern restorative justice practices, with little credit to historical indigenous and historical practice.[154]

Restorative justice was popularized in the west in the 1970s.[155] Several countries, including Australia, England, Canada, New Zealand, and the U.S., use some form of restorative justice.[156] In the U.S. there was a marked shift toward rehabilitative goals around the 1970s, though rehabilitative and restorative goals are far more popular within the juvenile justice system and with first-time or non-violent offenses.[157] Restorative justice within the formal adult criminal legal system is not popular in the U.S., but programs both pre-charge and post-conviction

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[152] *See generally* BESSEL VAN DER KOLK, THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA (1st ed. 2014).

[153] ZEHR & GOHAR, *supra* note 148 at 2, 3, 10, 17, 45; Julena Jumbe Gabagambi, *A Comparative Analysis of Restorative Justice Practices in Africa*, N.Y.U. HAUSER GLOBAL LAW SCHOOL PROGRAM (2018), https://perma.cc/M3AW-C7DP (discussing the use of restorative practices in various African countries and arguing that restorative justice was practiced on the African continent long before the colonialists arrived and that it should be revived across the continent); Fainos Mangena, *Restorative Justice's Deep Roots in Africa*, 34 S. AFR. J. PHIL. 1, 12 (2015); ALLAN MACRAE & HOWARD ZEHR, THE LITTLE BOOK OF FAMILY GROUP CONFERENCES, NEW ZEALAND STYLE (2000) [hereinafter MACRAE & ZEHR]. The principles of restorative justice are deeply rooted in spiritual and indigenous practices. MACRAE & ZEHR, *id.*, discuss how the Family Group Conference model became the norm in New Zealand. Māori youth were disproportionally impacted by the imposition of Western models of retributive justice. Māori leaders noted that in their tradition, when a harm occurred the whole community became involved with the intention of repair. Their voices were heard and in the late 1980s New Zealand moved toward utilized Family Group Conferencing. Finally, the great Jewish philosopher and rabbi known as Maimonides (1138-1204) wrote extensively about the Jewish process of *Teshuva. See also* Alissa Ackerman & Guila Benchimol, *Restorative Justice and Teshuva Following Sexual Misconduct*, JEWISH PHILANTHROPY (Sept. 12, 2018), https://perma.cc/K5VC-GPSZ.

[154] ZEHR, *supra* note 146.

[155] *Id.* at 8.

[156] *See* PATRICIA HUGHES & MARY JANE MOSSMAN, RE-THINKING ACCESS TO CRIMINAL JUSTICE IN CANADA: A CRITICAL REVIEW OF NEEDS, RESPONSES AND RESTORATIVE JUSTICE INITIATIVES 85-86 (Dep't Justice Can. 2001).

[157] *See generally* Shelley Johnson Listwan et al., *Cracks in the Penal Harm Movement: Evidence from the Field*, 7 CRIMINOLOGY & PUB. POL'Y 423 (2008); Kent Roach, *Changing Punishment at the Turn of the Century: Restorative Justice on the Rise*, 42 CANADIAN J. CRIMINOLOGY 249 (2000).

exist.[158] Some researchers estimate that formal restorative justice programs are used in at least half of U.S. states.[159]

One area where community accountability has proliferated over the last 20 years has been in the non-profit sector and in the transformative justice movement, as they operate outside traditional criminal legal and carceral spaces.[160] They are mostly associated with the prison abolition movement.[161] Much of this work has been pioneered by women of color and LGBTQIA+ people.[162] Transformative justice activists see the criminal legal system as responsible for committing acts of violence and harm against marginalized communities and seeks to address individual and community violence *within* the community.[163] While the transformative justice movement has used community accountability as a

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[158] Mark S. Umbreit & Jean Greenwood, *National Survey of Victim-Offender Mediation Programs in the United States*, 16 MEDIATION QUARTERLY 235, 236-41 (1999). *See generally* Russ Immarigeon, *Restorative Justice, Juvenile Offenders, and Crime Victims: A Review of the Literature*, RESTORATIVE JUV. JUST.: REPAIRING THE HARM OF YOUTH CRIME 305 (Gordon Bazemore & Lode Walgrave eds., Criminal Justice Press 1999).

[159] Sandra Pavelka, Restorative Justice in the States: An Analysis of Statutory Legislation and Policy, 2 JUST. POL'Y J. 1, 2 (2016); MARK UMBREIT & MARILYN PETERSON ARMOUR, RESTORATIVE JUSTICE DIALOGUE: AN ESSENTIAL GUIDE FOR RESEARCH AND PRACTICE (2011). Common Justice operates the only non-profit pre-charge adult diversion restorative justice program in the U.S, while The Sycamore Tree Project, a faith-based restorative justice program that operates within prisons, is used here in the U.S. and in over 30 other countries. The Sycamore Tree Project was developed by Prison Fellowship International. It has been in existence for over 20 years, with the UK and New Zealand as early adopters. The program brings crime victims into prison settings to meet people who have committed crimes. Using a structured guide, a facilitator leads discussions on a series of topics related to the impact of crime.

[160] Transformative justice ("TJ") is an abolitionist framework that views systems like prisons, police and others as sites where significant amounts of violence takes place and as systems that were created to be violent to maintain social control. Mia Mingus, *Transformative Justice: A Brief Description*, TRANSFORMHARM.COM, https://perma.cc/2AHB-SCZM (last visited Jan. 23, 2022). Some TJ organizations include, INCITE! Women, Trans and Gender Non-Conforming People of Color Against Violence, Generation FIVE, and the Bay Area Transformative Justice Collective ("BATJC").

[161] Mimi E. Kim, *From Carceral Feminism to Transformative Justice: Women-of-Color Feminism and Alternatives to Incarceration*, 27 J. ETHNIC & CULTURAL DIVERSITY IN SOC. WORK 219, 226 (2018); Mimi E. Kim, *Transformative Justice and Restorative Justice: Gender-Based Violence and Alternative Visions of Justice in the United States*, 27 INT'L REV. VICTIMOLOGY 162, 169 (2021) [hereinafter Kim, *Transformative Justice and Restorative Justice*]. Prison abolition is a term that is used to express opposition to the criminal legal system and to measures that seek to reform and legitimize current crime control measures.

[162] Kim, *Transformative Justice and Restorative Justice*, *supra* note 161, at 162-72.

[163] *See Community Accountability: Emerging Movements to Transform Violence*, 37 SOC. JUST., no. 4, 2011-2012, at 1, 4-5; Donna K. Coker, *Transformative Justice: Anti-Subordination Processes in Cases of Domestic Violence*, *in* RESTORATIVE JUSTICE AND FAMILY VIOLENCE 128, 144-46 (Heather Strang & John Braithwaite eds., 2002).

means of harm-reduction and repair since the 1970s, it is primarily focused on transforming communities and systems.[164]

While transformative justice is more concerned with transforming communities and systems, restorative justice is focused on the individuals and community members most directly impacted by an act of harm.[165] Restorative processes take on different forms, but they all share similar values of truth-telling, accountability, and the humanity of all people.[166] Restorative processes bring together people who have caused harm, people who have been harmed, and support people and community members with difficult, but often necessary conversations.[167] Restorative justice organizations and practitioners also operate and exist outside of the formal criminal legal system.[168] For example, restorative justice in schools has been popularized, both at the K-12 level and on college campuses in cases of student misconduct.[169] Restorative justice facilitator training programs have also cropped up in an effort to train additional people to respond to harm without involving the criminal legal system.[170] Most recently, a focus on restorative justice in cases of sexual harm has been renewed.[171]

How Is Restorative Justice Different?

Current criminal legal processes are concerned with the violation of criminal statutes. The violation of a statute is a harm against the state. Therefore, justice requires that the state determine guilt and impose a punishment on the person responsible for the violation. Criminal legal processes center on a series of questions, including: What laws have been

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[164] *See* Mimi E. Kim, *Moving Beyond Critique: Creative Interventions and Reconstructions of Community Accountability*, 37 SOC. JUST., no. 4, 2011-2012, at 14, 17 [hereinafter Kim, *Moving Beyond Critique*] (discussing community accountability measures and transformative justice have been used as harm-reduction in cases of gender-based violence since the 1970s).

[165] *See* ZEHR, *supra* note 146, at 38.

[166] ZEHR & GOHAR, *supra* note 149, at 13, 22, 27, 37.

[167] *Id.* at 25, 37.

[168] Examples include Common Justice in Brooklyn and the Bronx; Project NIA and the Community Justice for Youth Institute in Chicago; Restorative Justice for Oakland Youth (RJOY) and Community Works in Oakland and San Francisco; the Community Conferencing Center in Baltimore; and the Insight Prison Project in San Quentin, among others.

[169] *See generally* Belinda Hopkins, *Restorative Justice in Schools*, 17 SUPPORT FOR LEARNING 144 (2003).

[170] Vermont Law School and The University of San Diego Center for Restorative Justice are two such training and certificate programs. *See Restorative Justice Degrees*, VT. L. SCH., https://perma.cc/MC9E-NM4R (last visited Jan. 23, 2022); *Restorative Justice*, UNI. OF SAN DIEGO, CTR. FOR RESTORATIVE JUST., https://perma.cc/RW3Z-XLT5 (last visited Jan. 23, 2022).

[171] *See* Kim, *Moving Beyond Critique*, *supra* note 164, at 14-35 and accompanying note.

broken? Who did it? What do they deserve? There are three main philosophical arguments for current criminal legal processes.[172] The first centers on retribution. From a retributive or *just desserts* perspective, people who violate criminal statutes need to be punished because it is what they deserve.[173] Deterrence, on the other hand, implies that punishment will either stop an individual from committing another crime or will stop others from doing so.[174] Finally, incapacitation seeks to keep the community safe from dangerous people.[175] All of these notions are centered solely on people who violate the law. There is little—and often no—attention given to people who have been harmed by these law violations. Yet, there is a growing body of literature that critiques system responses to those who have caused harm and those who have been harmed.[176]

Restorative justice offers a framework that focuses on all people impacted by harm. This includes people who have perpetrated harmful acts, those who have experienced them, and others who have been impacted by them. It asks a very different series of questions, and as such offers distinctly varied outcomes. For instance, while criminal legal processes are concerned with which criminal statute was violated, restorative processes ask who was harmed. Instead of focusing on who is guilty and what punishment they deserve, restorative processes focus on the needs of the person who has been harmed and who is obliged to meet those needs. Restorative processes achieve justice by involving those affected by a harm in the process to collectively address the specific harm at hand.[177] To make justice more healing, restorative, and transformative, people who have been harmed must be satisfied with the process and people who cause harm must acknowledge their actions.[178] They must fully understand the impact of their behavior and must take steps toward active accountability.[179] Accountability measures to repair harm must also address the reason for the harmful behavior.[180] The final outcome seeks

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[172] *See generally* TERENCE MIETHE & HONG LU, PUNISHMENT: A COMPARATIVE HISTORICAL PERSPECTIVE (1st ed. 2005).

[173] *See generally id.*

[174] *See generally id.*

[175] *See generally id.*

[176] *See, e.g.*, Dale C. Spencer, *Cultural Criminology: An Invitation . . . to What?*, 19 CRITICAL CRIMINOLOGY 197 (2011).

[177] Based on the authors' experience.

[178] Based on the authors' experience. Satisfaction with the restorative process means different things to different clients and is often based on their goals and expectation. Restorative processes require that practitioners seek feedback on the experiences of their clients.

[179] *Id.*

[180] ZEHR, *supra* note 146, at 40-43.

to bring "closure" to both parties and to help them both successfully integrate back into the community.[181]

False assumptions about restorative justice are that it is soft on crime and does not hold people accountable because it does not punish wrongdoing.[182] Equating accountability with punishment is misguided. Punishment does little to help people who have caused harm fully understand the impact and aftermath of the harm that they have caused. Punishment does not offer opportunities for accountability that are linked to the specific harmful behavior. Finally, punishment does not typically help crime survivors to heal. Restorative justice offers the opportunity for these types of outcomes.

Is Restorative Justice Effective?

Studying the effectiveness of restorative justice proves to be challenging because of a lack of standardization and implementation across practices and programs and because of definitional considerations across research studies.[183] Yet, it is the very lack of standardization, some argue, that makes restorative justice more effective.[184] No two restorative processes are the same because the needs of parties involved are never identical. This makes measuring and evaluating restorative processes more difficult. In addition, the goals of restorative justice are difficult to operationalize as outcomes measures in scientific studies.[185]

To overcome methodological shortcomings, researchers have turned to more robust meta-analyses to measure effectiveness.[186] Meta-analytic

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[181] ZEHR & GOHAR, *supra* note 148, at 41 (noting how the word "closure" is not always preferable for people who have experienced harm because it suggests that everything can be placed in the past. The word does, however, capture a sense of being able to move forward which is how it is being used here in a restorative justice context.).

[182] *See* Williamson M. Evers & Vicki E. Alger, *Restorative Justice is Unfair to Students Who Want to Learn*, INDEP. INST. (Sept. 2, 2020), https://perma.cc/LM2M-CD83 (offering a typical view of the opposition to restorative options which is that restorative practices in schools lead to a culture of leniency and a lack of accountability).

[183] Daye Gang et al., *A Call for Evaluation of Restorative Justice Programs*, 22 TRAUMA, VIOLENCE, & ABUSE 186, 186-90 (2019).

[184] Based on the authors' experience as restorative justice practitioners, they have learned that no two restorative justice processes are the same. While all processes follow a set of values and guidelines described elsewhere in this paper, each process focuses on the specific needs of the individual participants in any given process.

[185] Lois Presser & Patricia Van Voorhis, *Values and Evaluation: Assessing Processes and Outcomes of Restorative Justice Programs*, 48 CRIME & DELINQ. 162, 171 (2002); *see also* Mark S. Umbreit, *Crime Victims Seeking Fairness, Not Revenge: Toward Restorative Justice*, 53 FED. PROBATION 52 (1989).

[186] William Bradshaw et al., *The Effect of Victim Offender Mediation on Juvenile Offender Recidivism: A Meta-analysis*, 24 CONFLICT RESOL. Q. 87, 89 (2006); Jeff Latimer et al., *The Effectiveness of Restorative Justice Practices: A Meta-analysis*, 85 PRISON J. 127, 131 (2005);

reviews tend to find more positive outcomes in restorative processes than in criminal legal processes across various outcome measures.[187] For example, restorative options are more likely to lead to recidivism reduction in both non-violent and violent offenses, and are seen as a cost-effective mechanism for doing so.[188] People who have caused harm and who have engaged in restorative justice are also more likely to comply with formal sanctions.[189] These measurement effects, though positive, are generally small.

Studies on victim satisfaction and restorative justice find that individuals who have been harmed and who had the opportunity to engage in a restorative conference with the person who caused them harm were more satisfied than those who experienced a criminal legal process only.[190] Finally, crime survivors who have engaged in restorative processes may be more prepared to deal with the impacts of trauma.[191]

Robin J. Wilson et al., *Circles of Support and Accountability: Engaging Community Volunteers in the Management of High-Risk Sexual Offenders*, 46 HOWARD J. 1, 5 (2005).

[187] Restorative justice conferencing (RJC) using face-to-face meetings of offenders and victims: Effects on offender recidivism and victim satisfaction. A systematic review. Studies on the effectiveness of restorative justice have measured satisfaction among people who have been harmed, reduction in repeat offending for violent offenses, ability for people who have been harmed to deal with trauma and post-traumatic stress, and compliance with formal sanctions. People who have been harmed and have participated in restorative justice experience less anxiety about further victimization, less fear of crime overall, and less anger about their specific harm. *See generally* Caroline M. Angel et al., *Short-Term Effects of Restorative Justice Conferences on Post-Traumatic Stress Symptoms Among Robbery and Burglary Victims: A Randomized Controlled Trial*, 10 J. EXP. CRIMINOLOGY 291, 292 (2014); LAWRENCE W. SHERMAN & HEATHER STRANG, RESTORATIVE JUSTICE: THE EVIDENCE 8 (The Smith Institute 2007); Lawrence W. Sherman et al., *Effects of Face-to-Face Restorative Justice on Victims of Crime in Four Randomized, Controlled Trials*, 1 J. EXPERIMENTAL CRIMINOLOGY 367, 371 (2005) [hereinafter *Four Randomized Controlled Trials*]; HEATHER STRANG ET AL., RESTORATIVE JUSTICE CONFERENCING (RJC) USING FACE-TO-FACE MEETINGS OF OFFENDERS AND VICTIMS: EFFECTS ON OFFENDER RECIDIVISM AND VICTIM SATISFACTION. A SYSTEMATIC REVIEW 5 (David Wilson eds., The Campbell Collaborations 2013).

[188] *See generally* JAMES BONTA ET AL., SOLICITOR GEN. CANADA, RESTORATIVE JUSTICE: AN EVALUATION OF THE RESTORATIVE RESOLUTIONS PROJECT 29 (1998); James Bonta et al., *An Outcome Evaluation of a Restorative Justice Alternative to Incarceration*, 5 CONTEMP. JUST. R. 319, 319-38 (2002); Bradshaw, et al., *supra* note 182, at 94; Jeff Latimer et al., *supra* note 186, at 137; William R. Nugent et al., *Participation in Victim-Offender Mediation and the Prevalence and Severity of Subsequent Delinquent Behavior: A Meta-Analysis*, 2003 UTAH L. REV. 137, 164 (2003); Nancy Rodriguez, *Restorative Justice at Work: Examining the Impact of Restorative Justice Resolutions on Juvenile Recidivism*, 53 CRIME & DELINQ. 355, 374-75 (2007); Lawrence W. Sherman et al., *Are Restorative Justice Conferences Effective in Reducing Repeat Offending? Findings from a Campbell Systematic Review* 31 J. QUANTITATIVE CRIMINOLOGY 1, 20 (2015).

[189] SHERMAN & STRANG, *supra* note 187, at 88-89.

[190] Mark S. Umbriet, Robert B. Coates & Betty Vos, *The Impact of Victim-Offender Mediation: Two Decades of Research*, 65 FED. PROBATION 29, 31 (2001).

[191] Caroline M. Angel et al., *supra* note 187, at 295-96.

People who experience harm who engage in restorative processes experience decreased in symptoms of post-traumatic stress.[192]

V. THE JOURNEY TO RESTORATIVE JUSTICE FOR CASES OF SEXUAL HARM

The rapes that the authors experienced in 1999 lead them on very different paths. Alexa immediately reported her rape to the police. This began a lengthy process during which Alexa was interviewed several times by law enforcement and prosecutors. Alexa had misgivings about testifying. However, she was often encouraged by those involved with the case to testify to protect the community from the man who raped her. Alexa also testified because she believed that it would help her heal and move on from the experience. Unfortunately, even though the man who raped her was found guilty and received a lengthy sentence, the unusual result did not mitigate the significant impact the criminal legal process had on her mental health and well-being.

Alissa did not tell anyone about her rape. Both the acute and chronic mental health impacts of the assault and the silence were devastating. Still, she remained silent about her rape for 15 years. In 2014, Alissa began opening up about the experience, because as a criminal justice professor and sex crimes expert, she felt like a fraud not owning her experience. Disclosing her rape had additional acute mental health outcomes, including flashbacks and nightmares that returned after many years. One of the first people she disclosed to was Dr. Jill S. Levenson, her colleague and friend who is a therapist who works with both survivors of sexual violence and individuals who have perpetrated it.[193] In 2016, she asked Alissa if she would be willing to speak to the men in her treatment program as "Alissa, rape survivor." It was this initial conversation and subsequent work together that led Alissa on a path toward embracing restorative justice. Further conversations with Alexa and the opportunity to participate in vicarious restorative justice process ("VRJ") sessions brought Alexa to a similar journey.

As sex crimes researchers, survivors, restorative justice participants and restorative justice practitioners, the authors have learned that a holistic approach to addressing harm is necessary if society ultimately seeks to help survivors to heal and to decrease the overall occurrence of sexual harm. Both authors found their most profound moments of healing

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[192] *See* STRANG ET AL., *supra* note 187, at 43-44.

[193] Dr. Jill S. Levenson is a Professor of Social Work at Barry University in Miami, Florida. She began her career working with survivors of sexual violence. Her therapeutic practice mostly focuses on individual and group therapy with men who have been mandated to treatment after a conviction for a sexual offense.

while engaging in the restorative process as survivors. The next section addresses the often unmet needs of people who have experienced harm and the needs of people who have caused sexual harm. The authors then make the case for restorative justice as a tool to address the needs of all people impacted by sexual harm.

Understanding the Needs of People Who Have Been Sexually Harmed

The impacts of sexual harm are profound. While no two people experience sexual harm or its aftermath in the same way, trauma can significantly impact how survivors connect to others and to the world around them.[194] "Trauma disrupts our relationship with ourselves, our bodies, our minds ours very beings. It interrupts our ability to relate to others. Trauma destroys our ability to trust others, to trust our thoughts, or to trust our bodies."[195] This inability to connect often begins during an initial experience of sexual harm when the person being harmed disconnects, or dissociates, from themselves.[196] Survivors will often discuss how they felt separated from their body or that they watched what happened to them from outside of themselves.[197]

When Alexa describes the experience of her rape, she talks about how she was able to focus on items in the room, like the clock or her roommate's face. In her mind she focused on what she would do after the rape was over. Alissa, on the other hand, remembers that she separated from her body and watched her rape from somewhere above the scene, but counted the waves to stay focused on something other than the rape.[198]

People who experience trauma often need to share their stories in their own way, something that is not possible in a traditional criminal

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[194] *See* JUDITH HERMAN, TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE—FROM DOMESTIC ABUSE TO POLITICAL TERROR 42-43 (1992).

[195] ALISSA R. ACKERMAN & JILL S. LEVENSON, HEALING FROM SEXUAL VIOLENCE: THE CASE FOR VICARIOUS RESTORATIVE JUSTICE 33-34 (2019).

[196] Herman writes:

> A rape survivor describes this detached state: "I left my body at that point. I was over next to the bed, watching this happen . . . . I disassociated from the helplessness. I was standing next to me and there was just this shell on the bed . . . . There was just a feeling of flatness. I was just there. When I repicture the room, I don't picture it from the bed. I picture it from the side of the bed. That's where I was watching from."

HERMAN, *supra* note 194, at 43 (footnote omitted).

[197] The theory of dissociation was first established by Pierre Janet in 1889. Most current ideas about dissociation and PTSD stem from his work.

[198] Other survivors have spoken about similar experiences. For instance, Thordis Elva states she now knows how many seconds there are in two hours because she counted the seconds on her clock during her entire rape. *See* Thordis Elva & Tom Stranger, *Our Story of Rape and Reconciliation*, TEDWOMEN (2016), https://perma.cc/D526-QGEY.

legal process.[199] The criminal legal response to sexual harm is problematic because it often confuses, disappoints, and traumatizes survivors in several ways including the complex rules and procedures of the legal system, the public nature of the legal proceedings, the relegation of a survivor's role in legal proceedings, the requirement to retell the intimate details of the act of sexual harm, the sequestering of witnesses who may be the survivor's friends and family, and defense attorney questioning which may exacerbate the self-blame the survivor is already experiencing.[200]

One of the country's leading experts on trauma and abuse, Dr. Judith Herman explains that "the wishes and needs of victims are often diametrically opposed to requirements of legal proceedings."[201] Survivors of sexual harm have many needs that are left unmet by the criminal legal system. Overall, studies with people who have experienced sexual harm suggest that they are more interested in having a voice in the dialogue with criminal legal professionals, recognition, and acknowledgement of harm by the person that perpetrated it, preventing sexual harm in the future, reconnecting with their communities, and in treatment for people who have harmed, rather than punishment.[202]

Often survivors enter the criminal legal system as a means of validating their experience.[203] It is critical that survivors are believed, absolved, and vindicated of any wrongdoing or responsibility for what was done to them.[204] Many survivors simply seek a voice and empowerment. Some survivors express wanting to be believed and for the perpetrator of the harm to confess.[205] However, in most cases, survivors are not able to tell their story in their own words or in their time during court testimony.[206] They are restricted by the questions that the prosecutor

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[199] *See generally* Rebecca Campbell et al., *The Impact of Sexual Assault Nurse Examiner Programs on Criminal Justice Case Outcomes: A Multisite Replication Study*, 20 VIOLENCE AGAINST WOMEN 607 (2014) (illustrating that the traditional legal system is not designed for this process through research showing that most cases at the six SANE sites never led to criminal prosecution due to high rates of case attrition that begins early in the investigation process). *See also* Shaw, *supra* note 45, at 454-55 (finding that fewer than 30% of cases are referred for prosecution and that police are less likely to complete an investigation if they believed the victim was becoming uncooperative, incompetent, or weak. These are common presentations of acute and chronic trauma.).

[200] *See* Herman, *supra* note 19, at 574; *see also* VANDIVER ET AL., *supra* note 56, at 68.

[201] *See* Herman, *supra* note 19, at 574.

[202] *Id.*

[203] *See id.* at 585.

[204] OUDSHOORN ET AL., *supra* note 129, at 27.

[205] Herman, *supra* note 19, at 585.

[206] *Id.* at 574.

and defense attorneys ask. Thus, their testimony does not accurately represent their stories.

Alexa remembers that part of the reason she was fearful about testifying was the possibility that she would say something that conflicted with her initial report to law enforcement. During the preparation process, she was told that this could be a way that a defense attorney could discredit her during the criminal trial. As such, Alexa still feels that her testimony does not adequately communicate what she experienced the night she was raped.

The ability to reconnect with and tell one's story can also help a person reconnect with their bodies and with other people.[207] Bessel van der Kolk explains that traumatic experiences often leave people speechless because they are unable to find words to describe the feelings and sensations that overwhelm their senses when they think about a traumatic experience.[208] Finding the right language leads to self-awareness and healing.[209] That language often involves metaphors related to the body itself. This is because trauma impacts the mind, body, and spirit.[210] It can affect every layer of the body, from the cellular and physiological to the psychological.[211] Simply put, the brain remembers what the body tries to forget.[212]

If someone experiences trauma and does not or cannot take the steps necessary to heal from that trauma, it can overtake their body and their brain.[213] Therefore, long after an experience of sexual harm, a person may not feel safe in their own skin. This can result in chronic pain in the body, including chronic pelvic pain, muscle tension, headaches, and other psychosomatic issues.[214] It can also result in total disconnection and dissociation from the body.[215] Bessel van der Kolk explains that trauma survivors often become experts in numbing because the body sensations that arise from trauma are often too overwhelming to process.[216] The

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[207] *See generally* VAN DER KOLK, *supra* note 152.

[208] *See* Bessel van der Kolk, *The Neurobiology of Childhood Trauma and Abuse*, 12 CHILD & ADOLESCENT PSYCHIATRIC CLINICS N. AM. 293, 305 (2003).

[209] ACKERMAN & LEVENSON, *supra* note 195, at 39.

[210] VAN DER KOLK, *supra* note 152, at 66-67.

[211] *See* HERMAN, *supra* note 194, at 37; Bessel van der Kolk, *Clinical Implications of Neuroscience Research in PTSD*, 1071 ANNALS OF THE N.Y. ACAD. SCI. 277 *passim* (2006).

[212] ACKERMAN & LEVENSON, *supra* note 195, at 40.

[213] VAN DER KOLK, *supra* note 152, at 67.

[214] VAN DER KOLK, *supra* note 152, at 268; Alissa R. Ackerman & Alexa Sardina, Beyond Fear: The Sex Crimes Podcast, *Bonus Episode: The Things Left Unsaid*, https://perma.cc/WHX4-F9FC.
[https://perma.cc/WHX4-F9FC] (last visited Jan. 23, 2022).

[215] VAN DER KOLK, *supra* note 152, at 91.

[216] *Id.*, at 90-91.

effects of numbing can be seen in both the psychological and behavioral consequences of sexual trauma.[217]

Compared to people who have not experienced sexual harm, those who have are three times more likely to suffer from depression, [218] but sexual harm can also lead to increased anxiety and even obsessive compulsive disorder (OCD).[219] Those who have experienced sexual harm are six times more likely to suffer from PTSD, 13 times more likely to abuse alcohol and 26 times more likely to abuse drugs.[220] Just as some people may turn to alcohol or drugs as a way to forget painful memories or to numb feelings of distress and anxiety, or even as a coping mechanism, eating disorders, like anorexia or bulimia, can also be a way to exert control over the body and cope with negative emotions.[221]

Self-harm is also common among those who have experienced sexual harm.[222] Deliberate self-harm is when people inflict physical harm on themselves, usually in private and without suicidal intentions. Some survivors may use self-harm to cope with difficult or painful feelings.[223] Common forms of self-harm include biting, cutting, burning, or scratching the skin, and even pulling out hair.[224] Some people may engage in self-harm to numb their pain, feel a release or reclaim a sense of control.[225] Unfortunately, this sense of relief is only temporary and thus the desire to harm oneself resurfaces.[226] This encourages a cycle of self-harm that can cause serious damage, infection and medical issues that can be life-threatening.[227] Lastly, survivors of sexual harm are four times more likely to contemplate suicide.[228]

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[217] *Id.*

[218] VANDIVER ET AL., *supra* note 56, at 75.

[219] Asaf Caspi et al., *Relationship Between Childhood Sexual Abuse and Obsessive-Compulsive Disorder: Case Control Study*, 45 ISR. J. PSYCHIATRY & RELATED SCI. 177 (2008).

[220] VANDIVER ET AL., *supra* note 56, at 75.

[221] Caitlyn Hamilton, *Trauma, Sexual Assault and Eating Disorders*, NAT'L EATING DISORDERS ASS'N, https://perma.cc/5FNU-2AX7 (last visited Jan. 23, 2022).

[222] Colleen M. Lang & Komal Sharma-Patel, *The Relation Between Childhood Maltreatment and Self-Injury: A Review of the Literature on Conceptualization and Intervention*, 12 TRAUMA, VIOLENCE, & ABUSE 23, 25 (2011) (explaining that self-harm is common among survivors of sexual harm, with the strongest association between self-injury and child sexual abuse); Mireille Cyr et al., *Clinical Correlates and Repetition of Self-Harming Behaviors Among Female Adolescent Victims of Sexual Abuse* 14 J. CHILD SEXUAL ABUSE 49, 51 (2005).

[223] Lang & Sharma-Patel, *supra* note 222, at 28.

[224] *Self Harm*, RAINN, https://perma.cc/SZJ5-WJVU (last visited Jan. 23, 2022) [hereinafter *Self Harm*, RAINN].

[225] *Id.*; van der Kolk, *supra* note 211.

[226] *Self Harm*, RAINN, *supra* note 224.

[227] *Id.*

[228] VANDIVER ET AL., *supra* note 56, at 75.

The authors both speak publicly about their alcohol and drug abuse in the aftermath of rape.[229] Like many other survivors of sexual violence, Alexa struggled with anorexia for many years following her rape. Alissa also struggled with self-harm for many years and attempted suicide twice in the three years following her rape.

People who have unresolved trauma or those who have a diagnosis of PTSD may live in a state of constant hyper-arousal, acute hypervigilance, or complete dissociation from the body.[230] Both the authors, for example, experience hypervigilance and an overly sensitive startle response. Something as loud as fireworks or as quiet as an unexpected whisper can trigger a trauma response in them. With an overactivated trauma response, the brain is less likely to properly interpret cues.[231] This may lead to the inability to determine that something could be dangerous or, at the other extreme, that everything is a threat.[232]

Sexual trauma shapes the way one connects with and thinks about themselves and others.[233] It can impact how one processes emotions and how they behave.[234] Understanding these impacts and the unique ways they are experienced by individual survivors, including helping survivors to understand these impacts in themselves, can aid in the healing process.[235] There are many additional needs that people who experience sexual harm may seek to address.[236] First and foremost, they need to feel safe and secure, both physically and emotionally.[237] This requires consistent and authentic relationships that help survivors regain trust.[238] People rarely lie about experiencing sexual harm and rates of false reports

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[229] ACKERMAN & LEVENSON, *supra* note 195.

[230] Jennifer C. Jones. & David H. Barlow, *The Etiology of Posttraumatic Stress Disorder*, 10 CLINICAL PSYCH. REV. 299 *passim* (1990).

[231] Gordon H. Bowers & Heidi Sivers, *Cognitive Impact of Traumatic Events*, 10 DEV. & PSYCHOPATHOLOGY 625, 625-26 (1998).

[232] van der Kolk, *supra* note 208, at 293.

[233] Herman, *supra* note 19.

[234] *Id*.

[235] Based on the authors' experiences as restorative justice facilitators and in prior advocacy work with people who have experienced sexual harm, they have found that helping people to understand how and why their bodies react as they do helps provide context and understanding which ultimately helps in making sense of experiences, decreasing shame, and promoting healing.

[236] OUDSHOORN ET AL., *supra* note 129, at 27-28.

[237] *Id.* It is the authors' practice to promote safety and security at every step of the process by keeping the person who was sexually harmed in control of decision making to the extent that is possible.

[238] Based on the authors' experience, consistent and authentic relationships require that the facilitator be accountable for their actions. Follow through is integral to building trust in facilitator-client relationships.

remain consistently low.[239] As such, when someone discloses sexual harm, they need to be believed, absolved, and vindicated. Like survivors of other crimes, sexual harm survivors often seek acknowledgement of the harm done to them.

The first thing that happens when someone experiences unwanted sexual contact is that they lose control over choices about their body. Giving them the ability to make choices about their healing and about their needs helps them empower themselves and regain a sense of control. Similarly, people who experience sexual harm need to be heard. They need opportunities to share their stories in safe spaces.[240] Survivors need to mourn what they have lost and grieve their pain. They often feel the need to express the impacts of the harm directly to the person who harmed them or to others who have committed similar harms.[241] They might also have questions that only the person who harmed them can answer. Survivors need access to education and support. This might include education around trauma responses and the mental health outcomes of trauma.[242] It may include helping survivors gain clarity around why their body responded the way it did during an experience of sexual harm.[243] People who have been sexually harmed need to know that there are different options and choices available to them. Finally, survivors need accountability surrounding unhealthy coping strategies that they have engaged in the aftermath of sexual harm.[244]

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[239] Andre W. E. A. De Zutter et al., *The Prevalence of False Allegations of Rape in the United States from 2006-2010*, 2 J. FORENSIC PSYCH. 2, 5 (2017); David Lisak et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 1318, 1331 (2010).

[240] De Zutter et al., *supra* note 239. Lisak et al., *supra* note 239.

[241] OUDSHOORN ET AL., *supra* note at 129, at 3.

[242] One personal example is how validating it was for both authors to learn about the neurobiology of trauma to make better sense of their experiences. In particular, reading *The Body Keeps the Score*, *supra* note 152, and *Trauma and Recovery*, *supra* note 194, changed the way the authors thought about their experiences.

[243] OUDSHOORN ET AL., *supra* note 129, at 27. Oudshoorn and colleagues provide the examples of a male survivor experiencing an erection or ejaculation during an assault and of a female survivor experiencing an orgasm while being abused. It has been our experience that education goes beyond these physical explanations. For instance, helping a survivor to understand the freeze response as a completely normal reaction to sexual trauma helps put them at ease. Similarly, explaining how individuals react differently in different situations helps survivors to feel less alone.

[244] Based on the authors' experience, naming unhealthy coping mechanisms and engaging conversation with clients who have experienced sexual harm around these coping mechanisms is critical. Ultimately, it is up to the person who was harmed to address any unhealthy coping strategies. Discussions around tools to use and healthy coping strategies can begin the accountability process for those who have been harmed.

Understanding the Needs of People Who Have Perpetrated Sexual Harm

If society is serious about eradicating sexual violence and committed to meeting the needs of people who have experienced sexual harm, then the needs of those that have caused the harm cannot be ignored. Sexually harmful behavior does not exist in a vacuum. The decision to commit a harmful sexual act can stem from individual experiences of harm, the inability to cope with life stressors, and societal-level messages about sexuality and masculinity.[245] These variables are not the cause of sexual harm, nor do they excuse or justify such behavior, but they help researchers and practitioners to understand why people engage in these acts.

Addressing harmful sexual behavior is challenging. It requires that the underlying root causes of behavior are appropriately addressed. Providing support to people who have caused sexual harm allows them to engage in the process of unpacking the experiences that led to their behavior. This most often requires treatment providers who specialize in problematic sexual behavior.[246] Additionally, many people who perpetrate sexual harm lack empathy for the people they have harmed.[247] Creating processes that help them to build empathy can be beneficial. Being fully responsible and accountable for one's behavior helps address these needs and the needs of people who have experienced sexual harm. Restorative justice is one tool that can aid this process, because remaining accountable for the harm someone has caused also allows that person to address the underlying causes of that harm.

Earlier the authors discussed the many needs that must be addressed for people who have experienced sexual harm.[248] Many of the needs of people who have caused sexual harm can be met by addressing those needs. For instance, the need for people who have experienced sexual harm to feel be heard and safe and secure in doing so may be met by the person who caused the harm to actively listen to the survivor telling their story. The need for accountability can be met by naming the action,

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[245] Anthony R. Beech & Ian J. Mitchell, *Intimacy Deficits/Attachment Problems in Sexual Offenders: Towards a Neurobiological Explanation*, *in* 1 THE WILEY HANDBOOK ON THE THEORIES, ASSESSMENT, AND TREATMENT OF SEXUAL OFFENDING 187 (Douglas P. Boer ed., 2016); JILL S. LEVENSON ET AL., TRAUMA-INFORMED CARE: TRANSFORMING TREATMENT FOR PEOPLE WHO HAVE SEXUALLY ABUSED 4 (2017); TERRY, *supra* note 124, at 57-58, 67, 106.

[246] ACKERMAN & LEVENSON, *supra* note 195, at 68.

[247] W.L. Marshall et al., *Empathy in Sex Offenders*, 15 CLINICAL PSYCH. REV. 99, 109 (1995); L.M. Williams & D. Finklehor, *The Characteristics of Incestuous Fathers: A Review of Recent Studies*, *in* HANDBOOK ON SEXUAL ASSAULT: ISSUES, THEORIES, AND TREATMENT OF THE OFFENDER 231, 248 (W.L. Marshall, D.R. Laws, & H.E. Barbaree eds., 1990).

[248] OUDSHOORN ET AL., *supra* note 129, at 27-28.

accepting responsibility for the harm, taking the steps to understand why they behaved in such a harmful way, and making a commitment to do the hard work necessary to ensure it does not happen again. The need to be believed, absolved, and vindicated can also be addressed by acknowledging what happened without excuses or justifications for the behavior. The need to have a voice and feel empowered can be met by listening, demonstrating remorse, and validating the experience. Finally, the need for information and options can be met by answering any questions the survivor has and sharing the steps one has taken and will continue to take to ensure that their behavior is different in the future. Restorative justice provides the opportunity and the space for all these needs to be addressed in a safe and meaningful way.

As with restorative justice more generally, cases of sexual harm can take many forms. Each case is handled with the same care and values related to authenticity, transparency, honesty, and a common humanity, but no two cases are the same. This is because no two people have the same needs or goals and because similar needs and goals may be addressed in distinctly different ways. It is important to be mindful that restorative justice is not for all people,[249] but that most people who engage in the process are satisfied with the results.

In the following section, the authors begin by talking about stepping into restorative justice. They share Alissa's experience of participating in and then co-creating the vicarious restorative justice process ("VRJ") for cases of sexual harm. The authors then share Alexa's experience of participating in a vicarious accountability circle process with Alissa. They go on to discuss the typical forms of restorative justice in cases of sexual harm, including victim-offender conferencing, circle processes, and VRJ. The authors provide a case example of a victim-offender dialogue that Alissa facilitated, including written comments from those participants provided after their restorative justice process. Lastly, the authors share a short case example of a VRJ process.

VI. BUILDING OUR PROFESSIONAL PRACTICE

On a Monday evening in April of 2016, Alissa met a group of men in an encounter that would change all of their lives. The goal of this experience was to help clients in Dr. Levenson's treatment group to build empathy. For this to occur, people must feel safe; and yet these men had every reason to be in fear. Their fear was palpable and valid, especially because of the way society treats people who have committed sexual

[249] Mark S. Umbreit et al., *Restorative Justice Dialogue: A Multi-Dimensional, Evidence-Based Practice Theory*, 10 CONTEMP. JUST. REV. 23, 29 (2007).

offenses. Alissa knew she had an opportunity to help the participants gain insight into how their actions may have impacted the people they had harmed simply by approaching them with vulnerability and respect. This, in turn, allowed the men to model that same vulnerability. What Alissa was not prepared for was the healing impacts this experience had on her personally. Here, she describes the experience:

> My body was visibly shaking as I took my seat at the front of the room. The door, my escape, was to my right, Jill sat to my left. The men sat in a circle of chairs taking up the rest of the room. I was both terrified and intrigued. This was the first time I was in a room full of people who had committed sexual offenses without the security of my title, Dr. Ackerman. My fear was not because I was seated in a room of men who have perpetrated sexual violence. It was directly related to my promise to be open, authentic and vulnerable. Still, the men were far more terrified than I was. Having never had to sit face-to-face with someone who had experienced sexual violence, I am sure they were expecting my anger and wrath, not my honesty and a common humanity.

At the end of the session, a man who had served 20 years in prison for a violent rape that was very similar to Alissa's asked if he could give her a hug and she immediately hugged him.[250] It was such a genuine expression of understanding and healing for them both. The night after this session, Alissa was able to return to the place where she was raped and make peace with it. This would not have happened without the healing dialogue that had occurred just 24 hours prior. Approaching difficult conversations in this fashion allows all parties involved to feel seen and heard. While this experience was not originally envisioned as a restorative justice circle process, that is exactly what it turned out to be. That initial experience in 2016 led to Alissa and Dr. Levenson writing a book on the use of VRJ for cases of sexual harm. It has also led to Alissa's participation in and facilitation of VRJ processes with over 500 people who have been convicted of sexual offenses.

In 2018, Alissa was asked to create an accountability circle for a man who had committed a rape 20 years ago. Alissa asked Alexa if she would be interested in participating and Alexa jumped at the opportunity. Alexa talks about her experience of participating in this circle as profoundly healing, unlike a criminal trial. She says that she had told her story many times, but telling the story in the accountability circle was the most

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[250] Alissa R. Ackerman, *The Importance of Connection*, TED (Oct. 2018), https://perma.cc/MF39-ZSFE.

important time she ever told it because it gave her the opportunity to tell it to the person that needed to hear it the most—a person who had committed rape.[251] Together, the authors have participated in and facilitated VRJ processes in multiple states.[252]

Models of Restorative in Cases of Sexual Harm

Over the last 25 years there has been a push for using restorative justice in cases of sexual harm because it can theoretically address both the justice and healing needs of survivors and people responsible for causing sexual harm.[253] Restorative justice can be used for all forms of sexual harm, from verbal harassment, to childhood sexual abuse and rape.[254] The cases the authors most often see in their practice are those involving rape and sexual assault.[255]

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[251] Alissa Ackerman, *Episode 13: Get Curious*, BEYOND FEAR: THE SEX CRIMES PODCAST (Nov. 11, 2020), https://perma.cc/2RF8-ZWNG.

[252] The authors have facilitated and/or participated in VRJ processes in California, Florida, Minnesota, and Oregon. The authors have served as restorative justice facilitators in the community, in treatment settings, and in prisons.

[253] *See, e.g.*, Gordon Bazemore & Twila Hugley Earle, *Balance in the Response to Family Violence: Challenging Restorative Principles*, *in* RESTORATIVE JUSTICE AND FAMILY VIOLENCE 153, 177 (H. Strang & J. Barithwaite eds.); Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1 (1999); Kathleen Daly, Professorial Lecture at the School of Criminology and Criminal Justice at Griffith University: Seeking Justice in the 21st Century: The Contested Politics of Race and Gender (Apr. 21, 2005); James Dignan & Michael Cavadino, *Towards a Framework for Conceptualizing and Evaluating Models of Criminal Justice from a Victim's Perspective*, 4 INT'L REV. VICTIMOLOGY 153 (1996); Barbara Hudson, *Restorative Justice: The Challenge of Sexual and Racial Violence*, 25 J. L. & SOC'Y 237 (1998); Barbara Hudson, *Restorative Justice and Gendered Violence: Diversion or Effective Justice?*, 42 BRIT. J. CRIMINOLOGY 616 (2002); Mary P. Koss, *Blame, Shame, and Community: Justice Responses to Violence Against Women*, 55 AM. PSYCH. 1332 (2000); Mary P. Koss et al., *Expanding a Community's Justice Response to Sex Crimes Through Advocacy, Prosecutorial, and Public Health Collaboration: Introducing the RESTORE Program*, 19 J. INTERPERSONAL VIOLENCE 1435 (2004); Mary P. Koss et al., *Justice Responses to Sexual Assault: Lessons Learned and New Directions*, *in* UNDOING HARM: INTERNATIONAL PERSPECTIVES ON INTERVENTIONS FOR MEN WHO USE VIOLENCE AGAINST WOMEN 37 (Mona Eliasson ed., 2004); Einat Peled et al., *Choice and Empowerment for Battered Women Who Stay: Toward a Constructivist Model*, 45 NAT'L ASS'N OF SOC. WORKERS, INC. 9 (2000); Laureen Snider, *Feminism, Punishment, and the Potential of Empowerment*, *in* CRIMINOLOGY AT THE CROSSROADS: FEMINIST READINGS IN CRIME AND JUSTICE 246 (Kathleen Daly & Lisa Maher eds., 1998).

[254] Annie Cossins, *Restorative Justice and Child Sex Offenses*, 48 BRIT. J. CRIMINOLOGY 359, 361 (2008). Cossins re-analyzes data from previous studies on child sexual abuse and restorative justice and finds that there is not enough evidence to support restorative justice options in cases where juveniles have committed a sexual offense against another child. In practice, the authors do not use restorative justice with children who have been sexually harmed but do take cases involving adult survivors of child sexual abuse.

[255] Based on the authors' experience.

In the authors' practice, most cases involve victim-offender conferencing, which brings the person who was harmed into a safe, face-to-face conversation with the person who caused the harm.[256] In some instances one or both people will bring a support person to participate with them in the face-to-face meeting.[257] Each person works with a trained facilitator ahead of time to address safety and justice needs, as well as goals for the overall process.[258] The facilitator might engage other professionals for assistance in the preparation process.[259] For example, a facilitator might suggest that one or both people seek professional counseling services to ensure they are psychologically and mentally prepared for a restorative process.[260]

Preparation for the person who caused harm might include psychoeducational sessions to help them better understand their behavior and emotions.[261] Similarly, preparation for the person who has been harmed can include conversations about trauma responses, sessions to practice telling the story, and asking and answering questions to best serve all parties involved in the process.[262] Everything is planned to ensure that both people feel safe and supported. Something as simple as a survivor choosing where they will sit in a room prior to a process can make a significant difference.[263] Simply put, by the time the two people come together they are both fully prepared for the conference. Some restorative processes involve one face-to-face meeting, while others will include several sessions over a period of time.[264] These decisions are made with participants as part of the decision-making process.

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[256] *See also* LORRAINE STUTZMAN AMSTUTZ, THE LITTLE BOOK OF VICTIM OFFENDER CONFERENCING: BRINGING VICTIMS AND OFFENDERS TOGETHER IN DIALOGUE 127 (2009); Clare McGlynn et al., *Seeking Justice for Survivors of Sexual Violence: Recognition, Voice, and Consequences*, *in* SEXUAL VIOLENCE AND RESTORATIVE JUSTICE: LEGAL, SOCIAL AND THERAPEUTIC DIMENSIONS (Estelle Zinsstag & Marie Keenan eds., 2016). While others in the field use terminology such as "victim-offender conferencing" or dialogue, the authors have chosen to use "one-one-one conferencing" or dialogue. When referencing the work of others, the authors use language consistent with their work. When the authors discuss their work, they use "one-on-one conferencing."

[257] Based on the authors' experience; McGlynn et al., *supra* note 256, at 2.

[258] Based on the authors' experience.

[259] In some instances, the authors will refer clients for therapeutic or trauma based clinical services prior to engaging in restorative processes. Facilitators, even those with extensive training in trauma, are not licensed therapists.

[260] *Id.*

[261] *Id.*

[262] *Id.*

[263] *Id.*

[264] *Id.*

Case Example: One-on-One Dialogue

In 2001, while attending a party, Jocelyn[265] was raped by Ronnie, an acquaintance who promised to look after her once she had expressed concern that she had had too much to drink. When speaking with Alissa, Jocelyn talked about the physical struggle that ensued between her and Ronnie. When she realized that he would continue to overpower her, she determined that if she just pretended that she liked the experience it would end far sooner than if she continued to fight him off. The next day, Jocelyn confronted Ronnie, who denied all culpability. Almost two decades after her rape, Jocelyn was still dealing with the physical and psychological impacts. In early 2018, she reached out to Alissa to see if restorative justice could be an option for her and Ronnie. She'd been back in touch with him via social media and they both wanted to engage in a restorative conversation. Alissa and Ronnie connected first via email and then by phone. During their first phone conversation, Ronnie acknowledged that he had raped Jocelyn and that he was ready to do whatever needed to be done to bring her healing and closure.

Little pre-education was needed prior to the one-on-one dialogue between Jocelyn and Ronnie. It was clear that Jocelyn had worked through significant layers of her trauma in individual therapy. She understood how the trauma from her rape continued to impact her daily, but therapy alone did not alleviate the trauma symptoms she experienced. With his therapist, Ronnie immediately began the work of processing the shame and guilt he felt for the rape he committed. This is important to point out because the feelings of shame and guilt only surfaced after Jocelyn confronted Ronnie 20 years after the rape. He had stuffed his actions so deep that they did not even cross his mind. This is a typical response the authors see in clients with whom they work.

To ensure that Jocelyn felt safe during the process, she chose the location where the one-on-one dialogue would take place in advance. On the day of the dialogue, Ronnie arrived, followed by Alissa. The two had time to process how Ronnie was feeling about seeing Jocelyn in person for the first time since the rape took place. Alissa reassured Ronnie that a restorative process is designed to bring healing to all parties and that she would not have agreed to bring the two of them together unless she was sure it was safe for them both. When Jocelyn arrived, Ronnie stood up to greet her as a sign of respect. Alissa stood to greet Jocelyn as well and then asked her where she would be most comfortable sitting for this

[265] All case examples use pseudonyms when necessary and some facts are edited from actual experiences in order to protect the anonymity and confidentiality of participants.

process. After Jocelyn chose the chair and the exact place in the room where she felt the safest and in control, both Alissa and Ronnie sat down.

Jocelyn and Ronnie exhibited body language that communicated that they were tense and uncomfortable. Nonetheless, Ronnie asked if he could read a letter he had written to Jocelyn to begin the dialogue. Jocelyn agreed and listened intently to Ronnie's admission of rape and full accountability for his actions. As Ronnie spoke, Jocelyn's visceral tension relaxed, and she seemed far more comfortable in her skin. Jocelyn then had the opportunity to share all the ways that this rape had impacted her. She spoke through tears as she described the acute manifestations of trauma in the direct aftermath of the rape, and then detailed the more chronic and insidious impacts on her physical and mental health over time.

The formal dialogue lasted approximately three hours, at which point Jocelyn and Ronnie asked Alissa to leave. There was more they wanted to discuss without the formality of a facilitator. This speaks volumes about the actual dialogue process, as Jocelyn felt safe enough to be alone with the man who raped her years prior.

Here is what Jocelyn noted about the process:[266]

> My RJ experience may have been a little unconventional in that I reached out to the person who sexually assaulted me . . . . [u]p until that point, he had been in denial that he had raped me. He apologized right away and we started exchanging messages and preparing for a restorative justice session with Alissa.
>
> As part of our preparation, we were tasked with coming up with agreements about the meeting. After exchanging messages online, we ended up agreeing to talk by phone. It was during one of our phone conversations that he told me had talked to Alissa. He said, "I told her 'I raped Jocelyn.'" It was the first time I had heard those words. I think many survivors have the experience of knowing they were raped and not having anyone be accountable, which is crazy-making. I often felt like I was lost in my thoughts about the rape and was worried that I had somehow made it up. Having him admit that he knew it was rape and say that it happened freed me from the self-doubt I had been experiencing for twenty years.
>
> The work we did to prepare for the restorative justice session and the meeting itself was both intense and powerful. Coming face to face with the person who hurt me all those years ago and hearing

[266] ACKERMAN & LEVENSON, *supra* note 195, at 9.

him say he was sorry and be accountable for his actions, shifted things for me. A few months after we had met up for our meeting, I realized that I no longer felt like my identity was tied up in my experience of the rape. He had apologized and demonstrated to me that he was actively making changes in his life. The sting of the encounter (many years ago) had dissipated. There was simply nothing left for my psyche to hold onto or process anymore. The experience had been validated and he had taken responsibility. I was free of the guilt that had been swirling in my head for two decades about all the things I could have or should have done differently. I finally got it. It wasn't my fault.

Ronnie wrote a reflection as well[267]:

I've been married for 14 incredible years, I have two beautiful children, and I raped someone 20 years ago. Confronting my past sexual transgressions wasn't just about how the survivor would heal or how I dealt with my emotions. It came, and still comes, with an incredible burden that I placed on my wife and children. I'm one of a very large group of males who have committed sexual assault and rape and buried it as deep as I could.

In 2018, three days before the Super Bowl, the survivor reached out to me on Facebook. I knew she was going to reach out at some point because she confronted me about the rape the day after it happened. Back then, I was a typical adolescent male, and like many men in society today, I denied all culpability. As soon as she reached out, I did a little research and quickly realized the impact that I had on her all this time.

I did it, I raped her. It was a fact now. For the next few months, I felt like I was walking around with a jersey that said "rapist" on the back.

After the survivor reached out to me, I knew I had to confront it. I felt compelled to reach out and apologize. There was this utter disgust in my stomach that I could not bury. I didn't know what would happen at that stage, but I couldn't live with myself knowing exactly how she felt and still denying it occurred like I did 20 years ago.

I remember exactly what I was doing when I received that Facebook message. I was at a burrito joint picking up some food for my children and I did everything I could not to show my

[267] ACKERMAN & LEVENSON, *supra* note 195, at 9-11.

children my emotions. As soon as I got home, I responded and apologized to the survivor. Later that night my wife came home, and I immediately told her what I had done 20 years before. What she did next was incredible.

She grabbed my face, looked me in the eyes, and said, "I love you." I cried for a long time and she supported me, despite me having done something as damaging as rape.

Both the survivor and my wife have incredible hearts. They believe in second chances and that good people make mistakes. Absolutely horrific mistakes. Yet, we have to learn from our past transgressions if we are going to try to make a better world.

Within a few weeks, we began working on a target date for a restorative justice session. Now I went from feeling sad and horrible to very scared. What would happen to my children? How would this affect my wife? Forget how I would be affected, there are all other people who have also become victims.

I think some people might not understand what restorative justice means. It's not necessarily a public outing of the perpetrator. It can absolutely be done in a confidential setting if the survivor chooses it to be that way. Remember, the survivor has total control here on how this goes. I lost that choice when I stole her ability to choose.

I was compelled to make the leap to start this process because I knew what I did was wrong. That's the first step a perpetrator must do. I didn't know what would transpire, but I knew I had to focus on doing the right thing. One might ask, "Why didn't I reach out to her earlier?" I buried it, and I didn't want to confront it. One thing the survivor said to me was that she was sad that I never reached out AND she was glad that she could do it when she was ready.

This journey isn't over for us. I still think about the survivor every day, definitely more often than I have in the last 20 years. I still feel like I owe the survivor so much. The restorative justice process is definitely for the survivor, but incredibly it is helping me with my own healing.

I've really been focused on doing the right thing. I don't know what will happen in a year, 10 years, or 20 years, but I do know that there is room for healing and that I can make a difference in society by focusing on doing what's right.

Another restorative process that can be used in cases of sexual harm is known as a circle process. Here, people with a vested interest in a particular case or issue come together to share their concerns and perspectives.[268] Circle processes might involve family members who have come together after the disclosure of sexual harm within the family. It could include a group of friends who did not believe a survivor's disclosure. Similarly, it might involve someone who caused harm, the person they harmed, and a group of support people. In some instances, a restorative process might begin as a one-on-one face-to-face encounter that leads to a larger circle process in time. In a circle process each person is considered an equal. Each person is granted the opportunity to answer questions designed by the facilitator without interruption from other participants. Such a process allows for better listening and understanding.

Finally, VRJ can involve both face-to-face victim-offender conferences and circle processes that allow people to participate in ways that are detached from their own specific cases of harm.[269] For instance, a survivor of sexual harm may be interested in participating but has lost contact with or does not know the person who harmed them. The person who caused harm may be unwilling to participate or they may be deceased. People who have committed a sexual offense may want to be accountable for their behavior, but do not know how to reach out to the person they harmed.[270] If they have been charged or convicted of a sexual offense, they may be legally prohibited from contacting the person they harmed. VRJ adheres to the same values and frameworks as traditional restorative justice processes; the only difference is that the people participating in the process do not know one another. VRJ can be used in settings that are not ideal for traditional restorative justice.

The restorative justice process with which Alissa initially engaged was a VRJ session that ultimately led to the creation of the VRJ model for healing from sexual violence.[271] VRJ can be used in institutional settings, as well.[272]

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[268] *See generally* KAY PRANIS, THE LITTLE BOOK OF CIRCLE PROCESSES: A NEW/OLD APPROACH TO PEACEMAKING (2005).

[269] Based on the authors' experiences.

[270] Based on the authors' experiences. In most instances when the authors engage in restorative processes, they will not reach out to a survivor on behalf of someone who caused harm. Restorative justice should be survivor driven.

[271] *See* ACKERMAN & LEVENSON, *supra* note 195, at vii-viii.

[272] The authors have participated in and facilitated VRJ sessions in the California prison system with individuals serving life sentences.

Case Example: VRJ

By the time Amelia was 21 she had experienced sexual harm at the hands of multiple people. Her abuse began at the age of eight when she was molested by a close family friend. At 16, Amelia was raped at a party by someone she thought was a friend and at 21 she experienced date rape. The multiple experiences of sexual violence caused significant mental health concerns for Amelia, which were compounded by the way she was dismissed by police when she reported the rape that occurred when she was 16. When Amelia contacted Alissa, she felt broken but was interested in learning more about the restorative justice process. She was considering participating in a restorative process, but under no circumstances did she want to participate with any of the individuals who had perpetrated sexual harm against her. This is when Alissa suggested that VRJ might be a good option.

As one accountability measure offered in some cases, Alissa asks people who have perpetrated sexual harm if they would be willing to give back by participating as proxies in cases where a survivor wants to participate but cannot or will not do so with the person who directly harmed them. Alissa chose Dan, someone who had perpetrated a date rape, to fill this role. As Dan was familiar with the process, there was no pre-conferencing work that needed to be completed with him prior to the circle process.

For Amelia, however, there was significant pre-education that occurred prior to the VRJ process. Amelia had questions about why she had experienced sexual harm on multiple occasions and wanted to better understand trauma responses, including why her body reacted as it did during her experiences of sexual harm and why she continued to experience body triggers. These conversations happened prior to the VRJ session. Amelia decided that she wanted to have the actual process occur in an online format, and that she wanted to have a support person with her throughout the dialogue. As this was a vicarious process, there were few accountability options Amelia could ask for. An additional conversation with Alissa helped her to determine what she was looking to accomplish in the session.

Amelia wanted to hear someone take responsibility for the harm they had caused, including a discussion of the steps they had taken to be accountable. She wanted to know what went through Dan's mind leading up to and during the rape he perpetrated. Finally, she wanted to hear directly from the mouth of someone who had committed an act that was similar to what she experienced explain that what happened to her was not her fault. Each of these goals were accomplished during a two-hour, online VRJ process. In addition, Amelia felt empowered because she was

able to impart some important knowledge to Dan that he had not considered. In follow up, Amelia was satisfied with the process and felt that it contributed to an overall improvement in her mental health and the way she thought about her experience of date rape.

Is Restorative Justice for Sexual Harm Effective?

Studies on the effectiveness for restorative justice in cases of sexual harm have found generally positive results.[273] However, these results are confounded by the fact that full scale evaluation studies have not been undertaken.[274] Still, some studies offer promising results. For example, an evaluation of 22 cases that were referred to Project RESTORE, found that participation decreased rates of PTSD in survivors and that survivors who participated in the process were satisfied with the outcome.[275]

One case study of an adult survivor of childhood sexual abuse and rape by a family member found that the restorative justice process helped her to feel empowered and provided a turning point in her healing process.[276] Another study noted that restorative processes are less victimizing for survivors as compared to traditional criminal legal processes.[277] One study comparing youth who went through a formal adjudication process with those who went through a restorative process found that those who went through a restorative process had lower rates of re-offending.[278] While some studies have addressed one aspect of effectiveness, such as recidivism or victim satisfaction, there remains a dearth of systematic program evaluations to assess the true effectiveness and impact of restorative justice in cases of sexual harm.

Due to the lack of research on its effectiveness, scholars have raised several concerns about restorative processes in cases of sexual harm.[279]

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[273] *See* Marie Keenan & Estelle Zinsstag, *Restorative Justice and Sexual Offenses: Can "Changing Lenses" Be Appropriate in this Case Too?*, 97 J. CRIMINOLOGY & PENAL REFORM 93, 100 (2014).

[274] *See* Gang et al., *supra* note 182, at 2.

[275] *See* Mary P. Koss, *The RESTORE Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcomes*, 29 J. INTERPERSONAL VIOLENCE 1623, 1623-60 (2014).

[276] *See generally* 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 (2012). While the use of restorative justice in cases of sexual violence is controversial, the results of this exploratory study, while tentative, provide an opening to consider the possibilities of restorative justice in cases of sexual violence.

[277] *See* Kathleen Daly, *Restorative Justice and Sexual Assault: An Archival Study of Court and Conference Cases*, 46 BRIT. J. CRIMINOLOGY 334, 338 (2006).

[278] Kathleen Daly et al., *Youth Sex Offending, Recidivism and Restorative Justice: Comparing Court and Conferences Cases*, 26 AUSTL. & N.Z. J. CRIMINOLOGY 241, 255 (2013).

[279] *See* Daly, *supra* note 278, at 350; *see also* Kathleen Daly & Sarah Curtis-Fawley, *Restorative Justice for Victims of Sexual Assault: Court or Conference?*, *in* GENDER AND CRIME:

One concern is that restorative justice might be used to restore relationships between people that only ever existed as an opportunity for one person to exploit the other.[280] Others argue that harm might be perceived as less serious than it actually is if it is adjudicated outside of a formal criminal legal process.[281] Still others caution about the misappropriation of the word justice.[282] Survivors' needs may include both retributive and restorative factors and many survivors are not concerned about rebuilding a personal relationship with the person who harmed them.[283]

Discourse surrounding this topic continues to grow and change. Because the empirical literature remains lacking, claims about restorative justice in cases of sexual harm are either overly positive or incredibly pessimistic.[284] As practitioners and researchers, the authors note that restorative justice cannot, and perhaps should not, be the first or only step toward meeting the needs of people impacted by sexual harm, but they see promise in it as a tool for those who are interested. Restorative justice has the potential to fill the needs of all people impacted by sexual harm, but more research is needed to ensure that those needs are met while balancing risk.[285]

PATTERNS OF VICTIMIZATION AND OFFENDING 230, 334 (Karen Heimer & Candace Kruttschnitt eds., 2006); *see generally* Kathleen Daly & Dannielle Wade, *In-Depth Study of Sexual Assault and Family Violence Cases, Part II: Sibling Sexual Assault, Other Sexual Assault, and Youth-Parent Assault*, S. AUSTL. JUV. JUST. AND CRIM. JUST. RSCH. ON CONFERENCING AND SENT'G (2012); Kathleen Daly et al., *In-Depth Study of Sexual Assault and Family Violence Cases*, S. AUSTL. JUV. JUST. AND CRIM. JUST. RSCH. ON CONFERENCING AND SENT'G (2007); SHIRLEY JULICH ET AL., AN EXPLORATORY STUDY OF RESTORATIVE JUST. AND SEXUAL VIOLENCE (2010); McGlynn et al., *supra* note 277; Clare McGlynn et al., *Seeking Justice for Survivors of Sexual Violence: Recognition, Voice and Consequences*, *in* SEXUAL VIOLENCE AND RESTORATIVE JUSTICE: LEGAL, SOCIAL AND THERAPEUTIC DIMENSIONS (Marie Keenan & Estelle Zinsstag eds., 2016).

[280] *See* Cossins, *supra* note 254, at 365.

[281] *See* Sarah Curtis-Fawley & Kathleen Daly, *Gendered Violence and Restorative Justice: The Views of Victim Advocates*, 11 VIOLENCE AGAINST WOMEN 603, 607-08 (2005).

[282] *See* Herman, *supra* note 19, at 597-99 (finding that survivor's views of justice do not fit well into either retributive or restorative justice models).

[283] *See* Herman, *supra* note 19, at 597.

[284] *See* ACKERMAN & LEVENSON, *supra* note 195, at 15.

[285] *See* Curtis-Fawley & Daly, supra note 280, at 632. *See also* Kathleen Daly, *Setting the Record Straight and a Call for Radical Change: A Reply to Annie Cossins on 'Restorative Justice and Child Sex Offenses,'* 48 BRIT. J. CRIMINOLOGY 557, 563 (2008); Kathleen Daly, *Seeking Justice in the 21st Century: Towards an Intersectional Politics of Justice*, 11 SOCIO. CRIME, L., & DEVIANCE 3 (2008); Kathleen Daly & Julie Stubbs, *Feminist Engagement with Restorative Justice*, 10 THEORETICAL CRIMINOLOGY 9, 24 (2006); SHIRLEY JULICH ET AL., PROJECT RESTORE AN EXPLORATORY STUDY OF RESTORATIVE JUSTICE AND SEXUAL VIOLENCE (Auckland University 2010); Mary P. Koss, Karen J. Bachar & C. Quince Hopkins, *Restorative Justice for Sexual Violence: Repairing Victims Building Community, and Holding Offend-*

The Limits of Restorative Justice and Sexual Harm

One reason for the burgeoning restorative justice movement in the United States is the systemic racism inherent in the criminal legal system. Disproportionate minority impact often begins in zero-tolerance policies in schools that lead to the school-to-prison pipeline and can be seen throughout every criminal legal policy, process, and practice from police contact to sentencing.[286] Scholars who write about restorative justice acknowledge the systemic racism within the criminal legal system.[287] Restorative justice practitioners were hopeful that diverting cases away from the criminal legal system could stymie disproportionate minority presence, especially in the juvenile justice system.[288]

Non-profit organizations that focus on restorative and racial justice are paving the way for better and more equitable ways of addressing harm.[289] Still, the insidious impacts of systemic racism and white supremacy are perpetuated in current restorative practices.[290]

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ers Accountable, 989 ANNALS N.Y. ACAD. SCIS. 384 (2003); Mary P. Koss, *Expanding a Community's Justice Response to Sex Crimes Through Advocacy, Prosecutorial, and Public Health Collaboration Introducing the RESTORE Program*, 19 J. INTERPERSONAL VIOLENCE 1435 (2004); McGlynn, *supra* note 68, at 825; McGlynn et al., *supra* note 275.

[286] There is an existing body of literature that focuses on disproportionate presence of Black and Brown people and systemic racism in the United States' criminal legal system. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR BLINDNESS 16 (2012).

[287] Howard Zehr is known as the father of modern restorative justice. His updated and revised *The Little Book on Restorative Justice* acknowledges systemic racism and questions whether we have done enough within the field of restorative justice to not perpetuate the problems we see within the criminal legal system. ZEHR, *supra* note 146, at 14. Similarly, *The Little Book of Restorative Justice for Sexual Abuse* makes a similar acknowledgement. OUDSHOORN ET AL., *supra* note 129, at 5.

[288] *See* TREVOR FRONIUS ET AL., WESTED JUST. & PREVENTION RSCH. CTR., RESTORATIVE JUSTICE IN U.S. SCHOOLS: AN UPDATED RESEARCH REVIEW 9, 19 (2019).

[289] Common Justice, based in New York City, and Impact Justice, based in Oakland California, are two such organizations. Common Justice is the only organization to focus on community-based solutions to violent felonies in adult courts using an equity lens to address racial inequities. Their website states, "Racial inequity drives violence. That means that any strategy to advance safety must advance equity as well." *About Common Justice*, COMMON JUST., https://perma.cc/Y9VK-UCGW (last visited Jan. 23, 2022). Danielle Sered, the executive director of Common Justice, is the author of *Until We Reckon* which grapples with dealing with violence from an abolitionist perspective. DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR (2021). The Restorative Justice Project at Impact Justice is the only program of its kind to partner with local communities across the country to offer technical assistance and training to address harm using pre-charge diversion programs. R*estorative Justice Project: Partnering with Communities to Address Harm Through Dialogue*, IMPACT JUST., https://perma.cc/S6YM-5DAH (last visited Jan. 23, 2022).

[290] A new edited book, *Colorizing Restorative Justice: Voicing Our Realities*, was released in 2020. This book highlights the experience of non-White restorative justice practitioners and scholars. The twenty authors collectively and individually call out the contradiction between

Organizations and individuals who practice restorative justice and hold the power to facilitate change do not always represent the marginalized people for whom traditional legal practices cause the most harm.[291] Acknowledging the problem is not enough. Making restorative justice safe and equitable for all means doing the work necessary to operate with a race-conscious lens.[292]

Facilitators must be skilled in their practice, culturally competent, and aware. This remains true for organizations and individuals who focus on restorative justice in cases of sexual harm. Even a narrow restorative justice focus requires facilitators and organizational leaders to be committed to anti-racism. It requires that White practitioners acknowledge White supremacy and their White privilege. Until restorative justice practitioners contend with issues of racism and White supremacy, we limit our ability to make actual change.

Few practitioners or restorative justice programs take cases involving sexual harm. As the movement has grown, there has been a call for more practitioners who have the capacity and expertise to effectively handle this type of caseload. This creates two different concerns. The first concern involves the use of restorative justice in conjunction with the criminal legal system. The second involves the lack of appropriate skills and expertise for facilitators to take on cases of sexual harm.

With newly elected district attorneys in multiple jurisdictions whose platforms involve restorative justice and criminal justice reform, there is renewed hope for change.[293] However, concerns remain that their

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restorative practices, the oppressive systems of Western societies created by colonizers by great harm to Indigenous and First Nations People, and White settler colleagues who do not understand these realities. *See* Sharon Goens-Bradley, *Breaking Racism's Insidious Grip on Restorative Practices: A Call to White Action*, *in* COLORIZING RESTORATIVE JUSTICE: VOICING OUR REALITIES 37-46 (Edward C. Valandra & Waŋbli Wapȟáha Hokšíla eds., 2020). Fania Davis writes that the restorative justice movement risks losing relevance if it does not address racism, systemic racism, and white supremacy. FANIA DAVIS, THE LITTLE BOOK ON RACE AND RESTORATIVE JUSTICE: BLACK LIVES, HEALING, AND U.S. SOCIAL TRANSFORMATION 37 (2019).

[291] SHARON GOENS-BRADLEY, *Breaking Racism's Insidious Grip on Restorative Practices: A Call to White Action*, *in* COLORIZING RESTORATIVE JUSTICE: VOICING OUR REALITIES, *supra* note 291, at 37-46.

[292] *See id.*

[293] See, for example, the elections of Eric Gonzalez in Brooklyn, George Gascón in Los Angeles, Rachael Rollins in Suffolk County, Chesa Boudin in San Francisco, and Larry Krasner in Philadelphia, to name a few. *See Justice 2020: An Action Plan for Brooklyn*, ERIC GONZALEZ, BROOKLYN DIST. ATT'Y'S OFF. (2020), https://perma.cc/MJS3-RDFT; George Gascon, *Special Directive 20-14*, L.A. CNTY. DIST. ATT'Y'S OFF. (Dec. 7, 2020), https://perma.cc/KWK4-LA8M; *Meet District Attorney Rollins*, SUFFOLK COUNTY DIST. ATT'Y (2019), https://perma.cc/7E66-EPJ6; *About the Office*, S.F. DISTRICT ATT'Y, https://perma.cc/4BYM-N5UX / (last visited Jan. 23, 2022); Larry Krasner, *Philadelphia DA Larry Krasner's Revolutionary Memo* (Feb. 15, 2018), https://perma.cc/8QEF-FT26.

platforms and visions will not actually come to fruition. Similarly, criminal justice reform and diversion options rarely include people who have been convicted of sexual offenses.[294] The authors fear that if and when progressive District Attorney offices are willing to use restorative options in cases of sexual offenses, that there will still be a racial component to how decisions are made. Namely, the authors are concerned that White people who have been charged with sexual offenses will be offered restorative justice, but people of color and other marginalized people will still be funneled through the criminal legal process.

As the call for restorative justice in cases of sexual harm increases, there is a critical need for facilitators who have the expertise and experience to take these cases. Simply put, sexual harm cases are different. They require a nuanced understanding of the consequences of sexual trauma, as well as the etiology of sexual offending. The authors are concerned that as the field grows, facilitators will be ill-equipped to take these cases. This will either lead to individuals seeking restorative service having few actual options available to them or facilitators offering services that they are not equipped to offer.

Finally, as Howard Zehr explains, restorative justice is not a panacea.[295] There are some people for whom restorative justice will never be the right option.[296] This is true both for people who have experienced sexual harm and those who have perpetrated it. People must be ready for the process, and some might not have the capacity with which to do so. We acknowledge that while the literature is clear that most people who sexually harm will not reoffend, there remains a small group of individuals who will continue to cause harm. As a society we have an obligation to protect people from that continued harm. The authors believe that current incarceration practices must be abolished. They also acknowledge that incapacitation may be necessary in some instances.

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[294] Even the most progressive prosecutorial offices in the nation have limitations to restorative justice when it comes to sex offenses. To illustrate, instead of restorative approaches to sex offenses, the goal in the Brooklyn District Attorney's *Justice 2020* plan is to, "[e]nhance prosecution of cases of gender-based violence, including acquaintance rape and sexual assault cases." ERIC GONZALEZ, BROOKLYN DIST. ATT'Y'S OFF., *supra* note 293, at 35.

[295] *See* ZEHR, *supra* note 146, at 14.

[296] Based on the authors' experience. There have been cases where the authors have ceased working with clients who have harmed because they were not progressing in taking true accountability for their behavior. Similarly, some people who have experienced harm will not be ready for a restorative process. Some individuals are oriented toward retributive justice.

VII. TOWARD A RESTORATIVE FUTURE

Current criminal legal processes and post-conviction policies do not address the needs of individuals impacted by sexual harm.[297] Overall, survivors do not feel like their justice or healing needs are met and the root causes of sexual harm are not addressed.[298] Despite the best of intentions, current approaches do not provide meaningful or helpful outcomes to those directly impacted by sexual harm.[299] Furthermore, these efforts have had little effect on preventing future acts of sexual harm.[300] Overall, survivors of sexual harm support the notion that they want meaningful outcomes and accountability measures for those who perpetrate harm against them.[301] Restorative justice offers the potential to meet these needs.

Building a restorative approach that holistically addresses sexual harm requires that it be culturally responsive, trauma-informed, survivor-centered, and evidence-based. Culturally responsive facilitators and programs acknowledge and address their privilege. They understand and value the knowledge and lived experiences of the people with whom they work.[302] They recognize and respect that their expertise is not a substitute for listening to the needs of the people they serve.

A trauma-informed approach to restorative justice is imperative for any practice or program related to sexual harm. The consequences of trauma are profound.[303] They impact interactions and experiences in ways that people might not be aware of.[304] For restorative processes to be effective, facilitators must utilize trauma-informed principles that address the psychological, neurological, and physical needs of clients. It requires active listening and stellar communication skills. Being trauma-informed means having empathy and compassion for people, even when they have

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[297] *See* Campbell, *supra* note 26, at 31; Rachel Kate Bandy, *The Impact of Sex Offender Policies on Victims*, *in* SEX OFFENDER LAWS: FAILED POLICIES, NEW DIRECTIONS, *supra* note 73, at 358-79.

[298] *See generally* Mary P. Koss, *Restoring Rape Survivors: Justice, Advocacy, and a Call to Action*, 1087 ANNALS N.Y. ACAD. SCIS. 206 (2006). The article highlights that individuals who have experienced rape feel that their legal needs are not met due to justice system issues such as attrition, retraumatization, and disparate treatment across gender, class, and ethnic lines. Empirical data presented in the article supports each issue and concludes that the current justice options are inadequate.

[299] *See id.*

[300] *See* Spohn & Tellis, *supra* note 38, at 170.

[301] *See* McGlynn & Westmarland, *supra* note 69, at 186.

[302] *See* Tarana Burke & Brené Brown, *Introduction* to YOU ARE YOUR BEST THING: VULNERABILITY, SHAME RESILIENCE, AND THE BLACK EXPERIENCE i, xvii (Tarana Burke & Brené Brown eds., 2021).

[303] *See generally* VAN DER KOLK, *supra* note 152.

[304] *See id.* at 62.

behaved in ways that are antithetical to one's own moral compass and values.

Restorative processes are, by their inherent nature, survivor-centered. This means that the safety needs of the person who has been harmed must be addressed first and must be prioritized throughout the process. This includes simple things including where the survivor will sit, where the process will occur, and who will speak first. It also includes discussions about intended outcomes and accountability measures. Being survivor-centered puts the person who was harmed in the driver's seat. They have control over the timeline of the process and input on all aspects of the process. This does not mean that survivors can engage in behavior that stigmatizes or punishes the person who caused harm. The restorative process is centered on doing no harm. Survivors who engage in this process understand that it must be safe for all parties for it to be effective.

Finally, restorative approaches to sexual harm must be evidence-based. The evidence for restorative justice and sexual harm is limited but growing. The available literature does suggest that people who engage in restorative justice to address sexual harm are satisfied with the process.[305] The evidence also suggests that restorative justice reduces rates of reoffending and builds empathy.[306] However, as restorative practices in this field grow, it is imperative that practitioners, organizations, and scholars alike make a commitment to evaluate the impact of their programs effectively and honestly across multiple domains, including participant satisfaction, follow through on accountability measures, and rates of reoffending, among other factors

As experts in the field of sexual violence, restorative justice practitioners who specialize in cases of sexual harm, and rape survivors who have navigated restorative processes, the authors of this piece wholeheartedly believe in the possibilities of a restorative approach to sexual harm. This can only happen if everyone has a seat at the table. Instead of an "us vs. them" mentality, we as a society must lean into difficult dialogues, which requires stepping outside of comfort zones. A culturally responsive, trauma-informed, evidence based, and survivor-centered process is possible. A world restored from sexual harm is possible.

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[305] *See* Umbreit et al., *supra* note 249, at 39.

[306] *See* SHERMAN & STRANG, *supra* note 187, at 8, 14.

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VICTIMS' RIGHTS FROM A RESTORATIVE PERSPECTIVE

LARA BAZELON

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Victims' Rights from a Restorative Perspective

Lara Bazelon & Bruce A. Green

The criminal adjudicatory process is meant in part to help crime victims heal. But for some crime victims, the process is re-victimizing. For decades, efforts have been made to make the criminal process fairer and more humane for victims. For example, state and federal laws are now designed to keep victims informed, allow them to be heard at sentencing, and afford them monetary restitution. But these efforts, while important, have not persuaded crime victims to trust criminal process. For example, sexual assaults remain grossly under-reported and under-prosecuted. Less than 1 percent of sexual assault crimes result in a felony conviction. Even the few victims who do receive their promised retributive outcome are not necessarily healed by the process.

Reform efforts seem to presuppose that victims of crime – or victims of particular crimes such as sexual assault – are essentially the same and have essentially the same need, namely, a need for the offender to be criminally prosecuted and sent to prison to serve the longest sentence the law allows. However, sexual assault victims are a diverse group – racially, ethnically, socio-economically, and with respect to sexual identity – and they suffer varied harms because sexual assault encompasses a wide realm of misconduct and victim-offender relationships or lack thereof. Even when victims suffer similar harms and come from similar backgrounds, they often have distinct, though sometimes overlapping, needs and objectives. Some have no desire to participate in the criminal adjudication process at all. Some will be re-traumatized by a successful criminal prosecution, even with the implementation of procedural reforms promoted by the victims' rights movement and others.

Proceeding from the premise that victims are a diverse group with differing needs, we focus on victims who might prefer, and be better served by, a non-adversarial process that is centered on their needs, namely, restorative justice. However much improved, adversarial adjudication directed at convicting and incarcerating offenders risks re-traumatizing victims rather than promoting healing. It denies victims any significant control over the process, including control over their own narratives. We explore the value of restorative justice processes as an alternative that, in many criminal cases, may be preferable from victims' perspective. We acknowledge that restorative justice processes are rarely employed in sexual assault cases in the United States and that prosecutors may have reasons, independent of victims' perceived interests, for preferring the adversary process, a criminal conviction and imprisonment. Further, some victims' advocates regard restorative justice as particularly inappropriate in the context of sexual assaults. Nonetheless, we suggest that when victims voluntarily choose to engage in a restorative justice process, it may be healing, because it gives victims agency in seeking a reckoning that fits with their particular needs and offers possibilities for addressing and repairing the harm that a criminal prosecution cannot.

INTRODUCTION

The victims' rights movement has made great strides to improve the adjudicatory process for crime victims in the United States: they are now entitled to notification of court proceedings,[1] the

[1] *See, e.g.*, ARIZ. REV. STAT. § 13-4406 (2017) ("On becoming aware of the date, time and place of

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right to seek monetary compensation from offenders,[2] and the opportunity to make a victim impact statement,[3] among other rights. But procedural reforms, including new ones inspired by the #MeToo movement,[4] cannot alter the fundamentally adversarial nature of our criminal justice system, which disempowers victims[5] and has a significant potential to re-traumatize them at precisely the time when the state should be helping them heal.[6] Crimes involving sexual assault have a particular potential to re-harm victims because the adjudicatory process keeps its focus squarely on the offender and subordinates the interests all other actors to achieving a conviction and retributive outcome. Most sexual assaults are never reported.[7] If a criminal case is initiated, control over the victim's narrative as well as every major decision about the case is ceded to the

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the initial appearance of the accused, the law enforcement agency shall inform the victim of that information unless the accused appeared in response to a summons or writ of habeas corpus. In that case, the prosecutor's office shall, on receiving that information, provide the notice to the victim."); *see also* § 13-4409(A) ("Except as provided in subsection B, the court shall provide notice of criminal proceedings, for criminal offenses filed by information, complaint or indictment, except initial appearances and arraignments, to the prosecutor's office at least five days before a scheduled proceeding to allow the prosecutor's office to provide notice to the victim.").

[2] The federal Victim and Witness Protection Act, for example, provides that the court may order restitution for the "cost of necessary medical and related professional services . . . [and] for lost income." 18 U.S.C. § 3663(a)(1) (2008). Note, however, that courts have interpreted this statute as excluding restitution for "mental anguish and suffering." United States v. Husky, 924 F.2d 223, 226–27 (11th Cir. 1991).

[3] In *Payne v. Tennessee*, 501 U.S. 808 (1991), the United States Supreme Court ruled that the Eighth Amendment allows the prosecution to introduce a victim impact statement at the sentencing phase of a capital case because it is "relevant evidence" to the determination whether impose the death penalty. *See generally* Robert C. Davis & Carrie Mulford, *Victims' Rights and New Remedies: Finally Giving Victims Their Due*, 24 J. CONTEMP. CRIM. L. 198 (May 2008).

[4] Alta Viscomi, *System Accountability and Sexual Violence: The Past and Future of the Criminal Justice System*, 22 RICH. PUB. INT. L. REV. 173, 181–88 (2019) (noting "the often brutal nature of the court confrontation process" continues in the post #MeToo era as do the barriers victims, particularly women of color, face in providing their cases).

[5] Linda G. Mills, *The Justice of Recovery: How the State Can Heal the Violence of Crime*, 57 HASTINGS L.J. 457, 460–61 (2006) ("Critics of the victims' rights movement, however, question the substance of [rape law reforms], noting that victim participation in criminal trials is largely symbolic. Moreover, courtroom dynamics subscribe a passive role to victims, who perform only when the prosecutor and the law invite such participation.").

[6] *See generally* SUSAN HERMAN, PARALLEL JUSTICE FOR VICTIMS OF CRIME (2010).

[7] Amy Kasparian, *Justice Beyond Bars: Exploring the Restorative Justice Alternative for Victims of Rape and Sexual Assault*, 37 SUFFOLK TRANSNAT'L L. REV. 377 (2014) (stating that "[t]he reforms of the past forty years" are little more than "symbolic steps" and that most rape and sexual assault remain unreported and unprosecuted); Alta Viscomi, *System Accountability and Sexual Violence: The Past and Future of the Criminal Justice System*, 22 RICH. PUB. INT. L. REV. 173, 180–81 (2019) (citing statistics).

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state.[8] The vast majority of cases end in plea bargains,[9] which may leave victims dissatisfied because they never had a chance to tell their story and because the bargain itself may seem unfair or unrepresentative of what happened to them.[10] In the rare case where there is a trial, the victim's narrative is shaped by prosecutor, the victim must undergo cross-examination by the defense attorney, and the matter of punishment is up to the judge.[11]

Our inquiry focuses on the harms that victims experience during criminal adjudication through trial and sentencing. Victims' reform efforts tend to "essentialize" crime victims, that is, to regard them as if they are essentially the same and have essentially the same needs and objectives.[12] But crime victims – and even victims of particular crimes -- are not a monolithic group.[13] Sexual assault victims, in particular, are diverse across racial, ethnic, socio-economic lines; some are members of LGBTQ groups, some are men. [14] The sexual violence they experience includes a wide array of

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[8] *See* Mills, *supra* note 5, at 458–62.

[9] Innocence Staff, *Guilty Pleas on the Rise, Criminal Trials on the Decline*, INNOCENCE PROJECT (Aug. 7, 2018), https://www.innocenceproject.org/guilty-pleas-on-the-rise-criminal-trials-on-the-decline/ ("Over the last 50 years, defendants chose trial in less than three percent of state and federal criminal cases—compared to 30 years ago when 20 percent of those arrested chose trial. The remaining 97 percent of cases were resolved through plea deals."); Jon Stinchcomb, *Most Sexual Assault Cases Don't Go To Trial. Here's Why.*, PORT CLINTON NEWS HERALD (Aug. 24, 2018), https://www.portclintonnewsherald.com/story/news/local/2018/08/24/ohio-sexual-assault-cases-trial-sentencing-plea-deal/978088002/.

[10] DANIELLE SERED, UNTIL WE RECKON 32-33 (2019) (explaining why a plea to a lesser charge "can feel profoundly disrespectful to [the victim's] experience").

[11] Mills, *supra* note 5, at 460–61.

[12] Aya Gruber defines "essentialism" as "the practice of treating certain 'groups,' whether racial, socio-economic, or ethnic, as though they all share the same beliefs, traits, goals, and desires." Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 774–45 (2007). Essentialism, Gruber writes, also operates from a reductionist view of the offender: "Defendants are subhuman; they are monsters." *Id*. at 775.

[13] Kathryn Castell, Julia Wolfe & Mai Nguyen, *What We Know About Victims of Sexual Assault in America*, FIVETHIRTYEIGHT (Sept. 21, 2018), https://projects.fivethirtyeight.com/sexual-assault-victims/.

[14] Victims seared into the public consciousness include Trish Meili, in the infamous 1989 Central Park Jogger case, and Catherine "Kitty" Genovese, who was sexually assaulted and ultimately killed a street near her home in 1964. Both victims were white, attractive, and middle class. Their attackers were men of color with violent criminal histories who they did not know. In Meili's case, the prosecution charged and wrongfully convicted five black and Hispanic teenagers. Years later, Matias Reyes, who is Puerto Rican, and had raped numerous other women in stranger attacks, confessed to the crime. Alfred Joyner, *Who is Matias Reyes? Serial rapist and Murderer in the Central Park Five Series When They See Us*, Newsweek, June 4, 2019. His DNA matched the DNA from the crime scene. Jim Dwyer, *The True Story of how a City in Fear Brutalized the Central Park Five*, New York Times, May 30, 2019. A black man named Winston Moseley was arrested and convicted for the sexual assault and murder of Genovese. Some experts believe that his confession was coerced. Saul Kassin, *The Killing of Kitty Genovese: What Else Does this Case Tell Us?* 12 Perspectives on Psychological Science TKK, 374-381 (2017).

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crimes—misdemeanors and felonies, stranger attacks and assaults by people they know. Even victims who experience similar harms and come from similar backgrounds may have a multiplicity of needs that go unmet even under the "best case scenario" where there is a conviction and severe sentence. We explore how the criminal process can serve the victims who want no part of the adversary process, not by promising to reduce the traumatic nature of criminal prosecutions to a tolerable level –which is not always possible – but by acknowledging that for some victims, there may be a different and preferable path. Empirical data suggests that for many survivors, the road to recovery involves "regaining power and control over what occurs in the aftermath of an assault, including the ability to make choices about when, how, and with whom to share their story, and the ability to limit their exposure to situations that may cause flashbacks or re-traumatization."[15]

The criminal justice system, by design, is not set up to provide this kind of choice and empowerment. As the criminologist Lisa Frohmann has noted, "Under current legal practice, the victim's affective and personal concerns are secondary to the concerns of the organization. To elevate the priority of victims' concerns, to have them play a more active . . . role in the processing of sexual assault complaints, major structural and ideological changes in the legal system would have to occur."[16] Yet the adjudicative process cannot accommodate such changes, which would radically undermine basic constitutional guarantees, including the right of the accused to present a defense and to confront and cross-examine witnesses.[17] Empowering victims would also be contrary to the traditional understanding of prosecutors' role and responsibility to seek justice, which requires declining to prosecute cases that cannot be proven beyond a reasonable doubt and determining whether the public interest demands a result different from what the victim desires.[18]

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[15] Stefanie Mundhenk Harrelson, *I Was Sexually Assaulted. And I Believe Incarcerating Rapists Doesn't Help Victims Like Me*, THE APPEAL (July 18, 2019), https://theappeal.org/i-was-sexually-assaulted-and-i-believe-incarcerating-rapists-doesnt-help-victims-like-me/ (citing Judith Lewis Herman, *Justice From the Victim's Perspective*, 11 VIOLENCE AGAINST WOMEN 571-602 (2005)), .

[16] Lisa Frohmann, *Constituting Power in Sexual Assault Cases: Prosecutorial Strategies for Victim Management*, 45 SOCIAL PROBLEMS 393 (1998).

[17] U.S. CONST. amend. VI; *see, e.g.*, Crawford v. Washington, 541 U.S. 36, 62–63 (2004) ("Dispensing with cross examination because testimony is obviously reliable is akin to dispensing with jury trial because the defendant is obviously guilty. This is not what the Sixth Amendment prescribes."); Davis v. Alaska, 415 U.S. 308, 320 (1974) ("The state's interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so fundamental a constitutional right as the effective cross examination for bias of an adverse witness").

[18] *See* Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORD. URB. L.J. 607 (1999); *see also* STANDARDS FOR CRIMINAL JUSTICE 3-1.2(c) (AM. BAR. ASS'N. 1993); MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt (AM. BAR. ASS'N. 2008) (The "seek justice" imperative is referred to as a "higher duty," which requires the prosecutor to serve as "a minister of justice and not simply . . . an advocate"). While this requirement is somewhat vague, it does "tell[] prosecutors that their role includes more than seeking conviction at all costs." Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 259 (1993); Paul H. Robinson, *Should the Victims' Rights Movement Have Influence Over Criminal Law Formulation and Adjudication*, 33 MCGEORGE L REV. 749, 749 (2002) (tying case outcomes to an objective measure of blameworthiness not an individual victim's need for retribution or lack thereof); Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel*

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In part, our inquiry offers a frank assessment of the limitations of criminal procedure in the United States viewed from crime victims' perspective. By its nature, the adversary process denies victims autonomy and puts them at risk of further psychological harm and invasion of privacy. While procedural reforms may enhance victims' participation or reduce the intrusiveness of direct and cross-examination, many victims will continue to find the process inhospitable if not painful. We also critique the victims' rights efforts insofar as they fail to acknowledge important differences among crime victims. This movement overlooks those who seek to avoid the criminal process because they will not be healed, but expect only to be further harmed, by a criminal prosecution, even one that results in the offender's conviction and incarceration. We then explore whether there are other ways to advocate for victims, specifically victims of sexual assault, outside of the traditional criminal justice system, that may provide better opportunities to exert agency and promote healing. We focus on one of these alternatives, restorative justice, and discuss how it might apply in sexual assault cases.[19] Notably, while other countries have used restorative justice in cases involving violent crimes, there is little data on its effectiveness with respect to sexual assault crimes in particular.[20] Within the United States, restorative justice is rarely employed in cases involving violent crime and

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Vision, 49 HOWARD L.J. 475, 483 (2006) ("The duty to act as a zealous advocate and the duty to act as a minister of justice are not contiguous: some tension between them seems inevitable.").

[19] We make this inquiry mindful of its controversial nature. Those who advocate for restorative justice in sexual assault cases, including survivors, have been subjected to public condemnation and ridicule. *See, e.g.*, Harrelson, *supra* note 14 (writing that "talking about restorative justice as a solution to rape instead of incarceration has resulted in me being called 'stupid,' 'naive,' 'malevolent,' and a 'bitch'").

[20] Countries including Australia, Canada, and the United Kingdom have used restorative justice practices in response to violent crime with positive results: a lower rate of recidivism and higher rate of satisfaction from the victims. Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15 (discussing a decade of "research and development work on restorative justice in the common law jurisprudence of Australia and England" and reporting that victims stated they got "more 'justice'" from the restorative process than the traditional legal system); Mark S. Umbreit, Robert B. Coates & Betty Vos, *The Impact if Victim-Offender Mediation: Two Decades of Research*, 65 FEDERAL PROBATION 29–38 (2001) (reporting the same over two decades). Currently, there are only a few projects scattered across the United States that apply restorative justice practices in cases of serious violent crime (excluding sexual violence), but these have shown promising results. *See, e.g.*, Danielle Sered, *A New Approach to Victim Services: The Common Justice Demonstration Project*, 24 FEDERAL SENTENCING REPORTER 50 (2011) (describing a restorative justice program that diverts violent offenders in New York). Vermont has a statute making it a "state policy" to "develop and employ restorative justice approaches whenever feasible and responsive to specific criminal acts." But the law carves out an exception for sexual assault related crimes. VT. STAT. ANN. tit. 24 § 1967 (2018). In 2018, however, "Vermont created a restorative justice study committee" to re-examine whether restorative justice might be used in sexual assault cases. Cara Kelly & Aaron Hegarty, *#MeToo was a culture shock. But changing laws will take more than a year.*, USA TODAY (Oct. 5, 2018), https://www.usatoday.com/story/news/investigations/2018/10/04/metoo-me-too-sexual-assault-survivors-rights-bill/1074976002/.

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almost never in sexual assault cases, [21] making data hard to come by.[22] For this reason, our discussion of restorative justice and sexual assault is necessarily preliminary—a further step in what we hope will be an ongoing and increasingly data-backed as well as story-driven exploration.

This article contributes to a collection of articles responding to the effects of the #MeToo movement on criminal law and procedure. It seeks to add not only to the literature on victims' rights and the role of restorative justice in the criminal process in general, but also to the literature in particular on how sexual offense victims should be treated in the criminal process. This question takes on added significance given the #MeToo Movement's success in broadening public understanding of the harms caused by sex offenses and in encouraging more rigorous prosecution of sex offenders,[23] to which some states have responded by reforming their laws to create new crimes, increase penalties, and extend statutes of limitations to bring suit and file charges.[24] Like earlier reform efforts designed to help crime victims, the #MeToo Movement focuses predominantly on punishing offenders: it envisions criminal trials as a forum in which women who are victims of sexual offenses can regain their voices and where guilty verdicts will serve as affirmations of victims' experiences, facilitating healing.[25] Our objective is not to deny the restorative power of successful prosecutions for some victims, but to question whether criminal prosecutions best serve victims in *all* cases, and to contrast criminal adjudication with processes that are more explicitly designed to be restorative for victims. Ultimately, we seek to expand the national discourse by encouraging

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[21] One exception is RESTORE, a federally funded pilot program in Pima County, Arizona that operated from 2004-2007. In all, 22 misdemeanor and felony sexual assault cases were referred by prosecutors to the program. Repeat sexual offenders were excluded as were those accused of domestic violence. Mary P. Koss, *The RESTORE Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcomes*, 29 J. INTERPERSONAL VIOLENCE 10–12 (2013), https://publichealth.arizona.edu/sites/publichealth.arizona.edu/files/14%2004%2024%20RESTORE%20On-line%20published.pdf [hereinafter Koss, *The RESTORE Program*]. Koss's peer-reviewed published report analyzing RESTORE's data found that two-thirds of felony-referred defendants and 91 percent of misdemeanor-referred defendants successfully completed the program and that 90 percent of all participants believed that "justice was done." *Id*.

[22] *Id*. (stating that "scholarly discourse on RJ for sexual assault has been hindered by lack of empirical data and is predominantly conceptual and dialectic").

[23] *See, e.g.*, Lesley Wexler, Jennifer Robbennolt & Colleen Murphy, *#MeToo, Time's Up, and Theories of Justice*, 2019 Ill. L. Rev. 45, 49-68 (2019).

[24] Holly R. Lake, *#MeToo Movement's Law and Policy Impact on Hollywood*, 42 MAY L.A.-Law (2019); Corina Knoll, *"I Can Still Smell Him," For 4 Legislators the Child Victims Act is Personal*, NEW YORK TIMES (Aug. 21, 2019); Sami Sparber, *Texas Toughens Penalties For Groping*, Houston Chronicle, June 4, 2019.

[25] Two notable responses to this movement were the prosecution of Larry Nassar, in which more than 100 victims testified at his sentencing following his guilty plea, and the New York prosecution of Jeffrey Epstein, at which the judge allowed putative victims to give similar testimony following Epstein's death in prison before a trial could commence. Both victim impact proceedings were controversial – the Epstein proceeding especially so. *See* Bruce A. Green & Rebecca Roiphe, *Punishment Without Process: "Victim Impact" Proceedings for Dead Defendants*, Fordham Law Review Online, vol. 88 (2019), http://fordhamlawreview.org/wp-content/uploads/2019/11/Green-Roiphe_November_FLRO_4.pdf.

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thoughtful consideration of reparative alternatives, such as restorative justice processes, that are not solely concerned with punishment but rather emphasize accountability and healing.

I. Background: The Development of Victims' Rights Laws

A. Early Efforts to Reform the Adjudicatory Process to Benefit Crime Victims

In the United States, organized efforts have been made for more than a century to improve the criminal justice process from victims' perspective.[26] Some of the efforts have focused on victims of particular crimes, such as sexual assault or domestic violence, and others have focused on crime victims as a class. Some of the focus is on improving social services and other assistance to crime victims. But much of the focus, and the subject of our discussion, concerns ameliorating the harms to victims caused not so much by the crime but by the ensuing criminal adjudicative process.

Like the current #MeToo Movement, some early reform efforts specifically targeted how the criminal laws and processes unfairly treated women who are victims of sexual assault. In the 1970s, many states did not recognize spousal rape, required that victims prove they physically resisted, were unlikely to prosecute date rape, and allowed cross examinations so broad as to place the victim's unrelated sexual history and choice of clothing on trial to imply that her "promiscuity" or provocativeness was in some way the cause of what had happened to her.[27] Reform efforts targeted these problems.[28]

But what came to be known as the victims' rights movement tended to focus more broadly on problems that were not specific to sexual assault cases. For example, other than via their testimony, scripted by the process, victims were voiceless – they did not speak at sentencing and had no right to be informed about the progress of their case as it wended its way through the system. Reformers recognized that in seeking to vindicate the interests of crime victims as well as the public generally, the traditional way of prosecuting criminal cases, including but not limited to sexual assault cases, often caused even greater misery for victims.[29] In 1980, Wisconsin adopted the first Crime Victims' Bill of Rights,[30] which was designed to address these problems, and other states eventually followed.

Among the most significant milestones in promoting victims' procedural interests in the adjudicative process, as well as more broadly, was President Reagan's appointment of a Task Force

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[26] *See* OFFICE OF JUSTICE PROGRAMS, LANDMARKS IN VICTIMS' RIGHTS AND SERVICES (2018), https://ovc.ncjrs.gov/ncvrw2018/info_flyers/2018NCVRW_Landmarks_508.pdf.
[27] CITES
[28] CITES
[29] Ronet Bachman & Raymond Paternoster, *A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Come?* 84 J. CRIM. L. & CRIMINOLOGY 554, 555 (1993) (describing "a fragile alliance among feminist groups, victims' rights groups, and organizations promoting more general 'law and order' themes" to combat stereotypes about "real rape," the historical tendency to blame women and the common practice of putting a woman's sexual history on trial during cross examination).
[30] *See* Dean G. Kilpatrick, *Interpersonal Violence and Public Policy: What About the Victims?*, 32 J. L. MED. & ETHICS 73, 77–78 (2004) (providing overview of the crime victims' rights movement).

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on Victims of Crime, which issued a 1982 report recommending 68 new programs, policies, practices and other measures, including a constitutional amendment guaranteeing crime victims "the right to be present and to be heard at all critical stages of judicial proceedings."[31] The report helped energize and chart the course of law reform efforts that have continued to this day. [32]

From the start, the focus of victims' rights efforts has been on employing and improving the criminal adjudicative process, on the assumption that victims, including sexual assault victims, are best served when offenders are prosecuted, convicted and punished harshly. While healing victims was important, reform efforts presupposed that punishing offenders was essential to healing.[33] The retributive preferences of the victims' rights movement in part reflect its history. The victims' rights movement developed in the context of a call for more prosecutions and harsher criminal punishment – for the decades'-long "war on crime" waged by Republican and Democratic presidents alike. It was that bipartisan movement that led to our current regime of mass incarceration, particularly of low-income men of color.[34] The restorative justice movement was itself just getting started in the United States in the 1970s and 1980s, when the victims' rights movement was picking up steam. Even more embryonic at that time was the push for diversion programs, problem-solving courts and other alternatives to criminal prosecutions and punitive sentences.[35]

B. The 1982 Task Force Narrative of How the Adjudicatory Process Harms Crime Victims

From the outset, the law reform efforts of the victims' rights movement, quite understandably, has built on stories, portrayed to be the lived experience of crime victims and their families. Stories have both explanatory and influential powers. But no single story or collection of stories captures the vast, differing and, at times, seemingly contradictory, experiences, perceptions, desires and needs of crime victims. The 1982 Task Force report responded to this challenge by constructing a fictional, composite story of a survivor of a violent crime as she progressed through the criminal process beginning with her report to the police.[36] The story was said to be based on interviews with crime

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[31] PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 17–115 (1982) [hereinafter PRESIDENT'S TASK FORCE REPORT].

[32] *See, e.g.*, Shirley S. Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 3 UTAH L. REV. 517, 528 (1985); Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 943–53 (1985).

[33] *See, e.g.*, Steven J. Twist & Keelah E.G. Williams, Twenty-five Years of Victims' Rights in Arizona, 47 Ariz. St. L.J. 421, 446 (2015) (quoting 1990 speech of the founder of Mothers Against Drunk Driving: "Victims don't want vengeance, they want healing; but there can be no healing until justice is done.").

[34] *See* Michelle Alexander, THE NEW JIM CROW 13 (New York: New Press 2010) (describing mass incarceration as a means to ensure "the subordinate status of a group defined largely by race").

[35] John S. Goldcamp, *The Drug Court Response: Issues and Implications for Justice Change*, 63 ALB. L. REV., 923, 924–26 (2000) (charting the growth of drug treatment courts starting in the late 1980s); Susan Daicoff, *Law As A Healing Profession: "The Comprehensive Law Movement,"* 6 PEPPERDINE DISPUTE RESOLUTION L.J. 1 (2006) (stating that, at the close of the twentieth century, practitioners grew disenchanted with the criminal justice system and created various types of problem solving courts).

[36] PRESIDENT'S TASK FORCE REPORT, *supra* note 31, at 3–13.

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victims.[37] For some victims, the fictional account undoubtedly resonated with aspects of their own experience.[38] But at the same time, the story was a caricature, in that many victims experienced none of the indignities depicted by the Task Force and no victim could have experienced them all.[39] And there are aspects of the story that seem extreme from today's perspective, given the successes of the law reform movement over the intervening decades.

The Task Force's composite story depicts an "ordeal" that begins with indignities suffered by the victim following a brutal rape by a stranger. In the composite story, the victim suffers further violation at the hands of the police, a nurse in the hospital, and the press, which reports the crime.[40] The report describes the fictional victim's susceptibility to harm or harassment by the attacker after he is arrested. It then describes the impact on the victim as the adjudicative process progresses from a preliminary hearing through trial, sentencing, appeal and, perhaps, retrial, with the prosecutor inflicting pain, degradation, and inequities upon the victim. The criminal process goes on at length, making it impossible for the victim to put the crime behind her and reconstruct her life. She submits to repetitive questioning by the prosecutor and defense counsel, who make her relive the offender's attack in intimate detail; she is compelled to disclose private information that puts her at risk; and she is subjected to an attack on her character. After the defendant is found guilty, there follows a sentencing hearing in which the defense lawyer minimizes the injuries the offender inflicted, and the sentencing judge denies the victim a chance to speak and announces a lenient sentence. Some victims' rights advocates have referred to the criminal adjudicatory process as a "second rape,"[41] and the Task Force's narrative lends credence to this characterization.

To redress the deficiencies described in its story, the Task Force made wide-ranging recommendations directed at hospitals, the police, and the ministry, among others,[42] but most importantly at the criminal adjudication process. The Task Force sought to counterbalance the liberal tilt of Supreme Court's criminal procedure decisions that many thought protected the rights of the accused at the expense of justice for crime victims.[43] The Report's recommendations for law reform

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[37] *Id.* at 2–3.

[38] *See, e.g.*, *Roberta Roper Interview Transcript*, UNIV. OF AKRON, http://vroh.uakron.edu/transcripts/Roper.php ("I think the President's Task Force . . . said it best. Victims had little or no role to play if they were fortunate enough to survive the crime . . . . [T]here were no rights for crime victims . . . . There were no services . . . . [W]e were literally on our own . . . .").

[39] *See* Henderson, *supra* note 26, at 967 ("The scenario presented in the Final Report is indeed horrifying. It is also somewhat incredible to anyone acquainted with criminal law practice, and it is insulting to judges, prosecutors, defense attorneys, and law enforcement officers. It is a composite of everything that could go wrong in the process, rather than a chronicle of an actual case. Yet the scenario presented in the Final Report, and other horror stories like it, have led to numerous victim's rights proposals that purport to remedy the situation.").

[40] PRESIDENT'S TASK FORCE REPORT, *supra* note 28, at 3–4.

[41] Lee Madigan & Nancy C. Gamble, The Second Rape: Society's Continued Betrayal of the Victim 97 (1991).

[42] PRESIDENT'S TASK FORCE REPORT, *supra* note 28, at 57–62, 89–96.

[43] The application of the exclusionary rule in particular raised the ire of conservatives, including Supreme Court Justices who found themselves in the minority. The Warren Court era rulings began

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included requiring that victims' addresses be kept private; that victim counseling be privileged (not subject to discovery); that hearsay be admissible in preliminary hearings so that victims need not testify; that bail laws be made more stringent to protect crime victims during the pretrial period; that victims be promptly notified about developments in their cases; that the Fourth Amendment exclusionary rule be abolished; that witnesses be protected from intimidation; that victim impact statements be required at sentencing; that judges' sentencing discretion be limited; that harsher sentences be imposed; that restitution be required; and that parole be abolished.[44] The Task Force also directed recommendations to both prosecutors and judges. It encouraged prosecutors to: keep victims apprised of the status of the case; bring victims' views to the court's attention; prosecute as harshly as possible those who harass or intimidate victims or witnesses; and discourage continuances to push cases to trial as quickly as possible.[45] It encouraged judges to: give equal weight to victims' and witnesses' interests as to those of the accused when ruling on requests for continuances; allow for, and give appropriate weight to, crime victims' input at sentencing; ordinarily order restitution to victims who suffered financial loss; and ordinarily allow victims and their families to attend the trial even if they will be witnesses.[46]

To some extent, the Task Force's recommendations were directed at preventing or mitigating harms caused by the offender as a consequence of the commission of a violent crime. For example, recommended measures designed to protect victims from harassment or to require convicted offenders to make restitution were plainly aimed at preventing or addressing the offender's blameworthy conduct. But to a greater extent the recommendations were meant to prevent or mitigate harms inflicted on the victim by the criminal process itself. For example, the Report recommended protecting the confidentiality of psychological counseling, expanding the admissibility of hearsay to reduce the need for victims' testimony at a preliminary hearing, and assuring victims' information about ongoing proceedings and an opportunity to tell the sentencing judge about the impact of the crime.[47]

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abating in the late 1970s after the election of Richard Nixon, who appointed four Justices who took a less expansive view of criminal defendants' rights. MICHAEL GRATZ & LINDA GREENHOUSE, THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT (Simon & Schuster 2016). But the Supreme Court still issued some controversial rulings that strictly applied the exclusionary rule, perhaps most famously in *Brewer v. Williams*, 430 U.S. 387 (1977), where the defendant was convicted for sexually assaulting, kidnapping, and murdering a young girl. By a 5-4 majority, the Court threw out the defendant's confession because it had been obtained in violation of the defendant's Sixth Amendment right to counsel. Chief Justice Burger, in dissent, wrote that the defendant "is guilty of the savage murder of a small child; no member of the Court contends he is not." He continued, "Today's holding fulfills Judge (later Mr. Justice) Cardozo's grim prophecy that someday some court might carry the exclusionary rule to the absurd extent that its operative effect would exclude evidence relating to the body of a murder victim because of the means by which it was found. In so ruling, the Court regresses to playing a grisly game of 'hide and seek,' once more exalting the sporting theory of criminal justice which has been experiencing a decline in our jurisprudence." Brewer v. Williams, 430 U.S. 387, 415–16 (1977) (Burger, C.J. dissenting).

[44] PRESIDENT'S TASK FORCE REPORT, *supra* note 25, at 17–18.

[45] *Id.* at 63–71.

[46] *Id.* at 72–82.

[47] PRESIDENT'S TASK FORCE REPORT, *supra* note 31, at __.

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Advocating for harsher punishments and more victim-centered protections carried particular resonance in cases of rape and sexual assault. Prior to early 1980s, the history of prosecuting rape and sexual assault was often one of blaming women, establishing evidentiary hurdles that made many prosecutions impossible, and treating some sexual violations – with the important exception of a rape allegation by a white woman against a black man[48] – as relatively minor or even non-criminal.[49] Through the mid-1970s, most state rape laws did not criminalize marital rape, and prosecutors routinely made the distinction between "real rape" involving a stranger, and "date rape," involving an acquaintance.[50] Prosecutors were legally required to prove that the victim actively resisted, and to demonstrate physical injury or provide other corroborating evidence.[51] In cases that went to trial, victims were cross-examined extensively about their prior sexual history under the theory that it was a "general reflection of [their] truthfulness" and "a supposed character trait for chastity."[52] Under these laws, women coming forward with rape accusations—with the important exception of white women bringing allegations against black men[53]—were disbelieved until they proved otherwise. Feminists

[48] The swift conviction and often pre-conviction lynching of black men accused of sexually assaulting white women has a long history in the United States dating back to slavery and continuing through the middle of the twentieth century. *See, e.g.*, SHERILYNN A. IFILL, ON THE COURTHOUSE LAWN: CONFRONTING THE LEGACY OF LYNCHING IN THE TWENTY-FIRST CENTURY (2007); LISA LINDQUIST DORR, WHITE WOMEN, RAPE, AND THE POWER OF RACE IN VIRGINIA: 1900-1960 (2011). Often black men were murdered by white mobs before their cases went to trial; or if they did go to trial, the trial itself was a sham. To this day, black men are more likely to receive stiffer sentences and more likely to be falsely convicted of rape than white men. Samuel P. Gross et al., *Exonerations in the United States 1989-2003*, 95 J. CRIM. L. & CRIMIN. 546, 551 (2003) ("Nobody should be surprised to find bias and discrimination continuing to play a role in rape prosecutions").

[49] Estelle Freedman, Redefining Rape: The Struggle Against Sexual Violence in the Era of Suffrage and Segregation 10, 21 (Harvard University Press 2013); *Reporting Rates: Why Will Only 2 Out of Every 100 Rapists Serve Time?*, RAPE, ABUSE & INCEST NAT'L NETWORK, https://www.rainn.org/get-information/statistics/reporting-rates (last visited Feb. 22, 2015).

[50] Ronet Bachman & Raymond Paternoster, *A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?*, 84 J. CRIM. L. & CRIMIN. 554, 554–55 (1993).

[51] Michelle J. Anderson, *Women Do Not Report the Violence They Suffer: Violence Against Women and the State Action Doctrine*, 46 VILL. L. REV. 907, 924–25 (2001). The Model Penal Code issued in 1962 required that an accuser demonstrate more than "token initial resistance." Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953, 966 (1998); Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1105–32 (1986) (collecting cases).

[52] Rebekah Smith, *Protecting the Victim: Rape and Sexual Harassment Shields Under Maine and Federal Law*, 49 ME. L. REV. 443 (1997); Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 765–66 (1986).

[53] N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Male*, 24 CARDOZO L. REV. 1315, 1322–32 (2004) (charting the history of black men being portrayed as bestial sexual predators, the prevalence of lynching black men accused of sex crimes against white women, and what Professor Randall Kennedy calls the "legal lynching" of black men in court trials devoid of due process); Frank Rudy Cooper, *Against Bipolar Masculinity: Intersectionality, Assimilation, Identity, Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853, 857 (2006) (describing the entrenched stereotype of African American men as "animalistic, sexually depraved,

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working within the victims' rights movement aimed to change that mindset, particularly when it came to the orientation of prosecutors and judges.

C. Ensuing Decades of Reform Efforts

Although victims' rights advocates have not succeeded in securing a federal constitutional Victims' Rights Amendment,[54] they have made significant progress in promoting state and federal laws designed to promote crime victims' interests.[55] Some laws and other advances to assist crime victims are not targeted specifically at the adjudicative procedure – for example, laws to establish and fund social programs, counseling services and compensation for crime victims.[56] But, with victims' interests at heart, other laws augment or alter the criminal adjudication process. These include state and federal statutes and state constitutional amendments designed to ensure that crime victims are kept abreast of developments in the case, can attend trials, and can give input to the prosecutor and the sentencing judge.[57] Additionally, over the years, the Supreme Court, presumably influenced by the victims' rights movement, has issued various opinions interpreting constitutional provisions more favorably to victims' interests.[58]

As Marie Gottschalk explains in her book *The Prison and the Gallows*, "Women and women's organizations played a central role in the consolidation of this conservative victims' rights movement

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and crime prone"); Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 TEX. TECH. L. REV. 147, 168 (2016) (discussing racial bias that infects how black men are treated in the criminal justice system and noting that "[a] number of scholars have expressed concern that racial bias may affect outcomes in campus sexual assault adjudications" particularly when the accused is a low-income black male athlete presumed to by "hypersexual" and a "thug").

[54] There are voluminous scholarly writings on proposed victims' rights amendments, which have been periodically debated in Congress. *See, e.g.,* Chief Justice Richard Barajas & Scott A. Nelson, *The Proposed Crime Victims' Federal Constitutional Amendment: Working Toward a Proper Balance*, 49 BAYLOR L. REV. 1 (1987); Paul G. Cassell, *Barbarians at the Gates: A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479 (1999); Robert P. Mosteller, *The Unnecessary Victims' Rights Amendment*, 1999 UTAH L. REV. 443 (1999); Steven J. Twist, *The Crime Victims' Rights Amendment and Two Good and Perfect Things*, 1999 UTAH L. REV. 369 (1999).

[55] Among the most demanding and extensive state laws concerning victims' rights in the criminal adjudicative process are those of Arizona and California. *See* Ariz. Victims' Rights Implementation Act, ARIZ. REV. STAT. §§ 13-4401 et seq.; Ariz. Const., art. II, § 2.1; Cal. Const. art. I, § 28; see generally Geoffrey Sant, *"Victimless Crime" Takes on a New Meaning: Did California's Victims' Rights Amendment Eliminate the Right to Be Recognized as a Victim*?, 39 J. LEGIS. 43 (2013); Steven J. Twist & Keelah E.G. Williams, *Twenty-Five Years of Victims' Rights in Arizona*, 47 ARIZ. ST. L.J. 421 (2015).

[56] *See, e.g.*, 42 U.S.C. § 10601 (2008) (establishing Crime Victims Fund).

[57] *See, e.g.*, Justice for All Act of 2004, 18 U.S.C. §3771 (2012); Victims' Rights Clarification Act of 1997, S. 447, 105th Cong. (1997).; Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, Stat. 1248 (1982). *See* Kesha Handy, *Federal Crime Victims' Rights*, 46 HOUSTON LAWYER 14 (2009).

[58] *See, e.g.*, Maryland v. Craig, 497 U.S. 836 (1990); South Carolina v. Gathers (1989); Booth v. Maryland, 482 U.S. 496 (1987).

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that emerged in the 1970s in the United States."[59] With respect to sex offenses, perhaps the best known reform to the adjudicatory process in the early years of the movement was the adoption of rape shield laws, which place strict limits on the admissibility of evidence concerning a victim's sexual history.[60] By 1978, when Congress passed the Privacy for Protection of Rape Victims Act, half of the states already had rape shield laws in place; the federal statute was seen as a model for those that did not. [61] Today, courts generally cannot allow such evidence for the purpose of probing a victim's "character for truthfulness" or "lack of consent."[62]

From the perspective of crime victims in general, among the states thought to have the most protective criminal procedure laws is California, with its incorporation of a victims' bill of rights into the state constitution and its strengthening of these provisions several years ago with the adoption of Marsy's Law.[63] The California state constitution now lists seventeen "personally held and enforceable rights" of crime victims, among which are: the right to protect private information from discovery; the right to refuse defense requests for discovery; the right to confer in advance with the prosecutor about the charges and any pretrial disposition; the right to attend public proceedings; the right to be heard at proceedings regarding (among other subjects) the defendant's plea, sentence, and pretrial release; the right to a speedy trial and a prompt and final conclusion of the case; the right to be notified of material events in the case; the right to restitution; and the right to be informed of the victim's rights.[64]

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[59] Marie Gottschalk, The Prison and The Gallows (Cambridge University Press 11 (2006).
[60] FED. R. EVID. 412; National District Attorney's Association, *Rape Shield Statutes as of March 2011*, https://ndaa.org/wp-content/uploads/NCPCA-Rape-Shield-2011.pdf (compiling state rape shield laws) (last visited September 3, 2019); *see generally* Rebekah Smith, *Protecting the Victim: Rape and Sexual Harassment Shields under Maine and Federal Law*, 49 ME. L. REV. 443, 457, 472 (1997) (describing the passage of the Privacy Protection for Rape Victims Act by the U.S. Congress in 1978, which established Federal Rule of Evidence 412, a federal rape shield statute, and enactment of a similar state law in Maine); Dianne Obritsch, *Utah Adopts Rule of Evidence 412: Prohibiting Public Exposure of a Victim's Sexual Past*, 21 J. CONTEMP. L. 96, 96 (1995); National District Attorney's Association, *Rape Shield Statutes as of March 2011*, https://ndaa.org/wp-content/uploads/NCPCA-Rape-Shield-2011.pdf (compiling state rape shield laws) (last visited September 3, 2019).
[61] Kathleen Winters, *United States v. Shaw: What Constitutes An "Injury" Under the Federal Rape Shield Statute*, 43 U. MIAMI L. REV. 947, 967-86 & n.152 (1989).
[62] Privacy Protection for Rape Victims Act, Pub. L. No. 95-540, 92 Stat. 2046 (1978); FED. R. EVID. 412. Instead, past sexual history evidence is ordinarily admissible only to show: (1) the perpetrator was someone other than the accused or (2) the existence of a pre-existing consensual sexual relationship between the complaining witness and the defendant. There is a final catchall exception: (3) evidence may be admitted if excluding it would violate the constitutional rights of the accused. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991); Michelle J. Anderson, From Chastity Requirements to Sexuality License: Sexual Consent and a New Rape Shield Law, 70 GEO. WASHINGTON L. REV. 51, 55–56 (2002) (citing FED. R. EVID. 412).
[63] *See* Cal. Const. art. I, § 28; *see generally* Ryan S. Appleby, Note, *Proposition 9, Marsy's Law: An Ill-Suited Ballot Initiative and the (Predictably) Unsatisfactory Results*, 86 S. CAL. L. REV. 321 (2013).
[64] *See* Cal. Const. art. I, § 28

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With respect to sexual assault victims in particular, contemporary law-reform efforts are directed, in part, at redressing procedural problems by reforming the substantive criminal law. For example, to curtail sentencing judges' discretion to impose lenient sentences, California enacted legislation in 2016 imposing mandatory minimum sentences for sexual assault and prohibiting probationary sentences in cases involving oral or vaginal penetration.[65] This was largely a response to the notorious "Stanford rape case," in which a white affluent college athlete who was convicted of sexually assaulting an unconscious woman received a sentence of six months instead of the six years requested by the prosecutor, prompting national outrage and the judge's recall from office.[66]

Reform efforts have gained momentum in the wake of the #MeToo movement; for example, in 2019, New York passed the Child Victims Act, which extends the statute of limitations in sexual assault cases.[67] Some post #MeToo efforts to reform the substantive law, particularly with regard to sexual offenses, are meant to ameliorate the difficulty prosecutors conventionally encounter in proving guilt beyond a reasonable doubt in light of the typical absence of witnesses other than the accused and the accuser.[68] Recognizing that it is not feasible to undermine directly the presumption of innocence, which is constitutionally protected and universally accepted, reformers have sought, indirectly, to ease prosecutors' burden of proof by redefining the conduct comprising sexual assault under the criminal law: In particular, reformers have sought to criminalize sexual activity in the

[65] CAL. PENAL CODE §§ 263.1, 1203.065.
[66] *See*, Niraj Chokshi, *After Stanford Case, California Governor Signs Bill Toughening Penalties for Sexual Assault*, NEW YORK TIMES (Sept. 30, 2016).
[67] N.Y. SEN. B. 2440 (2019-2020), https://legislation.nysenate.gov/pdf/bills/2019/S2440 (last visited Sept. 3, 2019); *See* Corina Knoll, "*I Can Still Smell Him," For 4 Legislators the Child Victims Act is Personal*, NEW YORK TIMES (Aug. 21, 2019) (describing New York State's passage of the Child Victims Act in 2019, which extends the statute of limitations on sexual assault crimes so that prosecutors can file charges up until the accused turns 28).
[68] *See, e.g.*, Mary Wood, *City Attorney Shares the Reality of Prosecuting Sexual Assault Cases*, https://www.law.virginia.edu/news/2001_02/zug.htm (describing a presentation at the University of Virginia School of Law by a veteran sex crimes prosecutor in Charlottesville, Virginia, who "said rape cases are notoriously hard to try in part because of the burden of proof; there are usually only two witnesses to the crime, the victim and the defendant") (last visited on Sept. 3, 2019).

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absence of affirmative consent,[69] so as to align the normative expectations of the criminal law with those of some university and college codes of student conduct.[70]

D. Concluding Thoughts

As this brief history reflects, the movement to promote crime victims' interests in the criminal process is nowhere near completion. The work advanced by the 1982 Task Force to make the criminal process more hospitable to crime victims continues, and efforts have also moved into new directions. Overwhelmingly, however, criminal procedure reform takes criminal adjudication as a given and presupposes that incarcerating offenders – what might be called the carceral solution – is essential to redress the harm to their victims.

In the next Part of this article, we question this central premise of victims' rights laws, because in many cases, the criminal process both harms victims and deprives them of what they need: agency after the ultimate experience of powerlessness, and healing from trauma. The traditional adjudicatory process is an adversarial one. It must be, to comply with the guarantees provided to criminal defendants in the Fifth, Sixth, and Fourteenth Amendments. It is not focused on and is often irreconcilable with granting victims agency or a means of healing. The focus is squarely on the defendant, who is incentivized to deny responsibility or minimize culpability to avoid a conviction or obtain a more favorable plea offer. Competent counsel routinely advise clients to admit only the barest facts necessary for the acceptance of a plea. The victim's role is circumscribed, pre-scripted, and limited to testifying when there is a trial and making a victim impact statement at sentencing. While there may be some cathartic power to these acts, there is also harm, harm from the questioning of the victim's account during cross examination and defense counsel's closing statement, and harm from the silence or conflicting statements of the defendant in response to that testimony or to a victim impact statement.

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[69] Beginning in 2012, the American Law Institute (ALI) debated whether to revise the Model Penal Code's definition which currently recognizes that consent to sexual activity may be "implied" – that is, communicated through silence or lack of action. A proposed alternative would require "affirmative consent," which could be demonstrated only through words or actions. Letter from 100 ALI Members to ABA President Robert M. Carlson, Esq. (August 8, 2019). The proposal met with "great controversy," with some ALI members arguing that an affirmative consent standard criminalized innocent conduct, including the "largely tacit ways that people engage in sexual behavior in the real world." *Id*. (citing to Professor Stephen Schulhofer's Tentative Draft No. 2 (Apr. 2016)). In 2016, the ALI rejected the affirmative consent definition and instead adopted a Model Penal Code definition of consent that included "both action and inaction." A similar debate in the American Bar Association is ongoing. Its governing body recently tabled a proposed resolution urging "legislatures and courts to define consent in sexual assault cases as the assent of a person who is competent to give consent to engage in a specific act of sexual penetration, oral sex, or sexual contact, to provide that consent is expressed by words or action in the context of all of the circumstances." ABA Comm. on Domestic and Sexual Violence, Resolution 114 (year).

[70] Jeremy Bauer-Wolf, *American Bar Association Tables New Definition of Consent in Criminal Sexual Assault Cases*, INSIDE HIGHER ED. (Aug. 14, 2019); KC Johnson & Stuart Taylor, Jr., *Will the ABA Reject Due Process?*, WALL ST. JOURNAL (Aug. 11, 2019).

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II. The Fundamental Harms Unaddressed or Under-Emphasized by Victims' Rights Laws

As previously discussed, the victims' rights movement has sought in various ways to make the criminal adjudicative process less hostile to crime victims. However, the movement, and the laws it promoted, fail to address fundamental harms to victims that are inherent in our constitutionally-constructed adversarial process of criminal adjudication aimed at identifying and punishing offenders. We begin in Section A with a counter-narrative—a short composite story that serves as a counter-point to the one on which the 1982 Task Force report built its recommendations. Drawing on our alternative account, Part B briefly emphasizes five ways in which victims can be deeply harmed in our adjudicative process as it is now constructed. Notwithstanding four decades of victims' rights reforms, victims are denied the opportunity to pursue restorative, rather than retributive, justice; they are deprived of agency regarding the criminal prosecution and their role in it; they are denied control in particular over their own voices and stories; they can be compelled to suffer psychological harm, including self-harm, as witnesses; and both the prosecution and the defense can intrude into their privacy, including into their confidential communications with therapists and other health care professionals. Amidst all this they have no right to a lawyer to advocate for their interests and their protection. Finally, Part C explains why these harms are unaddressed, or inadequately addressed, by victims' rights laws.

A. A Counter-Narrative of How the Adjudicatory Process Harms Crime Victims

The 1982 Task Force report could have told a different story, with different emphasis, depicting how crime victims suffer in the criminal process. Emphasizing other harms may not have led to a different set of recommendations, because other harms may seem irremediable or because there may be no political will to address them. But a different story with a different emphasis might have underscored the incompleteness of the proffered recommendations and the limited ability of those recommendations, when implemented, to serve the needs of some victims. A different narrative, focused on different needs and acknowledging the diversity among victims might have inspired a search for an alternative to employing an adversarial means to a retributive end as the principal public response to crime. Consider the following narrative. It, too, is extreme; purposefully so, to draw out crucial contrasts with the Task Force narrative.

The victim was sexually assaulted by an acquaintance—in this case, by another student when they were both intoxicated. They live in the same community and share a common set of friends. They are both non-white, on full scholarship, come from under-served communities, and are the first in their families to attend college. The assault the victim experienced was traumatic, and more trauma was to follow.[71]

Initially, the victim was uncertain whether to report the offense.[72] She dreaded not only the

[71] Her ensuing experience, while not universal, is common among crime victims. Similar experiences may be shared by, among others, a minor who had a consensual sexual relationship with a young adult, or a parent who was physically abused by a spouse or domestic partner, or a young man who was shot or stabbed by a rivalrous member of the same community after a heated exchange of words.
[72] Many crimes go unreported, including almost half of the crimes of gun violence and more than half

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reactions of her family and friends, and of the offender's friends who were her acquaintances, and how she would be treated by the police and other authorities, but also how she would be treated in the criminal process if the offender were to be prosecuted and she were to be a witness. Many in her situation would not report the offense.[73] But, perhaps supported by some of her friends or family, she decided to do so.

Afterwards, however, as it became increasingly clear that her fears about her experience of the criminal process would be realized, she regretted notifying the police and concluded that she did not want a prosecution to go forward.[74] In this jurisdiction, the prosecutor privileges the preferences of certain crime victims who want to "drop the charges": for example, the prosecutor would ordinarily defer to a store owner who did not want to charge a shoplifter, whether because the owner was motivated by sympathy or mercy for a member of the community who broke the law, seeking to preserve the good will of other members of the community who are customers, or looking to avoid the financial burden of having to serve as a witness.[75] But the prosecutor, while sympathetic to the victim, questioned whether she appreciated what the criminal process offered, believing sincerely that a prosecution and a conviction was in her best interest.[76]

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of property crimes. *See generally* U.S. DEP'T. OF JUSTICE, CRIMINAL VICTIMIZATION, 2017, at 4, 7 (Dec. 2018), https://www.bjs.gov/content/pub/pdf/cv17.pdf. Rape and sexual assault are among the most under-reported crimes. *See* U.S. DEP'T OF JUSTICE, RAPE AND SEXUAL ASSAULT: REPORTING TO POLICE AND MEDICAL ATTENTION, 1992-2000, at 1 (2002) ("Most rapes and sexual assaults against females were not reported to the police. Thirty-six percent of rapes, 34% of attempted rapes, and 26% of sexual assaults were reported to police, 1992-2000.").

[73] Sexual assault victims' reasons for not reporting vary. *See* Statistics About Sexual Violence, Nat'l Sexual Violence Resource Ctr. (2015), http://www .nsvrc.org/sites/default/files/publications nsvrc factsheet media-packet statistics-about-sexual-violence 0.pdf (stating that among the reasons why rape and sexual assault victims do not report to law enforcement are concern for not being believed, fear of the attackers getting back at him/her, embarrassment or shame. fear of being blamed, pressure from others not to tell, distrust of law enforcement, belief that there is not enough evidence, and desire to protect the attacker). Undocumented immigrants in particular tend to under-report crimes out of fear of adverse immigration consequences. *See, e.g.*, Suzan M. Pritchett, *Shielding the Deportable Outsider: Exploring the Rape Shield Law as Model Evidentiary Rule for Protecting U Visa Applicants as Witnesses in Criminal Proceedings*, 40 HARV. J.L. & GENDER 365, 366 (2017).

[74] At least at one time, the reverse situation was more typical: A victim who would be willing to testify will be persuaded by the police or prosecutor that charges should not be brought because a conviction is unlikely. *See* Lisa Frohmann, *Constituting Power in Sexual Assault Cases*, 45 SOCIAL PROBLEMS 393 (1998); *see also* Wayne A. Kerstetter, *Gateway to Justice: Police and Prosecutorial Response to Sexual Assaults Against Women*, 81 J. CRIM. L. & CRIMIN. 267, 285 (1990) (finding that sexual assault complainants will be more willing to prosecute when the accused is in custody and there is corroboration).

[75] *Cf.* Ric Simmons, *Private Plea Bargains*, 89 N.C. L. REV. 1125 (2011) (describing and analyzing private resolutions between crime victims and offenders).

[76] Prosecutors do not "represent" victims as clients, but represent "the state" or "the people"; consequently, prosecutors have no obligation to credit victims, to seek to serve victims' interests as distinct from prosecutors' perception of broader public interests, or to take direction from victims or seek to achieve their objectives. *See generally* Jeffrey J. Pokorak, *Rape Victims and Prosecutors: The*

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It is not uncommon for prosecutors to strongly encourage victims to press forward with criminal charges when victims regret having set the process in motion. Prosecutors are operating in good faith: they have put time and effort into the case, believe they can prove it, and believe that justice and public safety will best be served by a conviction and prison sentence. But victims in a situation like this one may in fact have any number of reasons for wanting to call a halt to the prosecution. The victim may: have sympathy for the offender and not want to ruin the offender's life; want to preserve a relationship with the offender; or want to defer to friends or family members who are discouraging a prosecution.[77] In this case, however, the victim had two other reasons.

First, the victim did not want retribution but something else. Punishing the offender would bring no comfort, it would make matters worse, including exacerbating her guilt about her own choices leading up to the offense. The victim felt some responsibility despite being told that only the offender was to blame.[78] To aid in the psychological healing process, the victim wanted an

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Inevitable Ethical Conflict of De Factor Client/Attorney Relationships, 48 S. TEX. L. REV. 695 (2007). An empirical study more than two decades ago described that, even before meeting putative victims of sexual assault, prosecutors made initial judgments about whether to bring a prosecution based on the likelihood of securing a conviction, following a review of the investigative file and investigators' advice; based on their initial assessments, when they first met with victims, prosecutors either elicited information for potential use in a prosecution or sought to persuade the victim that a prosecution should not be brought because a conviction would be too difficult to obtain. Lisa Frohmann, *Constituting Power in Sexual Assault Cases*, 45 SOCIAL PROBLEMS 393 (1998). A contemporaneous study suggested that prosecutors' judgments about the likelihood of a conviction were based on anticipated juror reactions to the evidence and therefore reinforced juror biases based on race, class and gender. Lisa Frohmann, *Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking*, 31 LAW & SOC. REV. 531 (1997); *see also* Elizabeth Anne Stanko, *The Impact of Victim Assessment on Prosecutors' Screening Decisions: The Case of the New York County District Attorney's Office*, 16 LAW & SOC'Y REV. 225, 237 (1981-1982) (concluding that prosecutors' implicit use of "[s]ocial class, sex, race, and life style" as factors in making charging decisions often reflects the "pragmatism of a prosecutor intent on maximizing convictions and using organizational resources efficiently").

[77] Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 TEX. TECH. L. REV. 147, 195 & nn. 25–26 (2016) (citing the findings of scholars that some victims "don't want to ruin a person's life" but rather want their harm to be validated and to "have choice and input into the resolution of their violation"); Elizabeth Joh, *Narrating Pain: The Problem with Victim Impact Statements*, 10 S. CAL. INTERDISC. L.J. 17, 28 (2000) (discussing the failure of the victims' rights movement to accept "narratives in which victims' families can exercise mercy, kindness, or forgiveness toward defendants").

[78] Audrey K. Miller et. al., *Deconstructing Self-Blame Following Sexual Assault: The Critical Roles of Cognitive Content and Process*, 16 VIOLENCE AGAINST WOMEN 1120, 1122 (2010); (providing reasons victims blame themselves, which include a perceived inability to say no, drinking to excess, and consenting to sexual contact prior to the unwanted sexual contact); Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 TEX. TECH. L. REV. 147, 194–195 (2016) (describing the power of restorative justice to help victims "overcome feelings of shame—shame from conduct that made them uniquely vulnerable").

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explanation from the offender, an acknowledgment of wrongdoing, an apology, and efforts to make amends.[79] A prosecution put an end to those options. The offender got a lawyer who made it clear to the victim that she could not speak to his client under any circumstances. The victim, meanwhile, might have been given a trained rape advocate to support her through the criminal process but had no means to retain lawyer to offer legal advice or help her extricate herself.

Further, the victim desperately did not want to testify, believing that being compelled to do so would compound the misery experienced so far. She did not want to relive painful or embarrassing experience publicly. She did not want to offer an account only to have it poked, prodded and distorted in court by the prosecutor and defense lawyer. She feared she would be blamed—her intoxication and her prior relationship, however distant, with the accused used to show that she consented, led him on, or otherwise failed to behave responsibility and appropriately. She was not ready to go public. She didn't want someone else deciding where and how her story would be told—and certainly not in court, in response to lawyers' questions, piecemeal, confined by rules of evidence, punctuated by objections. The victim wanted an empathetic audience, friends and family predisposed to believe and sympathize, not a dozen strangers on a jury whom a judge instructed to presume that the offender was innocent and so who were obligated to listen skeptically to her account. She reasonably feared that it will be painful to be subject to questioning by a defense lawyer, a skilled advocate whose profession and professional loyalties require trying to make witnesses appear to be mistaken, confused or even deliberate liars. She anticipated that testifying will be a psychological agony that will set back a long healing process that is barely underway. The victim wanted no part of the trial and the public ordeal it entailed.

This prosecutor, however, believed that the offender should be prosecuted regardless of what the victim wanted.[80] The prosecutor's view was that, when a case of this type was winnable, it was important to bring the case to court, both to punish and incapacitate the offender and to deter others. The prosecutor was sympathetic to this victim, but felt compelled to speak for all victims, aiming to vindicate a collective victim interest. The prosecutor has a number of reasons for thinking that what this victim wanted was not what was best for her or for victims generally.[81] For example, the

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[79] Kathleen Daly, *Restorative Justice and Sexual Assault: An Archival Study of Court and Conference Cases*, 46 BRIT. J. CRIMINOLOGY 334, 334–56 (2006).

[80] Although prosecutors may take account of victims' preferences among other considerations, prosecutors ordinarily do not privilege the preferences of crime victims and are not expected to do so. *See* Bruce A. Green, *Prosecutorial Discretion: The Difficulty and Necessity of Public Inquiry*, 123 DICK. L. REV. 590, 612 (2019).

[81] The literature on the prosecution of domestic violence addresses prosecution policies regarding reluctant victim-witnesses. Some prosecutors will forego criminal charges or seek to prove them without the victim's testimony, but others will insist on the victim testifying, and some will even use the threat of imprisonment to compel reluctant victims to testify. *See* Deborah Epstein, *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. J. GENDER, SOC. POLC'Y & LAW 465 (2003); Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions,* 109 HARV. L. REV. 1849 (1996); Thomas L. Kirsch, II, *Problems in Domestic Violence: Should Victims Be Forced to Participate in the Prosecution of Their Abusers?*, 7 WM. & MARY J. OF WOMEN & L. 383 (2001). Linda G. Mills, *Intuition and Insight: A New Job Description for the Battered Woman's Prosecutor*

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prosecutor believed that: deferring to vulnerable victims' preferences would encourage offenders and their cohorts to pressure victims not to testify to or withdraw their accusations; it was important to take a hard line with regard to certain crimes to redress law enforcement authorities' historic indifference; unsophisticated crime victims—particularly young people—were not well positioned to act in their own best interest, especially their long-term best interest, because they had incomplete or stereotypical understandings of the criminal process. Perhaps the prosecutor was sensitive to the history of rape prosecutions in which the state's discretionary decisions have been made disparately based on irrelevant and impermissible considerations—for example, statistics showing that sexual assaults committed against women of color are less likely to be prosecuted than sexual assaults committed against white women.[82]

If the case were not winnable at trial, the prosecutor might have dropped the charges or bargained them down to virtually nothing, even if the victim insisted on prosecuting to the hilt.[83] But the opposite was true here. The prosecutor not only personally believed the victim but was hopeful that a jury would find her credible. Without the victim's testimony, however, there was no case. The constitutional right of confrontation and evidentiary rules on the inadmissibility of hearsay precluded the prosecutor from relying instead on the victim's out-of-court statements to the police and others.[84] Only by credibly threatening to take the case to trial could the prosecutor secure a guilty plea as part of a fair plea bargain.

The victim left school and relocated, partly because the public nature of the case had brought

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and Other More Modest Proposals, 7 UCLA WOMEN'S L.J. 183 (1997); Meg Obenauf, *The Isolation Abyss: A Case Against Mandatory Prosecution*, 9 UCLA WOMEN'S L.J. 263 (1999). *See generally* Frank W. Miller, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 173 (1970) ("An important factor considered by prosecutors in making day-to-day decisions whether to charge is the expressed desire of the victim of the crime."). Prosecutors' greater willingness to prosecute, notwithstanding the victim's reluctance, in domestic violence cases as compared with sexual assault cases, see note 67, *supra*, likely reflects the greater ease of securing a conviction in a domestic violence case without the victim's testimony or with the testimony of a hostile victim-witness.

[82] Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 TEX. TECH. L. REV. 147, 155 (2016) ("A recent national survey of service providers and advocates found widespread police dismissiveness and hostility toward intimate partner violence and sexual assault claims made by sex workers, drug-involved women, poor women (particularly poor women of color), undocumented women, African American women, and LGBTQ individuals.").

[83] *See* note __, *supra*; *see also* Tamara Rice Lave, *The Prosecutor's Duty to "Imperfect" Rape Victims*, 49 TEX. TECH L. REV. 219 (2016) (criticizing prosecutors' reluctance to bring cases involving victims who they think juries will not find credible); Jeffrey W. Spears & Cassia C. Spohn, *The Genuine Victim and Prosecutors' Charging Decisions in Sexual Assault Cases*, 20 AM. J. CRIM. JUSTICE 183 (1996) (finding that Detroit prosecutors' charging decisions in sexual assault cases were influenced by victim characteristics, including conformity with traditional gender role expectations and prompt reporting, associated with "genuine" victims).

[84] *See generally* Tom Lininger, *Prosecution Batterers After Crawford*, 91 VA. L. REV. 747 (2005) (discussing Confrontation Clause decision impeding the admissibility of victims' extrajudicial statements); Anoosha Rouhanian, *A Call for Change: The Detrimental Impacts of Crawford v. Washington on Domestic Violence and Rape Cases*, 37 B.C. J.L. & SOC. JUST. 1 (2017) (same).

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with it unwelcome attention that made it impossible to resume her regular life, and in part to make it harder for the prosecutor to find her and bring her to court as a witness. But the prosecutor had an investigator find her and subpoena her to testify in court.[85] The prosecutor threatened that if the victim ignored the subpoena, she would be arrested and sent to jail as a "material witness" until the trial, even while the offender was out on bail.[86] The prosecutor also warned the victim that she would be jailed for civil contempt of court if she disobeyed the judge's order to testify, and she could then be prosecuted, convicted and imprisoned for criminal contempt of court.[87]

The accused rejected a plea offer and went to trial, where the victim very reluctantly testified. The defense lawyer cross-examined her skillfully. Although the rape-shield law barred gratuitous questioning about her sexual history, and, after procedural skirmishing, the court barred the defense lawyer from reading her therapist's notes and those of a victim's advocate with whom she spoke in the prosecutor's office, the rest of her life was an open book. The defense lawyer questioned the victim in detail about her allegations, including probing everything she said and did about it afterwards, as well as about anything she did before or since that might be used to make her appear unworthy of being believed. Contrary to the prosecutor's hopes, the jury acquitted the defendant.[88]

Meanwhile, the community in which the victim and the offender both live was roiled by the case. The victim was exposed to angry outbursts from those who believed that she was ruining a promising young man's life. Having been scarred by the cross-examination, the victim viewed the verdict as a rejection. She sunk deeper into depression.[89]

Over the course of this process, the victim was told more than once about the state law that

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[85] Even victim-witnesses who leave the jurisdiction may be brought back to testify. *See, e.g.*, People v. Cogswell, 227 P.3d 409 (Cal. 2010) (finding that prosecutor may compel out-of-state victim-witness's appearance through the Uniform Act to Secure the Attendance of Witnesses from without the State in Criminal Cases).

[86] Emily Shugarman, *Rape Survivors Face Jail If They Won't Testify in Louisiana*, Independent, April 21, 2017, (quoting Orleans Parish District Attorney Leon Cannizzaro saying, "If I have to put a victim of a crime in jail, for eight days, in order to . . keep the rapist off of the street, for a period of years and to prevent him from raping or harming someone else, I'm going to do that.").
Cf. Schneyder v. Smith, 653 F.3d 313 (3d Cir. 2011) (civil action for alleged unconstitutional detention of a material witness).

[87] *Cf.* In re Inquiry Concerning a Judge, 195 So. 2d 1129 (Fla. 2016) (sanctioning judge who held victim in contempt of court for violating trial subpoena).

[88] The conviction rate for criminal prosecutions in general is high in many jurisdictions. But the conviction rate for certain offenses, such as assault, is lower than for other offenses. *See* BUREAU OF JUSTICE STATISTICS, FAQ DETAIL (reporting that among felony defendants, over a one-year period, the conviction rate was lowest for defendants charged with assault (45%)), https://www.bjs.gov/index.cfm?ty=qa&iid=403.

[89] Criminal trials do not invariably re-traumatize crime victims. *See* Ulrich Orth & Andreas Maercker, *Do Trials of Perpetrators Retraumatize Crime Victims?*, 19 J. INTERPERSONAL VIOLENCE 212 (2004). But victims who are dissatisfied with the outcome of the criminal trial are more likely to experience psychological harm. *See* Uli Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings*, 15 SOCIAL JUST. RES. 313 (2002).

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codifies a crime victims' rights.[90] The victim had the opportunity to confer with the prosecutor,[91] but the prosecutor was uninterested in what she had to say after she expressed her desire not to move forward with a criminal case. The victim had the right to watch the entire trial, but she could think of nothing worse. The state had a lawyer and the accused had a lawyer, but she was never assigned a lawyer to advise her, to try to persuade the prosecutor to spare her the agony of testifying, and to help her assert whatever rights she had.[92]

If the offender had been found guilty, the victim might have been able to tell the judge her story in a less circumscribed fashion – though not necessarily entirely in her own way.[93] But she never got that chance, and in any event, she was more interested in speaking privately with a therapist than publicly with a judge. After her long ordeal, she did finally get one thing she wanted all along from the criminal process—to be left alone. But the offense remained a living memory as did the painful criminal process that followed it from the day she reported the offense until the offender's acquittal.

B. The Under-Emphasized Harms to Victims

As the composite narrative in Section A reflects, five fundamental harms to victims were overlooked or downplayed in the 1982 Task Force report. They were not addressed in the Task Force recommendations or in the laws pursued by victims' rights advocates in the succeeding decades. These harms are not caused by the offender, except perhaps indirectly by setting the criminal process in motion. They are caused by the criminal adjudicative process itself and by its participants in their quest for punishment. Though underemphasized by proponents of a victims' rights amendment and

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[90] Victims' rights laws generally require prosecutors or other law enforcement authorities to advise victims of their rights. *See, e.g.*, UTAH CODE ANN. §§ 77-37-3(3)(d) (requiring the law enforcement agency investigating a sexual offense to victims of their statutory rights).

[91] *See, e.g.*, United States v. Stevens, 239 F. Supp. 3d 417 (D. Conn. 2017) (rejecting plea agreement where prosecutor failed to provide victim's mother an opportunity to confer in advance as required by the Crime Victims' Rights Act, 18 U.S.C. § 3771(1)(5) (2012)).

[92] Victims' rights laws do not generally provide for the appointment of counsel to victims. *See generally* Margaret Garvin & Douglas E. Beloof, *Crime Victim Agency: Independent Lawyers for Sexual Assault Victims*, 13 OHIO ST. J. CRIM. L. 67 (2015); Myka Held, Note, *A Constitutional Remedy for Sexual Assault Survivors*, 16 GEO. J. GENDER & L. 445 (2015); Erin J. Heuring, *Til It Happens to You: Providing Victims of Sexual Assault with Their Own Legal Representation*, 53 IDAHO L. REV. 689 (2017); Tyrone Kirchengast, *Victim Lawyers, Victim Advocates, and the Adversarial Criminal Trial*, 16 NEW CRIM. L. REV. 568 (2013). Further, the laws generally limit the extent to which victims' privately retained lawyers can intervene in criminal proceedings to assert victims' rights and protect their interests. *See generally* Douglas Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy and Review*, 2005 BYU L. REV. 255 (2005). That role is principally assigned to the prosecutor, notwithstanding the universal understanding that the prosecutor does not represent the victim as a client. *See generally* Stacy Caplow, *What If There Is No Client?: Prosecutors as "Counselors" of Crime Victims*, 5 CLINICAL L. REV. 1 (1998); Pokorak, *supra* note 67.

[93] *See, e.g.*, Graham v. State, 440 P.3d 309 (Alaska 2019) (sentencing judge improperly allowed victims' families to play memorial videos that appealed to judge's emotions).

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similar reforms, these harms have garnered significant attention from those who seek to reform the criminal process in more fundamental ways, including by expanding the pursuit of restorative justice.[94]

First, the criminal process denies the victim an opportunity to pursue a form of justice – restorative justice – that may be more important to her than the retributive justice achieved by traditional criminal adjudications. The criminal process holds out the promise of a conviction and prison sentence for the offender. But the victim's psychological well-being may be better served in a restorative justice process, if the offender is equally willing to undertake it. In a restorative justice process, supportive community members participate, the victim can tell her story her way, and the offender acknowledges and apologizes for the harm he caused, shows insight into his behavior, accepts responsibility, and takes affirmative steps to repair the harm and not to harm others.[95] Restorative justice may be employed at various stages of a criminal process,[96] but our focus is on its use as an alternative to a criminal adjudication and incarceration – that is, on the diversion of offenders to a restorative justice process just as defendants in drug cases are diverted to drug courts where they agree to drug treatment instead of a prosecution and potential incarceration. As an alternative to criminal prosecution and punishment, restorative justice is premised on the belief that prison is a blunt and ineffective instrument ill-suited to achieving its aims. The criminal process encourages the offender to deny or minimize responsibility thus thwarting the needs of some victims for accountability and repair.[97]

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[94] *See, e.g.*, Hadar Dancig-Rosenberg & Tali Gal, *Restorative Criminal Justice*, 34 CARDOZO L. REV. 2313 (2013); Jean Ferguson, *Professional Discretion and the Use of Restorative Justice Programs in Appropriate Domestic Violence Cases: An Effective Innovation*, 4 CRIM. L. BRIEF 3 (2009); Zvi D. Gabbay, *Justifying Restorative Justice: A Theoretical Justification for the Use of Restorative Justice Practices*, 2005 J. DISP. RESOL. 349 (2005); Mary Ellen Reimund, *The Law and Restorative Justice: Friend or Foe? A Systemic Look at the Legal Issues in Restorative Justice*, 53 DRAKE L. REV. 667 (2005); Sered, *supra* note 10; Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15, 20–21.

[95] *See* Sered, *supra* note 10, at 96 et seq.

[96] In some jurisdictions, for example, restorative justice follows a defendant's guilty plea and its outcome is factored into the judge's sentencing decision. A program established in 2015 by U.S. District Court Judge Leo Sorokin in federal district court in Boston requires defendants facing serious though non-violent felony charges to plead guilty before entering into an 18-month long program that includes drug treatment, if necessary, enrollment in school or obtaining or maintaining a job, and participation in a court-run restorative justice program. Most of the defendants who enroll in this program are facing at least several years in prison. Those who successfully complete the program are usually sentenced to probation. Lara Bazelon, "Redemption for Offenders and Victims," American Prospect, Jan. 18, 2018. The program does not accept defendants accused of sexual assault offenses, however.

[97] While victims might theoretically pursue restorative justice after criminal proceedings are concluded, the opportunity may be entirely unavailable at that point. The offender, if convicted at trial, may appeal and will not want to compromise that appeal by making admissions. If the offender is not convicted, he or she will likely want nothing further to do with the case. Even if restorative justice is available post-trial, the victim may suffer further from the delay and the additional trauma that proceeded it.

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Second, the criminal process denies the crime victim agency or autonomy: after suffering a criminal offense that left her feeling disempowered, the victim loses control over how the offense will be addressed.[98] The victim cannot require the prosecutor to "drop the charges" or refuse to testify if the prosecution goes forward. Defense counsel may call the victim as a witness if the prosecutor does not do so.[99] 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.

It was not always this way. In the early days of the Republic, as a carryover from the English tradition, private prosecutions gave victims more influence over the prosecuting decision.[100] But by the twentieth century, that largely changed.[101] Prosecuting is now in the hands of public prosecutors. Theoretically, and as a matter of discretion, and evidence permitting, prosecutors could defer to crime victims regarding whether to bring charges, offer a plea bargain, or call the victim as a witness.[102] But while some victims' rights laws require prosecutors to confer with victims about these decisions, none require prosecutors to defer to victims.[103] Prosecutors do not represent the victim *per se*, they represent the interests of "the People," "the Commonwealth" or "the Government" and are expected to act in the best interests of that larger group even if it conflicts with the interest of an individual victim.[104]

Third, victims have no control, in particular, over how they or the lawyers at trial tell their story.[105] Constitutional, statutory and evidentiary provisions provide a framework governing how victims' stories can be told. Prosecutors, through direct examination, and defense lawyers, through cross-examination, elicit the information they require. Through their opening and closing statements, these lawyers then give meaning to the testimony, characterize it, credit or discredit it, digest it and explain it to the jury. Victims' stories do not belong to them in the criminal process. Once the prosecutor decides to call a victim as a witness, the victim's story is shaped and appropriated by others.

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[98] For academic writings on victims' loss of agency, see, e.g., Garvin & Beloof, *supra* note 83, at 69–72; Kirchengast, *supra* note 83.

[99] See, e.g., A.H. v. Superior Court of Arizona, 911 P.2d 633 (Ariz. App. 1996).

[100] *See* Darryl K. Brown, *Criminal Enforcement Redundancy: Oversight of Decisions Not to Prosecute*, 103 MINN. L. REV. 844 (2018); Michael Edmund O'Neill, *Private Vengeance and the Public Good*, 12 U. PA. J. CONST. L. 659 (2010).

[101] Bennett Capers, Against Prosecutors, __ Cornell L. Rev. ___ (forthcoming 2019)

[102] *Id*.

[103] *See, e.g.*, United States v. Stevens, 239 F. Supp. 3d 417 (D. Conn. 2017) (rejecting plea agreement where federal prosecutor failed to give the victim's family an opportunity to confer with the prosecutor in advance, as required by the Crime Victims' Rights Act, 18. U.S.C. § 3771(a)(5)).

[104] Lara A. Bazelon, *Hard Lessons: The Role of Law Schools in Addressing Prosecutorial Misconduct*, 16 BERKELEY J. CRIM. L. 391, 410 (2011) ("Unlike a defense attorney, whose sole object is to advance the interests of her client, prosecutors have no living, breathing individual for whom to advocate. Contrary to popular belief, the prosecutor does not represent the crime victim, at least not any more directly than she represents her next-door neighbor. The prosecutor's client is an impersonal monolith: the state, county, or federal government.").

[105] *See, e.g.*, Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIMINOL. 1 (1977).

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Fourth, victims have no right to protection from self-harm. The compulsion that they testify, subject to civil and criminal contempt, means that they can be forced to hurt themselves psychologically by submitting to public interrogation. Criminal defendants have a right against self-harm in the form of self-incriminatory testimony; they can refuse to testify in the adjudicative process.[106] Crime victims have no equivalent right. No matter how much they may be hurt psychologically by having to testify, the decision is not theirs. It is, principally, that of the prosecutor.

Fifth, victims' privacy is subject to intrusion by both the prosecution and defense. Rape shield laws are not an absolute barrier to the inspection and exposure of deeply private information.[107] 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 health-care professionals are confidential.[108] State laws do not necessarily recognize an absolute privilege for communications with a therapist or other medical professional, and health-care records may therefore be subject to discovery, particularly if they are likely to assist in the defense.[109]

Finally, victims are on their own. Most cannot afford to retain counsel, and are not afforded a lawyer to advise them, to advocate on their behalf with the prosecutor, and to help them take advantage of whatever legal protections may be available.[110] It is axiomatic that individuals with legal rights need lawyers to help implement those rights. Individuals embroiled in the criminal justice process, if only as witnesses, benefit from legal advice; consequently, corporations commonly compensate lawyers to represent officers and employees who are witnesses in both civil and criminal cases involving the corporation.[111] But the Victims' Rights Amendments that are periodically re-introduced in Congress do not include a right to counsel for crime victims. The victims' movement

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[106] U.S. Const. amend. V; *see, e.g.*, Doyle v. Ohio, 426 U.S. 610 (1976) (reversing defendant's conviction where prosecutor impeached his exculpatory story with his failure to give that story post-arrest and after invoking his right to silence); United States v. Hale, 422 U.S. 171, 182–83 (1975) (White, J., concurring) (holding that a prosecutor may not hold a defendant's post-*Miranda* invocation of silence against him at trial).

[107] Alison Menkes, *Rape and Sexual Assault*, 7 GEO. J. OF GENDER AND THE LAW 847, 849–50 (2006) (noting the ineffectiveness of rape shield laws to protect against disclosure of a victim's "sexual and psychological history").

[108] Tess Wilkinson-Ryan, *Admitting Mental Health Evidence to Impeach the Credibility of a Sexual Assault Victim*, 153 U. PENN. L. REV. 1373 (2005) (noting that defendants may request "a review of the complainant's mental health history, a mental health examination, or cross examination as to a history of psychological problems"); Jeffrey Toobin, *The Consent Defense*, NEW YORKER (Sept. 1, 2003) (discussing Colorado's rape shield laws in connection with the defense of consent raised by Kobe Bryant's lawyers after he was accused of rape).

[109] *See, e.g.*, Commonwealth v. Dwyer, 859 N.E.2d 400 (Mass. 2006); *see also* Meagen K. Monahan, Note, *Why Dwyer Got It Wrong: A Call to Rebalance the Scale and Protect Absolute Privileged Communications Between Sexual Assault Victims and Counselors*, 96 B.U. L. REV. 1523 (2016).

[110] *See* note __, *supra*.

[111] *See* NY City Bar, Comm. on Prof'l Ethics, Op. 2019-4 (2019) (addressing ethical implications of corporation's payment of a single "pool counsel" to represent multiple officers or employees as witnesses in an investigation).

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has not made a right to counsel into a priority.

C. The Limitations of Victims' Rights Law

The victims' rights movement called attention to victims' interests, called out the historically gendered and even misogynistic nature of sex crimes prosecutions, and obtained significant social and legal reforms for all victims and sex crimes victims in particular.[112] These are important achievements. But, as the prior sections suggest, there are significant limitations to criminal procedure reforms that have been enacted so far, and to the federal constitutional Victims' Rights Amendment that might one day become the movement's crowning achievement.[113]

The criminal procedural reforms initiated by victims' rights advocates take our criminal adjudicative process as both a given and a point of departure. The goal was never to offer an alternative but to improve the criminal process for crime victims' benefit. One underlying assumption of the reform effort, as we have noted, was that the preferred resolution, from all victims' perspective, was a criminal conviction and a severe, retributive sentence.[114] For many advocates, another assumption was that, regardless of the outcome, the criminal process might well be inevitable if victims went to the police, and so the best that could be done for crime victims was to try to limit how much the process harmed them.[115]

As we discuss in Part III, both assumptions are challenged by some victims and by proponents of restorative justice processes, who argue that these restorative processes achieve better outcomes for many victims while helping them heal, rather than re-victimizing them.[116] Among other things, restorative justice processes aim to avert the above-discussed harms that are intrinsic to adversarial adjudication. This is not to say that restorative justice is suitable or preferable in all cases. On the

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[112] Susan Estrich, *Rape*, 95 Yale L.J. 1087 (1986) (describing a history of rape law prosecutions in which, when it was not a violent stranger rape, "the woman must bear any guilt, the law has reflected, legitimized and reinforced a view of sex and woman which celebrates male aggressiveness and punishes female passivity"); Rebekah Smith, *Protecting the Victim: Rape and Sexual Harassment Shields Under Maine and Federal Law*, 49 ME. L. REV. 443, 455-59 (1997) (documenting "changes in both substantive and evidentiary rules of rape law").

[113] *See* note __, *supra* (citing academic literature on proposed Victims' Rights Amendments).

[114] Research has not borne out this assumption. Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15, 18 & n.11 ("Most victims are in fact quite 'lenient' in their own views about sentencing. Large proportions of crime victims surveyed are willing to consider alternatives to imprisonment for their offenders if they can play a part in the way their case is handled.") (citing Lucia Zedner, Victims in The Oxford Handbook of Criminology, 419, 443–44 (Mike Maguire et. al. eds. 2002)).

[115] *Cf.* Christa Obold-Eshleman, Note, *Victims' Rights and the Danger of Domestication of the Restorative Justice Paradigm*, 18 ND J.L. ETHICS & PUB POL'Y 571, 594 (2004) (observing that "the current victims' rights laws and proposals are developing largely in a way that is problematic for the restorative justice vision").

[116] Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15, 15, 22 (2003) (citing studies showing that "evidence for the success in repairing the harm of crime is rapidly accumulating").

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contrary, victims' situations vary. Sometimes, victims will prefer a criminal prosecution to go forward and will benefit from its success; sometimes, the public interest in a criminal prosecution should outweigh the victim's interest in an alternative; and sometimes, restorative justice is not a viable alternative because of the character of the offender. There are victims who want aid, social services, and restitution without participating in a criminal adjudicatory process. There are also victims who want no part of any process at all – restorative or adjudicatory. But proponents argue that restorative justice is often preferable for at least some victims: not only in cases of less serious crimes or juvenile offenders, where it is more likely to be employed (though still under-utilized) in the United States, but also in cases of violent crimes (including sexual assaults), which have conventionally been considered the most serious and therefore the most deserving of a retributive public response.[117]

The victims' rights movement's focus on criminal adjudication and retributivism owes much not only to its history but also to politics.[118] Efforts to reform the criminal process for victims' benefit needs the support of multiple branches of government. Its success depends on legislative funding for social programs and, with respect to reforming the criminal process in particular, on legislative support except in the few jurisdictions, such as California, where public referendums are an alternative. Further, the movement has sought changes in prosecutorial and judicial practices. It calls for victim-centered judicial interpretations and applications of constitutional and statutory provisions. These reforms require sympathetic prosecutors and judges. But from the start, public officials saw an opportunity to coopt the victims' rights movement in aid of a broader conservative agenda. An example was the Presidential Task Force's proposal to reform the Fourth Amendment.[119] The suppression of evidence in criminal cases was not a problem that related particularly to crimes with victims, but anything that made it easier to secure criminal convictions could potentially be characterized as a victim-centered reform.

For at least two reasons, the movement's success has depended, in particular, on securing the support of prosecutors. First, when it comes to the development of criminal law, prosecutors have enormous influence with legislators and judges. Legislators view prosecutors as particularly knowledgeable and experienced, and as representatives of the public interest. Second, proponents of victims' rights laws have had to walk a tightrope: their argument for more process turns in part on implication that prosecutors have ill-served victims. Indeed, the campaign for a Victims' Rights Amendment was founded on the idea that prosecutors have failed to afford victims the protections guaranteed by statutes. At the same time, however, victims' rights advocates also have to make the case that their interests and the prosecutors' interests were aligned. That is, victims' rights advocates have also had to convince prosecutors that their proposed reforms were consistent with prosecutors' objectives and would not excessively burden them.[120] To maintain the symbiotic relationship, victims'

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[117] *See, e.g.*, Sered, UNTIL WE RECKON *supra* note 10, *passim*.

[118] Aya Gruber, *The Feminist War on Crime*, supra note 12, at 771–74 (2007) (stating that the victims' rights movement was coopted by the tough on crime movement, neither of which had any "tolerance for victims' desires that conflict with state prosecutorial goals").

[119] President's Task Force Report, *supra* note 25, at 17, 24–28.

[120] This was no easy task and has not been entirely successful. An obligation to provide information to victims throughout the process is time-consuming and takes resources away from work that prosecutors may regard as more important. And while giving victims a voice with regard to plea bargaining or sentencing may support prosecutors' efforts, victims may also interfere with what the

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rights advocates were compelled to embrace retributivism. Prosecutors, in turn, relied on the victims' rights movement to bolster their claim that locking up offenders was the best way to serve the most vulnerable and deserving people.

Prosecutors could generally accommodate contemporary victims' rights laws, which work within the basic structure of the criminal adjudicatory process. Even prosecutors who viewed these laws as burdensome knew that it is politically perilous to be seen as opposing them. Thus, the implicit bargain between victims' rights proponents and prosecutors was struck in the 1980's. Victims' rights advocates secured prosecutors' support for victims' rights laws that, in turn, preserved prosecutors' power by reaffirming the criminal adjudicative process within which they operated.[121]

Perhaps that was the best deal that victims' rights advocates could obtain in the 1980's and ensuing years. But the result is that, largely for reasons of political expediency, the contemporary victims' rights movement focuses its efforts on victims' rights laws, such as Marsy's Law, that would do nothing to address some of the most fundamental and serious harms inflicted on crime victims by the criminal adjudicative process.[122]

III. The Myth of the Monolithic Victim and the Failure of the Carceral Solution

Any process built on the assumption that victims are a monolithic group who all want and need to see the offender convicted and harshly punished is deeply flawed. [123] But advocates for victims' rights reform have historically operated from this premise.[124] To be sure, since the 1970s and continuing through the present, victims' advocates have rightly pointed out that the existing system of rape prosecutions was cumbersome, unfair, and misogynistic.[125] They successfully sought changes to

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prosecutor considers to be in the best interest of the public overall. Michael Lyle, "Marsy's Law: Sounds Good, But Is It?" NEVADA CURRENT (Aug. 31, 2018) (quoting the executive director of the North Dakota State's Attorneys Association as critical of the law for its vagueness, the expense of implementing it, and possibly slowing down the adjudication of cases).

[121] AYA GRUBER, THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION **PAGE** (U.C. Press forthcoming 2020).

[122] What would happen if at least some prosecutors became supportive of restorative justice practices as an alternative to the carceral solution? We expect that conventional prosecutors will perceive efforts to establish restorative justice processes, in the name of victims' rights, as an existential threat for multiple reasons on which we will elaborate in a later article. Suffice it to say that it seems likely that conventional prosecutors will vehemently oppose reforms that would diminish their power and discretion by diverting criminal cases to processes, such as restorative justice processes, controlled by social service agencies and community representatives.

[123] *See* note 12, *supra*.

[124] Markus Dirk Dubber, *The Victim in American Penal Law: A Systemic Overview*, 3 BUFF. CRIM. L. REV. 3, 6 (1999-2000) (describing the Victims' Rights Movement as "fueled by grassroots campaigns of concerned citizens backed by politicians eager to outgo their opponents in the tough-on-crime competition"); Aya Gruber, *The Feminist War on Crime*, supra note 12, 774–45 ("As a tool of tough-on-crime penological goals, the victim must occupy a specific, predefined legal space, such that granting her 'rights' must necessarily lead to more incarceration for the defendant.").

[125] Ronet Bachman & Raymond Paternoster, *A Contemporary Look at the Effects of Rape Law*

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that process meant to address those impediments, imbalances, and biases. But reckoning with the shameful history of rape prosecutions in the United States has led to both an over- and an under-correction. The answer to every sexual assault victim is not for prosecutors to hold out the same ill-kept promise—"we will relieve your pain by prosecuting your offender to the maximum possible extent"—while victims' rights advocates nod vigorously in agreement.[126]

The promise is ill-kept for two reasons. First, as we discuss below, there is scant evidence to suggest that punishing an offender to the maximum possible extent ameliorates the suffering of victims.[127] To the contrary: studies show that any satisfaction victims may experience from such an outcome is temporary and not conducive to the healing process.[128] Second, the conviction rate for rape and sexual assault remains notoriously low, estimated at approximately 12 percent in 2007, and less than one percent from 2010-2014.[129] Rape retains the dubious distinction of being "the least reported, least indicted, and least convicted non-property felony."[130] For non-white victims, the

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Reform: How Far Have We Come?, 84 J. CRIM. L. & CRIMINOLOGY 554, 555 (1993); Julie K. Brown, *Justice Department Opens Probe into Jeffrey Epstein Plea Deal*, MIAMI HERALD (Feb. 6, 2019) (describing how Jeffrey Epstein, a millionaire financier with connections to former President Clinton and other powerbrokers, obtained a deal from federal prosecutors in 2008 that allowed him to avoid a trial and lengthy prison sentence on sex trafficking charges).

[126] Aya Gruber, *The Feminist War on Crime*, supra note 12, at 749–50 (describing how the victims' rights movement became increasingly aligned with prosecutors tough on crime agendas at the expense of the victims themselves); Sofie Karasek, *I'm a Campus Sexual Assault Activist. It's Time to Reimagine How We Punish Sex Crimes*, N.Y. TIMES (Feb. 22, 2018) (writing that as a survivor of sexual assault, she believes that "punitive justice," including prison, "is not designed to provide validation, acknowledgement or closure" and is not a guarantee that the offender will stop offending).

[127] Ulrich Orth, *Does Perpetrator Punishment Satisfy Victims' Feelings of Revenge?*, 30 AGGRESSIVE BEHAVIOR 62, 68 (2004).

[128] Susan Bandes, When Victims Seek Closure: Forgiveness, Vengeance and the Role of Government, 27 Fordham Urb. L.J. 1599, 1602-03 (2000) (noting the lack of empirical evidence to support the premise that victims require severe punishment of offenders to heal); SERED, UNTIL WE RECKON 40 ("[T]ime after time, victims tell the parole board that they still feel exactly the same way they did the day the crime occurred. Ten, fifteen, twenty years later—they feel the same."); Interview with Stepheny Milo, June 28, 2019 (Milo's son, Matthew Seivert, was senselessly murdered in 2003. She said that, 16 years later, she feels exactly the same amount of rage and pain) (interview on file with Lara Bazelon).

[129] Andrew Van Dam, *Less Than 1% of Rapes Lead to Felony Convictions*, WASH. POST (Oct. 6, 2018) https://www.washingtonpost.com/business/2018/10/06/less-than-percent-rapes-lead-felony-convictions-least-percent-victims-face-emotional-physical-consequences/ (citing an analysis by RAINN, which in turn relied on data gathered by the DOJ from 2010-2014); MARY KOSS & MARY ACHILLES, RESTORATIVE JUSTICE RESPONSES TO SEXUAL ASSAULT, NATIONAL ONLINE RESOURCE CENTER FOR VIOLENCE AGAINST WOMEN 4 (2008), https://pdfs.semanticscholar.org/4dd0/82fbebcf20665eacf2f8e9447678974a09ae.pdf?_ga=2.111463556.1440798903.1567804160-1316325837.1545245920 (last accessed Sept. 6, 2019) (reporting a 12% conviction rate for rape in the United States, according to 2007 data).

[130] MARY KOSS & MARY ACHILLES, RESTORATIVE JUSTICE RESPONSES TO SEXUAL ASSAULT, NATIONAL ONLINE RESOURCE CENTER FOR VIOLENCE AGAINST WOMEN 4 (2008); DAVID KARP ET

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outcomes are grimmer still. Because of implicit and explicit biases, police are less likely to refer their cases for prosecution, prosecutors are less likely to bring charges, and jurors are less likely to convict.[131]" In short, non-white victims, particularly those who suffer from poverty and substance abuse and who have criminal records, fare differently and worse at every stage of the criminal justice system.[132]

Women of color, trans women, and women in the LGBTQ community are invisible in the public narrative about rape, and less likely to have their interests represented in the courtroom.[133] The stereotypical rape victim is a young innocent white woman violently raped by a black male

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AL., CAMPUS PRISM: A REPORT ON PROMOTING RESTORATIVE INITIATIVES FOR SEXUAL MISCONDUCT ON COLLEGE CAMPUSES 8–9 (2016) (stating that only 13 percent of victims of campus sexual assaults report them and the lack of reporting "can be exacerbated for students of color and LGBTQ students who may have low expectations that the institutional process will be responsive to their needs").

[131] Elizabeth Kennedy, Feminist Sexual Ethics Project, Victim Race and Rape: A Review of Recent Research 18-30, http://www.brandeis.edu/projects/fse/slavery/slav-us/slav-us-articles/slav-us-art-kennedy-full.pdf. Mining data in Kansas City and Philadelphia revealed that "prosecutors were 4 ½ times more likely to file charges if the victim was white." A study of 900 cases in Indianapolis concluded that "[b]lack men accused of assaulting black women accounted for 45 percent of all reported rapes but for only 26 percent of all men sentenced to the state penitentiary and for only 17 percent of men who received sentences of six or more years. By contrast, black men accused of raping white women accounted for 23 percent of all reported rapes, but for 45 percent of all men sent to the state penitentiary and for 50 percent of all men who received prison sentences of six or more years." *Id*. at 16. Moreover, black women are "significantly less likely" to report having been sexually assaulted to the police than white women in part because "[t]he credibility of Black women as rape victims has never been established as firmly as it has been for White women." Gail Elizabeth Wyatt, *The Sociocultural Context of African American and White Women's Rape*, 48 J, SOC, ISSUES 86 (1992).

[132] Mary Koss & Mary Achilles, *Restorative Justice Responses to Sexual Assault*, National Online Resource Center for Violence Against Women 4 (2008) (stating that decisions whether to prosecute are "unduly influenced" by factors that include "class, race, character, conduct, mental health, sexual history, lack of injury, failure to manifest extreme emotional distress, and absent evidence of strong resistance"); Elizabeth Kennedy, Feminist Sexual Ethics Project, Victim Race and Rape: A Review of Recent Research 11, http://www.brandeis.edu/projects/fse/slavery/slav-us/slav-us-articles/slav-us-art-kennedy-full.pdf ("The overwhelming majority of studies confirm that the victim's race plays a significant role throughout the process of investigating and prosecuting rape crimes: specifically, these studies suggest that African American women who are victims of rape encounter a legal system that perceives them and the seriousness of their injuries differently because of their race.")

[133] SERED, UNTIL WE RECKON 204–06 (citing studies and stating that we often fail to tell the stories of victims who are not white and heterosexual or "[w]hen we do tell them, we do so in a distorted way"); AYA GRUBER, THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION (U.C. Press forthcoming 2020) (describing the ideal victim from the perspective of the feminist movement as a middle class innocent white woman and stating that "[w]omen who fell outside that idea were often not helped, or even harmed, by policies tailored for [that ideal victim]"); BETH RICHIE, ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA'S PRISON NATION 90 (2012).

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stranger.[134] Yet cross-racial stranger rapes are a fraction of sex crimes overall. [135] No victim could represent the group as a whole, but this particular kind of essentialism—the victim must be an innocent white woman brutally raped by a bestial black man—plays on racial and gender stereotypes and tends to result in an embrace of the carceral solution as necessary, deserved, and effective.[136] In fact, inter-racial sexual violence is rare; far more common are intra-racial non-stranger sexual assaults.[137] Victims are a diverse group: sexual violence occurs across race, ethnicity, geographic area, sexual orientation and socioeconomic class. Men are also victims of rape and sexual assault,[138] and trans women and LGBTQ women are at a particularly high risk.[139] Ignoring these victims in the public narrative and treating them as second-class victims in the criminal justice system underscores the need for a different approach. Casting the stereotypical offender as a hyper-sexualized black man

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[134]Sharin N. Elkholy, Feminism and Race in the United States, https://www.iep.utm.edu/fem-race/ (last visited Aug. 25, 2019); Lynne Henderson, *Co-opting Compassion: The Federal Victim's Rights Amendment*, 10 ST. THOMAS L. REV. 579, 583–85 (1998).

[135] Sered, UNTIL WE RECKON 22–23 ("In this way, when the image of an innocent young white woman is invoked as the prototypical victim, it not only supplants and displaces the lived experience of the vast majority of victims who do not belong to that demographic. It is also meant to conjure up a story about what justice looks like—justice in which the victim is pure and innocent, in which the person who caused harm is vengeful and monstrous, in which the prosecutor is righteous and vengeful, and in which the system as we know it contains them all in a rightful and proper order."); Aya Gruber, *Righting Victim Wrongs: Responding to Philosophical Criticisms of the Nonspecific Victim Liability Defense*, 52 BUFF. L. REV. 433, 433 (2004) (collecting stereotypes of victims); Vik Kanwar, *Capital Punishment as "Closure": The Limits of a Victim-Centered Jurisprudence*, 27 NYU REV. L. & SOC. CHANGE 215, 231 (2002) ("The public face of the Victims' Rights Movement hides the most severely affected victims of violent crime, sexism and racism (e.g., prostitutes or teenage black males in the juvenile justice system) who are implicitly disqualified as 'genuine' victims in Victims Rights' rhetoric.").

[136] SERED, UNTIL WE RECKON 194–96 (describing the effects of this archetype: black men are hyper-sexualized and portrayed as irredeemable monsters while white women are helpless and dependent on white men for "protection and survival" while black victims' pain is discounted as "somehow outside of and irrelevant to the justice equation").

[137] Elizabeth Kennedy, supra note 120, at 10.

[138] RAINN, Sexual Assault of Men and Boys, https://www.rainn.org/articles/sexual-assault-men-and-boys; Tina Vasquez, *#MeToo: Addressing Sexual Assault and Abuse in Social Justice Movements*, REWIRE (November 3, 2017), https://rewire.news/article/2017/11/03/metoo-addressing-sexual-assault-abuse-social-justice-movements/ (describing a case in which a self-identified queer man was raped by another man who was a member of his community).

[139] Sexual Assault and the LGBTQ Community, Human Rights Campaign, https://www.hrc.org/resources/sexual-assault-and-the-lgbt-community (citing 2015 Transgender Survey and the Centers for Disease Control's 2010 study on victimization broken down by sexual orientation); Donna Coker, *Crime, Logic, and Campus Sexual Assault*, 49 TEX. TECH. L. REV. 147, 162–63 (2016) (citing the DOJ's 2016 Campus Climate Survey Validation Study as documenting "significantly higher" rates of sexual assault for LGBTQ women and a 2010 National Intimate Partner and Sexual Violence study finding that "nearly 34% of multiracial non-Hispanic women and approximately 27% of indigenous women experienced rape in their lifetime compared to 18.8% of non-Hispanic women and 14.6% of Hispanic women").

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preying on a white woman is not only false, it promulgates centuries-old pernicious racial stereotyping.[140]

The narrative set forth at length in the 1982 Task Force report described a victim of violence at a stranger's hands who presumably would be restored to well-being through the expeditious arrest, incapacitation, conviction and punishment of the offender. But this paradigm of the crime victim, and underlying assumption that the criminal process can be better calibrated to meet her needs, are flawed. Many crime victims simply do not fit this paradigm or any other, as sexual assault cases illustrate. Seventy-eight percent of sexual assaults involve victims and offenders who know each other. Often, they come from the same communities.[141] More than a third of these cases involve intimate partner violence. Some of the offenders were victims of sexual violence themselves.[142] Poor women, both white and non-white, are far more likely to be assaulted than middle or upper class women.[143] Many victims, particularly from communities disproportionately impacted by mass incarceration, do not want to be part of a criminal process that they view as destructive because it ravages their neighborhoods and breaks apart their families, and because they feel unsafe knowing that the offender will come back to their community unrehabilitated and hardened by prison.[144] Other victims may be unwilling to go forward with a criminal prosecution because they move in the same social or professional circles as the offender or because they believe that the offender would benefit

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[140] N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Male*, supra note 42, at 1322–32.

[141] Michael Planty et. al., Bureau of Justice Statistics, Female Victims of Sexual Violence 1994-2010 at 4 (special report issued 2013 and revised 2016). "The NCVS collects information on nonfatal crimes reported and not reported to the police from a nationally representative sample of persons age 12 or older who live in U.S. households." *Id*. at 2.

[142] Linda G. Mills, *The Justice of Recovery: How the State Can Heal Victims of Crime*, 57 HASTINGS L.J. 457, 481–82 (2006) ("Intimate abuse cases are a classic example of victim turned victimizer, insofar as men who experienced and observed violence in their families of origin were five to nine times more likely to become violent against their partners.").

[143] Michael Planty et. al., Bureau of Justice Statistics, Female Victims of Sexual Violence 1994-2010 at 4 (special report issued 2013 and revised 2016) (noting that "females in households earning less than$25,000 per year experienced 3.5 rape or sexual assault victimizations per 1,000 females compared to 1.9 per 1,000 in households earning between $25,000 and $49,999, and 1.8 per 1,000 in households earning $50,000 or more"); SERED, UNTIL WE RECKON 216–18 (describing poor white and working class white neighborhoods as "beset by violence" that includes sexual violence that devastates families and communities).

[144] SERED, UNTIL WE RECKON, 29, 35–36,185–86 (citing examples to explain why for some sexual assault victims "engagement of law enforcement is regarded as likely to increase rather than diminish the threat of their safety and the safety of their families); Lynne Henderson, *Co-opting Compassion: The Federal Victim's Rights Amendment*, 10 ST. THOMAS L. REV. 579, 600 (1998) ("The punitive history of oppression, lynching, and harsh treatment by a white-dominated legal system and the damage that system has done to African American communities in this country is neither distant nor unreal. To concentrate on revenge and punishment may isolate the victim and create a cruel dilemma for her by demanding that she choose between her rage and her community.").

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from treatment or other rehabilitative programs.[145] In roughly half of all sexual assault cases both the victim and the perpetrator were under the influence of alcohol, which has "effects on sexual and aggressive behavior, stereotypes about drinking women, and . . . cognitive and motor skills.[146] The point is not to blame the victim or excuse the offender but rather to highlight how fraught, complex, and murky sexual violence can be for both parties.[147]

Sexual assaults are not all essentially the same. The #MeToo movement, which has raised awareness of the pervasive problem of sexual assault, has also raised awareness of the many forms it can take, from a colleague's "handsiness," to a date's unwanted groping, to a completed rape by an acquaintance to forced oral sex at gunpoint by a stranger.[148] #MeToo has done away with the risible idea that some level of unwanted sexual touching must be tolerated because it is simply not "serious enough" to report.[149] At the same time, as more and more people are exposed for committing a wide array of sexually inappropriate conduct, the shortcomings of the criminal justice system to address the complexity and nuance of the problem becomes more pronounced.[150] And even when the offenses are similar or the same, victims differ in their responses.

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[145] 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 (2018) (explaining why some complainants in campus sexual assault cases do not wish to move forward with a campus adjudicatory process); Sofie Karasek, *I'm a Campus Sexual Assault Activist. It's Time to Reimagine How We Punish Sex Crimes*, N.Y. TIMES (Feb. 22, 2018) (stating that, "putting [the person who assaulted her] in prison seemed almost laughably ill-suited to what I needed. What I needed was for him to change his behavior. He needed an intervention, not prison.").

[146] Antonia Abbey et al., Alcohol and Sexual Assault, National Institute on Alcohol Abuse and Alcoholism (2001), https://pubs.niaaa.nih.gov/publications/arh25-1/43-51.htm (stating that the percentages are "conservative"). "Beliefs about alcohol's effects on sexual and aggressive behavior, stereotypes about drinking women, and alcohol's effects on cognitive and motor skills contribute to alcohol-involved sexual assault." *Id*.

[147] Caroline Lippy & Sarah DuGue, *Exploring Alcohol Policy Approaches to Prevent Sexual Violence Perpetration*, 17 TRAUMA VIOLENCE & ABUSE 26, 27 (2017) ("Numerous studies have found a direct association between alcohol use and sexual violence perpetrated in diverse populations, including high school and college students, adolescents and adult sex offenders, community men and women, and among individuals in same sex relationships."); Donna Coker, *Crime, Logic, and Campus Sexual Assault*, 49 TEX. TECH. L. REV. 147, 194–95 (2016) ("Victims may experience shame because they blame themselves for the assault, believing that . . . their drinking was the cause of the assault.").

[148] Ann Hornaday, *Enough with Naming and Shaming: It's Time for Restorative Justice in Hollywood*, WASH. POST (Feb. 1, 2018) (describing post #MeToo accusations as ranging from subtle boundary violations and verbal abuse to outright assault and rape); David Karp et. al., Campus PRISM: A Report on Promoting Restorative Initiatives for Sexual Misconduct on College Campuses 7 (2016) (defining campus sexual misconduct as "a wide range of offending behaviors such as sexual harassment, stalking, sexual assault, and intimate partner violence").

[149] Nora Stewart, *The Light We Shine into The Grey: A Restorative #MeToo Solution and an Acknowledgement of Those #MeToo Leaves in the Dark*, 87 FORDHAM L. REV. 1693, 1694 (2019).

[150] Andrew Dalton, *One Year on From #MeToo, Sexual Misconduct Prosecutions are Still Rare in Hollywood*, INDEPENDENT (Oct. 7, 2018), https://www.independent.co.uk/news/world/americas/me-too-hollywood-sexual-misconduct-prosecutions-weinstein-cosby-spacey-a8572066.html (reporting

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The victims' rights movement purports to speak for all victims, but it fails to take their multiplicity of needs into account. If the goal is to make victims central in the process of confronting, assessing, and meting out consequences for the harm done, those with power and influence—prosecutors, victims' rights advocates, and other advocacy groups—need to provide victims with alternatives, not an all-or-nothing choice.[151] Better understanding what a particular victim needs in a particular situation may call for the appointment of *pro bono* counsel so that, like the accused, the victim has someone solely devoted to advocating for her interests.[152] Better understanding the needs of victims also calls for less coerciveness and stereotyped thinking, and more openness on the part of prosecutors and victims' rights advocates.

Under our current system, victims who report their sexual assaults to the police are presented at most with two options: the potential for a criminal conviction, which may or may not be realized, or nothing at all.[153] This one-size-fits-all-approach approach is incomplete and ill-suited to many situations no matter the race or socio-economic class or sexual orientation of the victim, and no matter what kind of assault was involved.[154] At its most functional, the criminal justice system makes victims passive actors in supporting roles.[155] The trauma they experience is not only due to re-living the event and experiencing intrusions into their personal history, it is also due to their lack of control over the legal process. Their participation at trial is dictated by the prosecutor and the focus at all times is squarely on the offender. While a victim impact statement allows victims to try to influence the sentence, the focus is only on consequences and is "presented too late in the justice process to offer victims any real sense of control."[156] No wonder then that so many victims feel disempowered,

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that the Los Angeles District Attorney's Office was considering charges in six cases but citing complications including statutes of limitation and lack of "hard evidence").

[151] C. Quince Hopkins, Mary P. Koss & Karen J. Bachar, *Applying Restorative Justice Practices to Ongoing Intimate Violence: Problems and Possibilities*, 23 ST. LOUIS U. PUB. L. REV. 289, 291 (2004) (stating that "existing remedies are problematic because they often base relief on an essentialized conception of a victim" when some victims may not want jail or prison) [hereinafter Quince et al., *Applying Restorative Justice Practices*].

[152] Merle H. Weiner, *Legal Counsel For Survivors of Campus Sexual Violence*, 29 YALE J. LAW & FEMINISM 123, 156 (2017) (arguing that sexual assault victims need separate counsel because prosecutors cannot be counted upon to represent the interests of the victim "especially if the victim's needs conflict with the prosecutor's effort to obtain a conviction"); Erin Gardner Schenk & David L. Shakes, *Into the Blue Yonder of Legal Representation of Victims of Sexual Assault: Can U.S. State Courts Learn from the Military?*, 6 U. DENV. CRIM. L. REV. 1, 25–26 (2016) (arguing that criminal courts should import the military's procedure of appointing special counsel to represent the interests of sexual assault victims).

[153] Michelle Alexander, *Reckoning with Violence*, N.Y. TIMES (Mar. 3, 2019), https://www.nytimes.com/2019/03/03/opinion/violence-criminal-justice.html; Donna Coker, *Crime, Logic, and Campus Sexual Assault*, 49 TEX. TECH. L. REV. 147, 161 (2016).

[154] Linda G. Mills, *The Justice of Recovery: How the State Can Heal Victims of Crime*, 57 HASTINGS L.J. 457, 458 (2006).

[155] Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 136 (2004).

[156] Linda G. Mills, *The Justice of Recovery: How the State Can Heal Victims of Crime*, 57 HASTINGS

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sidelined, and even erased.[157] By emphasizing retribution over all else, the criminal process leaves some victims unsatisfied and others worse off.[158]

IV. An Alternative Approach

There are victims of sexual assault who could benefit from a different approach[159]—indeed, there is an argument that it is unethical not to provide one, given the documented failure of the criminal process.[160] Victims need "a more comprehensive menu of options to facilitate their recovery from crime."[161] What many want is an opportunity to tell their story under their own power, validation of their suffering, accountability from the offender, a promise of change moving forward, and an agreed upon means of repairing the harm done to the victim and to the community.[162] For some victims, that means voluntarily engaging in a restorative justice process, which can take a variety of forms, including mediated victim-offender dialogues, healing circles, and other, more indirect ways of engagement that offer an opportunity for victims to tell their stories in their own voices under their own agency.[163]

At the heart of the restorative approach is the offender's acknowledgement of causing harm and validation of the victim's suffering, a reckoning with the offending behavior that involves reflection and insight, a commitment not to re-offend, and an agreed-upon means of holding the person accountable.[164] Some victims want solely, or additionally, restitution, a public apology, access to counseling, and additional measures such as securing safe housing or civil protective orders.[165] Author and restorative justice practitioner Danielle Sered found that when given a choice, "Do you want this [different kind of] intervention or prison?," ninety percent of survivors of violent

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L.J. 457, 470 (2006)

[157] LARA BAZELON, RECTIFY: THE POWER OF RESTORATIVE JUSTICE AFTER WRONGFUL CONVICTION 100–01 (2018) (quoting a victim's cousin as saying, "From the victim's point of view, it's no longer your case. It's the state's case. For a rape victim, her body isn't even her body anymore. It's a piece of evidence. Even the name of the case belongs to the perpetrator.").

[158] Amy Kasparian, *Justice Beyond Bars: Exploring the Restorative Justice Alternative for Victims of Rape and Sexual Assault*, 37 SUFFOLK TRANSNATIONAL L. REV. 377, 378 (2014).

[159] *See, e.g.*, Stefanie Mundhenk Harrelson, *I Was Sexually Assaulted. And I Believe Incarcerating Rapists Doesn't Help Victims Like Me*, THE APPEAL (July 18, 2019), supra note 14; Sofie Karasek, *I'm a Campus Sexual Assault Activist. It's Time to Reimagine How We Punish Sex Crimes*, NY TIMES (Feb. 22, 2018), supra note 115.

[160] SERED, UNTIL WE RECKON 41.

[161] Linda G. Mills, *The Justice of Recovery: How the State Can Heal Victims of Crime*, 57 HASTINGS L.J. 457, 458 (2006).

[162] SERED, UNTIL WE RECKON 23; Karp et. al., PRISM, supra note 119, at 3, 23–28.

[163] Ruth E. Fleury, *Missing Voices, Patterns of Battered Women's Satisfaction with the Criminal Justice System*, 8 VIOLENCE AGAINST WOMEN 181, 202 (2002); Karp et. al., PRISM, supra note 119, at 2.

[164] Mary P. Koss, *The Restore Program*, supra note 20, at 9.

[165] Mary P. Koss, *Restorative Justice for Acquaintance Rape and Misdemeanor Sex Crimes, in* RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN 218, 221 (James Ptacek ed. 2010).

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crime in New York City chose the restorative path offered by her organization, Common Justice.[166]

While victims of sexual assault are a diverse group, many share a common objective: assurance that the person who harmed them will not go on to harm more people.[167] While at first look, it may seem that criminal punishment is a means to achieving that end, it often is not. The criminogenic effect of prison has been well documented: we know that people who go to prison, particularly maximum security prisons for serious violent crimes, can emerge hardened and more violent than when they entered.[168] Nor do most prisons offer the programmatic and educational opportunities for the insight and self-reflection that are necessary for offenders to grapple with their sexually violent behavior—including hearing directly from the victim or surrogate victims— and take the steps necessary to change that behavior.[169]

What if victims of sexual assault had an alternative that would help them heal, hold offenders accountable, and keep them and their communities safe? Established programs have demonstrated that restorative justice, rigorously applied, is one such alternative even in cases involving extreme violence.[170] Scholars and psychologists have argued that it makes little sense to exclude sexual assault cases from programs like these, which are survivor-centered and address criminal acts that are deeply and personally violative.[171] Such a program, like all restorative programs, depends on the voluntary participation of victims, and not all victims will want to engage with it.[172] But the data suggest that many do, and that restorative justice, unlike criminal justice, is more effective in addressing the root causes of violent crime, making victims whole, reknitting communities, and reducing recidivism.[173] Insofar as prosecutors seek to do what is best for crime victims, victims of

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[166] SERED, UNTIL WE RECKON 42–43.
[167] SERED, UNTIL WE RECKON 30.
[168] Amy E. Lerman, *The People Prisons Make: Effects of Incarceration on Criminal Psychology*, *in* DO PRISONS MAKE US SAFER: THE BENEFITS AND COSTS OF THE PRISON BOOM 151–52 (Steven Raphael & Michael A. Stoll eds., 2009) (examining the "significant and criminogenic effect of placement in a higher-security prison"); Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 WISC. L. REV. 1067–69 (documenting the criminogenic effects of prison); Daniel S. Nagin et al., *Imprisonment and Reoffending*, 28 CRIME & JUSTICE 115, 178 (2009) (stating that "much of the literature points to a criminogenic effect of the experience of imprisonment").
[169] SERED, UNTIL WE RECKON 64–67, 78–79.
[170] SERED, UNTIL WE RECKON 133–34 (listing the types of offenses that her program addresses but stating that sexual assaults are excluded).
[171] Cyphert, *The Devil is in the Details*, supra note 134, at 85; Mills, *The Justice of Recovery: How the State Can Heal Victims of Crime*, 57 HASTINGS L.J. at 498–502; Strang & Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. at 35.
[172] SERED, UNTIL WE RECKON 28.
[173] SERED, UNTIL WE RECKON 143 (citing studies and stating that "[r]estorative justice has shown to leave those harmed more satisfied with outcomes: survivors in the United States have reported 80-90 percent rates of satisfaction, compared with satisfaction rates of about 30 percent for traditional court systems"); Koss, *The Restore Program*, supra note 20, at 12 (documenting that 63% of sexual assault victims in felony cases and 70 percent in misdemeanor cases agreed to participate in a restorative justice alternative to the criminal process in her pilot program in Arizona); Caroline Angel, Crime Victims Meet Their Offenders: Testing the Impact of Restorative Justice Conferences on Victims'

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sexual assault who would prefer a non-adjudicative and non-punitive alternative such as a restorative justice process should have that option because it empowers them, helps them heal, and aligns with prosecutorial objectives. Of course, victims do not exercise veto power within the system, and prosecutors may believe in individual cases that other public interests, such as public safety, should take precedence over doing what is in the victim's best interest. Ultimately, it is up to the prosecutor to decide what course of action to take. But barring exceptional cases – for example, cases involving repeat, violent sexual offenders – there is nothing to suggest that a prosecutor who is giving priority to the victim's interests should not honor a victim's restorative justice preference.

The use of restorative justice in sexual assault cases, however, is a rarity, in part because victims' rights advocates believe it lets offenders off the hook too easily and will fail to deter them from re-offending, and that communities are safer when those who commit sexual offenses are locked up.[174] In fact, the limited data available shows otherwise: in Australia, which applies restorative justice practices in juvenile sexual assault cases, an empirical study of 232 cases showed that "violent crime offenders whose cases were handled through restorative justice practices were 40% less likely to reoffend than those whose cases went through the criminal justice system."[175] Prosecutors inclined to skepticism when asked to adopt a restorative justice approach[176] should also pause and consider how the current system has failed and continues to fail victims and society at large, thus undermining

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Post-Traumatic Stress Symptoms," (Ph.D. dissertation 2005), https://repository.upenn.edu/dissertations/AAI3165634/ (examining restorative justice programs involving robbery, burglary, and assault and finding reduced rates of PTSD among victims who participated vis a vis victims who went through the traditional court system). There are other issues relating to protecting the offender's legal rights that we will address is a later article.

[174] Koss, *The Restore Program*, supra note 20 at 3 (collecting studies); Cyphert, *The Devil is in the Details*, supra note 134, at 69–70 (listing concerns); Carrie Johnson, *D.C. Prosecutors, Once Dubious, Are Becoming Believers in Restorative Justice*, NPR NEWS (July 2, 2019) (describing one prosecutor's initial reaction this way: Her first reaction? "Oh, OK, so we're not going to prosecute you? We're going to sit around in a circle with, like, the hippies down the hallway, and we're going to have a talk and then you don't have any punishment?").

[175] Cyphert, *The Devil is in the Details*, supra note 134, at 69–70 (citing Alletta Brenner, *Transforming Campus Culture to Prevent Rape: The Possibility and Promise of Restorative Justice as a Response to Campus Sexual Violence*, HARV. L. & GENDER (2013)).

[176] Even restorative justice participants are inclined to dismiss restorative justice practices as "soft on crime" approaches that coddle criminals with kumbaya silliness and generally let them off the hook. LARA BAZELON, RECTIFY: THE POWER OF RESTORATIVE JUSTICE AFTER WRONGFUL CONVICTION 125–28 (describing Bobby Fitzpatrick, an offender, initially viewing restorative justice as "rainbows and lollipops" only to radically change his views after completing the program). But this blinkered view of restorative justice fails to comprehend how difficult it is to witness firsthand the damage one has inflicted on someone else. As Sered writes, "In a fundamental way, what is required in acknowledging the impact of our actions can be harder—even scarier—than prison." She continues, "it requires of people the one thing prison almost never does: facing the people whose lives they've changed as a full human being who is responsible for the pain of others"). SERED, UNTIL WE RECKON 102–03.

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the prosecutors' "do justice" mandate.[177] In 2009-2010, the most recent years for which federal data were available, only 32 percent of rapes and sexual assaults were reported to the police.[178] Of that number, only 5.7 percent resulted in arrests, 1.1 percent were referred for prosecution, and .07 percent led to a conviction.[179] In short, fewer than 1 percent of rape allegations result in a criminal conviction. By contrast, the trauma experienced by the victims can be severe, with 75 percent reporting psychological problems including PTSD, anxiety, depression, and fear.[180]

We do not argue that restorative justice should supplant the existing criminal justice process, only that in some cases, where there is not a paramount need to incapacitate a dangerous offender or some other countervailing public interest that should take precedence, it should be offered to victims as an alternative. While existing programs that use restorative justice in cases of extreme interpersonal violence in the United States are limited, the few that exist show promise. Sered's organization, Common Justice, was created in 2008 by the Vera Institute in partnership with the Kings County District Attorney's Office in Brooklyn.[181] While the program does not include offenders accused of sex crimes, many of its participants have committed extremely serious crimes including shootings, stabbings, and other violent assaults. If, and only if, the victims agree to participate, they will come together—or use a surrogate to represent them—with the perpetrator "and family and community members with a stake in the outcome."[182] The victims are free to reject the Common Justice alternative, in which case the offenders will go through the court process, and if convicted, serve prison sentences.[183]

One might expect, given the victims' rights narrative about "what victims want," that most victims would reject what Common Justice offers them.[184] But ninety percent of victims choose the program over the traditional criminal justice process even though offenders will not be sent to prison and will have their felony conviction removed following successful completion of the program. By

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[177] *See* note __, *supra*.
[178] Michael Planty et. al., Bureau of Justice Statistics, Female Victims of Sexual Violence 1994-2010 at 6 (special report issued 2013 and revised 2016).
[179] Andrew Van Dam, *Less Than 1% of Rapes Lead to Felony Convictions*, WASH. POST (Oct. 6, 2018), https://www.washingtonpost.com/business/2018/10/06/less-than-percent-rapes-lead-felony-convictions-least-percent-victims-face-emotional-physical-consequences/ (Almost 9 out of every 10 sexual assault victims experience some level of distress, with 46 percent experiencing severe distress — a higher number than we see among victims of robbery or aggravated assault, according to an analysis by Justice Department statisticians Lynn Langton and Jennifer Truman of 2009-2012 figures from the massive annual crime victimization survey mentioned above. Other sources place the figure even higher.
[180] *Id.*
[181] SERED, UNTIL WE RECKON 133 ("Guided by restorative justice principles we offer a survivor-centered accountability process that gives those directly impacted by acts of violence the opportunity to shape what that repair will look like, and in the case of the responsible party, to carry out that repair instead of going to prison.")
[182] Danielle Sered, *A New Approach to Victim Services: The Common Justice Demonstration Project*, 24 FEDERAL SENTENCING REPORTER 50, 50 (2011)
[183] *Id.*
[184] SERED, UNTIL WE RECKON 42.

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2018, Sered wrote, the number of offenders who engaged in her program had a recidivism rate of only six percent. From 2012-2018, Common Justice expelled only one person from the program for committing a new crime.[185]

To offer another example: RESTORE, a federally-funded program that operated in Pima County, Arizona from 2004-2007,[186] worked collaboratively with local prosecutors to offer victims of felony and misdemeanor sexual assaults the opportunity to choose a restorative justice alternative over the traditional criminal process.[187] Sexual offenses ranged from rape to indecent exposure.[188] The majority of victims offered this choice accepted the opportunity to participate in RESTORE. Participation in RESTORE required victims and offenders to participate in a restorative justice conferencing process overseen by program personnel and a facilitator, together with family and supporters.[189] Victims described how the assault had impacted their lives and the lives of their friends and family.[190] Offenders took responsibility for committing the assault and also participated in active listening by putting the victims' story into their own words, with the victims correcting them when necessary.[191] Offenders were held to account through mandatory participation in sex offender therapy, substance abuse treatment where warranted, regular meetings and check-ins with case managers, community service, and restitution.[192]

A study of the program found that of the 22 cases accepted over a three-year period, "[t]wo thirds of felony and 91% of misdemeanor" offenders successfully completed the program. Two offenders were terminated from the program because homelessness, substance abuse or financial problems prevented them from complying with the requirements; one offender withdraw after reversing himself and denying responsibility.[193] More than 90 percent of the victims who participated stated that they "were satisfied that justice was done."[194] The percentage of victims suffering from PTSD dropped from 82% to 66% after completing the program.[195] The percentage of participants who "felt safe, listened to, supported, treated fairly, treated with respect, and not expected to do more than they anticipated" exceeded ninety percent.[196]

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[185] SERED, UNTIL WE RECKON 134.
[186] "The program operated from March, 2003, to August, 2007, and closed at the end of federal funding." Koss, *The Restore Program*, supra note 20, at 10.
[187] Quince et al., *Applying Restorative Justice Practices*, supra note 140, at 301–02 (explaining that RESTORE was "funded by a $1.5 million grant from the Centers for Disease Control").
Certain offenders were excluded, including juveniles, those accused of domestic violence, those with arrests for violent crimes excluding sexual assault, and those with repeated histories of sexual assault.
[188] Koss, *The Restore Program*, supra note 20, at 4.
[189] *Id*. at 8
[190] *Id*.
[191] *Id.*
[192] *Id*. at 9
[193] *Id*. at 25
[194] *Id*. at 32
[195] *Id*. at 19.
[196] *Id*. at 22.

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RESTORE and Common Justice are just two programs in two counties, but their results teach important lessons. First, the under-utilization and selective application of restorative justice practices should be re-examined. Traditionally, restorative justice has been reserved as an alternative only in cases involving juveniles or only for low-level non-violent offenses.[197] Studies and successful programs such as Common Justice and RESTORE have demonstrated that restorative justice programs founded on principles of victim-centeredness and offender accountability with a focus on rigor, repair, and community involvement are suited to all crimes, including those involving violence. Moreover, it is possible to implement a restorative justice alternative with the cooperation and support of prosecutors who recognize that restorative outcomes promote public safety and serve victims. RESTORE's partnership with a willing Pima County District Attorney's Office, and Common Justice's partnership with the King's County District Attorney's Office, which is now more than a decade-old, demonstrates that such partnerships are not only possible but successful and durable.[198]

In sum, the failure of the traditional criminal justice system to serve many victims' needs and serve justice in sexual assault cases demands a new approach. As we have discussed, the vast majority of sexual assault cases go unreported and unprosecuted. Few result in convictions. Most sexual assault cases involve people who know each other. Most victimizers were victims themselves at one point.[199] These data points suggest that a restorative, reparative approach holds more promise both for healing, in the case of victims, and reckoning, in the case of offenders. Sexual violence rips apart communities and the lives of individuals: left to fester—whether through neglect or through the incapacitation of the offender in a criminogenic environment that allows the victim no peace or safety—it infects future generations.[200] Ending this particular cycle of violence should be no different than ending the cycles of violence that lead to muggings, robberies, stabbings, and shootings. True respect, care, and advocacy for victims necessarily means offering them this alternative, which is centered on their needs and designed to empower them to have those needs met.

CONCLUSION

The victims' rights movement has altered the legal landscape. It has changed the way in which sexual assault crimes are charged, prosecuted, and punished. These reforms have been procedural and substantive. Victims have important procedural rights within the criminal process: to be kept up to date on the progression of their offenders' cases, to seek restitution, and to make a victim impact statement, among others. Victims of sexual assault in particular have seen important

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[197] Quince et al., *Applying Restorative Justice Practices*, supra note 140, at 300–01.

[198] Koss, *The Restore Program*, supra note 20, at 10; SERED, UNTIL WE RECKON 133; Adam Wisnieski, *Offender Meets Victim: A Survivor-Centered Approach to Violent Crime*, THE CRIME REPORT (Apr. 12, 2017) (describing Sered and Common Justice's collaboration with Eric Gonzalez, the Kings County District Attorney); Alexandra Brodsky, *Can Restorative Justice Change the Way Schools Handle Sexual Assault?*, THE NATION (Apr. 14, 2016) (describing Koss and RESTORE's collaboration with prosecutors).

[200] Mills, *The Justice of Recovery*, 57 HASTINGS L.J. at 482 ("A closer empirical look at victims reveals that, not only are victims likely to 'cross over' to become offenders, but that a vulnerability to and/or propensity for violence may be passed to subsequent generations.")

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reforms. Rape victims are no longer required to prove that they actively resisted or sustained physical injury. A spousal relationship is no longer a defense to a rape charge. But despite these ground-shifting reforms, sexual assault prosecutions remain infrequent and largely unsuccessful. When cases are tried, victims may be frustrated or even re-traumatized, because they have no control, they cannot tell their stories their own way, their conduct is mischaracterized, their lives may be put under a microscope, and they have no right to assigned counsel to advise them and advocate for them in the process. Even the "best case" outcomes in which the offender is punished and receives a lengthy sentence provide little if any solace or healing.

Restorative justice may offer the best hope of vindicating victims' rights by providing them with what they need most: validation, acknowledgement, empowerment, reckoning, and accountability. The United States has been slow to embrace restorative justice in any context, and particularly in sexual assault cases, because we are wedded to the criminal process and criminal punishment, particularly when it comes to intimate acts of violence. We suggest that it is past time to rethink that approach. The criminal process is a failure for many victims, who are not healed, for many offenders, who are not deterred, and for society, which bears the cost of mass incarceration: the devastation of communities, the recidivism rates, and the ever-widening circle of harm as offending behavior, left unaddressed, is passed from one generation to the next. True victim advocacy requires reckoning with these harsh realities and exploring a different approach—not as a replacement, but as an alternative. True victims' rights advocacy focuses on what victims themselves want rather than the embrace of tough-on-crime narratives that serve as little more than ill-kept or empty promises. What victims want may well be what restorative justice has to offer. It is time to give it more serious consideration.

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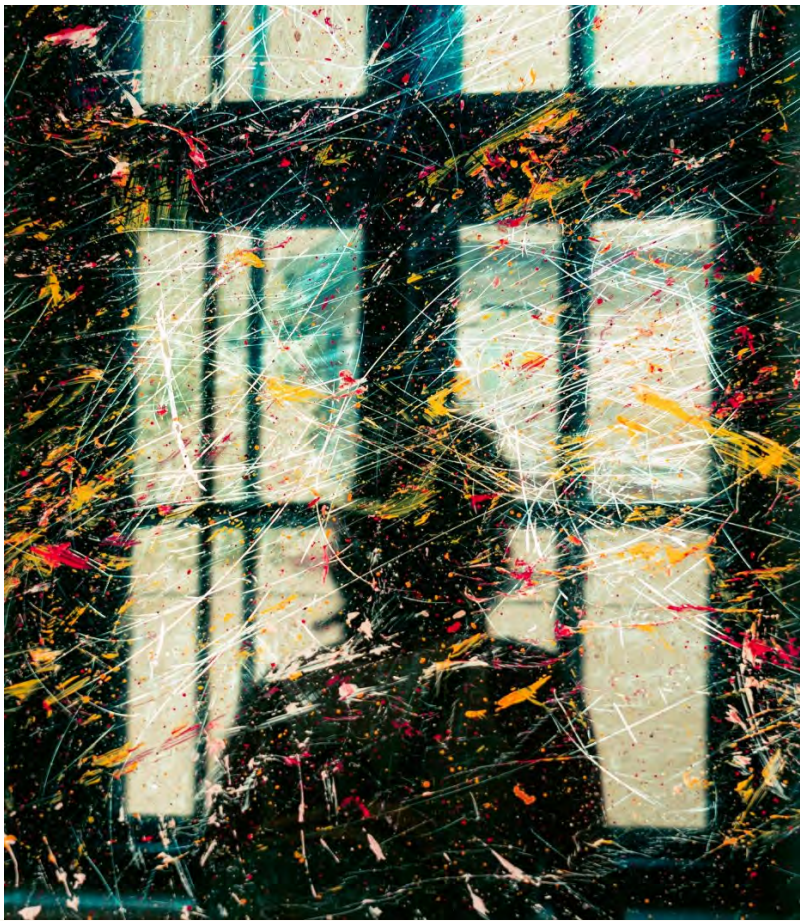
CULTURE & POLITICS

The Recall: Reframed

A short film asks how we can offer justice for survivors of sexual violence without perpetuating the harms of mass incarceration.

By **Rebecca Richman Cohen**

June 8, 2023



The Recall: Reframed (Full Film)

My desire to make a film about the recall of California Judge Aaron Persky was driven by outrage—my own and others'.

In *The People v. Turner*, a jury convicted Stanford swimming star Brock Turner of the sexual assault and attempted rape of an unconscious woman, Chanel Miller, on the university campus. Judge Persky sentenced Turner to six months in jail, three years probation, and a lifetime on the sex offender registry. This was the sentence recommended by the probation officer, but vocal advocates for sexual violence prevention and gender justice alleged that Persky's race, gender, and class biases unfairly influenced his sentencing in favor of Turner (prosecutors had asked for six years of incarceration). The California Commission on Judicial Performance's investigation found no evidence of wrongdoing nor any pattern of biased sentencing by Judge Persky. Yet public outcry over the sentence mushroomed into a call for Judge Persky's removal, and voters overwhelmingly stripped him of his judgeship.

Outrage—that potent alchemy of fear, anger, resentment, and disgust—is an appropriate public and personal response to the persistence of sexual harms and our country's woefully inept response to them. We are outraged that after generations of activism, people still debate how the survivors of sexual violence could have prevented their own victimization, and many remain eager to excuse or normalize sexual harms. We are outraged that our country still relies primarily on the criminal system to address sexual harms even though that system traditionally has failed to solve cases or support survivors, and in fact often re-traumatizes them. We are outraged that white, high-profile perpetrators of sexual violence have historically acted with impunity, especially if their victims are from a marginalized community.

My outrage at the persistence and prevalence of sexual violence in this country—on college campuses, in private homes, in workplaces, and on the street—is matched by another kind of outrage: my anger at the criminal legal system and its uniquely punitive

approach. A system that relies on severe punishment through excessive incarceration and sex offender registries that do not actually prevent sexual harm, but which do prevent people from building stable lives. A system that disproportionately impacts and imprisons Black and brown people, low-income people, immigrants, and undocumented people. A system that imposes mandatory minimum sentencing requirements and pursues vengeance and punishment over meaningful accountability and restoration. So I am dismayed by our failure of imagination when we, with the best of intentions, seek to support the very real—and often very harmed—survivors of sexual and gender violence by relying too heavily on that system.

I made *The Recall: Reframed* because I wanted to give voice to both kinds of outrage, which often stand in tension with one another but need not. I made it because we need to listen to the chorus of feminists, legal scholars, judges, and movement builders who see the Turner case not as an open-and-shut case of under-punishment, but rather as a complex, nuanced, and deeply meaningful encapsulation of what's wrong in the U.S. criminal legal system. These voices ask us for more than mere outrage: they challenge us to match our righteous condemnation of sexual violence with an equally dedicated condemnation of punitive, biased mass incarceration policies.

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I believe that the pain and anguish suffered by sexual assault survivors such as Miller is real and lasting. Too often, cases like hers are poorly investigated, riddled with errors, and deeply re-traumatizing. There is no question that our criminal legal system does not serve and protect survivors of sexual violence. There is no question that people responsible for sexual violence like Turner must be held accountable for the harm they cause.

But—*and!*—the question remains: How can we imagine a form of justice for survivors of sexual violence that does not also perpetuate the harms of mass incarceration? How can we investigate, understand, and respond to perpetrators of sexual and gender violence in a way that restores and rebalances their debt to society, without also stocking our jails and prisons in this, the most incarcerated nation in the world?

James Baldwin wrote that it is the "habits of thought [that] reinforce and sustain the habits of power." This is the clearest articulation I have found of what I hope our film can accomplish for viewers. How might we shift our habits of thought—our outrage—so that they correct not just the wrongs of sexual violence, but the wrongs of mass incarceration? *The Recall: Reframed* cannot answer that question in full, but it seeks to change our frame. It is my hope that it invites all of us to hold in our minds both the critical importance of seeking justice for gender violence, and the equally critical understanding that demanding harsher sentences will only make justice more elusive.

This article is part of a series created in collaboration with the Emancipator*,* Lux Magazine*, and* The Recall: Reframed*'s outreach campaign. The first of the* Emancipator*'s four articles is "The Cognitive Dissonance of Brock Turner*."

Image: Jr Korpa/Unsplash

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CLE Materials: Day 2

Panel 5: Investigations

January 5, 2024

Berkeley Center on Comparative Equality & Anti-Discrimination Law

Attorneys Conducting Workplace Investigations: Avoiding Traps for the Unwary

By Lindsay E. Harris and Mark L. Tuft

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Introduction

Many employers and attorneys misunderstand the circumstances in which outside attorneys may conduct independent workplace investigations, such as harassment and discrimination claims, in compliance with California law. California's Private Investigator Act[1] requires that only persons licensed as private investigators may conduct most workplace investigations, unless the person comes within one of several statutory exemptions.[2] One of the exemptions is for "[a]n attorney at law in performing his or her duties as an attorney at law" (the so-called "attorney exemption").[3] The meaning of the attorney exemption, however, has proven elusive, generating substantial confusion in the field, and giving rise to disparate practices by outside attorneys who conduct independent investigations. Among the most common mistakes is for attorneys to structure their engagements in a way that makes it clear they are not "acting as attorneys" in conducting independent investigations, believing that their status alone (as attorneys) suffices to bring them within the exemption, or that acting in an attorney capacity would somehow be inconsistent with the role of conducting an independent and impartial workplace investigation. Another common practice is for attorney-investigators to structure their engagements ambiguously, leaving it unclear whether they are functioning as lawyers or in some other capacity in conducting their investigations.

Consequences of Violating the Private Investigator Act

Defining the proper role of an attorney-investigator may appear to be a theoretical exercise, but there are significant consequences to attorneys and employers if an attorney who is not licensed as a private investigator fails to conduct a workplace investigation consistent with the attorney exemption. An attorney who conducts an investigation in violation of California's Private Investigator Act faces a potential misdemeanor conviction, punishable by a fine of $5,000 and/or imprisonment up to one year.[4] So does an employer that "knowingly" retains a nonexempt, unlicensed investigator, as well as any person who "conspires with another person" to violate the Act.[5] Other possible consequences to the employer include loss of the attorney-client privilege and work product protection that potentially may apply to an attorney's investigation, and the risk that the validity of the investigation may be challenged in civil proceedings on the basis that the investigation was conducted unlawfully. In addition, an attorney who is convicted under the Act could face State Bar discipline as well as civil liability. Attorneys conducting investigations under the exemption who fail to observe the rules governing lawyers (because they believe they are not conducting the investigation in an attorney capacity) may also face State Bar discipline.

For the Exemption to Apply, an Attorney Must Be Rendering Legal Services within an Attorney-Client Relationship

Few legal authorities provide guidance as to the meaning of the attorney exemption and the circumstances in which an attorney may conduct workplace investigations under the exemption. Two older Attorney General Opinions, however, address the meaning of a prior, similar version of the exemption: ("[a]n attorney at law in performing his duties as such attorney at law.")[6] According to these opinions, investigations must be conducted pursuant to an attorney-client relationship to come within the exemption.[7] In addition, for the exemption to apply, the services performed must have some connection to the attorney's practice of law such that the attorney is performing the

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[1] Bus. & Prof. Code §§ 7512-7573.

[2] Bus. & Prof. C. §7523(a). "Investigator" is broadly defined and arguably covers most workplace investigations in response to complaints of discrimination, harassment, retaliation, workplace safety issues, and other breaches of company rules, policies, or standards. *See* Bus. & Prof. C. §7521(b) & (e).

[3] Bus. & Prof. Code § 7522(e). The statute also exempts from its licensing requirement a person employed "exclusively and regularly" by an employer, in connection with the affairs of such employer. Bus. & Prof. Code § 7522(a). Notably, the statute contains no exemption to its licensing requirement for workplace investigations performed by outside human resources professionals.

[4] Bus. & Prof. Code §7523(b).

[5] *Id.*

[6] 30 Op.Atty.Gen. 175 (1957) and 11 Op.Atty.Gen. 177 (1948).

[7] 30 Op.Atty.Gen. 175 , 176 (1957).

services usually performed by an attorney in the practice of law. Thus, the application of the exemption depends on the "character of the services rendered" and not on the investigator's status as an attorney.[8] In other words, the mere fact that the person conducting the investigation is an attorney at law does not satisfy the exemption; rather, the attorney must be functioning as an attorney pursuant to an attorney-client relationship.[9]

Some attorneys conduct work-place investigations as a separate business apart from their law practice. If an outside attorney structures an investigation as a non-legal or ancillary business service, the exemption will not likely apply. Ancillary or law-related business services are generally considered non-legal services that are related or incident to the practice of law.[10] Likewise, if the engagement is ambiguous as to the character of the services being provided, the services may not qualify for purposes of the exemption.

The Attorney Exemption May Not Apply if the Attorney-Investigator is Retained Directly by the Employer's Outside Law Firm

Some law firms retain outside attorneys directly to conduct independent investigations on behalf of the law firm's clients. They do so, presumably, in order to ensure that the attorney's investigation relates directly to the law firm's advice to the client such that communications regarding the investigation will be protected by the attorney-client privilege between the outside law firm and the client. There is a risk, however, that this practice could run afoul of the attorney exemption, particularly since the attorney under this arrangement could be considered to be acting as a non-attorney assistant or investigator for the law firm. Because in this scenario there typically is no attorney-client relationship between the investigating attorney and the law firm or the law firm's client, the attorney's investigation may not qualify as legal services rendered by an attorney at law under §7522(e) as interpreted by the Attorney General opinions. In sum, for the investigation to be considered legal services within the exemption, it is better that the investigating attorney establish an attorney-client relationship directly with the employer rather than being engaged by the law firm.

A Factual Investigation May Qualify as Legal Services for Purposes of the Attorney Exemption

Since, in addition to entering into an attorney-client relationship, a lawyer must also provide "services usually performed by an attorney in the practice of law" (i.e. legal services) to qualify for the attorney exemption, the question becomes whether an attorney's factual investigation alone constitutes legal services for purposes of the exemption. Many employment law investigations conducted by lawyers are strictly factual investigations. The attorney does not render legal advice or make recommendations, but only conducts an objective investigation and provides factual findings. While some attorneys will provide findings that go beyond the facts, such as whether an employer's policy was violated, attorney-investigators do not typically (although they may) reach legal conclusions; for example, whether unlawful discrimination or harassment has occurred. Outside attorney-investigators also do not typically render legal advice to the employer regarding what the employer should do based on the investigation results. That function is often performed by the company's regular counsel, and not by the attorney investigator.[11]

Given the widespread practice of bifurcating workplace investigations from the rendering of legal advice, it should come as welcome news that several courts have recognized that attorneys can in fact be performing "legal services" in conducting factual investigations for clients. In *United States v. Rowe*, 96 F. 3d 1294 (9th Cir. 1996), for example, the Ninth Circuit rejected the government's argument that fact-finding conducted by a law firm's associates to

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[8] 11 Op.Atty.Gen 177, 178 (1948).

[9] 30 Op.Atty.Gen. 175, 176 (1957). In reaching this conclusion, the Attorney General cited an older California court opinion interpreting a similarly-worded attorney exemption to the Real Estate Broker's Act, *Haas v. Greenwald,* 196 Cal. 236 , 243-44 (1925) (attorney who conducted negotiations in capacity as a real estate broker and not as an attorney at law could not avail himself of exemption from licensing requirement of the Real Estate Broker's Act for "attorney at law in performing his duties as such attorney at law")

[10] Vapnek, Tuft, Peck & Wiener, *Cal. Prac. Guide: Professional Responsibility* (the Rutter Group, a division of West, a Thomson Reuter's Business 2010) ¶1:314; ABA Model Rule 5.7; Cal. State Bar Form. Opn. 1995-141.

[11] Workplace investigations are typically bifurcated in this manner to avoid conflicts of interest that may arise when an employer's regular counsel purports to conduct an independent investigation on behalf of a client for whom they also provide advice and advocacy, and where they receive substantial fees for services unrelated to any monitoring or investigative function. *See, e.g., Commission on Public Trust and Private Enterprise: A Personal Postscript* 12 (The Conference Board 2003) (concluding that practices such as independent investigations conducted by an organization's regular law firm, and combining auditing and advocacy functions, present potential conflicts of interest inconsistent with effective corporate governance, which requires a variety of truly independent, objective, outside professional organizations acting in the corporation's best interest); *see also* Cal. Rule of Prof. Conduct 5-210 (limiting circumstances in which attorney may serve as both witness and advocate) and ABA Model Rule 3.7 (lawyer as witness).

investigate alleged misconduct by another firm attorney cannot constitute professional legal services. The Ninth Circuit explained that, in analyzing the attorney-client privilege, fact-finding is a necessary part of rendering professional legal services to clients and courts should not draw a distinction between "fact-finding" and "lawyering."[12] Likewise, in *Sandra T.E. v. South Berwyn School Dist. 100*, 600 F.3d 612 (7th Cir. 2010), the court held that a law firm retained to use legal expertise in conducting an investigation of facts regarding sexual abuse allegations was performing "an integral part of the package of legal services for which it was hired" and that the firm's fact-finding was a "necessary prerequisite" to providing legal advice.[13] Several other cases have similarly held.[14] Thus, an attorney retained in his or her capacity as a lawyer to utilize his or her skill, training, and professional judgment in employment law in conducting a factual investigation will qualify for the exemption even if the attorney is not requested to give legal advice or render legal conclusions.

Attorneys in California May Limit the Scope of Their Representation of a Client to Performing a Factual Investigation.

Since the exemption under §7522(e) requires attorneys to perform services usually performed by an attorney in the practice of law, why have attorneys who conduct factual investigations shied away from doing so in their capacity "as attorneys at law?" This reluctance may be explained in part by a mistaken belief that functioning as an attorney necessarily entails engaging in advocacy, or requires the provision of legal advice, on behalf of the client. In fact, however, attorneys perform various functions for clients apart from advocacy, and they are permitted to limit the scope of their professional services by entering into discrete or task-based agreements with clients so long as the agreed scope of services can be performed competently.[15] This form of legal services – variously referred to as "task-based," "limited scope" or "unbundling" - is an increasingly common and efficient means of serving the legal needs of employers and other clients in California.[16]

Task-based representation is particularly suited to employment law investigations. Under California and federal law, employers are required to promptly investigate claims of harassment, discrimination, and retaliation.[17] The EEOC and DFEH further have specified that such investigations be "objective" or "impartial."[18] Hiring outside attorneys with employment law expertise who do not serve as the employer's regular counsel, and who perform fact-finding investigations without rendering legal advice, is an appropriate form of task-based representation that assists employers in complying with EEO laws. Task based legal services by an attorney in conducting a factual investigation and using legal skills and training as an attorney at law qualify under the attorney exemption without requiring that the attorney render legal advice or reach legal conclusions.

Of course, engaging a lawyer to conduct a workplace investigation as a task-based representation requires that the limited scope of services be reasonable under the circumstances. The lawyer must also be able to competently perform the limited services, and the client must give informed consent.[19] In some circumstances, limiting an attorney's representation to a strictly factual investigation may not be reasonable if the client is not sophisticated and does not have other counsel available to advise the client on legal issues related to the investigation and investigation results. An attorney conducting a facts-only investigation may also be required to alert the client to

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[12] *Id.* at 1296-97 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 390-91 (1981): "The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant.").

[13] 600 F. 3d at 620.

[14] *Better Gov't Bureau Inc. V. McGraw* (*In re Allen*), 106 F.3d 582 (4th Cir. 1997) (where lawyer is retained to use legal expertise to conduct investigation, the lawyer is performing "legal work"); *In re Int'l Sys. & Controls Corp. Sec. Litig*., 91 F.R.D. 552, 557 (S.D. Tex. 1981) (confidential communications made by attorneys "hired to investigate through the trained eyes of an attorney" are privileged), vacated on other grounds, 693 F.2d 1235 (5th Cir. 1982); *Wellpoint Health Networks Inc. v. Sup. Ct*., 59 Cal. App. 4th 110, 121-122 (1997) (lawyer performing a factual investigation pursuant to an attorney client relationship may be acting as a lawyer for purposes of the privilege).

[15] *See Cal. Prac. Guide: Professional. Responsibility, supra,* note 10, ¶3:33.5 ff.; and *see* ABA Model Rule 1.2(c).

[16] The California State Bar has adopted a resolution promoting the use of task based representation in appropriate circumstances. *State Bar of California Limited Scope Legal Assistance (Unbundling) Resolution* (May 15, 2009) (defining "limited scope legal assistance" as a "relationship between an attorney and a person seeking legal services in which it is agreed that the scope of the legal services will be limited to the defined tasks that the person asks the attorney to perform").

[17] *See, e.g.*, California Fair Employment and Housing Act (FEHA) (Gov't Code§§ 12900-12996); the Civil Rights Act of 1964 (Title VII) (42 USC §§ 2000e-2000e-17).

[18] *See, e.g., Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors* (EEOC, June 1999); *DFEH-185, "Sexual Harassment: The Facts about Sexual Harassment*" (11/07).

[19] Cal. Rule of Prof. Conduct 3-110; ABA Model Rule 1.2(c); *Cal. Prac. Guide: Professional Responsibility*, supra, note 10, ¶3:34; *see generally, An Ethics Primer on Limited Scope Representation* (State Bar of California, Committee on Professional Responsibility and Conduct).

reasonably foreseeable legal issues that become apparent during the investigation, even if these issues fall outside the scope of the agreed-upon representation.[20]

An Attorney's Responsibilities in Conducting Employment Investigations Differ from those of a Non-Attorney Investigator

Although an attorney can limit the scope of his or her representation as discussed above, under California's ethics rules and other law, attorneys conducting workplace investigations for clients under the attorney exemption still owe certain fiduciary duties to their clients that would not necessarily apply in the case of a non-lawyer investigator. These duties include the duty to perform legal services with competence[21]; the duty of loyalty, including the duty to avoid conflicts of interest[22]; the duty to keep clients reasonably informed of significant developments and to promptly comply with requests for information[23]; and the duty to protect the client's confidential information.[24] Attorneys representing clients also have certain obligations in communicating with third parties that may not apply to non-attorney investigators, including the duty not to communicate with parties known to be represented by counsel in the matter without their lawyer's consent, and the duty not to mislead employees or other constituents of the company regarding such matters as the lawyer's role and the identity of the lawyer's client.[25] The standard of care for lawyers conducting workplace investigations may also differ from the standard applicable to a non-lawyer investigator.

Problems that Can Arise When an Attorney is Not Clear about His or Her Role in Conducting an Investigation.

Various problems can arise if an attorney fails to structure the engagement properly. Assume, for example, that Attorney A is hired to conduct a workplace investigation but does not enter into a formal legal services agreement with the employer because he does not perceive that he is functioning as an attorney in an attorney-client relationship. In the course of the investigation Attorney A learns that Employee B, who is the subject of an internal harassment complaint, is represented by counsel in connection with the internal investigation. Since Attorney A does not consider himself to be representing the employer as an attorney and he wants to avoid being dragged into a potentially adversarial interaction with Employee B's attorney, he proceeds to contact Employee B directly and conducts an interview without obtaining consent from Employee B's attorney. Employee B is later terminated based on the results of Attorney A's investigation. He now complains that Attorney A, acting on behalf of the employer, violated the anti-contact rule .and misled him in arranging for and conducting the interview.[26] What is Attorney A's response? If Attorney A claims that the anti-contact rule does not apply because he was not functioning as an attorney for a client he (and the employer) risks violating the Private Investigator Act. If, on the other hand, he claims he qualifies for the attorney exemption because he was performing services as an attorney in the practice of law, his communications with Employee B violate the anti-contact rule and he risks State Bar discipline. In addition, any violation of the ethics rules by Attorney A could be used to challenge the propriety of the employer's investigation and call into question the validity of information obtained and the grounds for termination.

An Attorney's Duty of Loyalty to the Client does not mean the Attorney is Unable to Conduct an Impartial and Independent Investigation

Some have argued that it is inappropriate for an attorney to conduct an independent employment law investigation in a lawyer-client relationship with the employer because representing the employer as a client means that the investigation will not be objective or impartial. This position appears to be part of a larger misconception that the dominant role of an attorney is that of an advocate. However, lawyers perform various functions in representing clients, including acting as advisors, negotiators, fact-finders, as well as advocates.[27] A lawyer's duty of loyalty to an employer-client does not prevent the lawyer from conducting an objective and impartial investigation, if that is the purpose for which the lawyer is hired and the lawyer is capable of performing that function. Rather, the duty of

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[20] *See Nichols v. Keller,* 15 Cal. App. 4th 1672, 1683-84 (1993); *Cal. Prac. Guide: Professional Responsibility*, supra, note 10, ¶3.39 ff.

[21] Cal. Rule of Prof. Conduct 3-110.

[22] Cal. Rule of Prof. Conduct 3-310.

[23] Cal. Rule of Prof. Conduct 3-500; Cal. Bus. & Prof. Code §6068(m).

[24] Cal. Rule of Prof. Conduct 3-100; Bus. & Prof. C. § 6068(e).

[25] *See, e.g.*, Cal. Rule of Prof. Conduct 2-100 (the "anti-contact" rule); ABA Model Rule 4.3 (dealing with unrepresented person), and Cal. Rule of Prof. Conduct 3-600(D) (duty not to mislead constituents of an organizational client).

[26] *See*, Cal. Rule of Prof. Conduct 2-100 and ABA Model Rules 4.2 and 4.3. (dealing with unrepresented person).

[27] *See* ABA Model Rules, Preamble, ¶ 2, and see ABA Model Rule 2.1 (lawyer as advisor).

loyalty implies an obligation to accomplish the client's objective with respect to the matter in which the lawyer's services have been retained and to not allow other interests or responsibilities to interfere with achieving that objective.[28] Thus, the duty of loyalty relates to the role the lawyer assumes and the scope of the agreed-upon legal services. In the context of a limited scope representation undertaken for the purpose of conducting an impartial employment law investigation, the lawyer satisfies the duty of loyalty by applying his or her legal training and expertise in conducting an independent and unbiased investigation.

Privilege Issues Should Be Analyzed Separately from the Exemption

The fact that the attorney exemption requires legal services performed by an attorney at law in the context of an attorney-client relationship does not mean that the investigation or its results will necessarily be protected by the attorney-client privilege or as attorney work product. Whether an investigation is covered by the attorney-client privilege is an issue distinct from whether the investigation constitutes legal services for purpose of the exemption. Generally speaking, in order to fall within the privilege, the dominant purpose of the investigation must be to further the rendering of legal advice or legal services.[29] When an attorney conducts a factual investigation that is not connected to the rendering of legal advice or other legal services by the investigating attorney or by other counsel, the results of the investigation will likely not be privileged or protected as work product.[30] Nevertheless, the investigation may still fall within the attorney exemption. An attorney who performs a fact investigation under these circumstances would be well-advised to ensure that the client understands in advance the implications of structuring the engagement in this way and obtain the client's informed consent to conduct an investigation that will likely not be privileged.

An Investigation May Be Privileged Where One Attorney Conducts the Investigation and Other Counsel Provides Legal Advice

As noted above, employment law investigations are often bifurcated, with independent counsel conducting the investigation, and in-house or outside counsel rendering legal advice to, and representing, the employer in any litigation. The attorney-client privilege may apply to legal services that are bifurcated in this manner, provided the relationship is structured properly. A number of cases have held that the privilege may shield the results of an attorney's investigation where the dominant purpose of the investigation is to facilitate the rendering of legal advice or legal services to the client.[31] Although these cases involve situations where the same firm conducted the investigation and rendered legal advice, there is no reason why the attorney-client privilege should not apply to bifurcated task-based legal services where one attorney conducts a factual investigation in coordination with other counsel who provides legal advice to the employer – provided the dominant purpose of the attorney's investigation is to facilitate the rendering of the advice to the client, the lawyer performing the investigation is acting in his or her capacity as an attorney at law, and other elements of the privilege apply. [32]

Conclusion

An attorney's employment law-related investigation will qualify as legal services for purposes of the exemption if the attorney is functioning as an attorney at law in an attorney-client relationship with the employer-client. Attorneys may qualify for the attorney exemption under §7522(e) and satisfy the EEO goals of performing a fair and objective fact-finding by limiting the scope of the representation to conducting an objective and impartial

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[28] *See* ABA Model Rules 1.2(a) and 1.7(a)(2).

[29] *See Cal. Practice Guide: Professional Responsibility*, supra, note 10, ¶ 7:238.5; *see also Costco Wholesale Corp. v. Sup. Ct.*, 47 Cal. 4th 725, 743, 746 (2009) (courts must determine dominant purpose of the relationship between the attorney and the person or entity claiming the privilege).

[30] *See Wellpoint, supra*, note 14, 59 Cal. 4th at 122.

[31] *Sandra T.E. v. South Berwyn School Dist.* 100, 600 F.3d at 612, 620 ("when an attorney conducts a factual investigation in connection with the provision of legal services, any notes or memoranda documenting client interviews or other client communications in the course of the investigation are fully protected by the attorney client privilege.") (7th Cir. 2010); *United States v. Rowe*, 96 F. 3d 1294, 1297 (9th Cir. 1996) (*Upjohn* made "clear that fact-finding which pertains to legal advice counts as 'professional legal services'" for purposes of the attorney-client privilege); *Costco, supra*, note 29, 47 Cal. 4th at 743 (rejecting plaintiff's argument that an attorney's interviews of managers was fact gathering that could have been performed by a non-attorney since it was not disputed that Costco had retained the law firm, an expert in California wage and hour law, to provide legal advice regarding the exempt status of some of its employees).

[32] Of course, if the employer raises the adequacy of the investigation as an affirmative defense, a court may find that the privilege and the work product doctrine have been waived with respect to the factual results of the investigation and the attorney who conducted the investigation may be a witness. *Wellpoint, supra*, note 14, 59 Cal. App. 4th at 128, and see *Cal. Prac. Guide, Professional Responsibility*, supra, note 10, ¶7:238.6 ff.

investigation. There are steps lawyers can take to increase the likelihood that the work will be considered legal services for purposes of the exemption, including structuring the engagement as a limited scope attorney-client relationship, holding themselves out to third parties as attorneys at law rather than consultants or lay investigators, ensuring that other counsel are responsible for rendering legal advice to the client regarding the investigation, and complying with the ethics rules and other laws governing attorneys in conducting workplace investigations.

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MCLE SELF-STUDY:

ATTORNEY WORKPLACE INVESTIGATIONS: NEITHER IMPARTIAL NOR INDEPENDENT

A counterpoint to our September 2022 article on workplace investigations by Lindsay Harris and Amy Oppenheimer

Attorneys Conducting Impartial Workplace Investigations: Reclaiming the Independent Lawyer Role,[1] written by our friends and colleagues Lindsay Harris and Amy Oppenheimer,[2] certainly has a ring of "truthiness."[3] But, desiring something to be true does not make it so. Indeed, while Harris and Oppenheimer argue that attorney-client-privileged investigations can be impartial and that attorney workplace investigators can be independent from their clients (the defendant employers who retain them), we posit the exact opposite.

While acknowledging that "impartiality 'resists easy definition,'"[4] Harris and Oppenheimer proceed to restrict their view of that term to mean simply that the investigator is "free from bias."[5] Contrary to the narrow manner in which Harris and Oppenheimer view the term "impartial investigation," however, a truly "impartial"

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investigation would be one in which the investigator is not only free from bias *but also* treats all parties equally and is not influenced or controlled in any way by the complainant's employer.[6] Indeed, applying the Harris/Oppenheimer view of "impartial" to the world of baseball, they would conclude that a baseball game was fair even if the umpire hired by the Dodgers to officiate a Dodgers/Yankees game agreed to abide by the Dodgers' rules of the game, such that the umpire could only call strikes when the Dodgers were pitching and could only call balls when the Dodgers were batting, so long as the umpire was "free from bias."

For at least three reasons, we posit that attorney-client privileged workplace investigations are not impartial and that investigators conducting such investigations are not independent.

First, when an attorney conducts an attorney-client privileged investigation, the attorney is constrained not only by the attorney-client privilege but also other ethical considerations. As explained in detail below, attorney-client-privileged investigations are inherently structured to benefit the investigators' client employers from start to finish.

Second, the well documented "repeat player bias" prevents attorney investigators from being impartial. Indeed, because investigators know that "their clients may rely on the investigation to defend against claims made in subsequent litigation,"[7] the investigators have a strong financial incentive to structure the investigation and its outcome so as to bolster their clients' defenses (i.e., repeat business from not only their employer clients but also their clients' employment law defense firms).[8] Additionally, given that many investigators require, as part of their standard retainers/engagement agreements, that their clients indemnify and defend them from claims that may arise from the investigation,[9] these investigators are even further financially dependent upon their clients.

Third, in the real world, attorney workplace investigators are routinely complicit in and/or take no steps to stop defendant employers from weaponizing attorney-client-privileged investigations against the complainant. Indeed, most of the authorities cited by Harris and Oppenheimer specifically recognize that attorney-client-privileged investigations must be structured in ways designed to advantage the employer. For example, one of these authorities states that the "existence or threatened existence of" civil litigation "necessarily affects how the company and outside counsel conduct and document" the investigation. The authority also cautions that the investigator should provide interim oral (*not* written) reports to the employer, and that "[c]areful consideration should be given to the extent to which written reports should be rendered, if at all, during or at the conclusion of the investigation."[10] It further recommends that the corporate defendant work with its attorney investigator to determine whether or not to waive the attorney-client privilege.[11] Another article cited by Harris and Oppenheimer "outlines eight steps that can . . . limit legal exposure" for employers.[12] It also recommends that employers "make decisions about the investigation . . . including the type of investigator needed, the appropriate scope of the investigation, and the type of investigation report preferred" based on "the privilege standards as to investigative materials in their applicable jurisdictions."[13] Yet another article cited by Harris and Oppenheimer specifically cautions workplace investigators to structure their engagements in ways to ensure that the investigation is covered by the attorney-client privilege.[14] Even the Association of Workplace Investigator's *Guiding Principles For Conducting Workplace Investigations*[15] explicitly provides that workplace investigators should defer to their client's wishes regarding not just the scope of the investigation, but also the form of the investigatory report (*e.g.*, oral versus written). The *Guiding Principles* further recommends that workplace investigators "discuss[ ] the merits of potential report formats with the employer."[16]

Finally, as discussed in more detail below, if attorneys conducting workplace investigations really desire to reclaim the "independent lawyer" role, they need to take to heart Supreme Court Justice Louis D. Brandeis' famous saying, "sunlight is said to be the best of disinfectants."[17]

ATTORNEY-CLIENT PRIVILEGED INVESTIGATIONS ARE INHERENTLY STRUCTURED TO BENEFIT EMPLOYERS AND CANNOT THEREFORE BE IMPARTIAL

Attorneys conducting attorney-client-privileged workplace investigations can never be independent. The attorney-client-privileged nature of the investigation is fundamentally structured such that the investigator cannot treat the employee and the employer equally with respect to either the investigation or the investigatory report.[18]

AN ATTORNEY-CLIENT-PRIVILEGED INVESTIGATION ALLOWS THE EMPLOYER TO USE THE INVESTIGATION AS A SWORD WHEN THE INVESTIGATION FAVORS IT, AND AS A SHIELD WHEN IT DOES NOT

In *Wellpoint Health Networks, Inc. v. Superior Court*,[19] the plaintiff employee sought discovery of the workplace investigator's investigation, initially arguing that, because "an attorney retained to investigate employee claims of discrimination is not acting as an attorney but as a fact finder, the attorney-client privilege and work product doctrine therefore do not have any applicability."[20] The court rejected this argument, holding that the attorney-client privilege and work product doctrine do, in fact, apply to attorney workplace investigations. The

court then explained that the employer was free to waive the attorney-client privilege if it wanted to attempt to "prevail by showing that it investigated an employee's complaint and took action appropriate to the findings of the investigation."[21] If the investigator were to inform the employer that the investigation favors it, the employer would then instruct the investigator to thoroughly document the investigation in a comprehensive written report, which the employer could then use to defend against the employee's claims.

Even in those situations where the employer elected to rely on the investigation, it could still argue that some aspects of the investigation should remain privileged (i.e., the communications between the employer and/or its employment defense counsel and the investigator about the investigation).[22] So, for example, the employer could ask its outside defense counsel to communicate with the investigator in an effort to influence the investigator against the complainant or toward an outcome optimal to the employer. Under this arrangement, the employer could argue that it should be able to rely on the investigation. At the same time, the employer could use the attorney-client privilege to preclude the complainant from seeing these incriminating communications.[23] Similarly, some courts have actually allowed defendant employers to rely on the adequacy of an investigation, even while producing only a redacted version of the investigation report.[24]

Should an investigation corroborate the plaintiff employee's claims, the employer is free to claim attorney-client privilege and completely shield the investigation from the complainant/jury[25]—an information deficit that necessarily prejudices the complainant.

ATTORNEY INVESTIGATORS CONDUCTING PRIVILEGED INVESTIGATIONS ARE ETHICALLY REQUIRED TO ALERT THEIR EMPLOYER CLIENTS AS TO ALL INFORMATION UNCOVERED DURING THE INVESTIGATION–CONVERSELY, INVESTIGATORS ARE ETHICALLY PROHIBITED FROM ALERTING THE COMPLAINANT WITH INFORMATION THAT WOULD HELP THE COMPLAINANT

As Ms. Harris has correctly recognized in a prior law review article on this subject, "[a]n attorney conducting a facts-only investigation may also be required to alert the client to reasonably foreseeable legal issues that become apparent during the investigation, even if these issues fall outside the scope of the agreed upon representation."[26] This ethical obligation means that so-called "impartial" attorney investigators are required to provide employers with information unrelated to the investigation, which would allow employers to defend against complainants' claims. This necessarily favors the employer.

For example, an employer retains an attorney investigator to investigate a female Muslim employee's complaint that she was treated poorly and was then fired because of her gender. During the course of the investigation, the investigator uncovers facts demonstrating that, while there was no gender discrimination or harassment: (a) the employee's supervisor authored communications demonstrating that the supervisor harbored animus toward the employee's Muslim religion, and took adverse employment actions against the employee specifically because of that animus; and (b) unbeknownst to the employer, the employee embezzled money from the employer. In this situation, the attorney investigator would be ethically bound to disclose these facts to the employer.

Conversely, using this same example, the attorney investigator would be ethically precluded from sharing any of these facts with the employee. That is, because of attorney-client privilege, the investigator would be unable to disclose a finding to the employee that her supervisor had harbored anti-Muslim animus against her and fired her because of that animus.

In such a situation, the attorney investigator would not be acting in an impartial manner. Worse, if instructed by the employer client, the attorney investigator would be ethically obligated to prepare a written report debunking the complainant's allegations of gender discrimination (without disclosing the religious discrimination found) and finding that the employee had embezzled money from the employer.

THE "REPEAT PLAYER" BIAS PREVENTS ATTORNEY-CLIENT-PRIVILEGED INVESTIGATIONS FROM BEING IMPARTIAL

Studied at length in the arbitration-context,[27] the "repeat player" effect is also alive and well in workplace investigations. The "repeat player" effect in this context refers to an investigator's (conscious or unconscious) propensity to bias the outcome of an investigation in an employer's favor in the hopes of securing additional work.[28] This phenomenon can undermine the impartiality/independence of workplace investigations.[29]

Further, according to Harris and Oppenheimer, "[t]he investigator should see herself as an independent professional retained to render her candid and neutral assessment to the client, rather than retained to protect management, or to whitewash organizational wrongdoing."[30] This is simply not possible given that investigators stand to profit from: (1) the investigation; (2) *other* investigations for the client and the client's employment law defense firm(s); and (3) expert witness in other cases for the client and the client's employment

law defense firm(s).[31] Additionally, workplace investigators know that the employment defense bar is small. They can easily be blackballed and put out of business if they develop a reputation for putting "impartiality" above their clients' interests in defending against employment claims.

> As the United States Supreme Court has emphasized:
>
> [V]arious situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable. Among these cases are those in which the adjudicator has a pecuniary interest in the outcome.[32]

So too does that exist when the income stream of the attorney investigator would end if a negative report prohibited future rehire. With the forces of the "repeat player" and "pecuniary interest" biases working hand in glove, attorney workplace investigations are arguably a rigged system favoring the employer.

IN THE REAL WORLD, EMPLOYERS WEAPONIZE ATTORNEY-CLIENT PRIVILEGED INVESTIGATIONS

Far from the sanitized realm imagined in the Harris/Oppenheimer article is the real world, where corporations weaponize attorney-client privileged investigations in their own perceived monetary self-interest to the detriment of employee complainants. An illustration of how employers can misuse the investigative process can be seen in the sexual harassment workplace investigation at the Washington Commanders by Wilkinson Walsh. According to a recently released report from the U. S. House of Representatives,[33] the Washington Commanders retained Wilkinson to conduct an attorney-client-privileged workplace investigation into allegations of a pattern and practice of gender harassment and bullying within the Commanders' organization. Thereafter, the owner of the Commanders, Daniel Snyder, began to improperly control and influence the outcome of the investigation by launching a shadow investigation into former employees.[34] Snyder used and attempted to use non-disclosure agreements and hush money to silence witnesses.[35] This included: having his attorneys offer an accuser a monetary sum "in the seven figures" to not speak with anyone about her allegations;[36] sending private investigators to the homes of former employees;[37] making, along with his attorneys, at least seven presentations to Wilkinson during the investigation (presumably in an effort to influence the outcome of the investigation);[38] attempting to prevent an accuser from sharing information with Wilkinson;[39] using a proxy to block Wilkinson's access to information that could implicate him personally in sexual misconduct;[40] using a defamation lawsuit to target former employees and influence the Wilkinson Investigation;[41] and publicly announcing, in collaboration with the NFL, a summary of the Wilkinson Investigation that, by stating that all of those involved in the misconduct were no longer employed by the Commanders, falsely suggested that the Wilkinson Investigation had exonerated him,[42] while at the same time using the attorney-client privilege to preclude the release of the Wilkinson Investigation.[43]

EMPLOYERS USE ATTORNEY-CLIENT PRIVILEGED INVESTIGATIONS TO PRE-CONDITION THE INVESTIGATOR IN THEIR FAVOR

The notion of preconditioning or confirmation bias is "the seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis in hand."[44] At the same time, damning evidence is either ignored or interpreted in ways that do not undermine the pretextual conclusion.[45] For this reason, social scientists have strongly recommended that workplace investigators strictly limit their contact with their clients not just at the beginning of the investigation but throughout the investigation precisely to avoid preconditioning or confirmation bias.[46] Yet, it has been the authors' experience that the vast majority of workplace investigators do not limit such contact or communications with their clients and that their clients (and their clients' outside employment defense counsel) use that access to pre-condition and bias the investigator in the employer's favor.[47] In one particularly egregious case, before the investigation even began, the in-house investigator was informed that there would be a finding against the alleged harasser "over [the employer's] dead body" and that "the complaint was meritless."[48]

In the attorney-client privileged investigation setting, because these preconditioning and bias inducing communications are usually buried in attorney-client privileged communications, the employee never learns about these threats.

EMPLOYERS USE ATTORNEY-CLIENT PRIVILEGED INVESTIGATIONS TO STRUCTURE, SHAPE, AND CONTROL THE INVESTIGATION

In the real world, employers use the attorney-client privilege to structure, shape, and control the investigation—an intentional attempt to exert undue influence and avoid discovery of or hide the truth that the employer-client has legal exposure for workplace misconduct. Too often, attorney workplace investigators allow it.

For instance, attorney workplace investigators frequently do not interview employees whom they deem to have relevant information that may corroborate claims of

misconduct if their client does not want those witnesses interviewed.[49] When allegations emerged that Fox News' Roger Ailes had a long and sordid history of workplace sexual harassment, parent company 21st Century Fox turned to "independent" workplace investigator Paul, Weiss, Rifkind, Wharton & Garrison LLP (a firm known for its defense-side employment practice). This supposedly "neutral" law firm/investigator refused to interview female employees who were known to have been harassed by Ailes, one of whom took the affirmative step of reporting to Paul Weiss that she was one of Ailes' victims.[50]

In yet another case, CBS hired Covington & Burling and Debevoise & Plimpton in 2018 to conduct an "independent" investigation into sexual harassment allegations against CBS Chairman and CEO Leslie Moonves.[51] However, the investigation was overseen by none other than two "acolytes of Moonves" and a partner in the law firm representing the majority voting shareholder of ViacomCBS (the parent company of CBS).[52] It defies credulity that an "external" investigation which is overseen by the harasser's closest allies and the company's attorney would be free from "bias."

EMPLOYERS USE ATTORNEY-CLIENT PRIVILEGED INVESTIGATIONS TO "DIG UP DIRT" ABOUT THE COMPLAINANT

Not only do employers use attorney-client privileged investigations to shape and control the investigations, they also routinely use such investigations to "dig up dirt" in an effort to discredit the complainant.

Discrediting harassment victims is an all too familiar tactic to mitigate fall out from a misconduct complaint.[53] Unfortunately, these tactics are not limited to "private investigators" or allies of the accused. Instead, too often, the authors have found their employee-clients to be on the receiving end of these smear campaigns. "Well respected," "independent" attorney investigators are free to ask the complainant and witnesses highly personal and intrusive questions (questions often prepared by defense counsel) that would not be allowed in a court proceeding.

EMPLOYERS USE ATTORNEY-CLIENT PRIVILEGED INVESTIGATIONS TO SETTLE MERITORIOUS CASE FOR FAR LESS THAN THEY ARE WORTH

An employer's effort to pull the wool over the employee's eyes allows the employer to settle a meritorious case for far less than it is worth. They conceal not only the "privileged" communications between the investigator and the employer, but also the fruits of the investigation (*e.g.*, witness statements and the investigation report).

It is an oft recognized tenet of employment law that the employer is "in possession of the vast majority of evidence that would be relevant to employment-related claims against it . . . [which] work[s] to curtail the employee's ability to substantiate any claim against the employer."[54] The employer's sole access to the investigation materials exacerbates this information disparity. In the authors' experience, investigations are never fully shared with an employee and her counsel unless compelled by a court or arbitrator to do so or if the investigation materials exonerate the employer.[55] For example, employers may learn from the investigation that "other victim" evidence exists, that witnesses will corroborate the complainant's allegations of wrongdoing, or that "smoking gun" documents showing retaliatory animus exist. In such a case, the employer will engage in settlement discussions in an effort to resolve the matter before the complainant learns of the evidence.

Critically, Harris and Oppenheimer concede that "having full access to an employer's investigation might help plaintiff's attorneys better value their cases."[56] Given this admission alone, it is difficult to understand how attorney workplace investigators can contend that attorney-client-privileged investigations are "impartial" when employers and complainants are not on an equal footing.

EMPLOYERS SOMETIMES USE ATTORNEYS NOT ONLY AS OUTSIDE WORKPLACE INVESTIGATORS, BUT ALSO SIMULTANEOUSLY (OR SUBSEQUENTLY) AS DEFENSE COUNSEL

In the real world, employers also weaponize their "neutral" attorney-client-privileged investigations against employees them to craft the employer's litigation strategy. After the investigation concludes, the "neutral" investigator becomes an advocate for the very clients for whom they previously professed neutrality. Unfortunately, in California, courts have allowed it.[57]

Indeed, in one matter, the authors of this article were contacted by an attorney claiming to be a "neutral" workplace investigator. In their very first telephone conversation, the authors were informed that the investigator had reviewed their draft complaint for damages, which had been provided to the employer during confidential settlement negotiations. According to the "neutral" workplace investigator, she had already rendered a legal opinion to the employer about which causes of action were vulnerable to demurrer.

Other times, purportedly neutral investigators allow future litigation counsel to submit interview questions of the complainant. For example, such questions include: whether the complainant has retained counsel; whether the

complainant has seen a mental healthcare professional, and, if so, who and how many times; and the amount of damages sought by the complainant.

Worse, the authors of this article have experienced some employment defense attorneys who have orchestrated matters to allow the employer three bites at the apple. First bite, the employment defense attorney supervises an internal human resources representative who interviews the complainant and witnesses. Second bite, the employment defense attorney supervises (and sometimes participates in the investigation by)[58] an outside workplace investigator who interviews the complainant and witnesses. Third bite, the employment defense attorney gets to depose the complainant.

This gamesmanship has no place in workplace investigations when so much is at stake. The authors believe that California should follow federal courts that have held "a defendant may waive the attorney-client privilege if it fuses the roles of internal investigator and legal advisor," as "the plaintiffs must be permitted to probe the substance of [the defendant's] alleged investigation to determine its sufficiency."[59]

WORKPLACE INVESTIGATORS ARE NOT IMPARTIAL, BECAUSE THEY OFTEN DO NOT ALLOW THE ELECTRONIC RECORDING OF WITNESS INTERVIEWS AND BECAUSE THEIR CLIENTS DO NOT WANT AN OBJECTIVE ACCOUNT OF THE INVESTIGATION PRESERVED

The authors of this article have collectively represented clients (as complainants and third-party witnesses) in hundreds of workplace investigations. In virtually every single case, the workplace investigators have not only refused to electronically record their interviews, but they have also insisted that none of the interviewees record their own interviews.[60] Why? Investigators often offer a raft of absurd reasons,[61] but the real reason was acknowledged in an Association of Workplace Investigators Journal article. "One consideration generally trumps all the issues we discuss below: *what the client wants*."[62] The mere fact that attorney investigators defer to their clients and ignore the wishes of some complainants (and third-party witnesses) to electronically record interviews demonstrates that attorney investigators are not impartial. Moreover, this deference to the client's wishes demonstrates that, contrary to the opinion of Harris and Oppenheimer, attorney workplace investigators do not "remain[ ] uninfluenced by her relationship with the company or counsel who retain her."[63] Rather, attorney investigators allow their clients to call the shots.

Putting impartiality aside, recorded interviews offer significant advantages over non-recorded interviews. For example, recorded interviews:

- Allow the investigator to "maintain uninterrupted eye contact with the witness, focusing on the questions and answers while maintaining rapport with the witness."[64]
- Accurately capture what the witnesses say and thereby preclude the "he said/she said" disputes that often arise when the interviews are not electronically recorded.[65]
- Shed light on whether the investigator unduly focuses on facts that accord with the investigator's own biases or preordained theory of the case.[66]
- Do a nearly perfect job of capturing a witness's shifting story in all its elastic quality.[67]
- Capture things like pauses, the "hem haw" response, tone of voice, and changes in testimony.[68]
- Accurately capture what is asked by the investigator and thereby reveal whether the investigator was leading the witness in one direction or another and/or missed any important areas of inquiry.
- Offer insights into whether the investigator has any biases (consciously or unconsciously).[69]
- Allow the complainant or a judge, jury or arbitrator to be able to make their own credibility determinations of the complainant, the accused, and the third-party witnesses.
- Serve as direct evidence, which makes them a fantastic tool if a witness disappears and a great asset for witness impeachment.[70]

Given all of the advantages of recorded interviews, why would the clients of attorney investigators *not* want recorded interviews? The answer is simple–employers do not want the investigation preserved such that the jury, judge, and/or arbitrator can view the evidence themselves. Rather, the employer wants the jury, judge, and/or arbitrator to only see the evidence as filtered through the lens of *its* attorney workplace investigator.

IF ATTORNEY INVESTIGATORS WISH TO "RECLAIM THE INDEPENDENT LAWYER ROLE," THEY NEED TO STRICTLY ADHERE TO A CODE OF CONDUCT REQUIRING THEM TO BE TRULY IMPARTIAL

If attorney workplace investigators truly wish to "reclaim the independent lawyer role," they must ensure that they are "impartial" in the broadest sense of that word.

They must show that they are not only free from bias, but also that they treat all parties equally and are not influenced or controlled in any way whatsoever by their clients. This means, at a minimum, that the very outset of every investigation, the investigator must secure their clients' irrevocable written: (1) waiver of the attorney client privilege; (2) agreement to include the complainant's counsel in *all* communications with not only their clients but also their clients' employment defense counsel;[71] (3) agreement to videotape all interviews; (4) agreement to prepare a written report; and (5) agreement that the investigator will, at the end of the investigation, contemporaneously provide their client and counsel for the complainant with the written investigative report, all interviews, all notes, and all documents generated by or provided to the investigator.

The foregoing steps would be a good first start for those attorneys conducting impartial workplace investigations who truly desire to reclaim the independent lawyer role and would go a long way towards letting in the "sunlight."

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1. Lindsay Harris & Amy Oppenheimer, *Attorneys Conducting Impartial Workplace Investigations: Reclaiming the Independent Lawyer Role*, 36 Cal. Lab. & Emp. L. Rev. 5 (Sept. 2022).

2. One of the authors of this article retained Oppenheimer as an expert testifying on behalf of the plaintiff employee about how an employer's workplace investigation fell short of the standard of care.

3. "Truthiness" means "the quality of seeming to be true according to one's intuition, opinion, or perception without regard to logic, factual evidence, or the like." *See* Dictionary.com, available at https://www.dictionary.com/browse/truthiness (last visited Jan. 17, 2023).

4. Lindsay Harris & Amy Oppenheimer, *supra* note 1, at 6, n. 5.

5. *Id.*

6. "Impartial" means "treating or affecting all equally." *See* Merriam-Webster, available at https://www.merriam-webster.com/dictionary/impartial (last visited Jan. 17, 2023); *see also* Britannica ("treating all people and groups equally"), available at https://www.britannica.com/dictionary/impartial (last visited Jan. 17, 2023); Cambridge Dictionary ("not supporting any of the sides involved in an argument"), available at https://dictionary.cambridge.org/us/dictionary/english/impartial (last visited Jan. 17, 2023); Lexico ("Treating all rivals or disputants equally"), available at https://www.lexico.com/en/definition/impartial (last visited Jan. 17, 2023).

7. Leslie Ellis & Lisa Buehler, *Documenting and Preserving Workplace Investigations: What to Keep and How Long to Keep It*, 5 AWI J. 4, 1 (Oct. 2014) ("Experienced workplace investigators understand that their clients may rely on the investigation to defend against claims made in subsequent litigation"), available at https://cdn.ymaws.com/www.awi.org/resource/collection/B3103F98-2511-4D7E-B8A8-31E3B02583DF/Module%206%20-%20Documenting%20and%20Preserving%20Workplac.pdf (last visited Jan. 17, 2023).

8. *Id*. at 4 (recommending that when determining how to document and preserve workplace investigations, "[i]nvestigators should consider how the client will use the investigation—to substantiate employment decisions and defend against subsequent claims—and how it will be attacked in litigation.").

9. *See* Kirsten Branigan, Carole Nowicki, Lori Buza, & Jessica Allen, *Conducting Effective Independent Workplace Investigations in a Post-#MeToo Era*, 74 Disp. Resolution J. 85, 92 (2019); Douglas R. Richmond, *Navigating the Lawyering Minefield of Internal Investigations*, 63 Vill. L. Rev. 617, 687 (2018), available at https://digitalcommons.law.villanova.edu/vlr/vol63/iss4/2 (last visited Jan. 17, 2023).

10. Amer. College of Trial Lawyers Fed. Criminal Proc. Co., *2020 Update: Recommended Practices for Companies and Their Counsel in Conducting Internal Investigations*, at 3 & 11 (2020), available at https://www.actl.com/docs/default-source/default-document-library/position-statements-and-white-papers/2020—-recommended-practices-for-conducting-internal-investigations.pdf?sfvrsn=2473e169_2 (last visited Jan. 17, 2023) ("The goal at the outset should be frequent updating by oral reporting. Careful consideration should be given to the extent to which written reports should be rendered, if at all, during or at the conclusion of the investigation. There is typically limited utility and great risk in creating interim written reports of investigation.").

11. *Id*. at 11.

12. *See* Branigan *et al*., *supra* n. 9, at 85.

13. *Id*.

14. Lindsay Harris & Mark L. Tuft, *Attorneys Conducting Workplace Investigations: Avoiding Traps for the Unwary*, 25 Cal. Lab. & Emp. L. Rev. 4 (July 2011).

15. *Guiding Principles for Conducting Workplace Investigations*, Ass'n of Workplace Investigators, available at https://cdn.ymaws.com/www.awi.org/resource/resmgr/files/publications/AWI-Guiding-Principles-Broch.pdf (last visited Jan. 17, 2023).

16. *Id*.

17. Louis D Brandeis & Norman Hapgood, Other People's Money and How the Bankers Use It, *Chapter V: What Publicity Can Do* (2009), available at https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/other-peoples-money-chapter-v (last visited Jan. 17, 2023.)

18. *See*, *e.g*., Douglas R. Richmond, *supra* note 9, at 622 ("It is, after all, the client who determines the purpose and scope of the investigation . . . It is the client to whom the lawyers owe ethical duties of competence, communication, confidentiality, diligence, and loyalty, and who controls the attorney-client privilege with respect to the lawyers' communications.").

19. 59 Cal. App. 4th 110, 121 (1997) (*Wellpoint*).

20. *Id*.

21. *Id*. at 128.

22. *See Kaiser Foundation Hosp. v. Super. Court*, 66 Cal. App. 4th 1217, 1219, 1226 (1998) (allowing "employer [to] assert the protection of the attorney-client privilege and the attorney work product doctrine as to documents contained in its investigation files [even] where the employer pleads the adequacy of its prelitigation investigation into the claimed misconduct as a defense in the action"). *See also Wellpoint*, *supra* n. 19, at 122 (cautioning that there should not be a "blanket" nullification of the attorney client privilege and that the plaintiff should not have "carte blanche access" to the investigative file even where the defendant employer puts the adequacy of the investigation directly at issue).

23. *See*, *e.g*., *Gordon v. Nexstar Broadcasting, Inc*., 2019 WL 2177656, at *7 (E.D. Cal. 2019) (denying motion to compel production of communications between employment defense attorney and attorney workplace investigator even though defendant employer put the adequacy of the investigation directly at issue).

24. *See*, *e.g*., *Christensen v. Goodman Distribution Inc*., 2020 WL 4042938, at *3 (E.D. Cal. 2020).

25. *See*, *e.g*., Ramit Mizrahi, *Workplace Investigations In FEHA Cases–Making Them Work For You*, Advocate (June 2015) ("A plaintiff's attorney can ask the employer to make a *Wellpoint* election as a condition of the employee's participation. . . But, by refusing to make that election in advance, the employer is essentially saying, 'If the results are favorable to me, I will waive the privilege to get the information before the jury. If they are unfavorable, I will block the employee from getting corroborating information and block the jury from hearing the truth.'"), available at https://www.advocatemagazine.com/article/2015-june/workplace-investigations-in-feha-cases-making-them-work-for-you (last visited Jan. 17, 2023).

26. Lindsay Harris & Mark L. Tuft, *supra* n. 14; *see also Nichols v. Keller*, 15 Cal. App. 4th 1672, 1684 (1993) ("[E]ven when a retention is expressly limited, the attorney may still have a duty to alert the client to legal problems which are reasonably apparent, even though they fall outside the scope of retention."); Timothy J. Pierce, *Limited Scope Representation: Some Considerations*, 2 (same), available at https://inns.innsofcourt.org/media/69501/30172_november_2012_limitedscoperepresentationsomeconsiderations.pdf (last visited Jan. 17, 2023).

27. *Armendariz v. Found. Health Psychcare Servs., Inc*., 24 Cal. 4th 83, 111 (2000); Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 Employee Rights & Emp. Policy J. 189 (1997).

28. As Oppenheimer has previously recognized: "Many investigators believe they are too sophisticated to be

unwittingly swayed by the attitudes and opinions of others, but these influences are, by their very nature, unconscious. Research has shown that people are influenced and primed much more than they realize." *See* Amy Oppenheimer, *The Psychology of Bias: Understanding and Eliminating Bias in Investigations*, Ass'n of Workplace Investigators (2012), available at https://cdn.ymaws.com/www.awi.org/resource/collection/8AC6116E-0B82-4DA0-9FDB-14F840457195/Module%202%20-%20The%20Psychology%20of%20Bias.pdf (last visited Jan. 17, 2023) (discussing the impact unconscious biases can have on investigators).

29. *See*, *e.g.*, Mark Berger, *Can Employment Law Arbitration Work?* 61 U. Mo.—Kan. City L. Rev. 693, 714 (1993); Julius G. Getmant, *Labor Arbitration and Dispute Resolution*, 88 Yale L.J. 916, 936 (same); Block & Barasch, Proc. of N.Y.U. 44th Ann. Nat'l Conf. on Lab., at 298.

30. Lindsay Harris & Amy Oppenheimer, *supra* n. 1, at 5.

31. Ashley Lattal, *The Hidden World of Unconscious Bias and Its Impact on the "Neutral" Workplace Investigator*, 24 J.L. & Pol'y 411, 464 (2016), available at https://core.ac.uk/download/pdf/228608351.pdf (last visited Jan. 17, 2023) ("[I]f an organization repeatedly uses one or two investigators, these 'externals' may face the same biases as internal investigators—knowledge of the inner workings of the organization, dependence upon the organization, and ongoing relationships with those who may impact their livelihood.").

32. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *see also Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) ("It is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes.").

33. *See Conduct Detrimental: How the NFL and the Washington Commanders Covered Up Decades of Sexual Misconduct*, Committee on Oversight and Reform of the U.S. House of Representatives (December 8, 2022), available at https://www.documentcloud.org/documents/23396116-2022-12-08-nfl-report_final?responsive=1&title=0 (last visited Jan. 17, 2023).

34. *Id*. at 13.

35. *Id*. at 23 & 39.

36. *Id*. at 39.

37. *Id*. at 7, 23 & 30.

38. *Id*. at 27.

39. *Id*. at 34.

40. *Id*.

41. *Id*. at 23–24.

42. *Id*. at 11–12 & 64–65.

43. *Id*. at 13.

44. R.S. Nickerson, *Confirmation bias: A ubiquitous phenomenon in many guises*, 2 Rev. of Gen. Psych. 2, 175–220, 175 (June 1988), available at https://doi.org/10.1037/1089-2680.2.2.175 (last visited Jan. 17, 2023).

45. *Id*.

46. Ashley Lattal, *supra* n. 31, at 459.

47. *Id*. ("A client will often have a particular belief in the 'correct' outcome for an investigation, which they may communicate to the workplace investigator when he or she is retained. This can create an 'initial hypothesis' in the workplace investigator's mind and lead him or her down the dangerous road of confirmation bias."). *See also* Amy Oppenheimer, *supra* n. 28 (citing from the educational setting, a study that "showed that if teachers were randomly told that some students were superstars and others were not going to make it, the influence of those characterizations on the teacher's attitude toward the students impacted how the students performed.").

48. *See Doe v. U. of So. Cal.*, Case No. 2:20-cv-06098 (C.D. Cal. July 8, 2020).

49. Sometimes this failure to interview material witnesses occurs because the investigators' clients (defendant employers) specifically instruct the investigator to not interview particular witnesses or classes of witnesses (*e.g.*, former employees) and, other times, investigators make this decision on their own for fear of antagonizing their clients.

50. Pam Martens & Russ Martens, *Was Paul Weiss an Appropriate Law Firm to Investigate Sex Charges Against Roger Ailes?* Wall St. on Parade (August 24, 2016), available at https://wallstreetonparade.com/2016/08/was-paul-weiss-an-appropriate-law-firm-to-investigate-sex-charges-against-roger-ailes/ (last visited Jan. 17, 2023); Lloyd Grove, *Laurie Dhue's Lawyer Slams Fox's Probe Into Roger Ailes Harassment Claims*, Daily Beast (April 13, 2017) available at https://www.thedailybeast.com/laurie-dhues-lawyer-slams-foxs-probe-into-roger-ailes-harassment-claims (last visited Jan. 17, 2023).

51. Brian Steinberg, *CBS Hires Two Law Firms to Investigate Leslie Moonves Allegations*, Variety (August 1, 2018), available at https://variety.com/2018/tv/news/cbs-leslie-moonves-law-firms-allegations-1202893125/ (last visited Jan. 17, 2023).

52. Sumner Redstone, Wikipedia, available at https://en.wikipedia.org/wiki/Sumner_Redstone (last visited Jan. 17, 2023).

53. Susan Fowler, *I Spoke Out Against Sexual Harassment at Uber. The Aftermath Was More Terrifying Than Anything I Faced Before*, Time (February 17, 2020), available at https://time.com/5784464/susan-fowler-book-uber-sexual-harassment/ (last visited Jan. 17, 2023); Lisa Rein, *VA chief Wilkie sought to dig up dirt on woman who complained of sexual assault, agency insiders say*, The Washington Post

(Feb. 8, 2020), available at https://www.washingtonpost.com/politics/va-chief-wilkie-sought-to-dig-up-dirt-on-woman-who-complained-of-sexual-assault-agency-insiders-say/2020/02/08/c5823e44-49e1-11ea-9164-d3154ad8a5cd_story.html (last visited Jan. 17, 2023); Matthew Sheffield, *New York mayoral candidate Bo Dietl admits Fox News wanted him to spy on women alleging sexual harassment*, Salon (May 5, 2017), available at https://www.salon.com/2017/05/05/new-york-mayoral-candidate-bo-dietl-admits-fox-news-wanted-him-to-spy-on-women-alleging-sexual-harassment/ (last visited Jan. 17, 2023); *Sharpe v. Utica Mut. Ins. Co.*, 756 F.Supp.2d 230, 245 (N.D.N.Y. 2010); Jenny Vrentas, *Panel Finds Daniel Snyder Interfered With Sexual Harassment Investigation*, N.Y. Times (June 22, 2022), available at https://www.nytimes.com/2022/06/22/sports/football/dan-snyder-harassment-news-congress.html (last visited Jan. 17, 2023).

54. *Kinney v. United HealthCare Servs., Inc.*, 70 Cal. App. 4th 1322, 1332 (1999).

55. Pam Martens & Russ Martens, *supra* n. 50.

56. Lindsay Harris & Amy Oppenheimer, *supra* n. 1, at 5.

57. *Wellpoint*, *supra* n. 19.

58. Pam Martens and Russ Martens, *supra*, n. 50. (When Paul, Weiss, Rifkind, Wharton & Garrison LLP was hired to "investigate" sexual abuse allegations by the Board of Trustees of Syracuse University, Paul, Weiss "failed to produce the underlying notes and files . . . [about] what was discussed in its interviews which were done with litigation counsel present.").

59. *Barton v. Zimmer Inc.*, 2008 WL 80647, at *9 (N.D. Ind. Jan. 7, 2008); *Harding v. Dana Trans., Inc.*, 914 F.Supp. 1084, 1090-1100 (D.N.J. 1996) (finding in a sexual discrimination case that defendant had waived the attorney-client privilege where defendant's attorney "acted as [it]s attorney as well as its investigator.").

60. Indeed, many of the authorities cited by Harris and Oppenheimer specifically recommend that investigators ensure that the interviewees do not record their own interviews. *See* Kirsten Branigan, *et al.*, *supra* n. 9, at 96.

61. Investigators say that they do not electronically record witness interviews because doing so will have a "chilling effect" causing the interviewee to be less forthcoming and preventing them from "opening up truthfully," or it will somehow interfere with the investigator's ability to build a rapport with the witness, or it will make "witnesses nervous." *See* Keith Rohman & Elizabeth Rita, *Capturing the Witness Statement*, 4 AWI J. 3, 8-9 (July 2013), available at https://cdn.ymaws.com/www.awi.org/resource/collection/8AC6116E-0B82-4DA0-9FDB-14F840457195/Module%204%20-%20Capturing%20the%20Witness%20Statement%20-%20A.pdf (last visited Jan. 17, 2023).

62. *Id.* at 2.

63. Lindsay Harris & Amy Oppenheimer, *supra* n. 1, at 2.

64. *Id.* at 7.

65. *See*, *e.g.*, Ramit Mizrahi, *supra* n.25 ("Ask that all interviews be recorded. If they are, and a *Wellpoint* election is made, those recordings can make your case. This author had a case in which the investigator's summary of what a key witness said (and the findings in the report) differed drastically from the witness's taped statements. This called into question the integrity of the entire investigation. Similarly, recordings capture nuances such as tone of voice, give you accurate records of what was said, prevent bullying and intimidation, and allow you to determine the propriety of the interviewer's techniques."). Both of the authors of this article have also represented clients being interviewed by attorney workplace investigators who have not only attributed to the clients' statements they did not make but have also failed to note critically important statements that the clients *did* make.

66. *Id.* at 5.

67. *Id.* at 7.

68. *Id.*

69. *See Is Your Investigator More Biased Than You Think? Part I: How Unconscious Bias Can Disrupt Your Workplace Investigations*, Ogletree Deakins (July 17, 2017), available at https://ogletree.com/insights/is-your-investigator-more-biased-than-you-think-part-i-how-unconscious-bias-can-disrupt-your-workplace-investigations/ (last visited Jan. 17, 2023) (acknowledging that "[t]here are three relevant ways in which unconscious bias may manifest itself during workplace investigations: (1) confirmation bias; (2) "like me" (or not like me) bias; and (3) priming.").

70. *Id.*

71. Because substantive pre-investigation discussions between the attorney investigator and his or her client (the defendant employer) can prime the investigator to become (consciously or subconsciously) biased against the complainant and otherwise rig the investigation in favor of the employer, it is extremely important to ensure that the complainant's counsel is included in all communications between the investigator and his or her client and the client's employment defense counsel. *See*, *e.g.*, Ashley Lattal, *supra* n. 31, at 416-17. ("There is much room for bias to seep into the investigation process, including during initial discussions with the client [] about the case, preinterview document review, interviews regarding the line of questioning and the phrasing of questions, when deciding which witnesses to interview and what additional evidence to review, and when deciding which evidence to reference and which to ignore in reports").

CALIFORNIA EMPLOYMENT LAW NOTES

AUTHOR*

Anthony J. Oncidi

AGE/NATIONAL ORIGIN CASE WAS PROPERLY DISMISSED DESPITE "DIRECT EVIDENCE" OF DISCRIMINATORY ANIMUS

Opara v. Yellin, 57 F.4th 709 (9th Cir. 2023)

Joan Opara was terminated from her employment as an IRS revenue officer after the IRS determined she had committed several "UNAX offenses" (i.e., incidents of unauthorized access of taxpayer data). Following her termination, Opara sued the Treasury Secretary, alleging she was terminated in violation of the Age Discrimination in Employment Act and Title VII for, respectively, age and national origin discrimination. The district court granted summary judgment to the Treasury Secretary, and the Ninth Circuit affirmed, concluding that Opara's direct evidence of age-related discriminatory animus (several age-related comments from a decision maker), while sufficient to support a prima facie case of age discrimination, was insufficient to raise a genuine issue as to pretext concerning the reasons offered by the Secretary for the termination. The reason the direct evidence was insufficient to defeat the summary judgment motion was because it consisted entirely of Opara's own uncorroborated and self-serving testimony and allegations (citing *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054 (9th Cir. 2002)). The Ninth Circuit also affirmed dismissal of Opara's age/national origin discrimination claims based on her failure to show pretext for the UNAX offenses.

FAMILY COURT MAY ORDER EMPLOYER TO PROVIDE DETERMINATION OF ARREARAGES OWED IN SPOUSAL SUPPORT CASE

Brubaker v. Strum, 303 Cal. Rptr. 3d 579 (2023)

The family court ordered the employed former husband in this case to pay his former wife monthly child and spousal support payments. The husband's employer was ordered to withhold the total amount of support payments from the husband's paychecks and to forward those amounts to the California Child Support Services Department. Later, the wife filed a request with the family court for an order to determine child and spousal support arrearages. The family court denied the wife's request on the ground that the wife should seek relief directly from the husband's employer with respect to all periods during which there was a valid income withholding order in place. The Court of Appeal reversed, holding that pursuant to Cal. Fam. Code § 5241, the wife was permitted to obtain an order from the family court compelling the husband to provide a determination of arrearages. The appellate court also reversed the $9,329.50 in sanctions the family court ordered the wife's attorney to pay to the husband.

BACKGROUND CHECK AGENCY MAY HAVE VIOLATED STATE LAW BY DISCLOSING CONVICTION

Kemp v. Superior Court, 86 Cal. App. 5th 981 (2022)

In 2020, the background reporting agency in this case disclosed to an employer a conviction of an individual from 2011 who had applied for a job. Following receipt of the report, the prospective employer withdrew its job offer. The individual then filed this lawsuit against the reporting agency on the ground that the conviction/parole was too old to have been the subject of such a report. Although it is legal under the federal Fair Credit Reporting Act (FCRA) for a regulated agency to report a person's prior conviction to a prospective employer no matter how long ago it occurred, under the California Investigative Consumer Reporting Agencies Act (ICRAA) and the California Consumer Credit Reporting Agencies Act, a reporting agency is prohibited from reporting a "conviction of a crime that, from the date of disposition, release, or

parole, antedate the report by more than seven years." The reporting agency demurred to the complaint on the ground that the parole period ended fewer than seven years in the past, but the trial court overruled the demurrer, holding that the "plain meaning of 'from the date of . . . parole' refers to the start date of conditional release," which had occurred more than seven years before the report was issued. The Court of Appeal denied the reporting agency's writ petition (thus finding the demurrer was properly sustained in part), and ordered the trial court to further overrule the demurrer to the extent the trial court had held that the FCRA preempted the ICRAA claim.

FORMER TEACHER'S DEFAMATION SUIT WAS PROPERLY DISMISSED UNDER ANTI-SLAPP STATUTE

Bishop v. The Bishop's School, 86 Cal. App. 5th 893 (2022)

Chad Bishop was a teacher at The Bishop's School for 16 years. In March 2019, Bishop entered into a contract as an English teacher for the 2019-20 academic year. In September 2019, Bishop and Kendall Forte, a 19-year-old former student of the School who had graduated the previous June, exchanged "flirtatious" text messages with one another. Forte had posted an altered version of the texts on social media, and the School received communications from concerned parents about the incident. The School terminated Bishop's employment shortly thereafter for violating the School's policies and conduct expectations and related reasons. Bishop filed a lawsuit against the School for breach of contract and the Head of School (Ron Kim) for defamation. In response, defendants filed a motion to strike the first amended complaint under the anti-SLAPP statute as well as a demurrer. The trial court granted the anti-SLAPP motion as to the defamation claim, but denied it as to the contract claim.

The Court of Appeal affirmed dismissal of the defamation claim against Kim on the ground that Kim's statement to the school newspaper about the reasons for Bishop's termination constituted speech in connection with the issue of public interest of student safety, and was entitled to anti-SLAPP protection. The Court further held that Bishop could not establish a probability that he could prevail on the defamation claim because he could present no evidence that Kim had made a false and defamatory statement about Bishop. The Court also held that neither the termination letter nor the termination itself was protected speech under the anti-SLAPP statute.

JUDGMENT AGAINST EMPLOYER WAS ENFORCEABLE WHERE APPEAL WAS INVALID

Patel v. Chavez, 85 Cal. App. 5th 712 (2022)

Manuel Chavez was employed as an on-site hotel property manager by DTWO & E, Inc. and Stuart Union, LLC from 2002 to 2016. Chavez alleged he was paid less than the minimum wage and that the employers committed wage theft. In 2017, the Labor Commissioner issued two orders, decision or awards (ODA's) finding in favor of Chavez and ordered Stuart Union to pay $235,000. Stuart Union brought a procedurally defective appeal pursuant to Cal. Lab. Code 98.2, and PIIC (the insurance company) posted a bond under protest. The Court of Appeal affirmed several orders in favor of Chavez, including a dismissal in the entirety, finding that the appeal was invalid. After PIIC refused to release the bond to Chavez, Chavez filed a motion with the trial court, which entered judgment against the employer and PIIC as surety.

In this appeal, the employer claimed the trial court lacked jurisdiction to release the bond or enter judgment. The Court of Appeal rejected the argument that the proceedings should have been stayed pending the appeal because "[t]he pendency of an appeal does not stay enforcement of a money judgment absent an undertaking." An undertaking is a separate bond that must be posted that ranges between 1.5 to 2 times the amount of the judgment; however, in this case, the employer only posted a bond in the amount of the judgment itself. The Court, rejecting the employer's second argument that the trial court lacked jurisdiction because the section 98.2 appeal was invalid, held that while the posting of a bond is a jurisdictional prerequisite to a section 98.2 appeal, the reverse (i.e., a valid section 98.2 appeal is a jurisdictional prerequisite for a court to issue orders regarding such a bond) is "not necessarily true." *See also Adanna Car Wash Corp. v. Gomez*, 87 Cal. App. 5th 642 (2023) (employer's posting of licensing bond does not satisfy appeal bond requirement under section 98.2).

REAL ESTATE AGENTS ARE INDEPENDENT CONTRACTORS AS A MATTER OF LAW IF REQUIREMENTS MET

Whitlach v. Premier Valley, Inc., 86 Cal. App. 5th 673 (2022)

James Whitlach, a real estate agent, brought a PAGA suit against Premier Valley, Inc. dba Century 21 MM and Century 21 Real Estate, LLC (collectively "Century 21"). Whitlach alleged that Century 21's real estate agents were misclassified as independent contractors. The Court of Appeal affirmed the trial court's holding that section 650

of the Cal. Unemp. Ins. Code, rather than the ABC test or *S.G. Borello & Sons, Inc. v. Dep't of Indus. Rels.*] 48 Cal. 3d 341 (1989) was the proper test for classification of real estate agents because of A.B. 5's exemption for real estate licensees. Accordingly, real estate licensees are independent contractors if: (1) "substantially all" of their remuneration comes from sales; and (2) the written contract provides that the licensee is an independent contractor. Examining legislative history, the Court of Appeal explained this meant that Century 21's real estate licensees "as a matter of law" were independent contractors and not employees. The Court of Appeal rejected Whitlach's arguments that the statute was unconstitutional and that the contract was unconscionable. As to the first point, real estate agent contracts are unique and thus the legislature could have rationally decided that their unique nature warranted an exemption. The contract was also not unconscionable because the statute expressly permitted the designation of real estate agents as independent contractors. Because PAGA claims can only be brought by "aggrieved employee[s]," the claim was properly dismissed.

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LABOR AND EMPLOYMENT LAW

CALIFORNIA LAWYERS ASSOCIATION

WAGE AND HOUR CASE NOTES

AUTHOR*

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WHOLESALE PAGA WAIVER IN ARBITRATION AGREEMENT UNCONSCIONABLE

Navas v. Fresh Venture Foods, LLC, 85 Cal. App. 5th 626 (2022)

This case will be useful for any plaintiff-side employment attorneys looking to show that an arbitration agreement is unconscionable because it contains a wholesale PAGA waiver.

Navas and other Fresh Venture Foods (FVF) employees filed a class action lawsuit against FVF for minimum wage and overtime violations. The complaint also alleged a claim for penalties under the Private Attorneys General Act (PAGA). Navas signed an arbitration agreement requiring him to arbitrate all disputes against FVF on an individual basis, and waiving his right to bring any claims on a class or representative basis, including his right to bring a PAGA claim.

The arbitration agreement was substantively unconscionable because, among other things, it required Navas to waive his right to bring a PAGA claim, contrary to the rule enunciated under *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014). Although employers may require employees to bring the "individual" component of a PAGA claim in arbitration, they may not include a wholesale PAGA waiver in a mandatory arbitration agreement. *See Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022). Navas's arbitration agreement contained a wholesale PAGA waiver, and this illegal term contributed to the unconscionability of the entire agreement. When viewed in combination with a number of other unconscionable terms, the court held that the agreement as a whole was unenforceable. The trial court did not abuse its discretion in refusing to sever the offending terms because there were so many of them.

OUTSIDE SALESPERSON EXEMPTION DOES NOT APPLY TO EMPLOYEE WORKING AWAY FROM PROPERTY NOT CONTROLLED/OWNED BY EMPLOYER

Espinoza v. Warehouse Demo Services, Inc., 86 Cal. App. 5th 1184 (2022)

This case provides extensive discussion of the circumstances under which California's "outside salesperson" exemption applies to an employee who works on property that is not owned or controlled by the employer.

Warehouse Demo Services (WDS) is the exclusive in-house product demonstration company for Costco. WDS employs non-exempt "demonstrators" to perform demonstrations of products inside Costco warehouses. Demonstrators are assigned to a single Costco and do not travel. WDS does not rent space from Costco, but maintains an office inside each Costco where it has employees.

Espinoza worked as a WDS demonstrator for five years. She worked in a specific demonstration area inside a single Costco warehouse. She worked four days a week, six hours a day, a schedule set by WDS. She was not allowed to leave the demonstration area except when another demonstrator relieved her for breaks. Espinoza was supervised by an on-site event manager and two shift supervisors. She was required to clean up her demonstration area at the end of her shift.

Espinoza filed a wage-and-hour class action against WDS, alleging claims for minimum wage, overtime, and missed meal and rest breaks. WDS filed a summary judgment motion, arguing that Espinoza's claims failed because she fell within the "outside salesperson" exemption. Outside salespersons" are exempt from statutory overtime, minimum wage, reporting time, and meal-and-rest break requirements. *See* Cal. Lab. Code § 1171. To qualify as an "outside salesperson," the

employee must: 1) work more than half the time away from his or her employer's place of business; and 2) be engaged in sales.

The trial court granted WDS's motion, concluding that Espinoza worked more than half of her time away from WDS's place of business because WDS did not maintain, own, or control any space within Costco. The appellate court reversed. The main reason for the exemption is that outside salespersons generally control their own hours and it is difficult to control their working conditions. The facts of this case present the "perfect example" of when an employer controls its employees' hours and working conditions on property it does not own or lease.

Although WDS did not lease space from Costco, it functionally treated Costco warehouses as its satellite branches, maintaining office space in each of them. Unlike most traveling salespeople, Espinoza did not set her own schedule or decide where to work. Rather, WDS set her schedule, which was the same from week to week, and Espinoza worked in the same Costco warehouse from day to day. Espinoza was closely supervised by three different supervisors. She was required to clock in and out, and was not allowed to leave her demonstration area except when someone relieved her for meal and rest breaks. Accordingly, because WDS closely supervised Espinoza, required her to work in a specific location, and set her schedule, the traditional reasons for applying the outside salesperson exemption did not apply.

EMPLOYERS PAYING "PERCENTAGE BONUSES" THAT INCREASE GROSS WAGES NOT REQUIRED TO RECALCULATE OVERTIME

Lemm v. Ecolab Inc., 87 Cal. App. 5th 159 (2023)

There are many different ways for employers to calculate the "regular rate of pay" for purposes of overtime compensation. This case is a win for California employers because it articulates a simple rule for paying sales-based bonuses to non-exempt employees who work overtime hours.

Ecolab provides sanitation and pest control services. Lemm worked for Ecolab as a non-exempt salesperson. He installed and maintained Ecolab equipment, and sold Ecolab products. Lemm was paid hourly wages every two weeks. He was also given a monthly bonus that was calculated based on his sales. If he met or exceeded a specified sales goal, his gross wages for the month—which already included overtime wages—were increased by a certain percentage. The higher his sales, the higher was the percentage.

Under California law, employees are entitled to overtime compensation for working more than eight hours in a day or 40 in a week. Overtime compensation is one-and-a-half times the "regular rate of pay," which must incorporate any non-discretionary bonuses like the one Ecolab paid to Lemm. The parties in this case disagreed about how to incorporate the bonus into the regular rate.

Lemm argued that Ecolab was required to follow the bonus calculation set forth in the DLSE Enforcement Manual § 49.2.4, which was adopted in *Alvarado v. Dart Container Corp. of California*, 4 Cal. 5th 542 (2018). *Alvarado* involved a flat-sum bonus, under which employees were paid $15 (i.e., a flat sum that never changed) for working a shift on a Saturday or Sunday. Under this approach, employers must determine the bonus amount attributable to the workweek (or other period in which the bonus was earned), divide that amount by the number of hours worked in the workweek, and then increase the overtime rate accordingly.

Ecolab disagreed, arguing that its bonus was not a flat-sum bonus, but was instead a percentage bonus, under which Lemm's gross wages, which *already incorporated overtime pay*, were increased by a certain percentage depending on his sales. Ecolab argued that it was not required to go back and increase the overtime compensation rate based on the bonus amount because its bonus already incorporated Lemm's overtime compensation. It argued that its approach was consistent with a federal regulation, 29 C.F.R. § 778.210, which permits employers to simultaneously pay overtime compensation due on a monthly bonus by way of a percentage increase to straight time and overtime wages.

The appellate court held that Ecolab's compensation program complied with California law. Since Ecolab paid Lemm a bonus by increasing all of his wages—including overtime wages—by a certain percentage, it was not required to use the *Alvardo* formula and further increase his regular rate based on the bonus. This would have improperly required Ecolab to double-count the overtime compensation in its regular rate of pay calculation. Where a bonus already includes overtime pay, the employer is not required to pay "overtime on overtime."

FEDERAL AGENCY DECISION PREEMPTING CALIFORNIA'S MEAL AND REST BREAK LAWS FOR TRUCK DRIVERS IS RETROACTIVE

Valiente v. Swift Transp. Co. of Arizona, LLC, 54 F.4th 581 (9th Cir. 2022)

Congress passed the Motor Carrier Safety Act (MCSA) in 1984 to promote the safe operation of commercial motor vehicles, including trucks. The MCSA gives the Secretary

of Transportation the authority to decide that State laws regulating commercial motor vehicle safety are preempted. The Secretary has delegated this preemption authority to the Federal Motor Carrier Safety Administration (FMCSA).

In 2008, the FMCSA rejected a petition to rule that California's meal and rest break laws as applied to truck drivers were preempted by the MCSA, finding that the laws were not sufficiently related to commercial motor vehicle safety. In December 2018, the FMCSA reversed course, ruling that California's meal and rest break laws were preempted for any truck drivers subject to the MCSA.

In 2021, the Ninth Circuit ruled that the FMCSA's preemption decision was valid, but left open the question of whether the decision applied retroactively. *See Intl. Bhd. of Teamsters, Local 2785 v. Fed. Motor Carrier Safety Admin.*, 986 F.3d 841 (9th Cir. 2021). In *Valiente*, the Ninth Circuit answered this question, ruling in a 2-1 decision that the FMCSA's preemption decision applied retroactively, wiping out two meal-and-rest break class actions filed on behalf of California truck drivers in October 2018, two months before the FMCSA decision.

Interestingly, the pro-employer majority opinion was written by Judge Holly A. Thomas, a recent Biden appointee who formerly served as Deputy Director of the California Civil Rights Department. Judge Thomas applied the two-part retroactivity test set forth in *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994). If Congress has clearly authorized retroactive agency action, and that agency has expressed an intent to act retroactively, the court's inquiry ends. If the intent of Congress or the agency is unclear, the court proceeds to the second step to determine whether retroactive application would impair vested rights or have some other impermissible effect.

The majority concluded that retroactive application of the FMCSA's preemption decision was proper under the first step. The MCSA is clear: a State "may not enforce" preempted motor vehicle safety laws. The FMCSA preemption decision is similarly clear: California may no longer enforce its meal and rest break laws with respect to truck drivers subject to the MCSA. Any court decision enforcing California's meal and rest break laws would thus contravene the statute and the clear direction of the FMCSA, regardless of when the lawsuit was filed.

The dissent disagreed, finding that the FMCSA had not clearly expressed any intent for its preemption decision to apply retroactively. Under the second *Landgraf* step, the dissent concluded, retroactive application of the preemption decision impermissibly impaired the settled expectations of truck drivers that California's meal and rest break laws would apply.

IN PAGA CASE, THE STATE-MUST-CONSENT-TO-ARBITRATION RULE IS PREEMPTED; ARBITRATOR, NOT COURT, MUST DECIDE WHETHER AGREEMENT COVERS ENTIRE PAGA CLAIM

Lewis v. Simplified Lab. Staffing Sols., Inc., 85 Cal. App. 5th 983 (Cal. App. 2d Dist. 2022)

This is the first published appellate court decision to discuss the impact of *Viking River* on a motion to compel arbitration in a PAGA case. Unfortunately, it does not provide guidance on the most significant question generated by the U.S. Supreme Court's decision: whether a PAGA plaintiff whose "individual" PAGA claim is sent to arbitration loses standing to pursue the PAGA claim on behalf of others in court.

Simplified is a staffing agency. When Sylvia Lewis started working there in 2019, she signed an arbitration agreement governed by the Federal Arbitration Act (FAA) in which she agreed to arbitrate all "claims that arise out of [her] relationship with [Simplified]." Lewis filed a PAGA-only action against Simplified in 2020. Simplified moved to compel arbitration. The trial court denied the motion on the grounds that pre-dispute agreements to arbitrate PAGA claims are not enforceable, citing *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348 (2014). Simplified appealed. While the appeal was pending, the U.S. Supreme Court decided *Viking River*. The appellate court asked the parties to brief the impact of *Viking River*. This decision followed that briefing.

The Court first held that California's "State-must-consent" rule—i.e., PAGA claims cannot be arbitrated because the State is the real party in interest and has not consented to arbitration—does not survive *Viking River*. *Viking River* rejected *Iskanian*'s characterization of PAGA actions as a dispute between the State and the employer. Instead, the dispute is one between the employee and the employer arising out of their contractual relationship. *Viking River* rejected the notion that PAGA actions are inconsistent with the objectives of arbitration, distinguishing PAGA actions from class actions, which have multiple complex requirements making them ill-suited for arbitration. Given *Viking River*'s conclusion that PAGA actions may be arbitrated without offending the FAA, and that PAGA actions are more properly characterized as between the employee and the employer, the "State-must-consent" rule—which disregards the employee's choice of the arbitral forum for all disputes—is preempted.

The parties agreed that Lewis's "individual" PAGA claim—that is, the PAGA claim based on Cal. Lab. Code violations she personally suffered—must be arbitrated. They disagreed, however, about the fate of the PAGA claim on behalf of others. Simplified urged the court to dismiss that claim for lack of standing, per Part IV of *Viking River*. Lewis argued she should be allowed to litigate the claim in court, urging the court to reject the U.S. Supreme Court's standing analysis.

The Court punted. Rather than decide the standing issue, the Court instead held that the arbitrator should decide in the first instance whether the arbitration agreement even covered the PAGA claim on behalf of others. If the arbitration agreement covers the entire PAGA claim—both its individual and non-individual components—the Court would not need to decide the standing issue, because the entire claim would proceed in arbitration. In sending this question to the arbitrator, the Court relied on a rule from the American Arbitration Association's employment rules, which says that the arbitrator "shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the agreement." Significantly, the Court did not rely on a delegation clause, or even discuss whether the parties had validly delegated questions about the scope of the agreement to the arbitrator.

WHERE EMPLOYER'S OBLIGATION TO PAY WAGES WITHIN SEVEN DAYS FALLS ON WEEKEND, TIME TO PAY EXTENDED TO NEXT DAY THAT IS NOT A HOLIDAY

Parsons v. Estenson Logistics, LLC, 86 Cal. App. 5th 1260 (2022)

Robert Parsons filed a PAGA-only lawsuit against Estenson alleging a claim for violation of Cal. Lab. Code § 204, one of California's timely payment provisions. Section 204 provides that wages for employees who are paid weekly are timely only if they are paid "not more than seven calendar days following the close of the payroll period." Parson's lawsuit involved a single question: what happens if the seventh calendar day falls on a Saturday?

Estenson took the position that wages may be paid the following Monday because Cal. Code Civ. Proc. § 12a provides that weekends are holidays, and further provides that "If the last day for the performance of any act provided or required by law to be performed within a specified period of time is a holiday, then that period is hereby extended to and including the next day that is not a holiday."

Parsons disagreed, arguing that Cal. Civ. Proc. § 12a did not apply to payment obligations arising under the Cal. Lab. Code, but only to civil procedure deadlines such as statutes of limitations.

The trial court sided with Estenson, and the appellate court affirmed.

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NLRA CASE NOTES

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BOARD EXPANDS TRADITIONAL MAKE-WHOLE REMEDY TO INCLUDE DIRECT OR FORESEEABLE PECUNIARY HARMS

Thryv, Inc., 372 N.L.R.B. No. 22 (2022)

In a 3-2 decision, the National Labor Relations Board (NLRB or Board) expanded its traditional "make whole" remedy to include any "direct or foreseeable pecuniary harms" suffered by employees in all cases. These direct and foreseeable pecuniary harms were previously reserved for unusual cases.

The respondent operated a marketing agency whose salesforce was represented by the union. In July 2019, respondent began implementing a proposal to layoff certain employees effective in September 2019. The respondent mailed severance packages to affected employees prior to the layoff, and prior to any bargaining with the union. The respondent offered to bargain over the effects of the layoff decision, but asserted the parties were at impasse concerning the layoff decision. The respondent refused to respond to union information requests related to the layoff and potential future work for separated employees.

The administrative law judge (ALJ) found that the respondent violated section 8(a)(5) of the National Labor Relations Act (NLRA or Act) by failing to respond to the union's requests for information. The ALJ also found that the respondent did not violate section 8(a)(5) by unilaterally laying off the employees because, although the respondent had a duty to bargain over the economic layoff, the parties had reached impasse–based on the union's failure to make counter proposals prior to the layoff date.

The Board adopted the ALJ's finding that the respondent violated the Act by failing to respond to the information requests. Contrary to the ALJ, the Board also found that the layoffs violated section 8(a)(5) because the economic layoffs were a mandatory subject of bargaining and the respondent failed to satisfy its bargaining obligation. The fact that the respondent's decision was presented as a *fait accompli*, that the union did make counter proposals, and that the respondent's failure to respond to the information requests impeded bargaining all precluded the parties from reaching impasse. Most notably, the Board then clarified and expanded its traditional "make whole" remedy to include any "direct or foreseeable pecuniary harms" suffered by employees. The employees in the case sought three remedies for alleged pecuniary harms suffered as a result of the unlawful layoff: restoration of their prior book of business; reimbursement for the costs of maintaining a company car for business purposes; and out-of-pocket medical expenses incurred while on layoff. While the Board's order included the expanded make whole remedy, the Board deferred the determinations of whether the employees claims here were direct or foreseeable to a later compliance proceeding.

Dissenting, Members Kaplan and Ring agreed with the majority that employees should be made whole for losses suffered as a direct result of unfair labor practices. However, the dissenters disagreed with the blanket rule requiring compensation for "foreseeable" pecuniary harms. Rather, they asserted that indirect losses should only be ordered when the causal link was sufficiently clear, which requires an individual factual determination.

BOARD RETURNS TO PRIOR STANDARD CONCERNING ACCESS BY EMPLOYEES OF CONTRACTORS TO THIRD-PARTY PROPERTY

Bexar Cnty. Performing Arts Ctr. Found. d/b/a Tobin Ctr. for the Performing Arts, 372 N.L.R.B. No. 28 (2022)

In a 3-2 Decision, the NLRB returned to its standard established in *New York, New York Hotel & Casino*, 356 N.L.R.B. No. 907 (2011), providing that a property owner may lawfully

exclude off-duty employees who regularly work on the property for on onsite contactor and who seek to engage in section 7 activity on the property only where the property owner is able to demonstrate that the contractor employees' section 7 activity significantly interferes with the use of the property or where the exclusion is justified by another legitimate business reason.

The Tobin Center for the Performing Arts leased performance space to the San Antonio Symphony, the Ballet San Antonio, and the Opera San Antonio. The Symphony's agreement with the Tobin Center granted it the right to use the facility for 22 weeks each year for rehearsals and performances. The agreement also required Symphony employees to abide by all rules and regulations of the Tobin Center and granted the Tobin Center the ability to remove any disorderly or undesirable person. Approximately 79 percent of the Symphony's performances and rehearsals were done at the Tobin Center. On February 17, 2017, a group of Symphony employees leafleted peacefully at the entrance to the Tobin Center during a Ballet performance to raise awareness that the Ballet was using recording music instead of live music during the performance, thereby denying Symphony employees work. Event employees and local police officers forced the Symphony employees to relocate across the street to a public sidewalk.

In the Board's first decision in this case, *Bexar County I*, 368 N.L.R.B. No. 46 (2019), it announced a new standard to govern situations where off-duty contractor employees sought to access property where they regularly worked but that was not owned by their employer for NLRA purposes. That standard contained two steps. First, to be deemed to have a sufficient connection to the property to warrant greater section 7 access rights, the employees needed to work regularly and exclusively on the property. Second, if employees did work regularly and exclusively on the property, they could still be excluded from public and private areas of the property if there was a reasonable, non-trespassory alternative for their message. On appeal, the D.C. Circuit held that the terms and application of the Board's new standard was arbitrary and remanded the case back to the Board.

In the Board's current decision of the case, the Board declined to proceed with the test announced in *Bexar County I* and instead retuned to its prior test first announced in *New York, New York Hotel & Casino*. Under this standard, a property owner may exclude off-duty regular employees of an onsite contractor who seek to engage in section 7 activity only where it can demonstrate that the activity significantly interferes with the use of the property or the exclusion is justified by a legitimate business reason. This standard makes it easier for contractor employees to gain access to third party property for exercise of section 7 rights, and makes it more difficult for a property owner to lawfully exclude them. The Board applied its standard retroactively. Because the Symphony employees used the Tobin Center regularly and the respondent had not shown that the leafleting significantly interfered with the use of its property, the Board found the property's exclusion of employees violated the Act.

Dissenting, Members Kaplan and Ring would have retained the standard from *Bexar County I* because it more appropriately balanced property and section 7 rights.

BOARD AFFIRMS BRIGHT-LINE STANDARD REQUIRING EMPLOYER DISCLOSURES AND ASSURANCES PRIOR TO QUESTIONING EMPLOYEES DURING UNFAIR LABOR PRACTICE INVESTIGATIONS

Sunbelt Rentals, Inc., 372 N.L.R.B. No. 24 (2022)

In a 3-2 decision, the Board reaffirmed its bright-line standard from *Johnnie's Poultry*, 146 N.L.R.B. No. 770 (1964), requiring that an employer who questions employees, as part of an unfair labor practice (ULP) investigation, provide a series of disclosures and assurances to avoid engaging in an unlawful interrogation.

In 2018, a group of employee drivers for the respondent selected the union as their collective bargaining representative. The General Counsel later filed a complaint, alleging that the respondent committed multiple unfair labor practices in 2018 and 2019. In preparation for the NLRB hearing, the respondent's attorney met with two unit employees it planned to call for the hearing. The attorney informed the first employee of the purpose for the questions, that his participation was voluntary, and that he was entitled to his own attorney, but did not inform the employee that his responses would not affect his job. The attorney informed the second employee of the purpose of the questioning and that his responses would not affect his job, but did not inform the employee that his participation was voluntary.

Among other findings, the ALJ applied the NLRB's bright-line *Johnnie's Poultry* standard to find that the respondent's questioning of both employees constituted an unlawful interrogation under section 8(a)(1) of the Act due to the lack of strict adherence to the required disclosures and assurances.

The Board largely affirmed the ALJ's other findings in the case, but severed the interrogation issues and issued a

notice and invitation to file briefs regarding whether to adhere to or overrule the *Johnnie's Poultry* standard. In the current decision, the Board reaffirmed its bright-line rule from *Johnnie's Poultry* that requires a questioner to: explain the purpose of the questions; provide assurances that participation is entirely voluntary and that no reprisals will take place; conduct the questioning in a context free from hostility to union organization; limit questions to those with a legitimate purpose; refrain from inquiring into the employee's subjective state of mind; and refrain from otherwise interfering with statutory rights. The Board noted that appellate courts had generally, but not universally, accepted the bright-line rule from *Johnnie's Poultry*. The Board noted the benefits of this approach, including the "simplicity and predictability" of the standard and the wide availability of template documents containing the required disclosures. The Board rejected a totality of circumstances test used by certain reviewing courts, declined to apply the multi-factor test enunciated in *Rossmore House*, 269 N.L.R.B. No. 1176 (1984) used by the Board when employer questioning occurs outside of a ULP investigation, and declined to adopt a rebuttable presumption standard suggested by the dissenters.

Dissenting, Members Ring and Kaplan opined that a per-se violation standard for the *Johnnie's Poultry* rule is outside the Board's authority. The dissenters instead would implement a standard establishing a rebuttable presumption that questioning was coercive. Under this approach, if a respondent violates the requirements of *Johnnie's Poultry*, the respondent would then have the opportunity and the burden to show that the questioning was not coercive under the totality of the circumstances.

BOARD REINSTATES *SPECIALTY HEALTHCARE* STANDARD WHICH REQUIRES THAT A PARTY SEEKING TO EXPAND A PETITIONED FOR UNIT MUST DEMONSTRATE AN OVERWHELMING COMMUNITY OF INTEREST

Am. Steel Construction, Inc., 372 N.L.R.B. No. 23 (2022)

In a 3-2 decision, the NLRB overruled its unit determination standard established in *PCC Structurals*, 365 N.L.R.B No. 160 (2017), and *The Boeing Co.*, 368 N.L.R.B. No. 67 (2019), and reinstated its prior standard from *Specialty Healthcare*, 357 N.L.R.B. No. 934 (2011). Under the reinstated standard, employers who contend that a petitioned-for unit is inappropriate, without the addition of other employees, must demonstrate a heighted "overwhelming" community of interest between the petitioned-for and excluded employees to invalidate a unit.

The Union petitioned to represent all field ironworkers for the employer. The employer claimed the petitioned-for unit was inappropriate because any unit must also include painters, drivers, and inside fabricator employees of the employer.

The regional director (RD) applied the Board's standard from *PCC Structurals* and *The Boeing Co.*, determining that the unit was inappropriate because the petitioned-for field ironworkers did not possess a community of interest that was "sufficiently distinct" from the remaining employees. The RD consequently dismissed the petition.

On review the NLRB issued a notice and invitation to file briefs regarding whether to continue or replace the extant standard. In the current case, the NLRB announced that it would reinstate the standard from prior precedent in *Specialty Healthcare*. Under this reinstated test, the petitioner bears the burden of establishing that the petitioned-for unit shares a community of interest and is readily identifiable as a group. If an employer contends that the petitioned for unit is not sufficiently distinct—that is, that the smallest appropriate unit must contain employees not included in the petitioned-for unit–the employer has the burden to demonstrate that there is an "overwhelming community of interest" between the petitioned-for and excluded employees. The employer's heightened showing must demonstrate that "the interest of the petitioned-for and excluded employees are so similar that the petition is seeking, in essence, an arbitrary segment of an otherwise appropriate unit." The Board applied this reinstated test retroactively. Because the employer's burden had changed, the Board remanded the case for further processing.

Dissenting, Members Kaplan and Ring, noting the NLRA's prohibition against making "the extent to which the employees have organized" a controlling factor in unit determinations, would find that the *PCC Structurals* and *The Boeing Co.* tests more appropriately weighs employees' right to self organize and the need to recognize units that that are sufficiently workable for the purposes of effective collective bargaining.

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PUBLIC SECTOR CASE NOTES

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CALIFORNIA COURT OF APPEAL

Freedom Found. v. Superior Court, 87 Cal. App. 5th 47 (2022)

The Third District Court of Appeal heard this case on a petition for extraordinary writ of relief filed by the Freedom Foundation. The petition sought to overturn a trial court's decision declining to compel the California Department of Human Resources (CalHR) to disclose records regarding collective bargaining units and state employees.

Pursuant to the California Public Records Act (Cal. Gov't Code §§ 7920-7931) (CPRA), the Freedom Foundation requested from CalHR: the name of the labor organization representing each bargaining unit that represents State employees; the agencies/departments with represented employees; the number of represented employees paid by the State; the total amount of union dues/fees withheld by the State; and personally identifiable information related to each represented State employee. CalHR declined to provide the requested information on the basis that such information is protected by the exemption codified at Cal. Gov't Code § 7928.405, which exempts from disclosure state agencies' records related to activities governed by the Dills Act (Cal. Gov't Code §§ 3512-3524), the State's collective bargaining statute, "that reveal a state agency's deliberative processes, impressions, evaluations, opinions, recommendations, meeting minutes, research, work products, theories, or strategy."[1] In addition, CalHR asserted that certain data requested belonged to the State Controller's Office, and therefore CalHR has no authority to provide such information. On appeal, the Freedom Foundation again argued the exemption is inapplicable to its request because the exemption applies strictly to information falling under the general penumbra of "deliberative processes." The Court of Appeal disagreed, finding no ambiguity in the plain language of the statute and therefore applied the ordinary meaning of each term used in the exemption. Thus "deliberative processes, impressions, evaluations, opinions, recommendations, meeting minutes, research, work products, theories, or strateg[ies]," related to activities covered by the Dills Act are distinct categories that result in an exemption from disclosure. The Court further upheld the trial court's determination that the documents requested were not reasonably segregable into nonprivileged portions, and that CalHR did not have actual or constructive possession of the information belonging to the State Controller's Office. CalHR properly denied the request.

This decision is viewed as a victory for labor unions in California that represent State workers. Following the U.S. Supreme Court's decision in *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018), the Freedom Foundation has sought to contact represented employees throughout California's public sector to encourage them to drop their membership and stop paying dues to their union. This decision will likely hinder those efforts that are directed at State employees.

NEW LAW, S.B. 1334–MEAL AND REST BREAKS FOR PUBLIC SECTOR AND UC HEALTH CARE WORKERS

On September 29, 2022, Governor Newsom signed S.B. 1334, providing public sector and University of California health care workers with a statutory right to meal and rest periods. The law took effect on January 1, 2023.

Cal. Lab. Code § 512 mandates private sector employers to authorize and permit employees to take an unpaid 30-minute meal period on shifts over five hours, and a second unpaid 30-minute meal period on shifts over 10 hours. Employers must further authorize and permit employees to take one 10-minute paid rest period for every four hours worked, or major fraction thereof. Employees are entitled to an additional hour of pay at the

employee's regular rate of compensation for each workday that the employer does not provide a meal or rest period. Thus, an employee is entitled to two hours of pay for each workday that the employee misses both a meal break and a rest break.

Because courts have ruled that the Cal. Lab. Code applies only to private sector employers (unless specifically stated otherwise), public sector healthcare workers did not benefit from these protections prior to January 1, 2023. Now, section 512.1 has been added to the Cal. Lab. Code providing the same meal and rest periods to employees who provide direct patient care or support direct patient care in a general acute care hospital, clinic, or public health setting directly employed by specified public sector employers, as well as the penalty for an employer's failure to authorize and permit such meal and rest periods. This new law does not apply to employees who are covered by a collective bargaining agreement that provides for meal and rest periods. The statute also provides a monetary remedy equivalent to one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest period is not provided.

This law will likely inspire other legislative efforts to make various Cal. Lab. Code provisions apply expressly to the public sector workforce.

PUBLIC EMPLOYMENT RELATIONS BOARD

WHEN RESPONDING TO A UNION'S REQUEST FOR INFORMATION, AN EMPLOYER MAY BE REQUIRED TO COMPILE INFORMATION FROM VARIOUS SOURCES, INCLUDING EMPLOYEES' MEMORIES

Butte-Glenn Cmty. College Dist., PERB Dec. No. 2834-E (2022)

Following Butte-Glenn Community College District's cancelation of multiple courses, the University Professional and Technical Employees, Communication Workers of America Local 9119 (UPTE) emailed the District a request for six categories of information. The District responded asserting that it would respond only to the extent the CPRA required it to do so and, as such, would not create summary data beyond any preexisting records. Next, the District provided a partial response and asserted that the information responsive to two of the requests "does not exist."

Normally, an employer must "provide an exclusive representative with 'all information that is necessary and relevant to its right to represent bargaining unit employees regarding mandatory subjects of bargaining.'" *State of Cal. (State Water Res. Control Bd.)*, PERB Dec. No. 2830-S, 9-10 (2022) *citing Cty. and Cnty. of San Francisco*. PERB Dec. No. 2698-M, 6 (2020). "When a union requests relevant information, the employer must either fully supply the information or timely and adequately explain its reasons for not doing so, and the employer bears the burden of proof as to any defense, limitation, or condition that it asserts." *Sacramento Cty. Unified School Dist.*, PERB Dec. No. 2597-E, 8. (2018).

The District did not contest that the information was necessary and relevant. However, the District asserted, for the first time, in its exceptions on appeal to the Public Employment Relations Board (PERB or Board), that it did not act unlawfully because UPTE failed to reassert or clarify its information request after receiving the District's response. Here, PERB partially overruled *Trs. of the Cal. State Univ.*, PERB Dec. No. 1732-H (2019), and reaffirmed that "an exclusive representative need not reassert or clarify its information request upon receiving a partial response from the employer where it is sufficiently clear that the response did not fully satisfy the request." *Butte-Glenn Cmty. College Dist.*, PERB Dec. No. 2834-E, 14 (2022). PERB, finding that the record satisfies the "sufficiently clear" standard, determined that the District explicitly rooted its "position in its incorrect belief that it could analyze UPTE's request solely under CPRA standards, and thereby conclude that it had no duty to compile information contained in multiple sources, including employees' memories. The District's mistake of law does not change the fact that it was sufficiently clear the District failed to seek information beyond preexisting records." *Id.*

Previously, the Board "explained that while the CPRA provides unions with the same right to public records as any person or organization, the statutes we administer confer upon an exclusive representative, as part of its representational rights and duties, a separate, broader right to information." (*Butte-Glenn Cmty. College Dist.*, PERB Dec. No. 2834-E, at 15 *referencing Sacramento*, PERB Dec. No. 2597-E.)

PERB affirmed the ALJ's proposed decision and found the District violated the Educational Employment Relations Act (Cal. Gov't Code §§ 3540-3549.3) (EERA) by illegally applying CPRA standards to UPTE's request for information. As such, the District failed to attempt to gather all responsive information within its possession or control.

PERB EXPLAINS ITS "GAP-FILLING" DOCTRINE

Cty. and Cnty. of San Francisco, PERB Dec. No. A497-M (2022)

The San Francisco Deputy Sheriffs' Association filed a severance petition seeking to sever five classifications from existing bargaining units in the City and County of San Francisco represented by Service Employees International Union Local 1021 (SEIU). PERB's Office of the General Counsel (OGC) issued an administrative determination, finding that that PERB had jurisdiction over the petition, because the City's local rules do not include a provision that can accomplish severance without an undue burden on the Association.

The Association appealed, primarily arguing the City's local rules required the employer to process an earlier severance request the Association filed directly with the employer using PERB Regulations. SEIU responded asserting that the OGC should have dismissed the petition for lack of jurisdiction as the City's rules provide a process for the Association, and that whether an undue burden exists is a factual question requiring a formal hearing. PERB denied the Association's appeal, finding that: (1) the City does not have local rules that provide an avenue for processing a severance request without an undue burden; (2) it was not an abuse of discretion for the OGC to determine no hearing was necessary as there were no material facts in dispute; (3) PERB, not the City, is empowered to apply PERB Regulations; and (4) the petition was untimely under PERB Regulations.

Here, PERB explained that if an employer does not have a local rule that can achieve what a petitioner seeks without posing an undue burden, then PERB's Regulations "fill the gap." Here, the Association had two options: either it could have timely filed a severance petition with PERB; or it could have filed an unfair practice charge with PERB alleging the City maintained an unreasonable local rule or applied its local rules unreasonably.

This decision clarifies that if the PERB Regulations fill the gap, the petition needs to be filed with PERB and not with the local agency.

PERB DETERMINED THAT THE STANDARDS UNDER PEDD §§ 3550 & 3553 ARE DIFFERENT

Regents of the Univ. of Cal., PERB Dec. No. 2835-H (2022)

The Prohibition on Public Employer Deterring or Discouraging Union Membership (Cal. Gov't Code §§ 3550-3553) (PEDD) provides employees with statutory protections against public employers interfering with protected union activity. The Legislature passed this law in 2018 in anticipation of the Supreme Court's decision in *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018), invalidating fair share/agency fees. Cal. Gov't Code §§ 3550 and 3553 require public employers to remain neutral and permit employees free choice in the exercise of statutory rights related to union membership.

Cal. Gov't Code § 3550 requires public employers to remain neutral with respect to an employee's decision in three specific circumstances: (1) authorizing representation by a union; (2) becoming or remaining a union member; and (3) authorizing union fee deductions/paying dues. Cal. Gov't Code § 3553 requires public employers to meet and confer with certified or recognized exclusive bargaining representatives before issuing a mass communication concerning public employees' rights to join or support (or refrain from joining/supporting) an employee organization.

Shortly after PERB granted Teamsters Local 2010's unit modification petition to add a classification to its bargaining unit, the Regents of the University of California sent the employees in this newly added classification a communication that included four FAQs, including one addressing union membership and another addressing union dues, without first providing Teamsters an opportunity to meet and confer over the communication.

In a case of first impression regarding PEDD § 3553, PERB found that "any mass communication addressing the general subject matter of union membership or dues is a communication 'concerning public employees' rights to join or support an employee organization, or to refrain from joining or supporting an employee organization'" falls under PEDD § 3553(b).

Additionally, where PEDD § 3550 requires PERB "to consider if an employer's conduct or communication has a tendency to deter or discourage free choice, and if so whether the employer can establish a business necessity justifying the conduct or communication, [PEDD] section 3553 calls for no such inquiry." As such, even if the communication was content neutral, that would not provide a defense to a PEDD § 3553 violation.

Here, the Board found that the University violated PEDD § 3553 by sending a mass communication concerning public employees' rights to join or support an employee organization, or to refrain from joining or supporting an employee organization without meeting and conferring with Teamsters over the content of the FAQs before distributing them to employees. The Board also determined that the University violated PEDD § 3550 as "the FAQs' likelihood of influencing employee free choice outweighs the University's purported necessity to communicate with the newly-represented" classification about union membership.

This case is an example of PERB having an ALJ preside over a hearing to develop the factual record, but deciding the case directly itself.

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Ms. Steele and Ms. McDonagh thank Corey Kniss for his contributions.

1. This exemption was formerly codified at Cal. Gov. Code § 6254(p)(1)).

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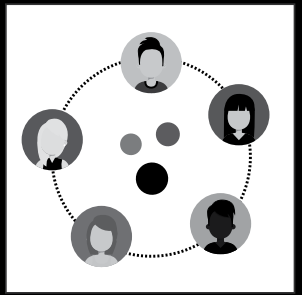

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ADR UPDATE

AUTHOR*

Ramit Mizrahi

Dear Reader, welcome to my first column covering mediation, arbitration, and all things ADR! In reflecting on the role of this column, which we have revived after a one-year hiatus, I aim to keep you up to date on the latest cases, and maybe share some reflections, space permitting. The deluge of arbitration cases never stops (by my count, there were about 60 published decisions in the past year). Space and time constraints mean that I will likely give you mostly big-picture overviews of the most important cases—enough to pique your interest so you can decide which ones are worth reading and digging into further. As important arbitration decisions often come down in wage-and-hour cases, I will aim not to cover anything that my fellow columnists and contributors have already written about. (On that note, I highly recommend you take a look at our November 2022 features discussing *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022), and its impact on PAGA cases, as well as this month's column by Lauren Teukolsky covering some post-*Viking* decisions.) This issue's column will focus on some recent cases worth noting, going back several months.

AGGRESSIVE SETTLEMENT COMMUNICATIONS & ANTI-SLAPP PROTECTIONS

Flickinger v. Finwall, 85 Cal. App. 5th 822 (2022)

Flickinger is a colorful case addressing where the line is drawn with respect to anti-SLAPP (Cal. Code Civ. Proc. § 425.16) protections for aggressive pre-litigation communications. In *Flickinger*, the working relationship between a homeowner and a contractor broke down with remodeling work still incomplete. Each threatened the other. The homeowner threatened to sue the contractor for not completing the work and not getting required permits, and sent a demand letter seeking $125,000. The contractor's defense was that the homeowner had not wanted the permits. He claimed that the homeowner had shared, while drunk, that this was because he was paying for the work with illegal kickbacks received from vendors while working for Apple. The contractor, through counsel, rejected the demand in a response containing the following language: "If [plaintiff] initiates litigation, [the contractor's] position will not change and he will aggressively defend himself. I suggest you discuss with [plaintiff] how such litigation may result in Apple opening an investigation into [plaintiff's] relationships with vendors." The homeowner filed suit, prevailed, and was awarded damages. He then filed a second suit against the contractor and his counsel, including for civil extortion and a Ralph Civil Rights Act (Cal. Civ. Code § 51.7) violation. The defense filed an anti-SLAPP motion, which the trial court denied. It determined that the response to the demand letter amounted to extortion as a matter of law, depriving it of anti-SLAPP protections. The Court of Appeal reversed. It applied *Flatley v. Mauro*, 39 Cal. 4th 299 (2006), and concluded that the letter fell within the bounds of professional conduct such that it was protected by the anti-SLAPP statute. The Court of Appeal reasoned that the letter made no "threat" other than that the contractor would "aggressively defend himself," and that the litigation itself could result in negative repercussions. This is not a threat to report the plaintiff to prosecuting authorities or take other actions deemed extortionate.

ARBITRATION WAIVER

Davis v. Shiekh Shoes, LLC, 84 Cal. App. 5th 956 (2022)

The Court of Appeal affirmed the trial court's denial of the employer-defendant's motion to compel arbitration based on waiver where the defendant had waited for 17 months before filing its motion. The Court determined that there was no reasonable explanation for the delay, rejecting arguments that the employer lacked counsel for several months, experienced pandemic-related court disruptions, and viewed the claims as being primarily against a co-defendant. The Court further held that the employer took actions inconsistent with an

intent to arbitrate, including requesting a trial date, actively participating in litigation, acquiescing to discovery and trial scheduling, and making court appearances. As the Federal Arbitration Act (9 U.S.C. §§ 1-14) (FAA) applied, no showing of prejudice was necessary under *Morgan v. Sundance, Inc.* 142 S. Ct. 1708 (2022).

Desert Reg'l Med. Ctr., Inc. v. Miller, 87 Cal. App. 5th 295 (2022)

Desert Regional Medical Center (DRMC) appealed the trial court's denial of its petition to compel arbitration based on delay. The Court of Appeal affirmed, holding that DRMC waived its right to arbitrate when it failed to file its petition for over four years, and instead participated in proceedings before the Labor Commissioner (as permitted in its arbitration agreement), filed a de novo appeal of the decision in the trial court, attempted to remove the action to federal court, filed motions of related cases, objected to written discovery, and sought sanctions, among other things. The Court of Appeal further rejected DRMC's argument that the issue of waiver should have been decided by the arbitrator, not the court.

Villareal v. LAD-T, LLC, 84 Cal. App. 5th 446 (2022), as modified (Nov. 2, 2022)

An employer-defendant in a Fair Employment and Housing Act (Cal. Gov't Code §§ 12900-12999) (FEHA) case sought to compel arbitration based on an agreement it had entered into using an unregistered fictitious business name. The trial court denied its motion because it had failed to comply with the fictitious business name registration requirement. The employer appealed. It then registered its fictitious business name while the appeal was pending, nearly a year after its motion was denied. The Court of Appeal vacated the trial court's denial of the motion to compel arbitration (as the fictitious business name statement had been filed), but remanded with instructions to address whether the employer waived its right to compel arbitration by delaying its filing of the statement.

WITHDRAWAL FROM ARBITRATION BASED ON UNTIMELY PAYMENTS

De Leon v. Juanita's Foods, 85 Cal. App. 5th 740 (2022)

The Court of Appeal held that Cal. Code Civ. Proc. § 1281.98 established a "bright-line rule" that a drafting party's failure to timely pay outstanding arbitration fees within 30 days constitutes a material breach, allowing the plaintiff to withdraw claims against that party from arbitration and to proceed in court. It cited with approval holdings in *Espinoza v. Superior Court*, 83 Cal. App. 5th 761 (2022) and *Gallo v. Wood Ranch USA, Inc.*, 81 Cal. App. 5th 621 (2022), interpreting section 1281.97 similarly. Interestingly, *De Leon* involved two employers, one that timely paid arbitration fees (Aerotek) and another that did not (Juanita's Foods). The trial court held that the employee was entitled to withdraw his claims against Juanita's Foods from arbitration, but that his claims against Aerotek would proceed in arbitration first, with the lawsuit against Juanita's Foods stayed pending the outcome of that proceeding.

Williams v. W. Coast Hosps., Inc., 86 Cal. App. 5th 105 (2022)

In a consumer case involving elder abuse/wrongful death, the Court of Appeal affirmed the trial court's order lifting a stay and permitting plaintiffs to resume litigating in court after the defendant failed to timely pay arbitration fees under Cal. Code Civ. Proc. § 1281.98. In doing so, it rejected the defendant's arguments that plaintiffs were first required to obtain a determination from the arbitrator that the defendant had defaulted on its obligations, or that these statutory provisions applied only to mandatory predispute arbitration agreements.

UNCONSIONABILITY ANALYSIS

Mills v. Facility Sols. Grp., Inc., 84 Cal. App. 5th 1035 (2022)

In *Mills*, the Court of Appeal affirmed the trial court's denial of a motion to compel arbitration based on unconscionability, and agreed that the agreement was so permeated with substantive unconscionability that those terms could not be severed. It had at least six substantive unconscionable terms, including that it: barred the plaintiff from recovering the filing fee if he prevailed and required the employee to pay the costs of postponing the hearing; required him to pay the costs of appeal and a second hearing; had an improper fee-shifting provision; did not provide for adequate discovery (no right to any written discovery); barred the tolling of statute of limitations periods; and had an invalid PAGA waiver. As there were multiple substantively unconscionable terms and severing them would amount to a rewriting of the agreement, the trial court was deemed correct in declining to sever them. Of note, in another case filed by the same plaintiff against the same defendant, a different trial judge had found the unconscionable terms severable. However, the Court of Appeal determined that that order was not final, so claim and issue preclusion did not apply.

Beco v. Fast Auto Loans, Inc., 86 Cal. App. 5th 292 (2022)

Beco is another case in which the Court of Appeal affirmed the trial court's denial of a motion to compel arbitration based on unconscionability. As a preliminary matter, the Court of Appeal held that there was not a clear and unmistakable delegation clause where the agreement stated that it covered "any dispute concerning the arbitrability of any such controversy or claim," and that incorporation by reference of the AAA rules did not delegate authority to the arbitrator to decide the enforceability of the agreement. The unconscionable terms included limited discovery entirely at the arbitrator's discretion, a shortened statute of limitations period, requiring the employee to bear his own fees and costs without the ability to recover them, and exposing the employee to liability for arbitration costs. The Court of Appeal also held that the trial court did not abuse its discretion in determining that the agreement was permeated by unconscionability which could not be remedied by severance. *See also Navas v. Fresh Venture Foods, LLC*, 85 Cal. App. 5th 626 (2022) (covered in Wage and Hour Case Notes, p. 14).

REVIEW OF ARBITRATION AWARDS

Taska v. RealReal, Inc., 85 Cal. App. 5th 1 (2022)

In a written decision, titled "Award," an arbitrator determined that plaintiff Elizabeth Taska failed to meet her burden on her claims and was not entitled to fees and costs under FEHA, but that neither was defendant The RealReal (TRR) because the claims were not frivolous or meritless. Two months later, the arbitrator reversed course in a new written decision, titled "Final Award," deeming Taska's conduct "unreasonable, meritless, frivolous, and vexatious" such that TRR was entitled to $53,705.43 in fees and costs. The arbitrator then issued a "Corrected Final Award" later that month to correct a calculation error, bringing the amount to $73,756.43. Taska petitioned the court to vacate the portion of the Corrected Final Award related to fees and costs, arguing that the arbitrator exceeded her authority by amending the Award; TRR petitioned to confirm the entire Corrected Final Award. The trial court agreed with Taska, confirming the Corrected Final Award only with respect to the liability determination. It entered judgment in favor of TRR, with each side to bear their own fees and costs. TRR appealed. The Court of Appeal affirmed, holding that the arbitrator exceeded her authority under Cal. Code Civ. Proc. §§ 1284 and 1286.6. The first "Award" included determinations on all the issues submitted in the arbitration, such that once the 30-day period for correction under § 1284 ran, the award became final and the arbitrator's jurisdiction ended.

HayDay Farms, Inc. v. FeeDx Holdings, Inc., 55 F.4th 1232 (9th Cir. 2022)

In this non-employment breach of contract case, a three-arbitrator tribunal awarded the plaintiffs more than $21 million in damages. The defendant sought to vacate the award in federal district court, arguing that it exceeded the tribunal's powers under the FAA. The district court agreed, vacating $7 million from the award on the basis that this portion of the award manifestly disregarded California law because it amounted to a windfall for the plaintiffs, but confirmed the rest. The Ninth Circuit reversed in part, holding that vacateur was improper because the award was not completely irrational, nor did it exhibit a manifest disregard of law. The Ninth Circuit acknowledged that the defendant's position was "sympathetic," and that the tribunal likely misread the contract and rejected the "best interpretation." Nevertheless, because the grounds for vacateur are extremely narrow, even a seemingly wrong award would be upheld so long as the arbitrator even arguably construed or applied the contract.

OTHER ARBITRATION DECISIONS

Vaughn v. Tesla, 87 Cal. App. 5th 208 (2023)

In *Vaughn*, the Court of Appeal held that injunctions sought under the FEHA are "public injunctions," and that the FAA does not preempt California's rule prohibiting waiver of the right to seek such injunctions. As such, it affirmed the trial court's order denying Tesla's motion to compel arbitration as it pertained to plaintiffs' request for a public injunction enjoining Tesla from committing further violations of the FEHA. It also affirmed the trial court's denial of the motion to compel arbitration of claims based on conduct that occurred when two of the plaintiffs worked for Tesla through staffing agencies before they joined as direct employees, as Tesla's arbitration agreement contained language that could be construed as applying only to claims related to direct employment (claims occurring after direct employment began were ordered into arbitration).

Suski v. Coinbase, Inc., 55 F.4th 1227 (9th Cir. 2022)

Plaintiffs filed a putative class action case against the cryptocurrency exchange Coinbase, alleging wrongdoing in connection with a sweepstake that it held. The plaintiffs had signed a Coinbase user agreement with an arbitration provision. They later entered into Coinbase's sweepstakes, which had Official Rules containing a forum selection clause stating that California courts had exclusive jurisdiction over all sweepstakes-related disputes. After suit was filed, Coinbase moved to compel arbitration. The district court denied the motion. It ruled that, because the two

agreements conflicted, there was a question of contract formation, which was for the court to decide. It then held that the forum selection clause in the official rules superseded the arbitration provision of the user agreement, and denied the motion to compel arbitration accordingly. On appeal, the Ninth Circuit affirmed, agreeing with the district court's reasoning.

Zhang v. Superior Ct., 85 Cal. App. 5th 167 (2022), *reh'g denied* (Nov. 18, 2022)

Zhang is an interesting case in which an arbitration agreement with a clear and unmistakable delegation clause tests the limits of the protections of Cal. Lab. Code § 925. It involved claims between Dentons U.S. LLP and one if its former equity partners, Jinshu "John" Zhang. Dentons initiated an arbitration action against Zhang in New York, and later a motion to compel arbitration in New York, and he filed a wrongful termination action in California. Dentons sought to stay Zhang's action pending completion of the arbitration in New York, while he argued that Cal. Lab. Code § 925 rendered the New York courts incompetent to rule on the motion to compel arbitration. Ultimately, the Court of Appeal held that the parties delegated issues of arbitrability to the arbitrator, including whether Zhang was an employee who may invoke Section 925. In essence, "the applicability of Labor Code section 925 is a question of arbitrability that may be delegated to the arbitrator"—even if that arbitrator is in another state.

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CASES PENDING BEFORE THE CALIFORNIA SUPREME COURT

AUTHOR*

Phyllis W. Cheng

ARBITRATION

Quach v. Cal. Commerce Club, Inc., 78 Cal. App. 5th 470 (2022), *review granted*, 297 Cal. Rptr. 3d 592 (Mem) (Aug. 24, 2022); S275121/B310458

Petition for review after reversal of order denying petition to compel arbitration. Does California's test for determining whether a party has waived its right to compel arbitration by engaging in litigation remain valid after the United States Supreme Court decision in *Morgan v. Sundance, Inc.*, ___ U.S. ___ [142 S.Ct. 1708] (2022)? Fully briefed.

Ramirez v. Charter Communications, Inc., 75 Cal. App. 5th 365 (2021), *review granted*, 2022 WL 2037698 (Mem) (Jun. 1, 2022); S273802/B309408

Petition for review after affirmance of order denying petition to compel arbitration. Did the Court of Appeal err in holding that a provision of an arbitration agreement allowing for recovery of interim attorney's fees after a successful motion to compel arbitration, was so substantively unconscionable that it rendered the arbitration agreement unenforceable? Fully briefed.

COVID-19

Kuciemba v. Victory Woodworks, 31 F.4th 1268 (9th Cir. 2022); *cert. granted* (Jun. 22, 2022); S274191/9th Cir. No. 21-15963

Request under California Rules of Court, rule 8.548, that this court decide questions of California law presented in a matter pending in the United States Court of Appeals for the Ninth Circuit. (1) If an employee contracts COVID-19 at his workplace and brings the virus home to his spouse, does California's derivative injury doctrine bar the spouse's claim against the employer? (2) Under California law, does an employer owe a duty to the households of its employees to exercise ordinary care to prevent the spread of COVID-19? Fully briefed.

DISCRIMINATION | HARASSMENT | RETALIATION

B*ailey v. San Francisco Dist. Attorney's Office*, nonpublished opinion, 2020 WL 5542657 (2020), *review granted* (Dec. 30, 2020); S265223/A153520

Petition for review after affirmance of judgment. Did the Court of Appeal properly affirm summary judgment in favor of defendants on plaintiff's claims of hostile work environment based on race, retaliation, and failure to prevent discrimination, harassment and retaliation? Fully briefed.

Raines v. U.S. Healthworks Med. Group, 28 F.4th 968 (mem) (9th Cir. 2022), *cert. granted* (Apr. 27 2022); S273630/9th Cir. 21-55229

Request under California Rules of Court, rule 8.548, that this court decide a question of California law presented in a matter pending in the United States Court of Appeals for the Ninth Circuit. Does California's Fair Employment and Housing Act, which defines "employer" to include "any person acting as an agent of an employer" (Cal. Gov't Code § 12926(d)), permit a business entity acting as an agent of an employer to be held directly liable for employment discrimination? Fully briefed.

WAGE AND HOUR

Adolph v. Uber Techs., Inc., nonpublished opinion, 2022 WL 1073583 (2022), *review granted* (Jul. 20, 2022); S274671/G059860, G060198

Petition after affirmance of order denying a petition to compel arbitration. Whether an aggrieved employee who has been compelled

to arbitrate claims under the Private Attorneys General Act (PAGA) that are "premised on Labor Code violations actually sustained by" the aggrieved employee (*Viking River Cruises, Inc. v. Moriana* 596 U.S. __, __ (2022) [142 S.Ct. 1906, 1916] (*Viking River Cruises*); see Lab. Code, §§ 2698, 2699, subd. (a)) maintains statutory standing to pursue "PAGA claims arising out of events involving other employees" (*Viking River Cruises*, at p. __ [142 S.Ct. at p. 1916]) in court or in any other forum the parties agree is suitable. Fully briefed.

Camp v. Home Depot U.S.A., Inc., 84 Cal. App. 5th 638 (2022), *review granted* (Feb. 1, 2023); S277518/H049033

Petition after reversal of judgment. Under California law, are employers permitted to use neutral time-rounding practices to calculate employees' work time for payroll purposes? Review granted, brief due.

Estrada v. Royalty Carpet Mills, Inc., 76 Cal. App. 5th 685 (2022) *Inc.*, *review granted*, 294 Cal. Rptr. 3d 460 (Mem) (Jun. 22, 2022); S274340/G058397, G058969

Petition after the affirmance in part and reversal in part of judgment. Do trial courts have inherent authority to ensure that claims under the Private Attorneys General Act (Cal. Lab. Code § 2698 *et seq*.) will be manageable at trial, and to strike or narrow such claims if they cannot be managed? Fully briefed.

People ex rel. Garcia-Brower v. Kolla's Inc., nonpublished opinion, nonpublished opinion, 2021 WL 1851487 (2021), review granted (Sept. 21, 2021); S269456/G057831

Petition after affirmance in part and reversal of judgment. Does Cal. Labor Code § 1102.5(b), which protects an employee from retaliation for disclosing unlawful activity, apply when the information is already known to that person or agency? Fully briefed.

Huerta v. CSI Elec. Contractors, Inc., 39 F.4th 1176 (9th Cir. 2022), *cert. granted* (Aug. 31, 2022); S275431/9th Circ. No. 21-16201

Request under California Rules of Court, rule 8.548, that this court decide questions of California law presented in a matter pending in the United States Court of Appeals for the Ninth Circuit. (1) Is time spent on an employer's premises in a personal vehicle and waiting to scan an identification badge, have security guards peer into the vehicle, and then exit a Security Gate compensable as "hours worked" within the meaning of California Industrial Welfare Commission Wage Order No. 16? (2) Is time spent on the employer's premises in a personal vehicle, driving between the Security Gate and the employee parking lots, while subject to certain rules from the employer, compensable as 'hours worked' or as "employer-mandated travel" within the meaning of California Industrial Welfare Commission Wage Order No. 16? (3) Is time spent on the employer's premises, when workers are prohibited from

From the Editors
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leaving but not required to engage in employer-mandated activities, compensable as "hours worked" within the meaning of California Industrial Welfare Commission Wage Order No. 16, or under CAL. LAB. CODE § 1194, when that time was designated as an unpaid "meal period" under a qualifying collective bargaining agreement? Fully briefed.

Iloff v. LaPaille, 80 Cal. App. 5th 427 (2022), *review granted*, 299 Cal. Rptr. 3d 770 (Mem) (Oct. 26, 2022); S275848/A163504

Petition for review after affirmance in part and reversal in part. (1) Must an employer demonstrate that it affirmatively took steps to ascertain whether its pay practices comply with CAL. LAB. CODE and Industrial Welfare Commission Wage Orders to establish a good faith defense to liquidated damages under CAL. LAB. CODE § 1194.2(b)? (2) May a wage claimant prosecute a paid sick leave claim under section 248.5(b) of the Healthy Workplaces, Healthy Families Act of 2014 (CAL. LAB. CODE § 245 et seq.) in a de novo wage claim trial conducted pursuant to Cal. Lab. Code § 98.2? Review granted/brief due.

Rattagan v. Uber Techs., 19 F.4th 1188 (9th Cir. Dec. 6, 2021), *cert. granted* (Feb. 29, 2022) S272113/9th Circ. No. 20-16796

Request under California Rules of Court, rule 8.548, that this court decide questions of California law presented in a matter pending in the United States Court of Appeals for the Ninth Circuit. Under California law, are claims for fraudulent concealment exempted from the economic loss rule? Fully briefed.

Turrieta v. Lyft, Inc., 284 Cal. Rptr. 3d 767 (2021), *review granted*, 288 Cal. Rptr. 3d 599 (Mem) (Jan. 5, 2022); S271721/B304701

Petition for review after affirmance of judgment. Does a plaintiff in a representative action filed under the Private Attorneys General Act (CAL. LAB. CODE § 2698 *et seq.*) (PAGA) have the right to intervene, or object to, or move to vacate, a judgment in a related action that purports to settle the claims that plaintiff has brought on behalf of the state? Fully briefed.

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* Phyllis W. Cheng is a neutral at ADR Services, Inc., and is on the mediation panels for the California Court of Appeal, Second Appellate District, and U.S. District Court, Central District of California, where she led its Mediation Practice Group for four years. She is Managing Editor of this publication, and prepares the Labor & Employment Case Law Alert, a free "electronic alert service" on new cases for Section members. To subscribe online at http://www.calbar.ca.gov, log onto "My State Bar Profile" and follow the instructions under "Change My E-mail Addresses and List Subscriptions."

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April 28, 2023	2023 Public Sector Conference	6.0 Hours MCLE	In-Person Conference Sacramento, CA

MESSAGE FROM THE CHAIR

AUTHOR*

Scott Stillman

In nearly every case, something unexpected happens. I still remember one of the first depositions I took. I was representing a waitress who had been sexually assaulted at the restaurant where she worked. A co-worker witnessed the whole incident. Ahead of taking the co-worker's deposition, I spoke to him by phone, during which he corroborated the details of the assault exactly as my client said it happened. I thought, "this should be a pretty simple, run-of-the-mill deposition." But I was in for a surprise.

At the deposition, when I asked him the same questions I had asked on the phone, all his "yes" answers suddenly became "no" answers. Of course, he even denied that he gave me different answers when we had spoken by phone. It was devastating for the case and my client. We had not expected that to happen and we were caught blindsided. Although it was not the outcome we anticipated, we still worked with what we had and settled the case.

For me, the deposition turned into a valuable lesson on the importance of flexibility. As lawyers, what often makes us successful is that we are planners. We like to have an action plan in place that we can execute, whether that be in litigation or counseling a client. But no matter how thought out and detailed the action plan is, twists and turns that we never anticipate will happen—so cultivating the skill of flexibility is key. We need to be able to adjust. As Bruce Lee wisely advised, "be water, my friend."

When I recently reflected on the flexibility lesson I learned above, I began thinking about what other skills or traits make a lawyer most effective. Lots come to mind, but a few rise to the top as being particularly worth discussing.

Do not take things too personally: We all want to be the best advocates possible and we have an obligation to represent clients zealously (while not violating the ethical principles of the profession obviously). However, it is counterproductive to make it personal. This can be hard, especially when we strongly believe that our position is the best and right position. It can also be difficult because labor and employment cases often involve intense, intimate relationships that *are* very personal. As labor and employment lawyers then, we need to ensure we do not take on our clients' emotions. The best lawyers I have seen do not let the ill-will between the clients impact their relationship with the attorney on the other side. They do not take personal jabs at the opposing party or counsel. Likewise, they do not take it personally when the other side disagrees. Adversaries can each provide zealous advocacy, but that is not permission to act out and get personal.

Be responsive: There is no doubt that the job of a lawyer can be demanding. Our to-do list seems to be never ending. Because there is always some urgent task to accomplish, it can be easy to become non-responsive to inquiries that come in from clients, potential clients, opposing counsel, other lawyers or persons in your firm or company. Yet, one trait I have seen in the lawyers I admire is that they are responsive. The response does not always need to be lengthy or substantive. It can be as simple as acknowledging receipt of an e-mail or giving a quick call back to let opposing counsel know you are slammed at the moment but can follow up in a week. This may seem small, but keeping the lines of communications open goes a long way.

Maintain credibility at all times: It is no secret that being credible is an important characteristic for a lawyer. When you are credible, you earn the trust of judges, opposing counsel, clients and anyone else with whom you work. Having credibility enhances your ability to be persuasive and problem solve effectively. Unfortunately, many of us may have seen lawyers who think they are being crafty or good advocates by abusing or circumventing the rules. However, that type of behavior usually catches up with those lawyers and when it does, it can be disastrous for their cases and even lead to the end of their careers (or even malpractice charges, negligence claims and disciplinary actions from the bar). It is just not worth going down that path and burning

your credibility in order to gain the upper hand. Moreover, the integrity of our legal profession and legal system relies on each of us remaining credible. Public trust in many of our institutions is eroding and we need to ensure we do not further contribute to that distrust. The most skilled lawyers I have seen do not engage in spinning the truth, creating false impressions, or denying obvious facts. Instead, they harness candor into powerful advocacy.

Be a creative problem solver: Attorneys solve problems. While it may be hard for our profession to admit, no one goes to a lawyer to be entertained or have a nice night out. They come to us for help with problems. This is true when clients retain litigators, when in-house counsel are consulted for input and when labor attorneys are needed for bargaining disputes. Often, lawyers get brought in on the really hard problems—the ones where significant controversy exists, emotions run high and tough decisions need to be made. Many books have been written about how to be a creative problem solver, so I would encourage turning to those texts to learn more about the details on how to accomplish that. However, I will briefly list what I have seen as common traits in the attorneys I would categorize as creative problem solvers. These characteristics include: not being scared to raise the idea of resolution (being the first to request settlement talks is not a sign that your case is weak); having an open mind; properly setting expectations; paying attention to detail; listening and understanding priorities; making concessions; being honest; and building consensus.

While some of the skills described above may come more naturally to some than others, I do believe we all have the capacity to become better at whatever trait we wish to improve. It may take some work, but we will all be even better lawyers for doing so.

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MCLE SELF-STUDY:

ATTORNEYS CONDUCTING IMPARTIAL WORKPLACE INVESTIGATIONS: RECLAIMING THE INDEPENDENT LAWYER ROLE

PART I

INTRODUCTION: A NEW PRACTICE AREA

Workplace investigations have become a substantial and distinct practice area for California employment law attorneys. Employers are mandated to and risk liability if they fail to conduct impartial investigations of discrimination and harassment.[1]

INSIDE THIS ISSUE

As a result, many employment lawyers have fled the grind of litigation to embrace a new role as independent workplace investigators.

Skeptics in the plaintiff's bar and investigation community contend that attorneys cannot be truly impartial, because they conduct independent investigations on behalf of employers in an attorney-client relationship. Critics claim that an attorney *cannot* conduct an impartial investigation on behalf of a client, because the Rules of Professional Conduct impose a duty of loyalty.[2] They also allege that attorneys *in fact* do not conduct impartial investigations, because the pull of future business from the client undermines their neutrality. Finally, some question whether investigations under the attorney-client privilege are incompatible with impartiality.

We conclude that outside attorney-investigators can and do conduct independent investigations, under the right circumstance and when free from conflicts of interest. The attorney-client privilege does not vitiate lawyer independence. Finally, this new practice area should be embraced as an exercise in independent judgment, which has motivated many to join our profession in the first place.

IMPARTIAL INVESTIGATIONS AND THE NEED FOR EXTERNAL INVESTIGATORS

California laws requires employers to conduct "impartial" or "objective" investigations of workplace discrimination and harassment.[3] In-house staff are not always the right choice as investigators, because they often lack authority and the real or perceived impartiality to conduct a credible investigation. This gives rise to the need for external investigators, who are sufficiently "independent" of the organization.[4]

IMPARTIALITY VERSUS INDEPENDENCE

Although employment laws and guidance refer to "impartial" or "objective" investigations,[5] we focus this article on "independent" investigations. These are related but distinct notions, with "independence" as one of several factors affecting impartiality. An "independent" investigation is where the lawyer exercises her independent professional judgment in conducting an investigation, and remains uninfluenced by her relationship with the company or counsel who retain her. In contrast, an "impartial" investigation is potentially a much broader concept, encompassing not only "independence," but also freedom from a wide array of other biases (e.g., unconscious racial bias, confirmation bias, anchoring bias, etc.).[6]

BIFURCATED STRUCTURE OF WORKPLACE INVESTIGATIONS

California workplace investigations conducted by attorneys are usually fact investigations. The attorney investigator does not render traditional legal advice or recommendations, but is engaged strictly to conduct an objective inquiry to produce factual findings for the employer.[7] To safeguard the neutrality of the investigation, the advice-giving function is normally performed by the employer's regular counsel.[8] Although the retainer agreement limits the attorney-investigator's role to that of conducting an impartial factual investigation, she nonetheless provides a legal service in an attorney-client relationship.[9]

Critics contend that if the attorney is "representing" the client, she cannot be "impartial," because her professional duty of loyalty precludes it. This criticism is based on a misunderstanding of how "limited scope representation" defines the lawyer's ethical role in workplace investigations.

MISCONCEPTIONS ABOUT THE VARIOUS ROLES LAWYERS MAY PLAY FOR THEIR CLIENTS

Critics premise their complaint on a mistaken belief that functioning as an attorney necessarily requires engaging in zealous advocacy on behalf of the client. This is rooted in a larger misconception of lawyering, one which "treats . . . advocacy as the defining metaphor for the profession," and which improperly conflates the various roles attorneys can, should, and do play in the American legal system.[10]

The ABA Model Rules of Professional Conduct identify the various roles attorneys play for clients apart from advocacy, including advisor, negotiator, and fact-finder.[11] Each of these roles has distinct ethical requirements.[12] Yet the "adversarial-advocate" role "continues to dominate lawyers' public discourse about ethics." This view is "severely deficient" and does not accurately depict the lawyer's ethical duties in other important roles (i.e., as advisor or evaluator).[13]

Indeed, the advocacy role pertains only in settings where a judge and an adversary operate as check and balance to the dangers of zealous partisanship. In other settings, however a lawyer may be *required* to be non-partisan. Retention as an independent investigator is one of those settings.[14]

LIMITED SCOPE REPRESENTATION ALLOWS ATTORNEYS TO ASSUME THE ROLE OF IMPARTIAL FACT-FINDERS

Legal developments in California have given attorneys new tools to explicitly delineate their roles. Attorneys are permitted to limit the scope of their services, so long as the scope is reasonable and the services can be performed

competently.[15] This form of legal service is known as "task-based" or "limited- scope" legal services and is an increasingly common way of serving the needs of employers and other clients in California.[16]

Over the past decade, attorneys engaged in workplace investigations have utilized limited scope engagements to explicitly reclaim an independent and objective lawyer role. They have crafted engagement agreements with their clients that clearly specify their retention as impartial investigators, and that explicitly disclaim any role of zealous advocacy.[17] Limited scope retention is "an appropriate form of task-based representation to comply with employment laws."[18]

Thus, the duty of loyalty does not prevent a lawyer from conducting an objective and impartial investigation.[19] If the lawyer has been retained for and is capable of performing that function, she satisfies her duty of loyalty by using her expertise to conduct an unbiased investigation.[20] Far from *precluding* impartiality, the Rules of Conduct *require* it.

THE EMPIRICAL QUESTION: CAN ATTORNEY INVESTIGATORS BE INDEPENDENT?

Aside from an important recent study in the context of financial fraud investigations conducted by external investigators,[21] we are not aware of empirical research on this question. Based on our personal experience, we believe that outside attorney-investigators can and do conduct investigations independent of inappropriate influence by management, under the right circumstances and when free from conflicts of interest. Moreover, scholarship in the field has identified factors conducive to the exercise of lawyer independence as discussed below.

IS THE ATTORNEY-INVESTIGATOR FREE FROM CONFLICTS OF INTEREST?

To conduct an independent investigation, the investigator must be free from conflicts of interest. These include conflicts that may arise from: previous representation of individual personnel (i.e., executives or employees); law partners having been parties to the events under investigation; as well as an investigator seeking unrelated business from a client.[22]

Conflicts similarly may arise from attempting to play conflicting roles (e.g., acting as investigatory counsel and defense counsel).[23] Likewise, a company's regular outside counsel is not positioned to conduct an independent investigation, because: the desire to maintain a future business relationship undermines independence; the investigation could implicate previous advice given; and the wrongdoing to be examined could affect relationships with senior management or executives.[24] In addition, the conflicting role of investigator and advisor/litigator implicates ethical rules on the lawyer as witness,[25] and creates the potential for complex privilege issues.

DOES THE INVESTIGATOR HAVE THE RIGHT KNOWLEDGE BASE?

The investigator should have adequate training in the substantive law at issue and investigative skills. The right knowledge base also includes the standards by which investigations are judged: structuring an investigation so as to safeguard independence; training in unconscious bias and methods to counter it;[26] and an understanding of the investigator's proper ethical role. The grounding in ethics should include a clear understanding of who the client is—the organization (or board or audit committee)—*not* the individual members of management.[27] An investigator who is not solid in the above knowledge base is more susceptible to improper influence from client constituents.[28]

DOES THE INVESTIGATOR UNDERSTAND HER ROLE AND HAVE THE RIGHT PERSONAL QUALITIES?

The investigator should see herself as an independent professional retained to render her candid and neutral assessment to the client, rather than retained to protect management, or to whitewash organizational wrongdoing.[29] The attorney-investigator should be someone who sees independence as "an admirable part of her professional role."[30] Other personal qualities include a high degree of integrity and an ability to have an open mind.

IS THE INVESTIGATOR PART OF A COMMUNITY OF PRACTITIONERS THAT SUPPORTS THE ABOVE NORMS AND STANDARDS?

"The first requisite of independence is that the lawyer have some source of norms, rules, or conventions to refer to in resisting client pressures."[31] In addition to substantive legal rules, discussed below, "informal norms and conventions are sometimes more powerful than legal ones."[32] The creation of the Association of Workplace Investigators (AWI) in 2009 has been a significant development in the field of workplace investigations—one which holds promise to bolster the ability of attorney-investigators to exercise independence.[33] AWI's mission is "to promote and enhance the quality of impartial workplace investigations."[34] It executes this mission through offering training and educational programs on impartial workplace investigations; publishing Guiding Principles for Conducting Workplace Investigations and the AWI Journal, a peer-reviewed professional journal; and offering other benefits, such as a members' list-serv and "Local Circles," where colleagues can meet to share questions and concerns.[35] Because many workplace investigators are sole practitioners, AWI plays an especially important role in providing them

with colleagues to whom they can turn for ethical and other advice. Indeed, one of the factors cited as militating against lawyer independence in the world of sole practitioners is the "solitude" of the lawyer (i.e., the absence of colleagues to turn to for needed expertise).[36]

DOES THE SYSTEM POSSESS MECHANISMS OF ACCOUNTABILITY?

"Institutional conditions" are a prerequisite to the exercise of lawyer independence. These include "strong norms, strongly institutionalized in laws, ethics, codes, liability rules, and practice standards."[37] These conditions are manifested in professional negligence rules; the substantive liability rules that apply in discrimination and harassment cases; and the ethics rules that pertain to the independent attorney investigator. In addition, "the most potent" influence on independence is "the client's need to impress or reassure third parties of the soundness or legitimacy of its conduct."[38]

As independent investigators, we are mindful of our contractual and fiduciary obligation to the organization to conduct an impartial investigation. If we fail to exercise the appropriate standard of care, both we and the client could face significant repercussions:

- A biased or sub-standard investigation could cause a client to fail to remediate on-going harassment, thereby perpetuating harm and creating liability, as well as causing other long-term problems for the organization: undermining the company's compliance function, damaging employee morale, and hurting credibility within the organization and larger community. Conversely, employers can reduce their exposure if they properly investigate (and remediate) allegations of discrimination and harassment.
- If the matter goes to litigation and the investigation is offered in defense, the investigation and investigator will be subjected to rigorous, adversarial scrutiny, and will need to answer to a judge or jury. A finding that the investigation was a sham or conducted in bad faith could subject the organization to damages, including punitive damages.[39]
- Likewise, the investigator could be sued for malpractice by the client.[40]
- Finally, the professional reputation of the investigator could be tarnished, leading those in need of independent investigations in the future not to retain them.[41]
- Additionally, in some cases, the court of public opinion may provide accountability, with organizations motivated to restore their credibility in the community through a fair and credible investigation process.[42]

DOES THE CLIENT WISH TO COMPLY WITH THE LAW? [43]

Independent investigations are more likely to occur when clients (and outside counsel) understand and desire an independent investigation.[44] A common criticism of independent investigators is that they simply "serve the client's interest."

However, this criticism is based on some false assumptions. First, "it confuses the managers . . . with the lawyer's actual client, the corporate entity."[45] Second, it identifies the client's purported "interest" with the narrowest, most short-term, and anti-social vision of that concept (i.e., covering up rather than addressing a problem in order to escape consequences in the near-term). However, many organizations recognize that a company's true long-term interests lie in conduct that upholds the legal system and its requirements. Third, it relies on a stereotype of the company decisionmaker as someone who desires a specific pre-determined outcome, and who tries to manipulate the investigation accordingly. In our experience, however, this scenario is the exception, rather than the rule—at least among the organizations we have been called upon to investigate. Rather, many decisionmakers truly desire a thorough and independent investigation to find out what happened.

This is not to deny the existence of unenlightened and even malfeasant heads of companies. Therefore, what might be usefully added to the workplace investigations field is more focused training from professional associations, such as AWI, on the:

- concept and definition of independence;
- conflicts of interest that undermine independence;
- ways constituents of an organization may intentionally or inadvertently subvert independence;
- strategies the lawyer can employ, both to educate clients and to guard against compromises; and
- methods to diminish the potential for unconscious bias in favor of management.

PART II: INDEPENDENT INVESTIGATIONS AND THE ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege is sometimes raised as a factor that can undermine independence.[46] The contention is that, if an investigation was truly independent, it would be non-privileged and accessible by the complainant. If an employer uses an investigation as a defense in litigation, it is well settled that the employer cannot maintain the privilege.[47]

However, plaintiff's attorneys may contend it is not fair for an employer to choose to assert the privilege—likely when the facts gathered would be adverse to the employer's interests—but waive the privilege when it is to their advantage. Rather, some contend the complaining employee should have full access to the information gathered regardless of whether the investigation is used as a defense in actual or potential litigation.

We believe this argument is based on the false premise that a complaint brought by the employee and the employer who has initiated an investigation of a complaint are similarly situated, when they are not. Centered in the litigation model, plaintiff's attorneys view the investigation as narrowly relevant only to litigation. An independent investigation is not done only in anticipation of litigation, but rather for the employer to prevent and respond to harassment and discrimination, and to take steps to fix any problems uncovered, whether or not litigation ensues. If an investigation could not be kept private, it would be a disincentive to uncovering all the facts, regardless of how private or potentially harmful. It also could dissuade future claimants and witnesses from coming forward.

Moreover, an employer has a duty to **all** of its employees, not just the individual who brings the complaint. This duty is often served by maintaining confidentiality of the investigation. Plaintiff's attorneys, on the other hand, are focused on what is best for their client in litigation, which includes maximizing a damage award. While attorneys for employers also focus on minimizing damages, they are also duty-bound to protect other employees in the workplace. This includes safeguarding employee privacy rights,[48] protecting witnesses from retaliation,[49] considering the reputational harms arising from unjustified accusations, and guarding against the very real risk and increasing threat of defamation claims (to witnesses, investigator, and employer).[50]

A proper Investigation has the potential to unearth all kinds of sensitive information, including information that is not relevant to the complaint. Because investigators cannot know in advance what information is relevant, they must be given a wide berth to chase down various avenues of inquiry, without concern as to where this may lead. The attorney-client privilege allows an employer to give an investigator wide latitude to review documents and interview witnesses without worrying that communications that are best left private become public. This, in turn, allows for a greater possibility of conducting a truly thorough and independent investigation. Indeed, this is the purpose behind the attorney-client privilege in the first place "to encourage full and frank communication between attorneys and their clients, and thereby promote broader public interests in the observance of law and administration of justice."[51]

If employee witnesses are not afforded confidentiality, and facts uncovered that are not directly relevant to the complaint cannot be kept private, investigations may have less opportunity for true independence. This is true both because the employer may be more inclined to constrain or "stage manage" the investigation; and because employee candor may be chilled by the knowledge that whatever they say will necessarily become public.[52]

Although having full access to an employer's investigation might help plaintiff's attorneys better value their cases prior to litigation, the broader public policy considerations outweigh that interest. Were the rules otherwise, any internal complaint, no matter how baseless, could compel an organization to hand over sensitive employee and institutional data—including non-germane information—to individuals who have no duties to the larger whole. This has the potential to hinder, rather than further, the enforcement of equality laws and staff morale in the work place. Moreover, should a plaintiff's claim proceed to litigation, the attorney-client privilege does not prevent access to the pertinent underlying *facts* of a case. Rather, U.S. civil discovery procedures are among the most demanding in the world in requiring employers to turn over relevant evidence to employee litigants.[53]

CONCLUSION

The dominant ethic of the American legal profession has long been one of "partisan advocacy."[54] However, this view fundamentally misconceives the role of the lawyer outside of the adversarial setting. Nothing in the professional rules of conduct prevents lawyers from conducting impartial investigations, if that is the role for which they have been retained. We do not claim that attorneys always live up to this ideal. However, under the right circumstances, attorneys can, do, and should embrace their role as independent investigators. It is a vital role for society, and lawyers are well-suited to the task. It is high time for attorneys to reclaim independence as a valued part of their professional identities.

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1. Under California law, employers must investigate claims of harassment, discrimination, and retaliation. This obligation arises from the employer's affirmative duty under the Fair Employment and Housing Act (FEHA) to take all reasonable steps to prevent harassment and discrimination from occurring; and employers may limit their potential damages if they are able to show that they responded effectively to complaints. Cal. Gov't Code § 12940(k) (2022); Cal. Code Regs., tit. 2, § 11023(a), (b)(4)(C) (2022); *State Dep't of Health Servs. v. Superior Ct.*, 31 Cal. 4th 1026, 1045 (2003). Similarly, under federal law, an employer may defend against certain claims by showing that it conducted an adequate investigation. The *Faragher-Ellerth* affirmative defense allows employers to avoid liability for hostile work environment claims by proving they (1) exercised reasonable care to prevent and promptly correct any harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

2. Cal. Rules Prof. Conduct, R. 1.7, cmt 1.

3. *Supra*, n. 1.

4 *See* Kirsten Branigan, Carole Nowicki, Lori Buza, & Jessica Allen, *Conducting Effective Independent Workplace Investigations in a Post-#MeToo Era*, 74 Disp. Resolution J. 85, 86 (2019) ("Utilizing outside, independent investigators is beneficial to maintaining the objectivity of the investigation."); Ashley Lattal, *The Hidden World of Unconscious Bias and its Impact on the "Neutral" Workplace Investigator*," 24 J. L. & Pol'y 411, 464 (2016), available at https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1510&context=jlp (last visited Aug. 15, 2022). ("Ultimately, where there is any possibility of bias, a company would be best served by retaining an external investigator who has no stake in the outcome.")

5. According to the California Department of Fair Employment and Housing (DFEH), the investigation must be "impartial" and based on "objective weighing of the evidence collected." *Harassment Prevention Guide*, at 8, (DFEH 2017) available at https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2017/06/DFEH-Workplace-Harassment-Guide-1.pdf (last visited Aug. 15, 2022). The Equal Employment Opportunity Commission (EEOC) requires an investigation to be "prompt, thorough, and impartial." *Vicarious Liability for Unlawful Harassment by Supervisors*, (EEOC 1998), available at https://www.eeoc.gov/laws/guidance/enforcement-guidance-vicarious-liability-unlawful-harassment-supervisors#:~:text=An%20employer%20is%20subject%20to,had%20supervisory%20authority%20over%20the (last visited Aug. 15, 2022). *See also Guiding Principles for Conducting Workplace Investigations* (AWI 2020); *Workplace Harassment Guide for California Employers*, (DFEH 2016), available at https://www.wagenerlaw.com/pdf/DFEH_Workplace_Harassment_Guide.pdf (last visited Aug. 15, 2022).

6. While impartiality "resists easy definition," it generally means "free from bias." *See generally* Ashley Lattal, *supra*, n. 4, at 421-422. *See also* Amy Oppenheimer, *The Psychology of Bias: Understanding and Eliminating Bias in Investigations (Parts I and II)*, 2 Cal. Ass'n of Workplace Investigators Q1 (2011). In turn, "bias" is an encompassing concept which includes any number of unconscious or other cognitive processes that may distort the evaluation of evidence by actors in the legal system. Such biases include hindsight bias, outcome bias, belief perseverance, confirmation bias, anchoring effects, tunnel vision, and more. Neil Bewer & Amy Bradfield Douglass (eds.), Psych. Science and the Law, at 30 (2019). "Bias" may also include unconscious bias based on categories such as race and gender. *Id.*, at XX. Judges in our system may also fall prey to the same cognitive biases that affect lay people. *Id.* at 400. *See also* Tracy A. Pearson, "After a Neutral and Impartial Investigation . . .": Implicit Bias in Internal Workplace Investigations, Dissertation, Rossier School of Education, University of Southern California (August 2021), available at https://www.proquest.com/openview/a35986837bb473f3a238837bde954473/1?cbl=18750&diss=y&pq-origsite=gscholar (last visited Aug. 15, 2022).

7. *Harassment Prevention Guide*, *Supra*, n. 5; *see* Lindsay E. Harris & Mark L. Tuft, *Attorneys Conducting Workplace Investigations: Avoiding Traps for the Unwary*, 25 Cal. Lab. & Emp. L. Rev. 4, 1-7 (2011), available at https://cdn.ymaws.

com/www.awi.org/resource/collection/6FBE4315-CBBB-443D-B005-8B0F2329CB57/Module%2011%20-%20Attorneys%20Conducting%20Workplace%20Inv.pdf (last visited Aug. 15, 2022).

8. Workplace investigations are bifurcated in this manner to avoid the types of conflicts of interest that could arise when an employer's regular counsel purports to conduct an independent investigation on behalf of a client for whom they also provide advice and advocacy, or where they receive significant fees for services unrelated to compliance or investigative functions. *See* Peter G. Peterson, *Com. on Public Trust and Private Enterprise: A Personal Postscript*, at 12 (2003) available at https://www.conference-board.org/pdf_free/SR-03-04-ES-postscript.pdf (last visited Aug. 15, 2022) (concluding that "independent" investigations by an entities' regular law firm, and combining auditing and advocacy roles, present conflicts of interest which undermine good corporate governance, which requires truly independent, outside professionals acting in the corporation's best interest). Robert W. Gordon, *A New Role for Lawyers? The Corporate Counselor After Enron*, 36 Conn. L. Rev. 1185, 1187 (2002-2003), available at https://www.semanticscholar.org/paper/A-New-Role-for-Lawyers-The-Corporate-Counselor-Gordon/88b6d33d7830a9e3bc8ff908bacc744f4d2db82d#paper-header (last visited Aug. 15, 2022) (discussing regular law firm's conflict of interest in conducting review of Enron deals it had previously signed off on).

9. In California, external investigators must either possess a private investigator license, or fall into one of several statutory exemptions. One of these exemptions permits attorneys to conduct investigations, but only if they do so in their attorney capacity, namely, if they are performing "legal services" within the context of an attorney-client relationship. Cal. Bus. & Prof. Code § 7522; Lindsay E. Harris & Mark L. Tuft, *supra*, n. 7, at 1-7.

10. *See generally* Kevin H. Michels, *Lawyer Independence: From Ideal to Viable Legal Standard*, 61 Case W. Res. L. Rev. 86, 137 (2010).

11. "As a representative of clients, a lawyer performs various functions. ¶As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. ¶As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. ¶As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. ¶As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or others." Model Rules of Prof'l Conduct Preamble ¶ 2, R. 2.1 (ABA 2020).

12. Kevin H. Michels, *supra*, n. 10, 137. For example, the advisor is bound by different ethical standards than the litigator: ABA Model Rules of Professional Conduct R. 2.1 ("Advisor") mandates that a lawyer acting in an "advisor" capacity "shall exercise independent professional judgment and render candid advice." The Comments to the rule explain that in rendering such advice, it is "proper to refer to relevant moral and ethical considerations" (cmt. 2) and that the lawyer "shall not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client" (cmt. 3). In other words, far from serving as the proverbial "hired gun," the lawyer as advisor is duty-bound to maintain "sufficient detachment from his client's interests" so as not to be "unduly influenced by the client's desire for a favorable answer." Kevin H. Michels, *supra*, n. 10. 100.

13. Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. Rev. 1, 20 (1988); *see also* Robert W. Gordon, *A New Role For Lawyers*, *supra*, n. 8, at 1205. ("In the trial setting, aggressive advocacy (at least in theory) supposedly operates to bring out the truth, by testing one-sided proof and argument against counter-proof and counter-argument. . . . Outside of such settings, one-sided advocacy is more likely to help parties overstep the line to violate the law, and to do so in such ways as are likely to evade detection and sanction, and thus frustrate the purposes of law and regulation.").

14. See Robert W. Gordon, *Imprudence and Partisanship: Starr's OIC and the Clinton-Lewinsky Affair*, 68 Fordham L. Rev. 639, 645-46, n.24 (1999) (listing situations in which lawyers are required to be impartial).

15. See Paul W. Vapneck, Cal. Practice Guide: Prof'l Responsibility, ¶ 1:333.5 (Rutter Group 1997); Model Rules of Prof'l Conduct R. 1.2(c) (ABA 2020).

16. The California State Bar has promoted the use of "limited scope legal assistance," which it defines as a "relationship between an attorney and a person seeking legal services in which it is agreed that the scope of the legal service will be limited to the defined tasks that the person asks the attorney to perform. *Attachment A: Statement in Support of Limited Scope Legal Assistance (Unbundling) Resolution* (State Bar of Cal. May 15, 2009), available at https://www.calbar.ca.gov/portals/0/documents/publiccomment/2009/Limited-Scope-Statement.pdf (last visited Aug. 15, 2022).

17. Further, these concepts are part of the Association of Workplace Investigators' (AWI) legal ethics curriculum, as well as in its webinars and trainings on how independent attorney investigators should define their ethical role in investigative retention agreements.

18. Lindsay E. Harris & Mark L. Tuft, *supra*, n. 7.

19. That is, the lawyer possesses no interests or responsibilities that undermine achieving that objective. *See* Model Rules of Pro. Conduct R. 1.2(c) (ABA 2020); Model Rules of Pro. Conduct R. 1.7(a)(2) (ABA 2020).

20. Indeed, many attorney-investigators specify in their contracts with clients that they are being engaged for the specific purpose of conducting an impartial investigation,

and that the client agrees that the attorney fulfills her duty of loyalty by so doing.

21. Rebecca Files & Michelle Liu, *Unraveling Financial Fraud: The Role of the Board of Directors and External Advisors in Conducting Independent Internal Investigations*, 1 (2022) ("We find that firms whose internal investigations are led by independent teams are more likely to retain external advisers, have a higher likelihood of chief executive officer (CEO) turnover, and face a lower likelihood of SEC enforcement action than do firms whose investigations are led by non-independent teams. . . . These results also suggest that appointing independent groups to lead internal investigations protects the firm, at the expense of the CEO, following accounting fraud.")

22. *See*, *e.g.*, Peter G. Peterson, *supra*, n. 8, 12 (Conflicts created where law firms and auditors are awarded largest portion of their fees by management for services unrelated to their monitoring functions.)

23. Amer. College of Trial Lawyers Fed. Criminal Proc. Com., *Recommended Practices for Companies and Their Counsel in Conducting Internal Investigations*, at 24 (2020), available at https://www.actl.com/docs/default-source/default-document-library/newsroom/reprint_federalcriminalprocedures_conducting_internal_investigations-29oct08 (last visited Aug. 15, 2022); *see also* Nat'l Ass'n of College and University Attorneys, *Ethics and Internal Investigations*, 2 (2020) ("Nor should the law firm that conducts the independent investigation later represent the organization in litigation on the subject of the investigation.")

24. *See* William C. Wagner & Trent J. Sandifur, *Legal Malpractice Claims Resulting from Internal Investigations*, XX (volume) For the Defense 39, 41 (2013); Douglas R. Richmond, *Navigating the Lawyering Minefield of Internal Investigations*, 63 Vill. L. Rev. 617, 688 (2018), available at https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=3383&context=vlr (last visited Aug. 5, 2022).

25. Cal. Rules Prof. Conduct R. 3.7 (Lawyer as Witness) (2021).

26. Regarding unconscious biases, "workplace investigators should understand the potentially detrimental impact such biases can have at each stage of the process and make conscious efforts to reduce the impact." Ashley Lattal, *supra*, n. 4, at 414. *See also* Amy Oppenheimer, *supra*, n. 6.

27. *See generally* Robert W. Gordon, *A New Role For Lawyers*, *supra*, n. 10, at 1205 (2003) ("The advocacy ideology regularly and persistently confuses the managers, who ask for lawyers' advice, with the lawyers' actual client, the corporate entity.")

28. *See*, *e.g.*, Milton C Regan Jr., Zachary B Hutchinson & Juliet R Aiken, *Lawyer Independence in Context: Lessons from Four Practice Settings*, 29 Geo. J. Legal Ethics 153, 163 (2016) (operating outside one's area of expertise may jeopardize the lawyer's ability to be independent). Conversely, where the lawyer possesses authority deriving from her expertise and "special knowledge," her ability to exercise independence increases. Robert W. Gordon, *The Independence of Lawyers*, n. 16, at 37.

29. Robert W. Gordon, *The Independence of Lawyers*, *supra*, n. 13. ("Before they can assert positions independent from their clients, lawyers have to want to do so;" arguing that attitude and motivation of lawyer is necessary but not sufficient condition of independence.)

30. *Id.*

31. *Id.*

32. *Id.*

33. The authors both formerly served on the AWI Board of Directors. Ms. Oppenheimer founded the organization.

34. *About AWI*, Ass'n of Workplace Investigators, available at https://www.awi.org/page/about_AWI (last visited Jul. 6, 2022).

35. *Id.* AWI currently has more than 1400 members internationally.

36. *See*, *e.g.*, Milton C. Regan Jr., Zachary B. Hutchinson & Juliet R. Aiken, *Lawyer Independence in Context: Lessons from Four Practice Settings*, 29 Geo. J. Legal Ethics 153, 166 (2016) (solo lawyers may lack colleagues who can advise them on ethical concerns, potentially "placing them at risk of acting improperly on behalf of clients with requests.")

37. Robert W. Gordon, *The Independence of Lawyers*, *supra*, n. 13, at XX.

38. *Id.*, at 37. In the white collar investigations context, these constraints are especially acute, as companies that desire leniency from third-party regulators such as the SEC and the Justice Department must meet the standards for independent investigations articulated by those agencies. *See Evaluation of Corporate Compliance Programs*, at 7 (USDOJ 2020), available at https://www.justice.gov/criminal-fraud/page/file/937501/download (last visited Aug. 15, 2022) ("What steps does the company take to ensure investigations are independent, objective, appropriately conducted, and properly documented?"). *See also Rep. of Investigation Pursuant to Section 21(a) of the Sec. Exch. Act of 1934 and Comm'n Statement on the Relationship of Coop. to Agency Enf't Decisions*, *Exchange Act*, No. 44,969, 76 SEC 220 (2001) (listing independence of investigations as among criteria they will consider "in determining whether and how much to credit self-policing, self-reporting, remediation and cooperation. . . .")

39. *Haddad v. Wal-Mart Stores, Inc.*, 455 Mass. 91, 108 (2009) (Court cited employer's "sham" investigation as among justifications to reinstate one million dollar punitive damages award); *Bruso v. United Airlines, Inc.*, 239 F.3d 848, 858 (7th Cir. 2001) (reversing trial court's grant of summary judgment on punitive damages based on evidence

that employer conducted a "sham" investigation designed to discredit plaintiff and protect company managers.).

40. See *Kirschner v. K & L Gates LLP*, 46 A.3d 737 (Pa. Super. Ct. 2012) (malpractice suit against law firm allowed to proceed where firm's deficient investigation failed to uncover fraud, where firm inappropriately allowed suspected wrongdoer to influence investigation, and where investigation report misled independent directors to believe no improper conduct had occurred); see also Purva Patel, *City of San Diego Files Lawsuit Against Vinson & Elkins*, Houston Chron. (July 29, 2006), available at https://www.chron.com/business/article/City-of-San-Diego-files-lawsuit-against-Vinson-1892021.php (last visited Aug. 15, 2022) (City sued law firm for professional negligence and breach of contract and fiduciary duty for aligning itself with accused city officials and failing to conduct adequate and independent investigation into their alleged financial mismanagement); *see also* Douglas R. Richmond, *supra*, n. 24, at 620 (lawyers who conduct internal investigations face "very real risks" of malpractice if they negligently conduct investigations).

41. *See, e.g.*, Vivia Chen, *Could the Cuomo Investigation Taint Davis Polk?*, Bloomberg L. Bus. & Prac. (May 27, 2021), available at https://news.bloomberglaw.com/business-and-practice/could-the-cuomo-investigation-taint-davis-polk (last visited Aug. 15, 2022) (arguing that short-term benefit of lucrative investigation not worth long-term risk to reputation, where Davis Polk Firm had potential conflicts of interest in undertaking investigation) available at https://news.bloomberglaw.com/business-and-practice/could-the-cuomo-investigation-taint-davis-polk (last visited Aug. 15, 2022). *See also supra*, Robert W. Gordon, *The Independence of Lawyers*, *supra*, n. 13, at 38. ("When called upon to certify to . . .outsiders the legality and respectability of a company's past or future conduct, one of the assets lawyers (or their firms) can bring is a reputation for integrity and independence.").

42. *See, e.g.*, Robert W. Gordon, *The Independence of Lawyers*, *supra*, n. 13, at 37 ("News media reporting allegations of corporate scandal or malfeasance want proof that the company is not engaged in a cover-up.").

43. *Id.* at 36 (A factor which facilitates lawyer independence in representation is "receptive clients, those with strategically placed officers who can be led toward creative voluntary compliance with the spirit of regulatory regimes rather than of formal perfunctory compliance or intense scorched-earth guerrilla resistance.").

44. *Id.* at 25 ("[Many] business executives want their lawyers to . . . serve as the 'corporate conscience,' to monitor middle-managers tempted to cut legal corners to meet profit targets, to follow the spirit as well as the letter of the law in order to preserve employee morale as well as a public image of civic leadership.").

45. *Id.*

46. The fact that an investigation is conducted by an attorney does not, in and of itself, mean that the investigation will necessarily be privileged. *See generally* Lindsay E. Harris & Mark L. Tuft, *supra*, n. 7, at 1.

47. See *Wellpoint Health Networks, Inc. v. Superior Ct.*, 59 Cal. App. 4th 110, 128 (1997).

48. The right of privacy in the California Constitution permits employees to sue employers for violations of the employee's reasonable expectation of privacy. *See, e.g.*, Branigan Robertson, *Employee Privacy in the Workplace*, available at https://brobertsonlaw.com/practice-areas/privacy/ (last visited July 10, 2022).

49. Employers have a duty to protect complainants and witnesses who cooperate in investigations from retaliation. Cal. Gov't Code § 12940(h); *Workplace Harassment Guide for California Employers*, *supra*, n. 5, at 8.

50. See, e.g., *Pearce v. E.F. Hutton Grp.*, 664 F. Supp. 1490 (D.D.C. 1987) (manager terminated for misconduct sued employer and investigating attorney for defamation based on company's disclosure of investigation report at press conference.). *See also* Douglas R. Richmond, *supra*, n. 24, at 687 (investigations pose significant risk of defamation claims and therefore lawyers "should not publish reports they prepare beyond delivering them to the client, or, in appropriate cases, sharing them with the government.").

51. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) ("The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.") . Of course, this argument assumes "we can count on lawyers to give good advice on compliance (and on clients to take that advice)." In other words, it assumes the lawyer will give sound advice based on independent, professional judgment. Kevin H. Michels, *supra*, n. 10, 101.

52. *See* Nancy Bornn, *Breaking Through: How Investigators Balance the Competing Priorities of Claimant and Employer Counsel, Part 3*, 10 Ass'n of Workplace Investigators J. 1, 15 (2019) (Employer counsel in survey said they would not prospectively waive privilege: "A big reason for the attorney-client privilege is to prevent the chilling effect in this context. It would have too many repercussions throughout the entire investigation and the way the investigation is conducted if you don't have some sort of protection over it."). *See also CRD Response to Public Record Act Requests*, at 1 (DFEH 2018), available at https://calcivilrights.ca.gov/prarequests/ (last visted Aug. 5, 2022) (DFEH may withhold records from public disclosure in order to "'prevent a 'chilling' effect on people who are victims of discrimination," in order to safeguard the privacy rights of complainants who "provide sensitive, personal and confidential information," and of respondents and third parties who submit confidential information; and to prevent interference with the DFEH's ability to "perform its statutory obligation to investigate, conciliate, mediate, and prosecute complaints.").

53. *See*, *e.g.*, Squire Patton Boggs, *Gathering Evidence: How Does France Compare*, La Revue (June 10, 2013), available at https://larevue.squirepattonboggs.com/gathering-evidence-how-does-france-compare_a2075.html (last visited Aug. 15, 2022) ("Parties to civil litigation in France have no duty imposed on them to disclose any evidence of particular documents to the opposing party" and "are not actually able to compel their opponent to disclose any evidence."); See also Bernhard Schmeilzl, *The Process and Main Stages of Civil Litigation in Germany*, available at https://www.germancivilprocedure.com/guide-to-german-civil-proceedings/ (last visited July 20, 2022) ("[T]here is neither any discovery procedure under German civil procedure rules, nor are there any depositions or written witness statements.").

54. Robert W. Gordon, *Imprudence and Partisanship*, *supra*, n. 14, at 645.

Editor's Note: Andrew Friedman and Courtney Abrams will co-author a rebuttal article on attorney-investigator impartiality in the March 2023 issue of this publication.

The Professional Responsibility of Independent Investigators

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Rudy Exelrod Zieff & Lowe

Rosha Jones
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Moderator: Christina Ro-Connolly, *Oppenheimer Investigations Group*

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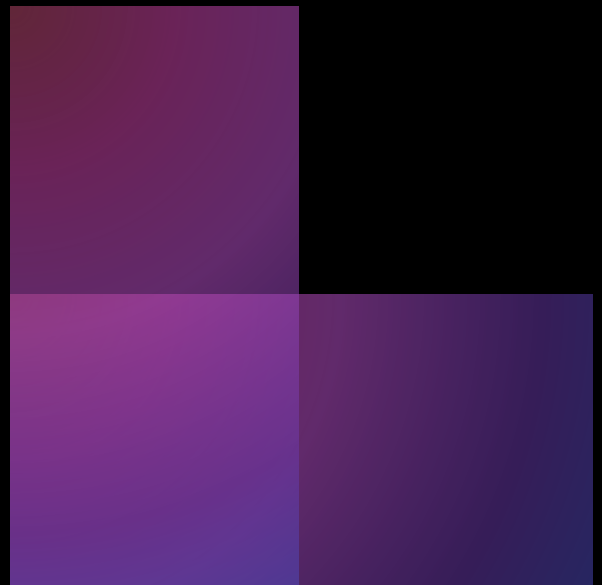
Investigations in the Public Eye – Public's Misconceptions

Publicity about investigations can lead to **misconceptions**:

- An investigation should uncover and take account something that occurred outside of work (sexual/social relationships, social media searches, prior criminal acts, etc.) AKA: "Why aren't you doing oppositional research?"
- An allegation shouldn't be substantiated unless it is "proved" beyond a reasonable doubt.
- The meaning of due process.
- Shouldn't the investigator consider the parties' overall "character"?



Why Investigate?

Part of an employer's duty to prevent and respond to harassment and discrimination under Title VII and FEHA. Cal. Gov't Code § 12940(k) (2022)

When there are contested allegations, employers need findings before taking action.

A fair & adequate investigation can prevent harm and reduce liability.

It reinforces and supports employer policies and the law.

It's the right thing to do! If done correctly, it can preserve workplace relationships and/or improve workplace culture.

An Inadequate Investigation can be Evidence of Pretext

***Mendoza v. Western Medical Center of Santa Ana*, 222 Cal App. 4th 1334 (2014)**

Judgment for plaintiff upheld in part due to testimony by plaintiff's expert witness who testified to numerous shortcomings in the investigation conducted by defendants following plaintiff’s complaint.

The Ethical Landscape

Independent Investigations – the Landscape

- Done by external attorneys (often in an AC relationship)
  - (Cal. Bus, & Prof. Code § 7522(e)(exception to general requirement to be a licensed private investigator); Lindsay E. Harris & Mark L. Tuft, *Attorneys Conducting Workplace Investigations: Avoiding Traps for the Unwary,* 25 Cal. La. & Emp. L Rev. 4, 1-7 (2011))
  - (internal HR and/or licensed PI's also do neutral investigations under different ethical landscape)
- Are usually done prior to litigation and for complaints that may or may not give rise to a legal claim.
- Are supposed to be conducted in a manner to respect/preserve confidentiality (to a degree..)
  - (California Civil Rights Department Harassment Prevention Guide for California Employers, pgs. 7-8 (2017) and Association of Workplace Investigators, Guiding Principles for Conducting Workplace Investigations (2020))

Lawyer Investigators – The Ethics

Lawyer Roles – Advisor, advocate, negotiation and evaluator – Model Rules of Professional Conduct Preamble Paragraph 2, R. 2.1 (ABA 2020). (Emphasis added)

Different ethical standards apply (attorney as advisory should exercise independent professional judgment and render candid advice – comments to ABA R. 2.1)

California State Bar has supported use of limited scope services. The limited scope can include acting as an impartial independent investigator to make factual findings.

***Investigator's Perspective*: If retained to be independent, not being independent (being biased for example) would be a breach of the attorney's ethical duties.**

Attorney Investigators – *The Rule*

While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.

Rules of Professional Conduct, Rule 2-100

Barriers to Independence – Common Issues

- Conflicts of Interests (previous representation, being parties to events investigated, seeking unrelated business from the organization)
- Failure to understand the role of independence and how to deliver on that
- Lack of knowledge of the impact of bias
- Repeat player bias?
- Pre-investigation communications with client that produce confirmation bias
- Role of Privilege (more on this later!)

Thorny Issues...

Confidentiality

Investigator's Perspective:

Critically important to many complainants, respondents and witnesses. May be lack of cooperation and fall out in workplace without it.

However, investigators must explain the limited nature of confidentially:

- If there is litigation, information may be subject to discovery and provided voluntarily or by court order.
- If Public entity and elected officials/high-ranking, employees involved could be subject to disclosure under Public Records Act.
- But could be redacted by court to protect witnesses.

Confidentiality

Plaintiff's Perspective:

- Many complainants seek full transparency. Who gets access to what information?
- Video or recording of interviews? Who gets access to this?
- Complainant and/or Respondent requests to bring counsel.
- How to engage trust in the process when Complainant feels left in the dark?
- If headed to litigation, WWJS (What Will the Jury Say)? Does the process and treatment of the Complainant and Respondent "feel" fair?

Confidentiality

Employer's Perspective:

- Many respondents also seek full transparency and want to obtain and/or disclose details including perceived motivations of the complainant or witnesses to clear their name.

- Typically more details are disclosed to respondents when allegations are sustained (especially when formal discipline is taken). What about allegations that are not sustained?

- Protecting against retaliation. Whom in the organization should get access to the report? Is it ever appropriate to share details related to the investigation? Is it ever appropriate to share witness statements?

Confidentiality

Considerations in a Unionized Workplace and Impact of Labor Laws:

- Union-represented employees have the right to have their representative present during an investigatory interview that the employee reasonably believes could lead to discipline. *NLRB v. J. Weingarten Inc.*, 420 U.S. 251 (1975).

- Union Requests For Information (RFIs): Balancing Test: Does confidentiality/ Privacy Outweigh the Union's Need for Information?

- Public Sector Labor Law or Collective Bargaining Agreements may include provisions that require prior notice to union, specify enhanced due process rights, require additional disclosure.

California Public Records Act

Essick v. County of Sonoma (July 2022)

Investigative report of complaint against elected Sheriff is subject to disclosure under CPRA allowing newspaper to gain access to the full report. Sheriff is not protected by exceptions that apply to employees and/or police officers.

(**Note**: However, under *Waters v. City of Petaluma* investigative report was not subject to disclosure in litigation due to attorney/client privilege. Query what the result would have been if Sonoma County claimed privilege.)

Confidentiality vs. Transparency

How do we balance them?

Investigations in the Public Eye – Claims of Defamation

Defamation lawsuits are increasingly used against employers enforcing their rules and as silencing tactics to keep targets and witnesses from speaking out.

Under U.S. law there are first amendment and public policy exemptions protecting institutions and individuals from liability for defamation.

On Oct. 1, 2021, a California appeals court ruled in favor of **Pamela Lopez**, a lobbyist who was sued for defamation after speaking out about being sexually assaulted by former California lawmaker Matt Dababneh. The appellate court found that Lopez was protected by Fair Reporting privilege, which says individuals can't be sued for defamation if they are simply reporting on what was already said in specific contexts, such as reports to a legislative committee.

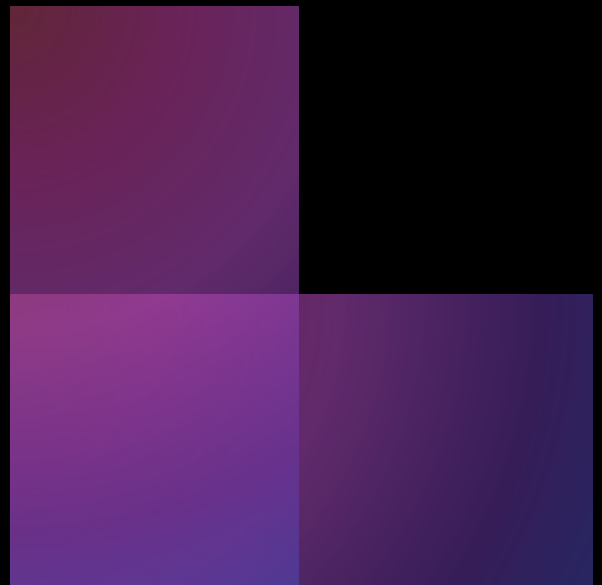
Attorney-Client Privilege Issues In Investigations

Purpose of the Attorney-Client Privilege in Investigations

Uncover all the facts without fear of exposure of private information (such as medical information or sensitive personal information.)

Encourages complainants and witnesses to speak up and provide full information without fear of a loss of privacy or control of their narrative.

Better allows for a positive post-investigative work environment that is free from retaliation.



The employer has duties to all its employees – the complainant, respondent and witnesses – to fairness and to protect confidential and private information.

See Attorneys Conducting Impartial Workplace Investigations: Reclaiming the Independent Lawyer Role, Harris & Oppenheimer, California Labor & Employment Law Review, September 2022.

Pitfalls of the Attorney-Client Privilege in Investigations

- Attorney-client privileged investigations are inherently structured to benefit employers. See *Wellpoint Health Networks, Inc., v. Superior Court*, 59 Cal.App.4th 110 (1997) (attorney-client privilege and work product doctrine apply to attorney workplace investigations).
- "Repeat player bias" and financial dependency may encourage implicit or other bias.
- Employers may weaponize attorney-client-privileged investigations against the complainant including by selecting the investigator, influencing the scope and form of the investigation, and deciding whether or not to waive privilege.
- Protected pre-investigation communications with client may produce confirmation bias

View from the Plaintiff's Bench: What Can Be Done to Encourage Impartiality and Level the Playing Field Within the Existing Framework?

See Attorney Workplace Investigations: Neither Impartial Nor Independent, Friedman & Abrams, California Labor & Employment Law Review, March 2023.

Reconciling the Attorney-Client Privilege with the Purposes of the Investigation

A Realistic Approach:

What Can Be Done to Make An Investigation More or Less Neutral?

QUESTIONS?

CLE Materials: Day 2

Panel 6: K-12 and Higher Education

January 5, 2024

Berkeley Center on Comparative Equality & Anti-Discrimination Law

FACT SHEET: U.S. Department of Education's 2022 Proposed Amendments to its Title IX Regulations

Over the last 50 years, since Title IX of the Education Amendments of 1972 (Title IX) was signed into law, it has paved the way for tremendous strides in access to education, scholarships, athletics, and more for millions of students across the country. In spite of this historic progress, women and girls still face fundamental barriers to equal education opportunity. Rates of sexual harassment and assault in our nation's schools and colleges remain unacceptable high. Far too many women see their education derailed because of pregnancy discrimination. The promise of Title IX, an education free from sex discrimination, remains as vital now as it was when it was first signed into law.

Today, in celebration of the 50th anniversary of Title IX, the U.S. Department of Education released for public comment proposed changes to the regulation that help schools and colleges implement this vital civil rights legislation. The proposed amendments aim to ensure full protection under Title IX for students, teachers, and employees from all forms of sex discrimination, including sex-based harassment and sexual violence, in federally funded elementary schools, secondary schools, and postsecondary institutions.

These proposed regulations will advance Title IX's goal of ensuring that no person experiences sex discrimination in education, that all students receive appropriate support as needed to access equal educational opportunities, and that school procedures for investigating and resolving complaints of sex discrimination, including sex-based harassment and sexual violence, are fair to all involved.

The Department's proposed amendments will restore vital protections for students in our nation's schools which were eroded by controversial regulations implemented during the previous Administration. Those regulations weakened protections for survivors of sexual assault and diminished the promise of an education free from discrimination. The new regulations proposed by the Department will also provide clear rules to help schools meet their Title IX obligation to eliminate sex discrimination in their programs and activities. Through the proposed regulations, the Department reaffirms its core commitment to fundamental fairness for all parties; protecting freedom of speech and academic freedom; and respect for the autonomy and protections that complainants need and deserve when they come forward with a claim of sex discrimination.

The Department's proposed regulations will also strengthen protections for LGBTQI+ students by clarifying that Title IX's protections against discrimination based on sex apply to discrimination based on sexual orientation and gender identity.

In developing these proposed regulations, the Department consulted extensively with stakeholders, and received input from students, parents, educators, state government representatives, advocates, lawyers, researchers, and representatives from elementary, secondary, and postsecondary schools. The Department also held its first-ever nationwide virtual public hearing on Title IX in June 2021 and conducted a careful review of federal case law to support its comprehensive review of current Title IX policy and development of the proposed regulations.

The proposed regulations would:

Clearly protect students and employees from all forms of sex discrimination

The Department's proposed regulations clarify that Title IX's prohibition of discrimination based on sex includes protections against discrimination based on sex stereotypes and pregnancy. The Department is

also clarifying that Title IX's protections against discrimination based on sex apply to sexual orientation and gender identity. This clarification is necessary to fulfill Title IX's nondiscrimination mandate.

Provide full protection from sex-based harassment.

The proposed regulations will restore vital protections for students against all forms of sex-based harassment. Under the previous Administration's regulations, some forms of sex-based harassment were not considered to be a violation of Title IX, denying equal educational opportunity. The proposed regulations would cover all forms of sex-based harassment, including unwelcome sex-based conduct that creates a hostile environment by denying or limiting a person's ability to participate in or benefit from a school's education program or activity.

Protect the right of parents and guardians to support their elementary and secondary school children.

The proposed regulations would strengthen clear protection for parents, guardians, and other authorized legal representatives of students to act on behalf of a student, including by seeking assistance under Title IX and participating in any grievance procedures.

Protect students and employees who are pregnant or have pregnancy-related conditions.

The proposed regulations would update existing protections for students, applicants, and employees against discrimination because of pregnancy or related conditions. The proposed regulations would strengthen requirements that schools provide reasonable modifications for pregnant students, reasonable break time for pregnant employees, and lactation space.

Require schools to take prompt and effective action to end any sex discrimination in their education programs or activities – and to prevent its recurrence and remedy its effects.

The proposed regulations would promote accountability and fulfill Title IX's nondiscrimination mandate by requiring schools to act promptly and effectively in response to information and complaints about sex discrimination in their education programs or activities. And they would require that schools train employees to notify the Title IX coordinator and respond to allegations of sex-based harassment in their education programs or activities.

Require schools to respond promptly to all complaints of sex discrimination with a fair and reliable process that includes trained, unbiased decisionmakers to evaluate all permissible evidence.

The proposed regulations would establish clear requirements for schools to conduct a reliable and impartial investigation of all sex discrimination complaints, as Title IX requires. The current regulations' requirements cover *only* formal complaints of sexual harassment.

The proposed regulations would keep as much of the current regulations as possible to ensure consistency for schools *and* would update procedures to fill gaps and work more effectively in protecting against sex discrimination in the nation's K-12 schools and postsecondary institutions.

The Department's proposed regulations would include the following requirements:

- All schools must treat complainants and respondents equitably.
- Schools have the option to offer informal resolution for resolving sex discrimination complaints.

- Title IX Coordinators, investigators, decisionmakers, and facilitators of an informal resolution process must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.
- A school's grievance procedures must give the parties an equal opportunity to present relevant evidence and respond to the relevant evidence of other parties.
- The school's decisionmakers must objectively evaluate each party's evidence.
- The proposed regulations would not require a live hearing for evaluating evidence, meaning that if a school determines that its fair and reliable process will be best accomplished with a single-investigator model, it can use that model.
- A school must have a process for a decisionmaker to assess the credibility of parties and witnesses through live questions by the decisionmaker. The proposed regulations would not require cross-examination by the parties for this purpose but would permit a postsecondary institution to use cross-examination if it so chooses or is required to by law.
- In evaluating the parties' evidence, a school must use the preponderance-of-the-evidence standard of proof unless the school uses the clear-and-convincing-evidence standard in all other comparable proceedings, including other discrimination complaints, in which case the school may use that standard in determining whether sex discrimination occurred.
- A school must not impose disciplinary sanctions under Title IX on any person unless it determines that sex discrimination has occurred.

Protect LGBTQI+ students from discrimination based on sexual orientation, gender identity, and sex characteristics.

The proposed regulations would clarify that Title IX's prohibition on discrimination based on sex applies to discrimination based on sexual orientation and gender identity. They would make clear that preventing someone from participating in school programs and activities consistent with their gender identity would cause harm in violation of Title IX, except in some limited areas set out in the statute or regulations. By providing this protection, the proposed provisions would carry out Title IX's nondiscrimination mandate and help to ensure access to education free from sex discrimination for LGBTQI+ students and others.

The Department plans to issue a separate notice of proposed rulemaking to address whether and how the Department should amend the Title IX regulations to address students' eligibility to participate on a particular male or female athletics team.

Require schools to provide supportive measures to students and employees affected by conduct that may constitute sex discrimination, including students who have brought complaints or been accused of sex-based harassment.

Under the proposed regulations, schools would be required to offer supportive measures, as appropriate, to restore or preserve a party's access to the school's education program or activity. The current regulations require this support only when sexual harassment, rather than any form of sex discrimination, might have occurred.

Clarify and confirm protection from retaliation for students, employees, and others who exercise their Title IX rights.

Retaliation against someone who provides information about alleged sex discrimination or who participates in a school's Title IX process can interfere with protections guaranteed by Title IX. If

students or others do not have clear protection against such retaliation, they may be unwilling to come forward with information or a complaint of sex discrimination, leaving Title IX protections unfulfilled.

The proposed regulations would make clear that schools must not intimidate, threaten, coerce, or discriminate against someone because they provided information about or made a complaint of sex discrimination or because they participated in the school's Title IX process – and that schools must protect students from retaliation by other students.

Improve the adaptability of the regulations' grievance procedure requirements so that all recipients can implement Title IX's promise of nondiscrimination fully and fairly in their educational environments.

To be effective in implementing Title IX, a school's grievance procedures for sex discrimination complaints must adapt to the age, maturity, needs, and level of independence of students in various educational settings, and the particular contexts of employees and third parties.

Based on this reality, the Department's proposed regulations would include a framework that accounts for these differences, including requirements that apply in all settings and specialized requirements that are tailored to the unique situation of sex-based harassment complaints involving postsecondary students.

This framework would ensure that all federally funded schools and postsecondary institutions can provide for the prompt and equitable resolution of sex discrimination complaints in their respective settings.

Ensure that schools share their nondiscrimination policies with all students, employees, and other participants in their education programs or activities

The proposed regulations also would require all schools that receive federal funding to clearly and effectively communicate their nondiscrimination policies to all students, employees, and other participants in their education programs or activities.

The Department's proposed Title IX regulations will be open for public comment for 60 days from the date of publication in the *Federal Register*.

Additional information on the proposed rule is available here. The unofficial version of the proposed rule is available here.

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Title IX's Protections for Transgender Student Athletes

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TITLE IX'S PROTECTIONS FOR TRANSGENDER STUDENT ATHLETES

*By Scott Skinner-Thompson and Ilona M. Turner**

INTRODUCTION

While transgender rights are steadily gaining ground across a number of areas—employment rights, access to health care, identity recognition—transgender people still often face obstacles in gaining equal access to the world of competitive athletics. Many people feel uncomfortable with the idea

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of transgender athletes—particularly transgender women and girls[1]—competing alongside non-transgender peers, even in elementary and secondary school sports. This article deconstructs these concerns and argues that transgender students in K-12 schools must be permitted to participate in athletics according to their gender identity. Such a policy is consistent with legal authority under Title IX and Title VII and, more importantly, best advances the well-being of already vulnerable transgender youth by helping to incorporate and include such students in activities that are critical to physical, social, mental, emotional development, and health.

Dispelling some of the concerns regarding transgender athletic inclusion, schools, local governments, and interscholastic athletic associations are increasingly recognizing the rights of transgender individuals to participate fully and equally on teams consistent with those individuals' gender identities. And transgender athletes have been successfully integrated into sports teams without creating competitive inequalities, injuries, or social disruption. For example, an 11-year-old transgender girl, Jazz, was recently permitted to play on a girls' recreational soccer team after the United States Soccer Federation directed that, consistent with her gender identity, she be allowed to play on the girls' team.[2] Similarly, the National Collegiate Athletic Association (NCAA) recently issued guidelines providing that transgender athletes may participate on sports teams consistent with their gender identity provided the athletes comply with rules governing the use of hormone treatment.[3] California also recently enacted a law that requires the state's K-12 public schools to permit students to participate on sports teams that match the students' gender identity.[4]

These trans-inclusive policies demonstrate that transgender children can be treated fairly and incorporated fully into athletic competitions without prejudicing any other participants, creating an unequal playing field, or creating a significantly increased risk of injury. Fostering such inclusion while students

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1. A transgender girl refers to a young person who was assigned male at birth but identifies as a girl. A transgender boy is a young person who was assigned female at birth but identifies as a boy.

2. *See, e.g.*, Pablo S. Torre & David Epstein, *The Transgender Athlete*, SPORTS ILLUSTRATED (May 28, 2012), *available at* http://sportsillustrated.cnn.com/vault/article/magazine/MAG1198744/1/index.htm.

3. Transgender men are permitted to play on either a men's or women's team if they have not taken testosterone; once they begin treatment with testosterone they are no longer eligible for women's teams. Transgender women are eligible to play on a women's team after they have undergone one year of hormone therapy. *See* Marta Lawrence, *Transgender Policy Approved*, NCAA (Sept. 13, 2011) http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2011/September/Transgender+policy+approved.

4. *See* Patrick McGreevy, *California Transgender Students Given Access to Opposite-Sex Programs*, LOS ANGELES TIMES (Aug. 12, 2013), *available at* http://www.latimes.com/local/political/la-me-pc-gov-brown-acts-on-transgender-bill-20130812,0,706863.story; *see also* Ian Lovett, *Changing Sex, and Changing Teams*, NEW YORK TIMES, *available at* http://www.nytimes.com/2013/05/07/us/transgender-high-school-students-gain-admission-to-sports-teams.html?hp&_r=1&.

are still in primary and secondary school will have a dramatic impact in reducing feelings of stigmatization and isolation that many transgender individuals experience. Such policies provide an environment where transgender children feel safe and supported. This inclusion will also serve to help educate non-transgender youth about the importance of treating all people fairly, including, but not limited to, their transgender peers.

As will be explained, not only is such inclusion the best policy, but it is consistent with, and, in fact, required by Title IX and related sex-discrimination jurisprudence. Part II of this article details Title IX jurisprudence regarding the integration of females onto traditionally male teams (and vice versa) and explains how that jurisprudence supports the inclusion of transgender athletes. Part III discusses case law developments specific to transgender individuals under Title IX and other sex-discrimination laws; developments which have increasingly recognized that discrimination against transgender people is a cognizable form of sex discrimination. Part IV delves into the possible justifications for barring transgender student-athletes from participating on the team that matches their gender identity, concluding that the purported concerns about safety and privacy have little basis in fact, particularly when applied to students in primary and secondary school. Indeed, for that reason, school districts and athletic associations across the country have begun adopting policies—many of which are described in Part IV as examples of "best practices"—that allow transgender students to participate on athletic teams based on their gender identity. Finally, Part V looks at the developmental benefits of participation in sports, concluding that equal access to athletic competition is critically important for the well-being of transgender young people.

I. TITLE IX AND SEX SEGREGATION IN SPORTS

Title IX and jurisprudence regarding the limits of sex segregation support the inclusion of transgender athletes. Passed in 1972, Title IX of the Education Amendments of 1972 prohibits discrimination "on the basis of sex . . . under any education program or activity receiving federal financial assistance."[5] While the original statute itself did not specifically mention sports,[6] Title IX's implementing regulations specifically name and prohibit discrimination in athletics. The implementing regulations for Title IX provide that "[n]o person

5. 20 U.S.C. §§ 1681-1688.

6. *See* McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck, 370 F.3d 275, 287 (2nd Cir. 2004) ("After Title IX was passed, there were efforts to limit the effect of the statute on athletics programs. In . . . .1974 . . . Congress enacted a provision known as the Javits Amendment, which instructed the Secretary of Health, Education, and Welfare ("HEW") to 'prepare and publish . . . proposed regulations implementing the provisions of Title IX of the Education Amendments of 1972 relating to the prohibition on sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.'").

shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient [of federal funds], and no recipient shall provide any such athletics separately on such basis."[7] But the implementing regulations also permit schools to "operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport."[8] Accordingly, the regulations recognize that schools may institute gender-segregated teams in certain circumstances, but also state that individuals cannot be denied the opportunity for equal participation in sports on the basis of their sex. These regulations, Title IX case law, and the reasoning behind each, all lead to the conclusion that transgender students in elementary and secondary schools must be permitted to participate on sports teams consistent with their gender identity.

A. Concerns Regarding Physical Differences Between the Sexes and Potential Injury Do Not Justify Trans Exclusion

Concerns that permitting transgender students to participate in K-12 athletics will lead to injuries for transgender males competing with cisgender[9] males, or cisgender females competing with transgender females, or competitive advantages or disadvantages, lack merit. These same arguments were previously advanced (and rejected) in an attempt to justify restricting girls from participation in sports altogether and, later, from participation on all-male sports teams where no female equivalent was offered. While much of the increased opportunity for girls created by Title IX has come from the creation of sex-segregated girls' athletic teams,[10] when sex-segregated teams have not been created, girls have often been permitted to participate on traditionally all-male athletic teams.[11] Courts have routinely rejected arguments that physical differences between the sexes justify exclusion of females from otherwise all-male sports teams.

For example, in *National Organization for Women, Essex County Chapter v. Little League Baseball, Inc.*, a New Jersey state court concluded that, pursuant to a New Jersey public accommodation anti-discrimination law, girls could not be excluded from participation in Little League Baseball, and that there was "substantial credible evidence . . . that girls of ages 8-12 are not as a class subject to materially greater hazard of injury while playing baseball than

7. 34 C.F.R. § 106.41(a).

8. 34 C.F.R. § 106.41(b).

9. "Cisgender" means a person whose gender identity matches the sex they were assigned at birth. The term is increasingly used as a synonym for "not transgender."

10. 34 C.F.R. § 106.41(c) (requiring schools to "provide equal athletic opportunity for members of both sexes").

11. *See infra* text accompanying notes 13-18.

boys of that age group."[12] Accordingly, the court held that girls "must be invited and admitted as freely and as unreservedly as the boys."[13] Similarly, in *Force v. Pierce City R-VI School District*, a federal district court held that a junior high school's prohibition on female participation on the football team was impermissible under the Equal Protection Clause of the Fourteenth Amendment.[14] The court specifically rejected the justification that because a typical 13-year-old female would allegedly have a higher potential for injury than a 13-year-old male, exclusion of females was permissible.[15] Instead, based on expert testimony, the court reasoned that "some 13 year old females could safely play eighth grade football in mixed sex competition, and some 13 year old males could not."[16] Yet, the school allowed all boys the opportunity to play football.[17] Thus, the court held that there was no valid justification for the wholesale exclusion of females from the football team.

The Washington State Supreme Court reached a similar result in *Darrin v. Gould*.[18] There, the court held that the policy of the Washington Interscholastic Athletic Association (WIAA) and a local school district which forbade girls from playing on high school football teams violated the Washington State Constitution. The court rejected the claimed justification that "the *majority* of girls are unable to compete with boys in contact football, and the potential for injury is great."[19] Like the Court in *Force*, the court in *Darrin* concluded that "[b]oys as well as girls run the risk of physical injury in contact football games. The risk of injury to 'the average boy' is not used as a reason for denying boys the opportunity to play on the team in interscholastic competition. Moreover, the fact that some boys cannot meet the team requirements is not use as a basis of disqualifying those boys that do meet such requirements."[20] Thus, the Court concluded, the proffered rationale of keeping girls safe from injury lacked consistency and could not justify the discriminatory policy preventing all girls from participating on the football team.[21]

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12. Nat'l Org. for Women v. Little League Baseball, Inc., 318 A.2d 33, 37 (N.J. Super. Ct. App. Div.), *aff'd*, 338 A.2d 198 (N.J. 1974).

13. *Id.* at 41.

14. Force v. Pierce City R-VI Sch. Dist., 570 F. Supp. 1020, 1022-32 (W.D. Mo. 1983).

15. *Id.* at 1028-29.

16. *Id.* at 1029.

17. *Id.*

18. Darrin v. Gould, 85 Wn.2d 859, 877 (Wash. Sup. Ct. 1975).

19. *Id.* at 875 (emphasis in original) (quotations omitted).

20. *Id.* at 876.

21. Numerous courts have reached this conclusion. *See, e.g.*, Fortin v. Darlington Little League, Inc., 514 F.2d 344 (1st. Cir. 1975) (rejecting argument that physical differences between boys and girls warranted exclusion of girls from little league baseball teams and holding that such a practice violated the Equal Protection Clause of the Fourteenth Amendment); Leffel v. Wisconsin Interscholastic Athletic Ass'n, 444 F. Supp. 1117, 1122 (E.D. Wis. 1978) (holding that "the exclusion of girls from all contact sports in order to protect female high school athletes from an unreasonable risk of injury is not fairly or

Put simply, courts have often rejected essentialist arguments claiming that girls are physically incapable of participating in youth sports with boys.[22] This case law, and the reasoning underpinning it, requires that similar arguments currently being made against the inclusion of transgender student athletes also be rejected. For K-12 students in particular, the physical differences between male and female students are not so significant as to justify forbidding transgender students from participating in sports consistent with their gender identity or for imposing any medical requirements before allowing such participation. There is significant overlap between the range of size and strength of boys and girls, thus making it likely that an individual transgender student would fit within the range of other team members and competitors.

The physical differences between male and female bodies become accentuated with adulthood, which is why the NCAA adopted a policy that requires transgender women to take testosterone-suppressing hormones for at least a year before competing on women's teams.[23] But those hypothetical physical differences cannot justify a blanket rule barring transgender students in K-12 schools from participating in sports according to their gender identity. Nor is a rule requiring medical treatment or hormone therapy practical at the K-12 level, as such treatment is largely unavailable to minors due to costs and other access barriers.[24] Accordingly, the best approach is that adopted by an

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substantially related to a justifiable governmental objective in the context of the fourteenth amendment); Lantz by Lantz v. Ambach, 620 F. Supp. 663, 665 (S.D.N.Y. 1985) (holding as unconstitutional a state regulation that forbid all girls from playing football and rejecting presumed physical differences between boys and girls as a valid justification for the exclusion of all girls); Saint v. Neb. Sch. Activities Ass'n, 684 F. Supp. 626, 629 (D. Neb. 1988) (holding that rule forbidding girls from wrestling was a "paternalistic gender-based classification, that is, one resulting from ascribing a particular trait or quality to one sex, when not all share that trait or quality [that] is not only inherently unfair, but generally tends only to perpetuate stereotypical notions regarding the proper roles of men and women")(internal quotations and citations omitted).

22. *See also* Erin E. Buzuvis, *Transgender Student-Athletes and Sex-Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletics*, 21 SETON HALL J. SPORTS & ENT. L. 1, 6-8 (2011) (discussing cases addressing the injury rationale for excluding females from all-male athletic teams).

23. *Id.*; *see* discussion *supra* note 3.

24. *See* Stuart Biegel, THE RIGHT TO BE OUT: SEXUAL ORIENTATION AND GENDER IDENTITY IN AMERICA'S PUBLIC SCHOOLS 179 (2010) ("Not only are those who desire gender reassignment surgery of any kind not generally able to afford it at this stage of their lives, but doctors do not typically perform such surgeries on people that young. This reality is central and cannot be ignored."); Dean Spade, "Compliance is Gendered: Struggling for Gender Self-Determination in a Hostile Economy," in TRANSGENDER RIGHTS 218-19 (2000) ("Economic and educational opportunity remain inaccessible to gender transgressive people because of severe and persistent discrimination, much of which remains legal, . . . Many trans people start out their lives with the obstacle of abuse or harassment at home, or being kicked out of their homes because of their gender identities or expressions."). *See also* World Professional Ass'n for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People, Version 7*, INT'L J. OF TRANSGENDERISM, Vol. 13, p. 178, *available at* http://www.wpath.org/documents/IJT%20SOC,%20V7.pdf ("Genital surgery should not be carried out until (i) patients reach the legal age of majority to

increasing number of states, including California, Washington, and Massachusetts, which permit any K-12 student to participate in sex-segregated sports in accordance with his or her gender identity.[25]

B. Concerns Regarding Unfair Competition or Diminution in Opportunities for Females Do Not Justify Trans Exclusion

Another potential concern that is sometimes raised regarding the inclusion of transgender females on female sports teams is that, as a result of transgender females' purported physical superiority allegedly resulting from having been born physically male, they will dominate the female athletic competition, depriving cisgender females of the opportunity to fairly and successfully compete. Without question, ensuring that young women are provided an opportunity to compete in sports is one of Title IX's most important objectives.[26] However, as noted above, in the context of youth sports, the physical differences between males and females are not significant enough to justify a belief that a transgender female would inevitably prevail against cisgender female athletes.[27] Nor is such speculative concern sufficient to outweigh the importance of permitting transgender females to participate in sports on a nondiscriminatory basis. Inclusion of transgender female athletes possesses little to no risk to Title IX's goal of providing equal opportunities for all female students. Instead, including transgender female athletes in sports consistent with their gender identity helps guarantee that Title IX's goal of providing athletic opportunities for all students (and *all* girls) free of discrimination is realized.

Certain courts have also recognized that female athletic participation and Title IX's corresponding objectives are not meaningfully jeopardized by the inclusion of young males on otherwise all female teams, or vice versa. For example, the Eighth Circuit, in *Brenden v. Independent School District 742*, rejected essentialist assumptions "that physiological differences between males and females make it impossible for the latter to equitably compete with males in athletic competition."[28] In that case, the court held that a school's policy

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give consent for medical procedures in a given country and (ii) patients have lived continuously for at least 12 months in the gender role that is congruent with their gender identity.").

25. *See, e.g.*, MASS. DEP'T OF ELEM. & SECONDARY ED., GUIDANCE FOR MASSACHUSETTS PUBLIC SCHOOLS CREATING A SAFE AND SUPPORTIVE SCHOOL ENVIRONMENT: NONDISCRIMINATION ON THE BASIS OF GENDER IDENTITY, *available at* http://www.doe.mass.edu/ssce/GenderIdentity.pdf (explaining that a trans-inclusive school environment is necessary because "[a]ll students need a safe and supportive school environment to progress academically and developmentally" and because transgender students, "because of widespread misunderstanding and lack of knowledge about their lives, are at a higher risk of peer ostracism, victimization, and bullying").

26. 34 C.F.R. § 106.41(c) (requiring schools to "provide equal athletic opportunity for members of both sexes").

27. *See supra* Part II.A.

28. Brenden v. Indep. Sch. Dist., 477 F.2d 1292, 1299 (8th Cir. 1973).

preventing female students from participating on the boys' tennis, cross-country, and cross-country skiing teams violated the Equal Protection Clause and concluded that the school had not "demonstrated a sufficient rational basis for their conclusion that women are incapable of competing with men in non-contact sports."[29] The court also noted that in many sports "factors such as coordination, concentration, agility and timing play a large role in achieving success" and that there was no evidence indicating that males possessed those factors to a greater degree than females, that would prevent females from competing successfully.[30]

Similarly, in *Attorney General v. Massachusetts Interscholastic Athletic Association*, the Massachusetts Supreme Court held that a state statute that prohibited boys from participating on girls' athletic teams violated the Massachusetts Equal Rights Amendment.[31] The court held that the physical differences between males and females are "not so clear or uniform as to justify a rule in which sex is" an absolute bar to male participation on female teams.[32] Elaborating, the court explained that:

> The general male athletic superiority based on physical features is challenged by the development in increasing numbers of female athletes whose abilities exceed those of most men, and in some cases approach those of the most talented men. Coordination, concentration, strategic acumen, and technique or form (capabilities of both sexes) intermix with strength and speed (where males have some biologic advantages) to produce athletic results. Classification on strict grounds of sex, without reference to actual skill differentials in particular sports, would merely echo "archaic and overbroad generalizations."[33]

The court also noted that "women may, however, have an edge in sports that test balance, since their average lower center of gravity augments stability. They retain heat longer and enjoy far greater buoyancy than men—both advantages in swimming. There is also evidence of higher endurance levels and lower injury rates for females."[34]

Courts have also recognized that fears regarding males joining the sport in overwhelming numbers and denying females athletic opportunities are overblown and do not justify the exclusion of male participants. For example,

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29. *Id.* at 1300.

30. *Id.*; *see also* Weeks v. Southern Bell Telephone & Telegraph Co., 408 F.2d 228, 236 (5th Cir. 1969) (holding, in the Title VII employment context, that "technique is as important in strength" and "[t]echnique is hardly a function of sex").

31. Attorney Gen. v. Mass. Interscholastic Athletic Assoc., 393 N.E.2d 284,285-86, 296 (1979).

32. *Id.* at 293.

33. *Id.*

34. *Id.* at 293 n. 34.

in *Gomes v. Rhode Island Interscholastic League*, the court held that there was no evidence that the inclusion of a male on the previously all-female volleyball team "will lead to a sudden male influx or domination of Rhode Island interscholastic volleyball."[35] The court reached this conclusion even after recognizing, based on the expert evidence, that males on average may have an athletic advantage in terms of volleyball competition.[36] The Massachusetts Supreme Court reasoned similarly in *Attorney General v. MIAA*, holding that fears there would be "swamping of girls' teams by boys of skill and prowess superior to those of girls" were overblown.[37] The court emphasized that "[w]e neither know, nor are apprised by the record, that the apprehended peril is such as to require so sweeping a prohibition" and held that even if there were such evidence, it would not justify the ban.[38]

The same holds true for the inclusion of transgender girls on girls' teams. There is no evidence or indication that the number of transgender girls desiring to participant on a given sport could be significant enough to deny cisgender girls meaningful athletic opportunities, even assuming *arguendo* that transgender girls have innate physical advantages (which, as addressed more fully in Part IV below, they do not). Nor can mere speculation about such an influx of transgender female athletes serve as a rationale for their exclusion. In sum, the same outdated justifications that have been proffered—and rejected—for justifying absolute sex segregation of interscholastic sports teams in all instances provide no logical or legal basis to justify the wholesale exclusion of transgender athletes from participation on sports teams that align with the students' gender identity.

II. TITLE IX LAW REGARDING DISCRIMINATION AGAINST TRANSGENDER STUDENTS

While there are currently no published Title IX decisions specifically about transgender students and their entitlement to participation in school athletics, Title IX's prohibition of sex discrimination can be read to require that transgender individuals be permitted to fully participate in school athletics. Title IX has been interpreted by courts and the U.S. Department of Education

35. Gomes v. R.I. Interscholastic League, 469 F. Supp. 659 (D.R.I. 1979), *vacated on other grounds*, 604 F.2d 733 (1st. Cir. 1979).

36. *Id.* at 662.

37. Attorney Gen. v. Mass. Interscholastic Athletic Assoc., 393 N.E.2d 284, 293 (Sup. Ct. Mass. 1979).

38. *Id.* at 294. Despite the holding of *MIAA* and *Gomes*, courts have generally been more skeptical of attempts by boys to participate in traditionally all-girls sports. *See* Buzuvis, *supra* note 22, at 8-9 ("Courts considering claims by male athletes seeking to participate on a predominantly female team have similarly invoked concerns about preserving opportunities for female athletes. . . . [M]ale plaintiffs generally have less success than female plaintiffs seeking access to cross-sex teams, an asymmetry that also reflects and reinforces stereotypes about the superiority of male athletes.").

to prohibit harassment against gender nonconforming students.[39] For the same reasons that Title IX, which only generally refers to "sex" discrimination and harassment but not transgender discrimination specifically, has been extended to transgender individuals in the context of harassment, it should also be understood to guarantee transgender students equal educational opportunities free from discrimination.

A. Title IX Precedent Regarding Transgender or Gender Nonconforming Plaintiffs

Courts and the Department of Education have held that Title IX prohibits discrimination and harassment against transgender individuals. For example, in *Miles v. New York University*, the Southern District of New York held that a transgender woman who was sexually harassed because she was female was entitled to the protection of Title IX.[40] The court held that "Title IX was enacted precisely to deter that type [of sexually harassing] behavior, even though the legislators may not have had in mind the specific fact pattern here involved."[41]

In addition, a number of court decisions have recognized that Title IX protects against harassment of students because they are perceived as gender nonconforming. For example, in *Pratt v. Indian River Cent. School Dist.,* the court held that "harassment based on nonconformity with sex stereotypes is a legally cognizable claim under Title IX."[42] In so holding, the court held that evidence that a male student was mocked as a "pussy," "sissy," and "girl" because of his perceived gender nonconformity constituted discrimination based on sex.[43] The court also held that, while federal law contains no explicit prohibition of sexual orientation-based discrimination, "allegations of harassment based on sexual orientation do not defeat a sex stereotyping harassment claim."[44] In accord, the court in *Doe v. Brimfield Grade School* held that "[d]iscrimination because one's behavior does not conform to stereotypical ideas of one's gender can amount to actionable discrimination based on sex" and held that harassment of a young boy based on his perceived femininity was actionable under Title IX.[45] Accordingly, just as a student perceived as gay can be protected under Title IX for harassment based on his perceived nonconformity with traditional gender expectations, so too does Title

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39. *See infra* Part III.A.

40. Miles v. N.Y. Univ., 979 F. Supp. 248 (S.D.N.Y. 1997).

41. *Id.* at 250.

42. Pratt v. Indian River Cent. Sch. Dist., 803 F.Supp.2d 135, 151 (N.D.N.Y. 2011).

43. *Id.*at 151-52.

44. *Id.* at 151.

45. Doe v. Brimfield Grade Sch., 552 F. Supp. 2d 816, 823 (C.D. Ill. 2008) (quotations omitted).

IX protect transgender individuals from harassment based on purported nonconformity with gender stereotypes.[46]

Moreover, in 2010 the U.S. Department of Education issued a letter (the "Dear Colleague Letter") explaining to school officials across the country that Title IX's prohibition on sex discrimination prohibits harassment of lesbian, gay, bisexual, or transgender students based on gender nonconformity.[47] The Dear Colleague Letter instructs that "[a]lthough Title IX does not prohibit discrimination based solely on sexual orientation, Title IX does protect all students, including lesbian, gay, bisexual, and transgender (LGBT) students from sex discrimination. When students are subjected to harassment on the basis of their LGBT status, they may also . . . be subjected to forms of sex discrimination prohibited under Title IX."[48] The letter continues, explaining that "harassing conduct [that] was based in part on the student's failure to act as some of his peers believed a boy should act" is actionable under Title IX.[49]

In addition, in 2013 the U.S. Department of Justice and Department of Education investigated the Arcadia Unified School District in Southern California for failing to permit a transgender boy to use the boys' restrooms, locker rooms, and other sex-segregated facilities at school.[50] In that case, the student—assigned female at birth—had lived as a boy full-time since the spring of his fifth grade year.[51] The investigation found that he was "consistently . . . accepted and treated as a boy by his [middle-school] classmates and teachers," only some of whom knew of his transgender status.[52] Nonetheless, the middle school refused to allow him to use boys' restrooms or locker rooms, "[c]iting generalized concerns about safety and privacy," instead requiring him to use a

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46. Other cases have reached similar results to those in *Pratt* and *Doe*. *See, e.g.*, Theno v. Tonganoxie Unified School Dist. No. 464, 377 F. Supp. 2d 952, 964 (D. Kan. 2005) (holding that peer harassment of a student for perceived failure to conform with gender stereotypes is actionable under Title IX); Snelling v. Fall Mountain Reg'l Sch. Dist., 2001 DNH 57 (Dist. Ct. N. H. 2001).

47. U.S. DEPARTMENT OF EDUCATION, "DEAR COLLEAGUE" LETTER (Oct. 26, 2010), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf.

48. *Id.*

49. *Id.*

50. U.S. DEPT. OF JUSTICE CIVIL RIGHTS DIV. & U.S. DEPT. OF EDUC. OFFICE FOR CIVIL RIGHTS, LETTER TO ASAF ORR RE CONCLUSION OF INVESTIGATION IN DOJ CASE NO. DJ169-12C-79, OCR CASE NO. 09-12-1020 (July 24, 2013), *available at* http://www.nclrights.org/wp-content/uploads/2013/09/Arcadia_Notification_Letter_07.24.2013.pdf (hereinafter "ARCADIA LETTER"). This historic Voluntary Resolution Agreement was announced shortly after the resolution of a similar case in Colorado. IN RE COY MATHIS, COLO. DIV. OF CIVIL RIGHTS, CHARGE NO. P20130034X (June 17, 2013), *available at* http://www.transgenderlegal.org/media/uploads/doc_529.pdf. In that case, the Colorado Division of Civil Rights held that a school district had violated a first-grade transgender girl's civil rights by refusing to permit her to use the girls' restroom and requiring her to use a nurse's bathroom instead. *Id.* at 10.

51. ARCADIA LETTER, *supra* note 50, at 2.

52. *Id.* at 3.

private, gender-neutral restroom in the nurse's office as a restroom and a place to change for gym class.[53] (This was despite the fact that, as the investigation showed, the boys' locker room did not have functioning showers, had private changing areas, and that teachers, parents, and administrators "consistently stated that students did not fully disrobe when changing for P.E."[54]) As a result of this alternative arrangement, the student "regularly missed class time in both P.E. and other subjects because of the distance of the health office from the gym and his classrooms."[55] The arrangement also made the student uncomfortable "because it made him feel 'different'" and subjected him to unwanted questions from other students.[56]

The letter from the Department of Justice and Department of Education concluding the investigation noted that "[t]here is no dispute the District treated the student differently than other students because of his gender identity."[57] The investigation found that the district's alleged motivations related to the privacy and safety of the transgender student and all students were not grounded in fact.[58] Since the District agreed to voluntarily settle the matter, however, the investigation did not formally result in findings against the district.[59] Under the Voluntary Resolution Agreement,[60] the district agreed "to permit the Student to use male-designated facilities at school and on school-sponsored trips and to otherwise treat the Student as a boy in all respects."[61] The district also committed to change its policies and train staff to ensure that it "treat[s] . . . other transgender students . . . in a nondiscriminatory manner."[62]

These precedents, while not reaching the specific question of whether schools are required to permit transgender students to participate on sports teams consistent with their gender identity, make clear that Title IX's prohibitions on sex discrimination and sexual harassment can extend to transgender students if the discrimination or harassment is on "the basis of sex."[63]

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53. *Id.* at 3-4.

54. *Id.* at 4.

55. *Id.*

56. *Id.*

57. IN RE COY MATHIS, *supra* note 50, at 4.

58. *Id.* at 4-6.

59. *See* discussion *supra* note 50; *see also* IN RE COY MATHIS, *supra* note 50, at 2.

60. RESOLUTION AGREEMENT BETWEEN ARCADIA UNIFIED SCH. DIST., THE U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, & THE U.S DEP'T OF JUSTICE, CIVIL RIGHTS. DIV., OCR CASE NO. 09-12-1020, DOJ CASE NO. 169-12C-70 (Jul. 24, 2013), *available at* http://www.justice.gov/crt/about/edu/documents/arcadiaagree.pdf.

61. ARCADIA LETTER, *supra* note 50, at 7.

62. *Id.* at 7.

63. For a discussion of the shortcomings of the existing precedent, and the need for a rule that Title IX *per se* applies to discrimination on the basis of gender identity or transgender status, *see* Devi Rao, *Gender Identity Discrimination IS Sex Discrimination: Protecting Students from Bullying and Harassment Using Title IX*, 28 WIS. J. L. GENDER & SOC'Y 245 (2013).

B. Title VII Precedent Regarding Transgender or Gender Nonconforming Plaintiffs

While case law involving transgender plaintiffs is scarce under Title IX, additional support for the conclusion that Title IX protects transgender student athletes can be found in cases interpreting Title VII of the 1964 Civil Rights Act.[64] Title VII, which prohibits sex discrimination in employment, has been applied regularly to claims of discrimination brought by transgender plaintiffs. Courts generally recognize that cases interpreting Title VII's provisions are relevant to and can be imported into analysis of Title IX.[65] The Supreme Court has cited to Title VII precedent when interpreting Title IX.[66] Indeed, the Supreme Court has recognized that in some ways Title IX's prohibition on discrimination is broader than that of Title VII.[67]

Particularly in recent years, federal courts have increasingly recognized that Title VII's prohibition on sex discrimination in employment extends to discrimination based on an individual's transgender status or gender nonconformity. Most prominently, in the landmark decision of *Macy v. Holder*, the Equal Employment Opportunity Commission (EEOC) held that discrimination against a person because she is transgender is sex discrimination.[68] In *Macy*, the complainant, a transgender woman, applied for a position with the Bureau of Alcohol, Tobacco, Firearms and Explosives.[69] When she applied for the job, the complainant had not yet transitioned and was still presenting as male.[70] After a phone interview, the complainant was offered the job, pending a background check.[71] Subsequently, she informed the prospective employer that she was in the process of transitioning and shortly thereafter she was informed the position was no longer available.[72] The complainant alleged that the job was revoked because she was transgender.[73]

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64. 42 U.S.C. § 2000e-2.

65. *See, e.g.*, Miles v. N.Y. Univ., 979 F. Supp. 248, 250 n. 4 (S.D.N.Y. 1997) (in the context of a transgender harassment suit, holding that "it is now established that the Title IX term 'on the basis of sex' is interpreted in the same manner as similar language in Title VII").

66. *See* Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 75 (1992) (citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986), a Title VII case, for its interpretation of Title IX's employment discrimination provisions).

67. *See* Jackson v. Birmingham, 544 U.S. 167, 175 (2005) (noting that "Title IX is a broadly written general prohibition on discrimination, followed by specific, narrow exceptions to that broad prohibition. By contrast, Title VII spells out in greater detail the conduct that constitutes discrimination in violation of that statute.").

68. Macy v. Holder, EEOC Appeal. No. 0120120821, 2012 WL 1435995, *7-9 (Apr. 20, 2012).

69. *Id.* at *1.

70. *Id.*

71. *Id.*

72. *Id.* at *2.

73. *Id.* at *2 - *3.

The EEOC found that Macy's claim was cognizable under Title VII, holding that "a transgender person who has experienced discrimination based on his or her gender identity may establish a prima facie case of sex discrimination" and that "intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination 'based on . . . sex,' and such discrimination therefore violates Title VII."[74] The EEOC concluded that "Title VII prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender, by assumption that disadvantage men, by gender stereotypes, or by the desire to accommodate other people's prejudice or discomfort" and that a transgender individual who is discriminated against based on his or her gender identity may establish a claim through any of these different formulations.[75]

In reaching this conclusion, the EEOC relied, in part, on the Supreme Court's seminal 1989 decision *Price Waterhouse v. Hopkins*.[76] There, the Supreme Court held that discrimination for failing to conform to gender-based expectations (for example, not acting like a woman "should" act) violates Title VII—in other words, that sex stereotyping constitutes actionable sex discrimination.[77] As the EEOC correctly reasoned in *Macy*, just as actions and assumptions based on sex stereotypes constitute sex discrimination, so too do actions taken against a transgender person for not conforming to stereotypes associated with their birth sex.[78]

Other federal courts have reached similar decisions. For example, in *Glenn v. Brumby*, the Eleventh Circuit held that a state employee who was fired after she transitioned from male to female was protected by the Equal Protection Clause of the Fourteenth Amendment.[79] According to the Eleventh Circuit, "discrimination against a transgender individual because of her gender non-conformity is sex discrimination, whether it's being described as on the basis of sex or gender."[80] Similarly, in *Schroer v. Billington*, a federal district court concluded after a bench trial that the Library of Congress violated Title VII when it refused to hire Diane Schroer after she informed the Library that she was transitioning to female.[81] The court held that the decision to rescind the job offer "after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was literally discrimination 'because of. . .sex'" by an analogy to religious discrimination, and therefore prohibited under Title VII.[82] Finally, in *Smith v. City of Salem*, the Sixth Circuit held that

74. *Id.* at *10-*11.

75. *Id.* at *10.

76. 490 U.S. 228 (1989).

77. *Id.* at 250.

78. Macy v. Holder, EEOC Appeal. No. 0120120821, 2012 WL 1435995, *7 (Apr. 20, 2012).

79. Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011).

80. *Id.* at 1317.

81. Schroer v. Billington, 577 F.Supp.2d 293 (D.D.C. 2008).

82. *Id.* at 308.

the district court erred in dismissing a firefighter's claim that her suspension from her job because she was transgender violated Title VII.[83] The court held that "[s]ex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior. A label, such as 'transsexual,' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity."[84]

In sum, while these cases may each rely on slightly different reasoning for concluding that Title VII's prohibitions on sex discrimination protect transgender individuals—that is, some rely on theories of sex-stereotyping akin to *Price Waterhouse,* whereas *Macy* holds that discrimination against transgender individuals is per se sex discrimination[85]—they each hold that discrimination against transgender individuals is sex discrimination under Title VII (or the Equal Protection Clause) and, therefore, transgender individuals are protected under the law.

Government agencies have begun to affirmatively recognize that Title VII's precedents regarding transgender employees are applicable to transgender students under Title IX. For instance, the July 2013 letter from the U.S. Department of Justice and Department of Education concluding the investigation into the Arcadia Unified School District's discriminatory treatment of a transgender student cited to *Macy*, *Glenn*, *Schroer*, and *Smith* for the proposition that Title VII has been interpreted to protect transgender individuals from discrimination based on their gender nonconformity or gender identity.[86] That letter explained that "[c]ourts rely on Title VII precedent to analyze discrimination 'on the basis of sex' under Title IX."[87]

Consistent with these decisions, holding that Title VII's and Title IX's sex-discrimination provisions include transgender discrimination, courts and regulatory bodies should interpret Title IX's guarantee of equal athletic opportunities to require that transgender students be permitted to participate on sports teams consistent with their gender identity. Transgender girls must be treated the same as all other girls, and transgender boys must be treated the same as all other boys. To do otherwise denies them full and equal access to the same educational opportunities as their peers.

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83. Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004).

84. *Id.* at 575.

85. For an in-depth discussion of the different legal theories under which transgender discrimination may be considered "sex" discrimination, *see* Erin Buzuvis, *"Because of Sex": Using Title IX to Protect Transgender Students from Discrimination in Education*, 28 WIS. J. L. GENDER & SOC'Y 219 (2013).

86. ARCADIA LETTER, *supra* note 50, at 2 n.3.

87. *Id.*

III. THERE IS NO LEGITIMATE BASIS FOR DENYING TRANSGENDER STUDENTS THIS OPPORTUNITY

Several concerns are frequently raised in opposition to the inclusion of transgender students on athletic teams consistent with their gender identity. In addition to concerns regarding competitive advantages or disadvantages, addressed above, concerns regarding privacy in locker rooms and the alleged lack of an objective standard for determining whether a student is a boy or girl for athletic purposes are often raised. However, each of these concerns is dramatically overstated, and such fears can be easily addressed by common sense, practical solutions. These unrealistic fears cannot justify denying transgender youth the equal opportunity to participate in sports.

A. Inherent Differences in Physical Size and Ability

It is generally presumed that natal males will have an inherent advantage over natal females. Among adults, men are on average 10% bigger than women.[88] The average man has longer arms, bigger and stronger legs, and more muscle fiber than the average woman.[89] The average woman has lower body weight and more body fat, with a lower center of gravity.[90] These differences largely result from the effect of sex hormones beginning in adolescence, although some may also stem from the cultural differences in opportunities and encouragement to participate in athletics between the sexes.[91] Even among adults, the range of physical differences within each sex is far broader than the average differences between men and women.[92]

As the National Collegiate Athletic Association explains in its official policy document concerning transgender student-athletes,

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88. Syda Kosofsky, *Toward Gender Equality in Professional Sports*, 4 HASTINGS WOMEN'S L.J. 209, 214-15 (1993); Cristen Conger, *Do men really have more upper body strength than women?*, at http://science.howstuffworks.com/life/human-biology/men-vs-women-upper-body-strength.htm.

89. Kosofsky, *supra* note 88, at 214-15; E. J. Miller, et al., *Gender Differences in Strength and Muscle Fiber Characteristics*, EUR. J. OF APPLIED PHYSIOLOGY & OCCUPATIONAL PHYSIOLOGY, Vol. 66, No. 3, 254 (1993).

90. Kosofsky, *supra* note 88, at 214-15.

91. Deborah L. Rhode, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 302-03 (1989) ("Physiological characteristics are heavily influenced by social norms governing diet, appearance, dress, behavior, and athletic opportunities. How much of males' advantage in most sports results from nature and how much from nurture remains unclear. It is, however, obvious that the differences in men's and women's capabilities are relatively small in comparison to the differences in opportunities now open to them.").

92. Hoover v. Meiklejohn, 430 F. Supp. 164, 166 (D. Colo. 1977) ("[W]hile males as a class tend to have an advantage in strength and speed over females as a class, the range of differences among individuals in both sexes is greater than the average differences between the sexes."); *see also* Women's Sports Foundation, Issues Related to Girls and Boys Competing With and Against Each Other in Sports and Physical Activity Settings, *available at* http://www.womenssportsfoundation.org/en/home/advocate/foundation-positions/equity-issues/coed_physical_activity_settings.

> Transgender women display a great deal of physical variation, just as there is a great deal of natural variation in physical size and ability among non-transgender women and men. Many people may have a stereotype that all transgender women are unusually tall and have large bones and muscles. But that is not true. A male-to-female transgender woman may be small and slight, even if she is not on hormone blockers or taking estrogen. It is important not to overgeneralize. The assumption that all male-bodied people are taller, stronger, and more highly skilled in a sport than all female-bodied people is not accurate.[93]

Prior to puberty, moreover, there are no significant differences in the physical size or ability of boys and girls.[94] For that reason, youth athletic teams are often integrated in the first instance.[95]

Even after puberty has begun, young people develop at different rates, and high-school-age students exhibit a wide range of physical characteristics.[96] Therefore, by necessity, high school sports, already accommodate students at vastly different levels of development.[97] The assumption that transgender girls will be inherently bigger, stronger, and more skilled is "especially inaccurate when applied to youth who are still developing physically and who therefore display a significantly broader range of variation in size, strength, and skill than older youth and adults."[98] Accordingly, age or physical development alone should not impede the integration of transgender students.

B. Privacy in Locker Rooms

Apprehensions regarding locker room privacy can be easily resolved. As a general matter, both transgender students and non-transgender students often have concerns about privacy. These concerns can be easily addressed by offering private changing areas to any student who desires additional privacy,

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93. NAT'L COLLEGIATE ATHLETIC ASS'N, NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES 7 (Aug. 2011), *available at* http://www.uh.edu/lgbt/docs/Transgender_Handbook_2011_Final.pdf.

94. *See* TRANSGENDER LAW AND POLICY INSTITUTE, GUIDELINES FOR CREATING POLICIES FOR TRANSGENDER CHILDREN IN RECREATIONAL SPORTS 2-3, *available at* http://www.transgenderlaw.org/resources/trans_children_in_sports.pdf; Women's Sports Foundation, *supra* note 92, at 1 ("Prior to puberty, there is no gender-based physiological reason to separate females and males in sports competition.").

95. *See* Women's Sports Foundation, *supra* note 92, at 1-2 (recommending that sports teams for preadolescent children not be segregated according to sex).

96. *See* Hoover v. Meiklejohn, 430 F. Supp. 164, 166 (discussing the range of physical differences within each sex even after puberty).

97. See Pat Griffin & Helen J. Carroll, *On the Team: Equal Opportunity for Transgender Student Athletes* 13 (2009), *available at* http://www.nclrights.org/site/DocServer/TransgenderStudentAthleteReport.pdf?docID=7901

98. *Id.* at 16.

whether the student is transgender or not. A policy *requiring* transgender students to use a separate changing area, however, would have the potentially damaging effect of isolating and stigmatizing that student, and could reveal a student's transgender identity without their consent. School districts have begun to recognize that permitting transgender students to use locker rooms consistent with the students' gender identity is the best practice and that privacy concerns can simultaneously be reasonably accommodated.[99]

Guaranteeing transgender students access to locker rooms consistent with their gender identity is also critical to help ensure that they are fully included in all team- and camaraderie-building aspects of participating on sports teams. In the context of both middle and high school sports, significant amounts of strategizing, coaching, and bonding occurs in locker rooms while teams prepare for competition before games, during halftimes, and even after games. The failure to permit transgender athletes to participate in this aspect of the athletic experience would deprive them of a truly equal opportunity to participate.

C. *Fraudulent Assertion of a Transgender Identity for Competitive Advantage*

Concerns regarding the use of a gender identity standard being open to subjective interpretation and abuse by students looking to gain a competitive advantage in a sport are also entirely unsubstantiated. To begin with, the continued prevalence of anti-transgender prejudice among young people makes it extremely unlikely that a cisgender boy would pretend to be transgender just to compete on a girls' team or in a girls' sport.[100] Moreover, there simply is no evidence that any man or boy has ever falsely asserted a female or transgender identity to obtain a competitive advantage. As the National Collegiate Athletic Association has recognized:

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99. *See, e.g.*, California Education Committee, LLC v. O'Connell, No. 34-2008-00026507-CU-CR-GDS (Cal. Super. Ct. June 8, 2009, *available at* http://www.nclrights.org/site/DocServer/Sac_Superior_Ct_decision_06.01.2009.pdf?docID=6041) (dismissing a lawsuit brought against a school district claiming that the district violated the privacy and safety of non-transgender students when it permitted a transgender boy to change in the boy's locker room); *see also* Los Angeles Unified Sch. Dist. Policy on Transgender and Gender Variant Students (Sept. 9, 2011), *available at* http://notebook.lausd.net/pls/ptl/docs/PAGE/CA_LAUSD/FLDR_ORGANIZATIONS/FLDR_GENERAL_COUNSEL/TRANSGENDER%20%20GENDER%20NONCONFORMING%20STUDENTS-REF-1557%201%209-9-11.PDF (providing that "students shall have access to the locker room facility that corresponds to their gender identity asserted at school" and requiring that all students be offered the opportunity for private changing areas).

100. *See generally* Emily A. Greytak, et al., *Harsh Realities: the Experiences of Transgender Youth in our Nation's Schools*, GAY LESBIAN STRAIGHT EDUCATION NETWORK (GLSEN) (2009), *available at* http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/001/1375-1.pdf (nationwide survey found that nine out of ten transgender youth had experienced harassment at school in the past year).

> [F]ears that men will pretend to be female to compete on a women's team are unwarranted given that in the entire 40 year history of "sex verification" procedures in international sport competitions, no instances of such "fraud" have been revealed. Instead, rather than identifying men who are trying to fraudulently compete as women, "sex verification" tests have been misused to humiliate and unfairly exclude women with intersex conditions. The apparent failure of such tests to serve their stated purpose of deterring fraud—and the terrible damage they have caused to individual women athletes—should be taken into account when developing policies for the inclusion of transgender athletes.[101]

Even if fraud were a realistic concern, it could be addressed with a simple requirement that the asserted gender identity be genuine.[102] That said, it will remain important that school districts and leagues not impose an excessively onerous standard, or one that relies inappropriately on apparent conformity with gender stereotypes, to test or validate a transgender student's gender identity. Such a standard would discriminate against transgender students by requiring them to conform to gender stereotypes or medical hurdles not required of any other students.

D. Best Practices for Integrating Transgender Student Athletes

In reality, none of the asserted concerns relating to the integration of transgender student athletes pose problems when such policies are implemented in the real world. A growing number of school districts and athletic associations have already implemented viable, appropriate standards for including transgender students in athletic activities based solely on the student's gender identity.[103] While many of these statewide policies have been adopted in states that explicitly prohibit discrimination against transgender students, Title IX provides an equivalent basis for mandating such a policy even in states that lack explicit discrimination protections.[104]

In 2008,[105] the Washington Interscholastic Activities Association, the rulemaking body for high school sports teams in Washington State, adopted a first-in-the-nation policy permitting all students to participate in activities "in a

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101. NCAA, *supra* note 93, at 8.

102. *See, e.g.*, MASS. DEP'T OF ELEM. & SECONDARY EDUC., *supra* note 25 (describing Massachusetts standard requiring either that the student's identity be "consistent[ly] and uniform[ly] asserted *or* "other evidence that the gender-related identity is sincerely held as part of [the] person's core identity.").

103. *See* Bob Cook, *Schools on Notice to Figure Out How to Handle Transgender Athletes*, FORBES (March 2, 2013), *available at* http://www.forbes.com/sites/bobcook/2013/03/12/schools-on-notice-to-figure-out-how-to-handle-transgender-athletes/.

104. *See supra* Part III.

105. *See* Griffin & Carroll, *supra* note 97, at 26.

manner that is consistent with their gender identity, irrespective of the gender listed on a student's records."[106] The policy provides a detailed appeal procedure to be followed if "any questions arise whether a student's request to participate in a sex-segregated activity consistent with his or her gender identity is bona fide."[107] The appealing student can be asked to provide "documentation" of their "consistent gender identification (e.g., affirmed written statements from student and/or parent/guardian and/or health care provider)."[108]

In early 2013, Massachusetts Department of Elementary and Secondary Education adopted a comprehensive set of guidelines regarding equal opportunity for transgender students.[109] That policy provides: "Where there are sex-segregated classes or athletic activities, including intramural and interscholastic athletics, all students must be allowed to participate in a manner consistent with their gender identity."[110] The policy makes clear that the determining factor is the student's identity:

> Consistent with the statutory standard, a school should accept a student's assertion of his or her gender identity when there is "consistent and uniform assertion of the gender-related identity, or any other evidence that the gender-related identity is sincerely held as part of a person's core identity.'" If a student's gender-related identity, appearance, or behavior meets this standard, the only circumstance in which a school may question a student's asserted gender identity is where school personnel have a credible basis for believing that the student's gender-related identity is being asserted for some improper purpose.[111]

The Massachusetts guidance also recognizes, however, that due to widespread prejudice, transgender students may not feel safe "consistently" asserting their gender identity in all places and at all times.[112] The guidance, therefore, "does not require consistent and uniform assertion of gender identity as long as there is 'other evidence that the gender-related identity is sincerely

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106. WASH. INTERSCHOLASTIC ACTIVITIES ASSOC. HANDBOOK 2012-13, 18.15.0 ("Gender Identity Participation") and Appendix 6 ("Gender Identity"), *available at* http://www.wiaa.com/ConDocs/Con1125/FinalHandbook.pdf.

107. *Id.*

108. *Id.*

109. MASS. DEP'T OF ELEM. & SECONDARY ED., *supra* note 25; *see also* Travis Andersen, *Schools Get Guidelines on Transgender Students*, BOSTON GLOBE (Feb. 17, 2013), *available at* http://www.bostonglobe.com/metro/2013/02/17/transgender/FHmjIUlSZo0LCMy02xF97M/story.html.

110. MASS. DEP'T OF ELEM. & SECONDARY ED., *supra* note 25.

111. *Id.*

112. *Id.*

held as part of [the] person's core identity.'"[113] The guidance suggests that such evidence could include:

> [A] letter from a parent, health care provider, school staff member familiar with the student (a teacher, guidance counselor, or school psychologist, among others), or other family members or friends. A letter from a social worker, doctor, nurse practitioner, or other health care provider stating that a student is being provided medical care or treatment relating to her/his gender identity is one form of confirmation of an asserted gender identity. It is not, however, the exclusive form upon which the school or student may rely. A letter from a clergy member, coach, family friend, or relative stating that the student has asked to be treated consistent with her/his asserted gender identity, or photographs at public events or family gatherings, are other potential forms of confirmation. These examples are intended to be illustrative rather than comprehensive.[114]

In the spring of 2013, the California Interscholastic Federation (CIF), the body that governs competitive high school sports in the state, issued guidelines for the inclusion of transgender student athletes modeled closely after the Washington policy.[115] The CIF policy provides in relevant part: "All students should have the opportunity to participate in CIF activities in a manner that is consistent with their gender identity, irrespective of the gender listed on a student's records."[116] The California Legislature also recently passed a law clarifying the state's nondiscrimination law to specify that transgender students must be permitted to participate in all sex-segregated activities and use all sex-segregated facilities in accordance with the student's gender identity.[117]

It should be noted that policies governing participation in sports for adults often include some kind of requirement related to medical transition before transgender women can participate on women's teams, despite the fact that medical transition—particularly genital surgery—is not affordable, necessary, or appropriate for all transgender people.[118] Moreover, "whether a transgender person has genital reconstructive surgery has no bearing on their athletic ability."[119] The International Olympic Committee applies one of the most

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113. *Id.*

114. *Id.*

115. CALI. INTERSCHOLASTIC FED'N BYLAWS, 300 D ("Gender Identity Participation") (on file with author).

116. *Id.*

117. *See* Assem. B. 1266 (2013), *available at* http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB1266&search_keywords=.

118. *See, e.g.*, J.M. Grant et al., Injustice at Every Turn: A Report of the National Transgender Discrimination Study (2011), *available at* http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf.

119. *See* Griffin & Carroll, *supra* note 97, at 12.

onerous standards in the sporting world, requiring that transgender women who transition after puberty must undergo genital surgery, hormone therapy, and then wait two years following surgery before they can participate as women.[120] By contrast, in 2011, the National Collegiate Athletic Association adopted a policy much more closely aligned to the reality of transgender people's lives.[121] The NCAA policy requires that transgender women undergo only one year of hormone therapy before they can participate on women's teams.[122] The policy quotes Dr. Eric Vilain of UCLA as noting that "[r]esearch suggests that androgen deprivation and cross sex hormone treatment in male-to-female transsexuals reduces muscle mass; accordingly, one year of hormone therapy is an appropriate transitional time before a male-to-female student-athlete competes on a women's team."[123]

None of the model student policies described in this section as best practices require medical intervention for K-12 students, for all the reasons described in Part IV.a., supra. Some state policies have required medical intervention, however. Connecticut's governing body for high school sports, the Connecticut Interscholastic Athletic Conference (CIAC), has adopted a uniquely onerous standard that is even more difficult to meet than the NCAA standard for college-age student athletes.[124] The Connecticut policy largely tracks that of the International Olympic Committee.[125] The policy provides that a transgender student can only participate "in the gender of their birth certificate unless they have undergone sex reassignment," defined as follows:

> The student-athlete has undergone sex reassignment before puberty, OR
> The student who has undergone sex reassignment after puberty under all of the following conditions:
>
> Surgical anatomical changes have been completed, including external genitalia changes and gonadectomy.
> All legal recognition of the sex reassignment has been conferred with all the proper governmental agencies. (Driver's license, voter registration, etc.)
> Hormonal therapy appropriate for the assigned sex has been administered in a verifiable manner and for sufficient length of time to minimize gender-related advantages in sports

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120. *See* INT'L OLYMPIC COMM'N, STATEMENT OF THE STOCKHOLM CONSENSUS ON SEX REASSIGNMENT IN SPORTS (Nov. 12, 2003), http://www.olympic.org/Documents/Reports/EN/en_report_905.pdf.

121. NCAA, *supra* note 93.

122. *Id.* at 13.

123. *Id.*

124. *See* Buzuvis, *supra* note 22, at 26.

125. *Id.* The IOC policy requires, for transgender athletes who transition after puberty, complete genital surgery, removal of the gonads, hormone therapy, and a two-year waiting period. *See supra* note 120.

> competition.
> Athletic eligibility in the reassigned gender can begin no sooner than two years after all surgical and anatomical changes have been completed.[126]

In 2011, however, the state of Connecticut adopted a nondiscrimination law that specifically prohibits the state's public schools from discriminating against transgender students.[127] Subsequently, in April 2012, the state's Commission on Human Rights and Opportunities published on its website guidance created by the Connecticut Safe Schools Coalition which provides in relevant part that "[t]ransgender students should be permitted to participate in sex-segregated athletic activities based on their gender identity."[128] It seems likely that CIAC's onerous standard will need to be revisited in the near future to bring it into accordance with the state's nondiscrimination policy.

Colorado provides an example of the evolving understanding of the best practice in this area. The Colorado High School Activities Association adopted a policy in 2009 that required medical transition before a transgender student could participate in sports in accordance with his or her gender identity.[129] The original Colorado policy provided that a transgender student could participate only after "hormonal therapy appropriate for the assigned sex has been administered in a verifiable manner and sufficient length of time to minimize gender-related advantages."[130]

As noted above, however, requiring medical intervention for transgender minors is particularly unfair and impractical. By the 2012-2013 school year, Colorado's policy had been modified to provide:

> The Colorado High School Activities Association in accordance with Equal Protection Clause of the United States Constitution does not prohibit transgender students from participating in athletics. A transgender student-athlete's home school will perform a confidential

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126. CONN. INTERSCHOLASTIC ATHLETIC CONFERENCE HANDBOOK 2012-2013, Art. IX, Sec. B ("Transgender Participation") at 54, *available at* http://www.casciac.org/pdfs/ciachandbook_1213.pdf.

127. CONN. GEN. STAT. § 10-15c.

128. *See* CONN. STATE DEPT. OF EDUC., BULLYING AND HARASSMENT RESOURCE PAGE (link to "Guidelines for Schools on Gender Identity and Expression"), *available at* http://www.sde.ct.gov/sde/cwp/view.asp?a=2700&Q=322402.

129. *See* Buzuvis, *supra* note 22, at 26-27.

130. *Id.* Oregon's policy similarly requires transgender girls to undergo hormone treatment before they can play on a girls' team. OR. SCH. ACTIVITIES ASSOC., 2012-13 OSAA HANDBOOK, *available at* http://www.osaa.org/publications/handbook/1213/06ExecutiveBoardPolicies.asp (permitting a male-to-female transgender student who is not taking hormones to participate only on boys' teams, but permitting a male-to-female transgender student who has taken hormones for at least one year to participate on girls' teams).

> evaluation to determine the appropriate gender assignment for the prospective student-athlete. The CHSAA will follow approved policy procedures to ensure that gender-related advantages and safety concerns are minimized.[131]

In April 2013, the CHSAA Board of Directors approved further revisions to the policy regarding transgender student athletes. The Board's minutes from their April 2013 meeting indicate that the policy was being updated "to more accurately reflect the current state and federal laws with regards to discrimination and inclusion."[132] The new policy states affirmatively that "The Colorado High School Activities Association recognizes the right of transgender student athletes to participate in interscholastic activities free from unlawful discrimination based on sexual orientation."[133] (Under Colorado law, discrimination based on "transgender status" is included under its prohibition of discrimination based on "sexual orientation."[134]) The new policy language removes the vague, ominous references to the need to address "gender-related advantages" and "safety concerns." Instead, similar to the Massachusetts guidance, the policy lays out specific procedures that should be followed to identify the genuine gender identity of a transgender student, providing that relevant documentation could include:

> A written statement from the student affirming the consistent gender identity and expression to which the student self-relates.
> Documentation from individuals such as, but not limited to parents, friends, and/or teacher, which affirm that the actions, attitudes, dress and manner demonstrate the student's consistent gender identification and expression.
> Written verification from an appropriate health-care professional (doctor, psychiatrist, psychologist) of the student's consistent gender identification and expression.
> Medical documentation (hormonal therapy, sexual re-assignment surgery, counseling, medical personnel, etc.)[135]

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131. CHSAA, CHSAA 2012-2013 HANDBOOK, *available at* http://www.chsaa.org/about/pdf/Handbook-12-13.pdf.

132. *See* COLO. HIGH SCH. ACTIVITIES ASSOC., BOARD OF DIRECTORS MEETING MINUTES (April 2013), *available at* http://www2.chsaa.org/about/pdf/BDMinutesApril2013.pdf

133. CHSAA, *supra* note 131, at Art. 3, 300, *available at* http://www.chsaa.org/home/pdf/TRANSGENDERPROCEDUREPOLICY.pdf.

134. COLO. REV. STAT. ANN. § 22-32-109(1)(*ll*)(I) (providing that all public schools must adopt policies that prohibit discrimination based on sexual orientation); COLO. REV. STAT. ANN. §§ 2-4-401(13.5) (throughout Colorado statutes, "'[s]exual orientation' means a person's orientation toward heterosexuality, homosexuality, bisexuality, or transgender status or another person's perception thereof").

135. *See* CHSAA, *supra* note 132.

As in the Washington, Massachusetts, and California policies, the student's identity is (appropriately) the touchstone; once that is established, no additional inquiry is required or permitted.

Several organizations have also developed detailed, in-depth policies with recommendations regarding the treatment of transgender student athletes.[136] For example, model school district policies promulgated by the GLSEN and the National Center for Transgender Equality[137] and the California Safe Schools Coalition[138] include provisions requiring that transgender students be permitted to participate in sex-segregated intramural and interscholastic sports teams, as well as physical education classes, on the basis of their gender identity.

The most robust resource on this issue is a report published in 2009 entitled "On the Team: Equal Opportunities for Transgender Student Athletes."[139] That report was the result of a 2009 "think tank" meeting that brought together advocates, educators, doctors, and coaches to discuss and identify the best practices for ensuring that transgender students could participate in high school and collegiate athletics.[140] The think tank produced recommended policies for high school and collegiate athletic programs.[141] The recommended collegiate policy was subsequently adopted by the NCAA; as noted, it provides that a transgender woman can play on a women's team after undergoing one year of hormone therapy.[142] The report's recommended policy for high school athletics, by contrast, provides that a student "shall be allowed to participate in a sports activity in accordance with his or her gender identity irrespective of the gender listed on the student's birth certificate or other student records, and regardless of whether the student has undergone any medical treatment."[143]

The largest recreational sports league in the nation, the U.S. Soccer Federation, has also adopted an inclusive policy for the participation of transgender athletes, both youth and adults. That policy was enacted in 2012 in order to ensure a consistent standard would be applied after the Federation decided to allow Jazz, the 11-year-old transgender girl, to play on a girls' team.[144] Like the other "best practice" policies identified above, the

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136. *See, e.g.*, Griffin & Carroll, *supra* note 97.

137. GLSEN AND NATIONAL CENTER FOR TRANSGENDER EQUALITY, MODEL DISTRICT POLICY ON TRANSGENDER AND GENDER NONCONFORMING STUDENTS, *available at* http://glsen.org/article/transgender-model-district-pol.

138. CAL. SAFE SCH. COALITION, MODEL SCHOOL DISTRICT POLICY REGARDING TRANSGENDER AND GENDER NONCONFORMING STUDENTS, *available at* http://www.casafeschools.org/csscmodelpolicy1209.pdf.

139. Griffin & Carroll, *supra* note 97.

140. *Id.* at 2.

141. *Id.*

142. NCAA, *supra* note 93, at 13.

143. Griffin & Carroll, *supra* note 97, at 24.

144. *See* Dan Woog, *US Soccer and All That Jazz,* BETWEEN THE LINES NEWS (March 7, 2013), *available at* http://www.pridesource.com/article.html?article=58803 (describing adoption of the new policy).

Federation's new policy relies solely on the player's gender identity, without any requirement of medical transition:

> For the purposes of registration on gender-based amateur teams, a player may register with the gender team with which the player identifies, and confirmation sufficient for guaranteeing access shall be satisfied by documentation or evidence that shows the stated gender is sincerely held, and part of a person's core identity. Documentation satisfying the herein stated standard includes, but is not limited to, government-issued documentation or documentation prepared by a health care provider, counselor, or other qualified professional not related to the player.[145]

It is important to note that none of the "best practice" policies described above prohibits a transgender student who has not undergone medical transition from participating on the team associated with the student's sex assigned at birth.[146] For some transgender students, especially those in the early stages of transition, continuing to participate on a team based on their assigned sex may feel more comfortable. No current policy dictates that a transgender student *must* play on the team associated with their gender identity, nor should they. That decision should be made by the individual transgender student based on his or her needs including privacy, safety, and comfort.[147] For example, Kye Allums, a transgender man, played on the women's basketball team at George Washington University before he had undergone hormone treatment, as permitted by NCAA policy.[148]

In sum, while opponents sometimes raise concerns regarding the feasibility or fairness of integrating transgender students into athletic teams, those concerns are vastly overstated and cannot justify excluding transgender student athletes or requiring them to play on a team that conflicts with who they are. Instead, permitting transgender students to participate in athletics on the basis of their gender identity is by far the most fair and practical solution, as well as the only approach that is consistent with Title IX's non-discrimination requirements.

E. Equal Access to Sports Is Critically Important to the Well-Being of

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145. U.S. SOCCER FED'N TRANSGENDER INCLUSION POLICY (on file with authors).

146. *See, e.g.*, Griffin & Carroll, *supra* note 97, at 24 (Recommended Policy for High School Athletics) ("This policy shall not prevent a transgender student athlete from electing to participate in a sports activity according to his or her assigned birth gender.").

147. *See, e.g.*, NCAA, *supra* note 93, at 13 ("Any transgender student-athlete who is not taking hormone treatment related to gender transition may participate in sex-separated sports activities in accordance with his or her assigned birth gender.").

148. *See* Erik Brady, *Transgender Male Kye Allums on the Women's Team at GW*, USA TODAY (Nov. 4, 2010), *available at* http://usatoday30.usatoday.com/sports/college/womensbasketball/atlantic10/2010-11-03-kye-allums-george-washington-transgender_N.htm?csp=digg.

Transgender Students

As outlined above, if interpreted consistently with Title VII, Title IX prohibits schools from discriminating against transgender students and guarantees such students equal access to all educational opportunities, including athletics. Nor does any legitimate policy basis justify the exclusion of transgender students from sports teams that accord with their gender identity. But, perhaps most compelling, providing transgender students an equal opportunity to participate in athletics is essential to their well-being, self-esteem, and mental health.

Significant research over the past half-century has demonstrated the value that participation in sports can have for young people.[149] Numerous studies across the fields of sports medicine, psychology, human development, and public health have examined the effects of participation in youth sports.[150] These studies confirm that youth sports participation benefits the participants in multiple ways. Physically, participation helps build bone and muscle strength, reduces the risk of developing chronic diseases, reduces the risk of obesity, and helps develop habits of exercise with long-term benefits.[151] Psychologically, participation in sports helps promote mental health and combat anxiety and depression.[152] In fact, sports participation can be a protective factor against adolescent suicide,[153] which may be particularly important given the high rates of social isolation and suicide attempts among transgender youth.[154] Sports

149. Kelly P. Troutman & Mikaela J. Dufur, *From High School Jocks to College Grads: Assessing the Long-Term Effects of High School Sport Participation on Females' Educational Attainment*, YOUTH SOCIETY Vol. 38 No. 4, 443 (June 2007) ("Numerous studies centered on high school athletics have demonstrated that participants in interscholastic sport enjoy various positive benefits from their involvement.").

150. *See* Suzanne Le Menestrel & Daniel F. Perkins, *An overview of how sports, out-of-school time, and youth well-being can and do intersect*, NEW DIRECTIONS FOR YOUTH DEVELOPMENT, No. 115, 13-14 (Fall 2007).

151. *See Id.* at 14-15 (noting that "[t]he most recent dietary guidelines for American advise that children and youth should be involved in at least sixty minutes of physical activity on all or most days of the week" and that "The health benefits of participation in physical activity have been well documented: building healthy bones and muscle; reducing the risks of developing chronic diseases such as heart disease and diabetes; reducing the chance of being overweight and obese; reducing feelings of anxiety, depression, and hopelessness; and promoting psychological well-being.").

152. *Id.* at 15.

153. Lindsay A. Taliaferro et al., *High School Youth and Suicide Risk: Exploring Protection Afforded Through Physical Activity and Sport Participation*, J. SCH. HEALTH, Vol. 78, No. 10, 545, 552 ("we found that sport participation related to reduced risk of hopelessness and suicidal behavior").

154. Among transgender students in K-12 schools, nearly 50% have attempted suicide. *See, e.g.*, SAN FRANCISCO UNIFIED SCH. DIST., KEEPING OUR LGBT YOUTH SAFE AND IN SCHOOL, *available at* http://www.healthiersf.org/LGBTQ/GetTheFacts/docs/LGBTQ_websiteHealthSurvey1011.pdf (featuring results from the 2011 Youth Risk Behavior Survey, developed by the U.S. Centers for Disease Control and Prevention). Nine out of 10 transgender youth have been harassed at school in the last year. *See* Greytak, et al., *supra* note 100.

also provide a social support network and integration that, in turn, further enhances youth mental health.[155]

Involvement in team sports also leads to higher academic outcomes for children.[156] Studies have confirmed that participation in athletics is predictive of outcomes such as staying in school, and increases general measures of positive adjustment.[157] Studies also reveal that high school athletes are more likely to attend and graduate from college than those who do not participate in high school sports.[158] Sports participation also has a positive impact on students' GPAs while in high school.[159] In addition, sports participation builds values such as teamwork, sportsmanship, and hard work and improves social skills.[160]

These social, mental, and physical benefits of interscholastic sports participation are even more necessary for vulnerable groups such as transgender students.[161] Not allowing these students to play on sports teams consistent with their gender identity will only increase feelings of isolation and despair. Moreover, requiring that they play on teams consistent with their natal birth is impractical and forces them to reject their gender identity. Many

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155. Taliaferro et al., *supra* note 153, at 551 ("Athletes may experience greater social integration when they become members of a social network that includes teammates, coaches, health professionals, family, and community. The team sport environment represents a fertile ground for adolescent self-esteem development because teams provide opportunities for youth to engage with adults and peers to achieve collective goals. Through its capacity to foster social support and integration, sports participation may create a distinct form of protection against risk factors associated with adolescent suicide.").

156. Bonnie L. Barber, Jacquelynne S. Eccles, & Margaret R. Stone, *Whatever Happened to the Jock, the Brain, and the Princess? Young Adult Pathways Linked to Adolescent Activity Involvement and Social Identity*, J. OF ADOLESCENT RES., Vol. 16, No.5, 429, 430 (September 2001) ("activity participation is linked to better school achievement, educational attainment, occupational status, and income").

157. *Id.*

158. Troutman & Dufur, *supra* note 149, at 458 ("Results from this sample of females provide evidence that supports the hypothesis that females who played high school sport are more likely to graduate from college than are their counterparts").

159. Jacquelynne S. Eccles & Bonnie L. Barber, *Student Council, Volunteering, Basketball, or Marching Band: What Kind of Extracurricular Involvement Matters?*, J. OF ADOLESCENT RES., Vol. 14, No. 1, 10, 18 (Jan. 1999) ("[S]ports participation predicted an increase in liking school between 10^{th} and 12^{th} grades, a higher than expected 12^{th}-grade GPA, and a greater than expected likelihood of being enrolled full-time in college at 21.").

160. *Get Set To Make the Case, Presenting Sports as an Agent for Social Change*, *available at* http://digitalcommons.calpoly.edu/cgi/viewcontent.cgi?article=1028&context=rpta_fac (collecting research concluding that "[s]ports can help kids improve their self-esteem and develop important social and leadership skills. . .teamwork skills, and initiative").

161. Biegel, *supra* note 24, at 193 ("Too often, transgender youth are restricted to sports teams that do not correspond to their gender identities. Gender-nonconforming students cannot help but see this as yet one more way in which they are not take seriously and are told that their identities are not valid. In general, it is recommended that, as much as possible, students should be permitted to participate in gender-segregated sports and gym class activities in accordance with the gender with which they identify.").

transgender students—particularly those who are not "out" as transgender, but simply living as a member of the sex with which they identify—would refuse to play sports altogether rather than be forced to play as a member of their birth-assigned sex. Indeed, this is the reaction most people, transgender or not, would likely have upon being required to be identified as a member of the other sex in order to play a sport. Requiring transgender children, and none others, to play on teams inconsistent with their gender identity is discriminatory, and denies those young people access to the innumerable benefits that athletics can provide.

In addition to the direct, inherent value that including transgender students will have to the students that are allowed to participate on teams consistent with their gender identity, such a policy will also have broader societal effect on attitudes towards transgender individuals and transgender rights. As Professor Stuart Biegel has explained:

> [I]t is important to emphasize just how substantial and just how direct the influence of organized sports can be on the lives of our young people. The numbers alone reveal the scope of the impact. A very large percentage of America's youth participate in organized sports, from the little leagues through high school, college, and beyond. In light of this level of participation, it is inevitable that a substantial number of young people will be influenced by the cultures, traditions, and mindsets highly prevalent in these programs.[162]

Accordingly, in order to guarantee that every child's right to equal educational opportunity is protected, consistent with Title VII and Title IX precedent, transgender students must be permitted to play on sports teams consistent with their gender identity.

CONCLUSION

If correctly interpreted, consistent with Title VII employment discrimination precedent and Title IX precedent regarding gender-based harassment, Title IX prohibits discrimination against transgender individuals. Therefore, under Title IX, transgender students must be provided equal opportunities to participate in school athletics consistent with their gender identity: transgender boys must be treated like all other boys and transgender girls must be treated like all other girls. This interpretation of Title IX is also consistent with case law addressing the integration of traditionally sex-segregated sports, which has already debunked several of the concerns regarding limited participation of males on female sports teams and vice versa, including concerns regarding the risk of injuries and competitive disadvantages.

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162. *Id.* at 151.

More importantly, hypothetical concerns regarding injuries or overblown fears regarding locker room privacy cannot trump the need to comply with Title IX's mandate that all children—including transgender children—be provided with equal opportunities to participate in athletics. Permitted to participate on athletic teams consistent with their gender identity, transgender students—one of society's most vulnerable and at-risk populations—will reap tremendous benefits to their self-esteem and mental and physical health. When transgender students are fully integrated and able to thrive at school like all other students, their teammates, competitors, and communities will be enriched as well.

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U.S. Department of Justice
Civil Rights Division

U.S. Department of Education
Office for Civil Rights

Dear Colleague Letter on Transgender Students
Notice of Language Assistance

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U.S. Department of Justice
Civil Rights Division

U.S. Department of Education
Office for Civil Rights

May 13, 2016

Dear Colleague:

Schools across the country strive to create and sustain inclusive, supportive, safe, and nondiscriminatory communities for all students. In recent years, we have received an increasing number of questions from parents, teachers, principals, and school superintendents about civil rights protections for transgender students. Title IX of the Education Amendments of 1972 (Title IX) and its implementing regulations prohibit sex discrimination in educational programs and activities operated by recipients of Federal financial assistance.[1] This prohibition encompasses discrimination based on a student's gender identity, including discrimination based on a student's transgender status. This letter summarizes a school's Title IX obligations regarding transgender students and explains how the U.S. Department of Education (ED) and the U.S. Department of Justice (DOJ) evaluate a school's compliance with these obligations.

ED and DOJ (the Departments) have determined that this letter is *significant guidance*.[2] This guidance does not add requirements to applicable law, but provides information and examples to inform recipients about how the Departments evaluate whether covered entities are complying with their legal obligations. If you have questions or are interested in commenting on this guidance, please contact ED at ocr@ed.gov or 800-421-3481 (TDD 800-877-8339); or DOJ at education@usdoj.gov or 877-292-3804 (TTY: 800-514-0383).

Accompanying this letter is a separate document from ED's Office of Elementary and Secondary Education, *Examples of Policies and Emerging Practices for Supporting Transgender Students*. The examples in that document are taken from policies that school districts, state education agencies, and high school athletics associations around the country have adopted to help ensure that transgender students enjoy a supportive and nondiscriminatory school environment. Schools are encouraged to consult that document for practical ways to meet Title IX's requirements.[3]

Terminology

- *Gender identity* refers to an individual's internal sense of gender. A person's gender identity may be different from or the same as the person's sex assigned at birth.

- *Sex assigned at birth* refers to the sex designation recorded on an infant's birth certificate should such a record be provided at birth.

- *Transgender* describes those individuals whose gender identity is different from the sex they were assigned at birth. A *transgender male* is someone who identifies as male but was assigned the sex of female at birth; a *transgender female* is someone who identifies as female but was assigned the sex of male at birth.

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- *Gender transition* refers to the process in which transgender individuals begin asserting the sex that corresponds to their gender identity instead of the sex they were assigned at birth. During gender transition, individuals begin to live and identify as the sex consistent with their gender identity and may dress differently, adopt a new name, and use pronouns consistent with their gender identity. Transgender individuals may undergo gender transition at any stage of their lives, and gender transition can happen swiftly or over a long duration of time.

Compliance with Title IX

As a condition of receiving Federal funds, a school agrees that it will not exclude, separate, deny benefits to, or otherwise treat differently on the basis of sex any person in its educational programs or activities unless expressly authorized to do so under Title IX or its implementing regulations.[4] The Departments treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations. This means that a school must not treat a transgender student differently from the way it treats other students of the same gender identity. The Departments' interpretation is consistent with courts' and other agencies' interpretations of Federal laws prohibiting sex discrimination.[5]

The Departments interpret Title IX to require that when a student or the student's parent or guardian, as appropriate, notifies the school administration that the student will assert a gender identity that differs from previous representations or records, the school will begin treating the student consistent with the student's gender identity. Under Title IX, there is no medical diagnosis or treatment requirement that students must meet as a prerequisite to being treated consistent with their gender identity.[6] Because transgender students often are unable to obtain identification documents that reflect their gender identity (*e.g.*, due to restrictions imposed by state or local law in their place of birth or residence),[7] requiring students to produce such identification documents in order to treat them consistent with their gender identity may violate Title IX when doing so has the practical effect of limiting or denying students equal access to an educational program or activity.

A school's Title IX obligation to ensure nondiscrimination on the basis of sex requires schools to provide transgender students equal access to educational programs and activities even in circumstances in which other students, parents, or community members raise objections or concerns. As is consistently recognized in civil rights cases, the desire to accommodate others' discomfort cannot justify a policy that singles out and disadvantages a particular class of students.[8]

1. Safe and Nondiscriminatory Environment

Schools have a responsibility to provide a safe and nondiscriminatory environment for all students, including transgender students. Harassment that targets a student based on gender identity, transgender status, or gender transition is harassment based on sex, and the Departments enforce Title IX accordingly.[9] If sex-based harassment creates a hostile environment, the school must take prompt and effective steps to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects. A school's failure to treat students consistent with their gender identity may create or contribute to a hostile environment in violation of Title IX. For a more detailed discussion of Title IX

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requirements related to sex-based harassment, see guidance documents from ED's Office for Civil Rights (OCR) that are specific to this topic.[10]

2. Identification Documents, Names, and Pronouns

Under Title IX, a school must treat students consistent with their gender identity even if their education records or identification documents indicate a different sex. The Departments have resolved Title IX investigations with agreements committing that school staff and contractors will use pronouns and names consistent with a transgender student's gender identity.[11]

3. Sex-Segregated Activities and Facilities

Title IX's implementing regulations permit a school to provide sex-segregated restrooms, locker rooms, shower facilities, housing, and athletic teams, as well as single-sex classes under certain circumstances.[12] When a school provides sex-segregated activities and facilities, transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity.[13]

- **Restrooms and Locker Rooms**. A school may provide separate facilities on the basis of sex, but must allow transgender students access to such facilities consistent with their gender identity.[14] A school may not require transgender students to use facilities inconsistent with their gender identity or to use individual-user facilities when other students are not required to do so. A school may, however, make individual-user options available to all students who voluntarily seek additional privacy.[15]

- **Athletics.** Title IX regulations permit a school to operate or sponsor sex-segregated athletics teams when selection for such teams is based upon competitive skill or when the activity involved is a contact sport.[16] A school may not, however, adopt or adhere to requirements that rely on overly broad generalizations or stereotypes about the differences between transgender students and other students of the same sex (*i.e.*, the same gender identity) or others' discomfort with transgender students.[17] Title IX does not prohibit age-appropriate, tailored requirements based on sound, current, and research-based medical knowledge about the impact of the students' participation on the competitive fairness or physical safety of the sport.[18]

- **Single-Sex Classes**. Although separating students by sex in classes and activities is generally prohibited, nonvocational elementary and secondary schools may offer nonvocational single-sex classes and extracurricular activities under certain circumstances.[19] When offering such classes and activities, a school must allow transgender students to participate consistent with their gender identity.

- **Single-Sex Schools**. Title IX does not apply to the admissions policies of certain educational institutions, including nonvocational elementary and secondary schools, and private undergraduate colleges.[20] Those schools are therefore permitted under Title IX to set their own

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sex-based admissions policies. Nothing in Title IX prohibits a private undergraduate women's college from admitting transgender women if it so chooses.

- **Social Fraternities and Sororities**. Title IX does not apply to the membership practices of social fraternities and sororities.[21] Those organizations are therefore permitted under Title IX to set their own policies regarding the sex, including gender identity, of their members. Nothing in Title IX prohibits a fraternity from admitting transgender men or a sorority from admitting transgender women if it so chooses.

- **Housing and Overnight Accommodations**. Title IX allows a school to provide separate housing on the basis of sex.[22] But a school must allow transgender students to access housing consistent with their gender identity and may not require transgender students to stay in single-occupancy accommodations or to disclose personal information when not required of other students. Nothing in Title IX prohibits a school from honoring a student's voluntary request for single-occupancy accommodations if it so chooses.[23]

- **Other Sex-Specific Activities and Rules**. Unless expressly authorized by Title IX or its implementing regulations, a school may not segregate or otherwise distinguish students on the basis of their sex, including gender identity, in any school activities or the application of any school rule. Likewise, a school may not discipline students or exclude them from participating in activities for appearing or behaving in a manner that is consistent with their gender identity or that does not conform to stereotypical notions of masculinity or femininity (*e.g.*, in yearbook photographs, at school dances, or at graduation ceremonies).[24]

4. Privacy and Education Records

Protecting transgender students' privacy is critical to ensuring they are treated consistent with their gender identity. The Departments may find a Title IX violation when a school limits students' educational rights or opportunities by failing to take reasonable steps to protect students' privacy related to their transgender status, including their birth name or sex assigned at birth.[25] Nonconsensual disclosure of personally identifiable information (PII), such as a student's birth name or sex assigned at birth, could be harmful to or invade the privacy of transgender students and may also violate the Family Educational Rights and Privacy Act (FERPA).[26] A school may maintain records with this information, but such records should be kept confidential.

- **Disclosure of Personally Identifiable Information from Education Records**. FERPA generally prevents the nonconsensual disclosure of PII from a student's education records; one exception is that records may be disclosed to individual school personnel who have been determined to have a legitimate educational interest in the information.[27] Even when a student has disclosed the student's transgender status to some members of the school community, schools may not rely on this FERPA exception to disclose PII from education records to other school personnel who do not have a legitimate educational interest in the information. Inappropriately disclosing (or requiring students or their parents to disclose) PII from education records to the school community may

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violate FERPA and interfere with transgender students' right under Title IX to be treated consistent with their gender identity.

- **Disclosure of Directory Information**. Under FERPA's implementing regulations, a school may disclose appropriately designated directory information from a student's education record if disclosure would not generally be considered harmful or an invasion of privacy.[28] Directory information may include a student's name, address, telephone number, date and place of birth, honors and awards, and dates of attendance.[29] School officials may not designate students' sex, including transgender status, as directory information because doing so could be harmful or an invasion of privacy.[30] A school also must allow eligible students (*i.e.*, students who have reached 18 years of age or are attending a postsecondary institution) or parents, as appropriate, a reasonable amount of time to request that the school not disclose a student's directory information.[31]

- **Amendment or Correction of Education Records**. A school may receive requests to correct a student's education records to make them consistent with the student's gender identity. Updating a transgender student's education records to reflect the student's gender identity and new name will help protect privacy and ensure personnel consistently use appropriate names and pronouns.

  - Under FERPA, a school must consider the request of an eligible student or parent to amend information in the student's education records that is inaccurate, misleading, or in violation of the student's privacy rights.[32] If the school does not amend the record, it must inform the requestor of its decision and of the right to a hearing. If, after the hearing, the school does not amend the record, it must inform the requestor of the right to insert a statement in the record with the requestor's comments on the contested information, a statement that the requestor disagrees with the hearing decision, or both. That statement must be disclosed whenever the record to which the statement relates is disclosed.[33]
  - Under Title IX, a school must respond to a request to amend information related to a student's transgender status consistent with its general practices for amending other students' records.[34] If a student or parent complains about the school's handling of such a request, the school must promptly and equitably resolve the complaint under the school's Title IX grievance procedures.[35]

* * *

We appreciate the work that many schools, state agencies, and other organizations have undertaken to make educational programs and activities welcoming, safe, and inclusive for all students.

Sincerely,

/s/

Catherine E. Lhamon
Assistant Secretary for Civil Rights
U.S. Department of Education

/s/

Vanita Gupta
Principal Deputy Assistant Attorney General for Civil Rights
U.S. Department of Justice

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[1] 20 U.S.C. §§ 1681–1688; 34 C.F.R. Pt. 106; 28 C.F.R. Pt. 54. In this letter, the term *schools* refers to recipients of Federal financial assistance at all educational levels, including school districts, colleges, and universities. An educational institution that is controlled by a religious organization is exempt from Title IX to the extent that compliance would not be consistent with the religious tenets of such organization. 20 U.S.C. § 1681(a)(3); 34 C.F.R. § 106.12(a).

[2] Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), www.whitehouse.gov/sites/default/files/omb/fedreg/2007/012507_good_guidance.pdf.

[3] ED, *Examples of Policies and Emerging Practices for Supporting Transgender Students* (May 13, 2016), www.ed.gov/oese/oshs/emergingpractices.pdf. OCR also posts many of its resolution agreements in cases involving transgender students online at www.ed.gov/ocr/lgbt.html. While these agreements address fact-specific cases, and therefore do not state general policy, they identify examples of ways OCR and recipients have resolved some issues addressed in this guidance.

[4] 34 C.F.R. §§ 106.4, 106.31(a). For simplicity, this letter cites only to ED's Title IX regulations. DOJ has also promulgated Title IX regulations. *See* 28 C.F.R. Pt. 54. For purposes of how the Title IX regulations at issue in this guidance apply to transgender individuals, DOJ interprets its regulations similarly to ED. State and local rules cannot limit or override the requirements of Federal laws. *See* 34 C.F.R. § 106.6(b).

[5] *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Oncale v. Sundowner Offshore Servs. Inc.*, 523 U.S. 75, 79 (1998); *G.G. v. Gloucester Cnty. Sch. Bd.*, No. 15-2056, 2016 WL 1567467, at *8 (4th Cir. Apr. 19, 2016); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 572-75 (6th Cir. 2004); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000); *Schroer v. Billington*, 577 F. Supp. 2d 293, 306-08 (D.D.C. 2008); *Macy v. Dep't of Justice*, Appeal No. 012012082 (U.S. Equal Emp't Opportunity Comm'n Apr. 20, 2012). *See also* U.S. Dep't of Labor (USDOL), Training and Employment Guidance Letter No. 37-14, *Update on Complying with Nondiscrimination Requirements: Discrimination Based on Gender Identity, Gender Expression and Sex Stereotyping are Prohibited Forms of Sex Discrimination in the Workforce Development System* (2015), wdr.doleta.gov/directives/attach/TEGL/TEGL_37-14.pdf; USDOL, Job Corps, Directive: Job Corps Program Instruction Notice No. 14-31, *Ensuring Equal Access for Transgender Applicants and Students to the Job Corps Program* (May 1, 2015), https://supportservices.jobcorps.gov/Program%20Instruction%20Notices/pi_14_31.pdf; DOJ, Memorandum from the Attorney General, *Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964* (2014), www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/18/title_vii_memo.pdf; USDOL, Office of Federal Contract Compliance Programs, Directive 2014-02, *Gender Identity and Sex Discrimination* (2014), www.dol.gov/ofccp/regs/compliance/directives/dir2014_02.html.

[6] *See Lusardi v. Dep't of the Army*, Appeal No. 0120133395 at 9 (U.S. Equal Emp't Opportunity Comm'n Apr. 1, 2015) ("An agency may not condition access to facilities—or to other terms, conditions, or privileges of employment—on the completion of certain medical steps that the agency itself has unilaterally determined will somehow prove the bona fides of the individual's gender identity.").

[7] *See G.G.*, 2016 WL 1567467, at *1 n.1 (noting that medical authorities "do not permit sex reassignment surgery for persons who are under the legal age of majority").

[8] 34 C.F.R. § 106.31(b)(4); *see G.G.*, 2016 WL 1567467, at *8 & n.10 (affirming that individuals have legitimate and important privacy interests and noting that these interests do not inherently conflict with nondiscrimination principles); *Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981, 984 (8th Cir. 2002) (rejecting claim that allowing a transgender woman "merely [to be] present in the women's faculty restroom" created a hostile environment); *Glenn*, 663 F.3d at 1321 (defendant's proffered justification that "other women might object to [the plaintiff]'s restroom use" was "wholly irrelevant"). *See also Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (recognizing that "mere negative attitudes, or fear . . . are not permissible bases for" government action).

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[9] *See, e.g.,* Resolution Agreement, *In re Downey Unified Sch. Dist., CA*, OCR Case No. 09-12-1095, (Oct. 8, 2014), www.ed.gov/documents/press-releases/downey-school-district-agreement.pdf (agreement to address harassment of transgender student, including allegations that peers continued to call her by her former name, shared pictures of her prior to her transition, and frequently asked questions about her anatomy and sexuality); Consent Decree, *Doe v. Anoka-Hennepin Sch. Dist. No. 11, MN* (D. Minn. Mar. 1, 2012), www.ed.gov/ocr/docs/investigations/05115901-d.pdf (consent decree to address sex-based harassment, including based on nonconformity with gender stereotypes); Resolution Agreement, *In re Tehachapi Unified Sch. Dist*., *CA*, OCR Case No. 09-11-1031 (June 30, 2011), www.ed.gov/ocr/docs/investigations/09111031-b.pdf (agreement to address sexual and gender-based harassment, including harassment based on nonconformity with gender stereotypes). *See also Lusardi,* Appeal No. 0120133395, at *15 ("Persistent failure to use the employee's correct name and pronoun may constitute unlawful, sex-based harassment if such conduct is either severe or pervasive enough to create a hostile work environment").

[10] *See, e.g.*, OCR, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (2001), www.ed.gov/ocr/docs/shguide.pdf; OCR, *Dear Colleague Letter: Harassment and Bullying* (Oct. 26, 2010), www.ed.gov/ocr/letters/colleague-201010.pdf; OCR, *Dear Colleague Letter: Sexual Violence* (Apr. 4, 2011), www.ed.gov/ocr/letters/colleague-201104.pdf; OCR, *Questions and Answers on Title IX and Sexual Violence* (Apr. 29, 2014), www.ed.gov/ocr/docs/qa-201404-title-ix.pdf.

[11] *See, e.g.*, Resolution Agreement, *In re Cent. Piedmont Cmty. Coll., NC,* OCR Case No. 11-14-2265 (Aug. 13, 2015), www.ed.gov/ocr/docs/investigations/more/11142265-b.pdf (agreement to use a transgender student's preferred name and gender and change the student's official record to reflect a name change).

[12] 34 C.F.R. §§ 106.32, 106.33, 106.34, 106.41(b).

[13] *See* 34 C.F.R. § 106.31.

[14] 34 C.F.R. § 106.33.

[15] *See, e.g.*, Resolution Agreement, *In re Township High Sch. Dist. 211, IL*, OCR Case No. 05-14-1055 (Dec. 2, 2015), www.ed.gov/ocr/docs/investigations/more/05141055-b.pdf (agreement to provide any student who requests additional privacy "access to a reasonable alternative, such as assignment of a student locker in near proximity to the office of a teacher or coach; use of another private area (such as a restroom stall) within the public area; use of a nearby private area (such as a single-use facility); or a separate schedule of use.").

[16] 34 C.F.R. § 106.41(b). Nothing in Title IX prohibits schools from offering coeducational athletic opportunities.

[17] 34 C.F.R. § 106.6(b), (c). An interscholastic athletic association is subject to Title IX if (1) the association receives Federal financial assistance or (2) its members are recipients of Federal financial assistance and have ceded controlling authority over portions of their athletic program to the association. Where an athletic association is covered by Title IX, a school's obligations regarding transgender athletes apply with equal force to the association.

[18] The National Collegiate Athletic Association (NCAA), for example, reported that in developing its policy for participation by transgender students in college athletics, it consulted with medical experts, athletics officials, affected students, and a consensus report entitled *On the Team: Equal Opportunity for Transgender Student Athletes* (2010) by Dr. Pat Griffin & Helen J. Carroll (*On the Team*), https://www.ncaa.org/sites/default/files/NCLR_TransStudentAthlete%2B(2).pdf. *See* NCAA Office of Inclusion, *NCAA Inclusion of Transgender Student-Athletes* 2, 30-31 (2011), https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf (citing *On the Team*). The *On the Team* report noted that policies that may be appropriate at the college level may "be unfair and too complicated for [the high school] level of competition." *On the Team* at 26. After engaging in similar processes, some state interscholastic athletics associations have adopted policies for participation by transgender students in high school athletics that they determined were age-appropriate.

[19] 34 C.F.R. § 106.34(a), (b). Schools may also separate students by sex in physical education classes during participation in contact sports. *Id*. § 106.34(a)(1).

[20] 20 U.S.C. § 1681(a)(1); 34 C.F.R. § 106.15(d); 34 C.F.R. § 106.34(c) (a recipient may offer a single-sex public nonvocational elementary and secondary school so long as it provides students of the excluded sex a "substantially

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equal single-sex school or coeducational school").

[21] 20 U.S.C. § 1681(a)(6)(A); 34 C.F.R. § 106.14(a).

[22] 20 U.S.C. § 1686; 34 C.F.R. § 106.32.

[23] *See, e.g.,* Resolution Agreement, *In re Arcadia Unified. Sch. Dist., CA*, OCR Case No. 09-12-1020, DOJ Case No. 169-12C-70, (July 24, 2013), www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadiaagree.pdf (agreement to provide access to single-sex overnight events consistent with students' gender identity, but allowing students to request access to private facilities).

[24] *See* 34 C.F.R. §§ 106.31(a), 106.31(b)(4). *See also*, *In re Downey Unified Sch. Dist., CA*, *supra* n. 9; *In re Cent. Piedmont Cmty. Coll., NC, supra* n. 11.

[25] 34 C.F.R. § 106.31(b)(7).

[26] 20 U.S.C. § 1232g; 34 C.F.R. Part 99. FERPA is administered by ED's Family Policy Compliance Office (FPCO). Additional information about FERPA and FPCO is available at www.ed.gov/fpco.

[27] 20 U.S.C. § 1232g(b)(1)(A); 34 C.F.R. § 99.31(a)(1).

[28] 34 C.F.R. §§ 99.3, 99.31(a)(11), 99.37.

[29] 20 U.S.C. § 1232g(a)(5)(A); 34 C.F.R. § 99.3.

[30] Letter from FPCO to Institutions of Postsecondary Education 3 (Sept. 2009), www.ed.gov/policy/gen/guid/fpco/doc/censuslettertohighered091609.pdf.

[31] 20 U.S.C. § 1232g(a)(5)(B); 34 C.F.R. §§ 99.3. 99.37(a)(3).

[32] 34 C.F.R. § 99.20.

[33] 34 C.F.R. §§ 99.20-99.22.

[34] *See* 34 C.F.R. § 106.31(b)(4).

[35] 34 C.F.R. § 106.8(b).

Frequently Asked Questions

School Success and Opportunity Act (Assembly Bill 1266) Frequently Asked Questions.

Consistent with our mission to provide a world-class education for all students, from early childhood to adulthood, the California Department of Education issues the following Frequently Asked Questions (FAQs) in an effort to (a) foster an educational environment that is safe and free from discrimination for all students, regardless of sex, sexual orientation, gender identity, or gender expression, and (b) assist school districts with understanding and implementing policy changes related to AB 1266 and transgender student privacy, facility use, and participation in school athletic competitions.

These FAQs are provided to promote the goals of reducing the stigmatization of and improving the educational integration of transgender and gender nonconforming students, maintaining the privacy of all students, and supporting healthy communication between educators, students, and parents to further the successful educational development and well-being of every student.

Expand All | Collapse All

1. What is Assembly Bill (AB) 1266?

   AB 1266, also known as the “School Success and Opportunity Act,” was introduced by Assemblyman Tom Ammiano on February 22, 2013. It requires that pupils be permitted to participate in sex-segregated school programs, activities, and use facilities consistent with their gender identity, without respect to the gender listed in a pupil’s records. AB 1266 was approved by Governor Brown on August 12, 2013.

   According to Assemblyman Ammiano, “This bill is needed to ensure that transgender students are protected and have the same opportunities to participate and succeed as all other students.” “AB 1266 clarifies California’s student nondiscrimination laws by specifying that all students in K-12 schools must be permitted to participate in school programs, activities, and facilities in accordance with the student’s gender identity.”

   As part of the analysis of AB 1266, Assemblyman Ammiano also stated, "Athletics and physical education classes, which are often segregated by sex, provide numerous well-documented positive effects for a student's physical, social, and emotional development. Playing sports can provide student athletes with important lessons about self-discipline, teamwork, success, and failure, as well as the joy and shared excitement that being a member of a sports team can bring. When transgender students are denied the opportunity

to participate in physical education classes in a manner consistent with their gender identity, they miss out on these important benefits and suffer from stigmatization and isolation. In addition, in many cases, students who are transgender are unable to get the credits they need to graduate on time when, for example, they do not have a place to get ready for gym class."

2. When did this law go into effect?

   AB 1266 became a provision within California Education Code, Section 221.5(f), on January 1, 2014. It is important to note that prior to the enactment of AB 1266, both state and federal law have prohibited gender-based discrimination for some time.

   Federal Protection:

   Title IX prohibits sexual harassment and discrimination based on gender or sex stereotypes in every jurisdiction. While Title IX does not specifically use the terms “transgender” or “gender identity or expression,” courts have held that harassment and other discrimination against transgender and gender nonconforming people constitutes sex discrimination. This position has also been supported by the U.S. Department of Education. These rights were clarified in the October 26, 2010, “Dear Colleague Letter” and the April 29, 2014, guidance issued by the U.S. Department of Education, Office for Civil Rights, described in the “Recent Developments and Resources” section at the end of this document.

   California Law:

   It is the policy of the State of California to afford all persons in public schools, regardless of their disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic that is contained in the definition of hate crimes set forth in Section 422.55 of the Penal Code, equal rights and opportunities in the educational institutions of the state. (Education Code Section 200.)

   No person shall be subjected to discrimination on the basis of disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic that is contained in the definition of hate crimes set forth in Section 422.55 of the Penal Code in any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance or enrolls pupils who receive state student financial aid. (Education Code Section 220.)

3. What specifically does AB 1266 provide?

   Pre-existing state law prohibits public schools from discriminating on the basis of several characteristics, including sex, sexual orientation, and gender identity. Pre-existing state law also requires that participation in a particular physical education activity or sport, if required of pupils of one sex, be available to pupils of each sex. AB 1266 requires a pupil be permitted

to participate in sex-segregated school programs, activities, and facilities including athletic teams and competitions, consistent with his or her gender identity, regardless of the gender listed on the pupil's records.

As amended, Education Code Section 221.5(f) provides that “a pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil’s records.”

4. How should a school district, teacher, school administrator or other employee define gender, transgender, or gender identity?

   There are a number of developing terms used to describe transgender characteristics and experiences, which may differ based on region, age, culture, or other factors. Many of these terms are not currently defined by law. However, several common definitions have been used by the courts, the U.S. Department of Education, and a number of groups with educational equity expertise, including the Gay, Lesbian, Straight, Education Network, and the California School Boards Association. Any definitions provided in these materials are provided to facilitate the process of providing safe and nondiscriminatory learning environments and are not provided for the purpose of labeling any students.

"Gender" means sex, and includes a person's gender identity and gender expression. "Gender expression" means a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth. (*Education Code* Section 210.7.)

“Gender identity” refers to a person’s gender-related identity, appearance or behavior whether or not different from that traditionally associated with the person’s physiology or assigned sex at birth.

“Gender expression” refers to external cues that one uses to represent or communicate one’s gender to others, such as behavior, clothing, hairstyles, activities, voice, mannerisms, or body characteristics.

“Transgender” describes people whose gender identity is different from that traditionally associated with their assigned sex at birth. “Transgender boy” and “transgender male” refer to an individual assigned the female sex at birth who has a male gender identity. “Transgender girl” and “transgender female” refer to an individual assigned the male sex at birth who has a female gender identity. An individual can express or assert a transgender gender identity in a variety of ways, which may but do not always include specific medical treatments or procedures. Medical treatments or procedures are not considered a prerequisite for one’s recognition as transgender.

“Gender nonconformity” refers to one’s gender expression, gender characteristics, or gender identity that does not conform to gender stereotypes “typically” associated with one’s legal sex assigned at birth, such as “feminine” boys, “masculine” girls and those who are perceived as androgynous. Sexual orientation is not the same as gender identity. Not all transgender youth identify as gay, lesbian or bisexual, and not all gay, lesbian and bisexual youth display gender-nonconforming characteristics.

5. How can a teacher or school administrator determine whether a student is transgender or not?

The first and best option is always to engage in an open dialogue with the student and the student’s parent or parents if applicable (but see FAQs 6 and 7). Gender identity is a deeply rooted element of a person’s identity. Therefore, school districts should accept and respect a student’s assertion of their gender identity where the student expresses that identity at school or where there is other evidence that this is a sincerely held part of the student’s core identity. Some examples of evidence that the student’s asserted gender identity is sincerely held could include letters from family members or healthcare providers, photographs of the student at public events or family gatherings, or letters from community members such as clergy.

If a student meets one or more of those requirements, a school may not question the student’s assertion of their gender identity except in the rare circumstance where school

personnel have a credible basis for believing that the student is making that assertion for some improper purpose. The fact that a student may express or present their gender identity in different ways in different contexts does not, by itself, undermine a student's assertion of their gender identity.

A school cannot require a student to provide any particular type of diagnosis, proof of medical treatment, or meet an age requirement as a condition to receiving the protections afforded under California's antidiscrimination statutes. Similarly, there is no threshold step for social transition that any student must meet in order to have his or her gender identity recognized and respected by a school.

6. May a student's gender identity be shared with the student's parents, other students, or members of the public?

   A transgender or gender nonconforming student may not express their gender identity openly in all contexts, including at home. Revealing a student's gender identity or expression to others may compromise the student's safety. Thus, preserving a student's privacy is of the utmost importance. The right of transgender students to keep their transgender status private is grounded in California's antidiscrimination laws as well as federal and state laws. Disclosing that a student is transgender without the student's permission may violate California's antidiscrimination law by increasing the student's vulnerability to harassment and may violate the student's right to privacy.

   - A. Public Records Act requests - The Education Code requires that schools keep student records private. Private information such as transgender status or gender identity falls within this code requirement and should not be released. (Education Code Section 49060.)

   - B. Family Educational and Privacy Rights (FERPA) - FERPA is federal law that protects the privacy of students' education records. FERPA provides that schools may only disclose information in school records with written permission from a student's parents or from the student after the student reaches the age of 18. (20 U.S.C. Section 1232g.) This includes any "information that . . . would allow a reasonable person in the school community . . . to identify the student with reasonable certainty." (34 C.F.R. Section 99.3.)

   - C. California Constitution - Minors enjoy a right to privacy under Article I, Section I of the California Constitution that is enforceable against private parties and government officials. The right to privacy encompasses the right to non-disclosure (autonomy privacy) as well as in the collection and dissemination of personal information such as medical records and gender identity (informational privacy).
     Even when information is part of a student's records and therefore covered by FERPA, the law provides several exceptions that permit appropriate communications under

circumstances in which the student or others may be at risk of harm. Transgender or gender nonconforming students are often subject to stressors which can place them at risk of self-harm. FERPA expressly permits the disclosure of information from a student's records "…to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals." (34 C.F.R. Section 99.36(a).) "If the educational agency or institution determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals." *(Id.* Section 99.36(c).)

Moreover, although FERPA restricts disclosures of information obtained from a student's records, it was never intended to act as a complete prohibition on all communications. One threshold point that is often overlooked is that FERPA limits only the disclosure of records and information from records about a student. It does not limit disclosure or discussion of personal observations.

In other words, if a school employee develops a concern about a student based on the employee's observations of or personal interactions with the student, the employee may disclose that concern to anyone without violating, or even implicating, FERPA. Of course, in most cases, the initial disclosure should be made to professionals trained to evaluate and handle such concerns, such as school student health or welfare personnel, who can then determine whether further and broader disclosures are appropriate.

7. What steps should a school or school district take to protect a transgender or gender nonconforming student's right to privacy?

   To prevent accidental disclosure of a student's transgender status, it is strongly recommended that schools keep records that reflect a transgender student's birth name and assigned sex (e.g., copy of the birth certificate) apart from the student's school records. Schools should consider placing physical documents in a locked file cabinet in the principal's or nurse's office. Alternatively, schools could indicate in the student's records that the necessary identity documents have been reviewed and accepted without retaining the documents themselves. Furthermore, schools should implement similar safeguards to protect against disclosure of information contained in electronic records.

   Pursuant to the above protections, schools must consult with a transgender student to determine who can or will be informed of the student's transgender status, if anyone, including the student's family. With rare exceptions, schools are required to respect the limitations that a student places on the disclosure of their transgender status, including not sharing that information with the student's parents. In those very rare circumstances where a school believes there is a specific and compelling "need to know," the school should inform the student that the school intends to disclose the student's transgender status, giving the

student the opportunity to make that disclosure her or himself. Additionally, schools must take measures to ensure that any disclosure is made in a way that reduces or eliminates the risk of re-disclosure and protects the transgender student from harassment and discrimination. Those measures could include providing counseling to the student and the student's family to facilitate the family's acceptance and support of the student's transgender status. Schools are not permitted to disclose private student information to other students or the parents of those students.

A transgender student's right to privacy does not restrict a student's right to openly discuss and express their gender identity or to decide when or with whom to share private information. A student does not waive his or her right to privacy by selectively sharing this information with others.

8. What is a school or school district's obligation when a student's stated gender identity is different than the student's gender marker in the school's or district's official records?

   A school district is required to maintain a mandatory permanent student record which includes the legal name of the student and the student's gender. If and when a school district receives documentation that such legal name or gender has been changed, the district must update the student's official record accordingly.

   If the school district has not received documentation supporting a legal name or gender change, the school should nonetheless update all unofficial school records (e.g. attendance sheets, school IDs, report cards) to reflect the student's name and gender marker that is consistent with the student's gender identity. This is critical in order to avoid unintentionally revealing the student's transgender status to others in violation of the student's privacy rights, as discussed above in section 6.

   If a student so chooses, district personnel shall be required to address the student by a name and the pronouns consistent with the student's gender identity, without the necessity of legal documentation or a change to the student's official district record. The student's age is not a factor. For example, children as early as age two are expressing a different gender identity. It is strongly suggested that teachers privately ask transgender or gender nonconforming students at the beginning of the school year how they want to be addressed in class, in correspondence to the home, or at conferences with the student's parents.

   In addition to preserving a transgender student's privacy, referring to a transgender student by the student's chosen name and pronouns fosters a safe, supportive and inclusive learning environment. To ensure that transgender students have equal access to the programs and activities provided by the school, all members of the school community must use a transgender student's chosen name and pronouns. Schools should also implement safeguards to reduce the possibility of inadvertent slips or mistakes, particularly among temporary personnel such as substitute teachers.

If a member of the school community intentionally uses a student's incorrect name and pronoun, or persistently refuses to respect a student's chosen name and pronouns, that conduct should be treated as harassment. That type of harassment can create a hostile learning environment, violate the transgender student's privacy rights, and increase that student's risk for harassment by other members of the school community. Examples of this type of harassment include a teacher consistently using the student's incorrect name when displaying the student's work in the classroom, or a transgender student's peers referring to the student by the student's birth name during class, but would not include unintentional or sporadic occurrences. Depending on the circumstances, the school's failure to address known incidents of that type of harassment may violate California's antidiscrimination laws.

9. How does a school or school district determine the appropriate facilities, programs, and activities for transgender students?

A school may maintain separate restroom and locker room facilities for male and female students. However, students shall have access to the restroom and locker room that corresponds to their gender identity asserted at school. As an alternative, a "gender neutral" restroom or private changing area may be used by any student who desires increased privacy, regardless of the underlying reason. The use of such a "gender neutral" restroom or private changing area shall be a matter of choice for a student and no student shall be compelled to use such restroom or changing area.

If there is a reason or request for increased privacy and safety, regardless of the underlying reason, any student may be provided access to a reasonable alternative locker room such as:

- A. Use of a private area in the public area of the locker room facility (i.e., a nearby restroom stall with a door, an area separated by a curtain, or a P.E. instructor's office in the locker room).
- B. A separate changing schedule (either utilizing the locker room before or after the other students).
- C. Use of a nearby private area (i.e., a nearby restroom or a health office restroom).

It should be emphasized that any alternative arrangement should be provided in a way that keeps the student's gender identity confidential.

Schools cannot, however, require a transgender student to use those alternatives. Requiring a transgender student to be singled out by using separate facilities is not only a denial of equal access, it also may violate the student's right to privacy by disclosing the student's transgender status or causing others to question why the student is being treated differently.

Some students (or parents) may feel uncomfortable with a transgender student using the same sex-segregated restroom or locker room. This discomfort is not a reason to deny access to the transgender student. School administrators and counseling staff should work with students and parents to address the discomfort and to foster understanding of gender identity, to create a school culture that respects and values all students.

10. How should a school or district determine the appropriate placement for transgender students related to sports and physical education classes?

    Transgender students are entitled to and must be provided the same opportunities as all other students to participate in physical education and sports consistent with their gender identity. Participation in competitive athletic activities and contact sports are to be addressed on a case-by-case basis. For additional guidance, the California Interscholastic Federation issued new bylaws in 2013, which provide a detailed process for gender identity participation in interscholastic sports. (See, Recent Developments section below.)

11. May a school district or school enforce a gender-based dress code?

    Nondiscriminatory gender segregated dress codes may be enforced by a school or school district pursuant to district policy. Students shall have the right to dress in accordance with their gender identity, within the constraints of the dress codes adopted by the school. School staff shall not enforce a school's dress code more strictly against transgender and gender nonconforming students than other students.

12. How should school districts and schools address harassment, bullying and abuse of transgender students?

    California law requires that schools provide all students with a safe, supportive and inclusive learning environment, free from discrimination, harassment, and bullying. Examples of harassment and abuse commonly experienced by transgender students include, but are not limited to, being teased for failing to conform to sex stereotypes, being deliberately referred to by the name and/or pronouns associated with the student's assigned sex at birth, being deliberately excluded from peer activities, and having personal items stolen or damaged. School district efforts to prevent and address harassment must include strong local policies and procedures for handling complaints of harassment, consistent and effective implementation of those policies, and encouraging members of the school community to report incidents of harassment. Beyond investigating incidents, schools should implement appropriate corrective action to end the harassment and monitor the effectiveness of those actions.

13. Should a school district or school generally review its gender-based policies?

    As a general matter, schools should evaluate all gender-based policies, rules, and practices and maintain only those that have a clear and sound pedagogical purpose. Examples of policies and practices that should be reconsidered include: gender-based dress code for graduation or senior portraits and asking students to line up according to gender. Gender-

based policies, rules, and practices can have the effect of marginalizing, stigmatizing, and excluding students, whether they are gender nonconforming or not. In some circumstances, these policies, rules, and practices may violate federal and state law. For these reasons, schools should consider alternatives to them.

Whenever students are separated by gender in school activities or are subject to an otherwise lawful gender-specific rule, policy, or practice, students must be permitted to participate in such activities or conform to such rule, policy, or practice consistent with their gender identity.

RECENT DEVELOPMENTS AND RESOURCES

The California School Boards Association's (CSBA) Legal Guidance on Rights of Gender Nonconforming Students in Schools

CSBA has also developed a model board policy and administrative regulation that can be adopted by districts. The most current CSBA sample language is available through GAMUT Policy and Policy Plus:

- Board Policy 5145.3 - Nondiscrimination/Harassment
- Administrative Regulation 5145.3 - Nondiscrimination/Harassment

Office for Civil Rights Complaint and Resolution Agreement

On July 24, 2013, the U.S. Department of Education's Office for Civil Rights and the U.S. Department of Justice's Civil Rights Division entered into a Resolution Agreement with the Arcadia Unified School District to resolve a complaint alleging violations of Title IX. The case was brought on behalf of a transgender student who was denied access to the boys' restrooms and locker rooms, and required to sleep in a separate facility during an overnight field trip. The agreement requires the school district to treat the student in a manner consistent with his gender identity for all purposes. Moreover, the school district agreed to retain a consultant to revise their policies to prohibit discrimination on the basis of gender identity and implement a district-wide training program for staff and students.

The Resolution Agreement (PDF; Posted 29-Jan-2016) between the Office for Civil Rights and Arcadia Unified School District

California Interscholastic Federation

In February 2013, the California Interscholastic Federation (CIF) issued new bylaws which provide that all students should have the opportunity to participate in CIF activities in a manner that is consistent with their gender identity. CIF Regulation 300 D, Gender Identify Participation, provides:

Participation in interscholastic athletics is a valuable part of the educational experience for all

students. All students should have the opportunity to participate in CIF activities in a manner that is consistent with their gender identity, irrespective of the gender listed on a student's records. The student and/or the student's school may seek review of the student's eligibility for participation in interscholastic athletics in a gender that does not match the gender assigned to him or her at birth, should either the student or the school have questions or need guidance in making the determination, by working through the procedure set forth in the "Guidelines for Gender Identity Participation."

NOTE: The student's school may make the initial determination whether a student may participate in interscholastic athletics in a gender that does not match the gender assigned to him or her at birth.

The new California Interscholastic Federation bylaws

Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence, April 29, 2014

In April 2014, the U.S. Department of Education, Office for Civil Rights, issued guidance making clear that federal law prohibits discrimination against students on the basis of transgender status: "Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity and OCR accepts such complaints for investigation (PDF; Posted 29-Jan-2016)."

Office for Civil Rights Dear Colleague Letter, October 26, 2010

In October 2010, the U.S. Department of Education, Office for Civil Rights, issued a Dear Colleague Letter that, among other things, clarified that although Title IX does not prohibit discrimination on the basis of sexual orientation, harassment directed at a student because that student is gay, lesbian, bisexual, or transgender may constitute sexual harassment and sex discrimination prohibited by Title IX.

The U.S. Department of Education, Office for Civil Rights, Dear Colleague Letter, October 26, 2010 (PDF; Posted 29-Jan-2016)

Other Resources

Gay-Straight Alliance Network/Tides Center, Transgender Law Center and National Center for Lesbian Rights. (2004). Beyond the Binary: A Tool Kit for Gender Identity Activism in Schools. San Francisco, CA: GSA Network (PDF; Posted 29-Jan-2016)

Gerald P. Mallon, "Practice with Transgendered Children," in *Social Services with Transgendered Youth* 49, 55-58 (Gerald P. Mallon ed., 1999)

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Questions: School Health and Safety Office | shso@cde.ca.gov | 916-319-0914

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K-12 and Higher Education

Meet Our Panel

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Topics of Discussion

1. Transgender Students' Rights on Campus
2. Unique Challenges in Gender Discrimination and Violence in Education
3. Implementing New Title IX Regulations

1. Transgender Students' Rights on Campus

Title IX Cases – Bathrooms and Locker Rooms

Bostock v. Clayton County, 140 S.Ct. 1731 (2020)

- Held discrimination against gay and transgender people is a form of sex discrimination under Title VII.

Grimm v. Gloucester County Sch. Bd., 972 F.3d 586 (4th Cir. 2020)

- 2016: 4th Circuit reversed dismissal of Title IX claim from transgender boy denied access to the boys' restroom at school, holding that OCR guidance deserved deference.
- 2017: Supreme Court vacated and remanded after OCR withdrew that guidance.
- 2020: 4th Circuit affirmed summary judgment in favor of the student.

Title IX Cases – Bathrooms and Locker Rooms

Whitaker v. Kenosha USD, 858 F.3d 1034 (7th Cir. 2017)

- Affirmed preliminary injunction for transgender boy under Title IX and the Equal Protection Clause.

A.C. v. Metro. Sch. Dist. of Martinsville, No. 22-1786, 2023 WL 4881915 (7th Cir. Aug. 1, 2023)

- Declined to overrule *Whitaker* in appeal of several cases involving restroom and locker room access.

Adams v. Sch. Bd. of St. John's County, 57 F.4th 791 (11th Cir. 2022) (en banc)

- Reversed ruling in favor of transgender boy, holding there is no right to bathroom access consistent with gender identity under Title IX or the Equal Protection Clause.

Title IX Cases – Sports Teams

At least 23 states have passed laws prohibiting transgender girls from participating in girls' sports teams.

Bostock v. Clayton County, 140 S.Ct. 1731 (2020)

- Held discrimination against gay and transgender people is a form of sex discrimination under Title VII.

Hecox v. Little, 79 F.4th 1009 (9th Cir. 2023)

- Affirmed preliminary injunction against Idaho's transgender sports ban (the "Fairness in Women's Sports Act").
- State law barred transgender girls from competing on girls' teams at any age and level of competition and created a sex verification procedure that permitted any individual to challenge the sex of any female athlete.

Title IX Cases – Sports Teams

- *B.P.J. v. West Virginia State Bd. of Ed.*, 550 F.Supp.3d 347 (S.D.W.V. 2021), on appeal to 4th Circuit
  - 11-year-old transgender girl challenged newly enacted state transgender sports ban.
  - District court granted preliminary injunction in 2021, finding the ban likely violated Title IX and Equal Protection, but then in January 2023 granted summary judgment to the state.
  - 4th Circuit stayed the summary judgment order pending appeal in February 2023.
  - State filed for emergency review by SCOTUS, which rejected it in April 2023.

For a discussion of the policy interests supporting inclusive policies, see Scott Skinner-Thompson and Ilona M. Turner, *Title IX's Protections for Transgender Student Athletes, 28 Wisc. J. Law, Gender & Society* 271 (2013).

Legal Challenges to Pronoun Policies

Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021)

- Held that public university professor stated a claim for infringement of his First Amendment rights when the school directed him to use "she/her" pronouns to refer to a transgender female student.

Kluge v. Brownsburg Community School Corp., 64 F.4th 861 (7th Cir. 2023)

- Affirmed dismissal of Title VII religious discrimination claim brought by high school teacher who objected to using transgender students' names and pronouns.

U.S. Department of Education Guidance and Regulations on Transgender Students

2016 Dear Colleague letter stated schools should respect transgender students' gender identity including with names, pronouns, bathrooms, and locker rooms.

In 2017, the Trump administration rescinded the letter.

In June 2021, the Department published formal interpretation stating it will interpret "sex" to include gender identity, following the *Bostock* decision (86 Fed. Reg. 32637).

20 states sued to challenge that guidance, and in July 2022 a federal district court in Tennessee issued a preliminary injunction, which currently bars the Department of Education from relying on that interpretation in those 20 states:

- *State of Tenn. v. U.S. Dept. of Ed.*, Case No. 3:21-cv-308, 2022 WL 2791450 (E.D. Tenn., July 15, 2022)
- The 20 states are Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, and West Virginia.

U.S. Department of Education Guidance and Regulations on Transgender Students

Proposed Title IX regulations:

- The regulations proposed in July 2022 would clarify that "sex" includes gender identity and that schools must generally allow transgender students to participate consistent with their gender identity.
- Separate regulations on sports teams were proposed in April 2023, which would allow schools to exclude transgender athletes in some circumstances.

California Law – Transgender Students' Rights

Cal. Ed. Code Section 201(a):

- All pupils have the right to participate fully in the educational process, free from discrimination and harassment.

Cal. Ed. Code Section 220:

- No person shall be subject to discrimination on the basis of gender in any program or activity conducted by an educational institution that receives or benefits from state financial assistance.

Cal. Ed. Code Section 201(b):

- Public schools have an affirmative obligation to combat sexism and other forms of bias, and a responsibility to provide equal educational opportunity to all pupils.

California Law – Transgender Students' Rights

Cal. Ed. Code Section 221.5(f) (A.B. 1266, enacted in 2013) specifically requires:

"A pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with [their] gender identity, irrespective of the gender listed on the pupil's records."

California Law – Transgender Students' Rights

The California Code of Regulations (5 CCR Section 4900(a)) similarly provides:

"No person shall be excluded from participation in or denied the benefits of any local agency's program or activity on the basis of sex, sexual orientation, gender, ethnic group identification, race, ancestry, national origin, religion, color, or mental or physical disability in any program or activity conducted by an 'educational institution' or any other 'local agency' . . . that receives or benefits from any state financial assistance."

Recent Cases in CA Challenging K-12 Transgender Policies

People v. Chino Valley Unified Sch. Dist., No. CIV SB 2317301 (Cal. Super. Ct. Aug. 28, 2023)

- Attorney General sought injunction of policy requiring parent disclosure in San Bernardino County.
- Oct. 19, 2023 – Court issued preliminary injunction halting enforcement of policy.

Konen v. Caldeira, No. 5:22-cv-05195-EJD (N.D. Cal. July 17, 2023)

- Parental notification – claims against Spreckles Unified School District, schoolteachers, principal.
- Court recently approved $100,000 settlement.

Regino v. Staley, No. 2:23-cv-00032-JAM-DMC (E.D. Cal. July 10, 2023)

- Parental notification – claims against Chico Unified School District and board members.
- July 10, 2023 – District Court granted District's Motion to Dismiss. Ninth Cir. appeal pending.

Mirabelli v. Olsen, No. 3:23-cv-00768-BEN-WVG, 2023 WL 5976992 (S.D. Cal. Sept. 14, 2023)

- Staff challenge regarding sincerely-held religious belief.

Transgender Students' Rights in SFUSD

- Policies that Reinforce the Rights of Trans/Non-Binary Students:
  - Right to Privacy
  - Names/Pronouns
  - Restroom/Locker Room Accessibility
  - Athletics
- Addressing and Supporting Students Needs
- California Department of Education (CDE) FAQ
- Office for Civil Rights (OCR) – Dear Colleague Letters

2. Unique Challenges in Gender Discrimination and Violence in Education

Unique Challenges in K-12 Setting

Minors & Parents

- Investigating and supporting young children/youth, parents,

Limited Resources

- Limited People power and required nuanced skills required to conduct lengthy processes

Compensatory Educational

- Restorative Justice
- Prevention and Education

Neurodivergent Students

Communication ahead of the interview

- School Administrator
- Parents/Guardians
- Student

Interview Challenges

- Training
- Language Usage
- Communicating with the Student

Documentation

- Investigation Report
- Final Decision

Alternative Resolutions- Title IX Higher Education

- Restorative Justice – Due to the current regs, many Universities and Colleges have been exploring RJ. Many complainants shared they want to explore other options due to Hearing requirements.
  - University of San Diego – Restorative Justice Certificate
- Agreements – Many other options have been facilitated agreements. Allowed the opportunity to explore other options with students.
- Mediation – Healthy Relationship and Toxic Relationship, while we are limited under CA Law for sexual assault has been an options for intimate partner violence.

Recent (Non-CA) Title IX Cases Highlighting Unique Challenges in Higher Ed

S.C. v. Metro. Gov't of Nashville & Davidson Cnty., No. 22-5125 (6th Cir. Nov. 15, 2023)

- Held: schools must consider post-incident student-on-student cyberbullying/electronic harassment or face liability.

Emma Wilson, et al. v. Nicholas Johnson, et al., Case No. 1:22-cv-336-HAB (N.D. Ind. Nov. 20, 2023)

- The District Court dismissed Title IX lawsuit against Huntington University (Indiana) regarding sexual assault allegations against ex-running coach, citing University's lack of knowledge of allegations.

3. Implementing Title IX Regulations

Where the T9 Regulations are ...

(DOE 2022 Fact Sheet re Proposed Regs)

	Pre-2020 T9 Regs	2020 T9 Regs	Proposed 2023 T9 Regs
Definitions		Severe, Pervasive, and Objectively Offensive	Severe or Pervasive
Process	Investigator Model (College)	Hearing & Direct Cross Examination (College)	Can pick which process (K-12 and College)
Jurisdiction		No Outside US, "education program and program"	May broaden to off campus
Pregnancy	No mention in previous regulations	No mention in current regulations	Potential T9 grievance procedure for Pregnancy concerns

Implementing New Title IX Regulations

Communication with your community

- Printed materials
- Online resources
- Townhall meetings?

Engaging community stakeholders

- Opportunities for involvement

Transparency

- Be clear about why we are making the changes
- Offer avenues for community to express concerns

Implementing New Title IX Regulations: Impacts

Policy Confusion

- Which policy applies?
- Clear jurisdictional guidelines
- Communicating with parties and advisors

State law considerations

- Differing definitions
- Differing requirements

Hearings

- Pros and Cons
- Relying on statements from non-participating individuals

New Developments in K-12 and Higher Education

Thank You!