Cutting-Edge Policies and Services for Addressing Campus Sexual Violence

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ABSTRACT: This Article argues that survivors of campus sexual violence often need legal counsel before, during, and after campus disciplinary proceedings. Lawyers have been overlooked as a critical resource for survivors, and this omission means that most survivors do not receive essential services for addressing their victimization and furthering their recovery. This Article sets forth the reasons why institutions of higher education should make available free legal services to their students who are victimized, and addresses the reasons why institutions might be hesitant to do so. The Article then argues that potential institutional concerns do not relieve colleges and universities of their existing legal obligation to provide some survivors with free legal services. This Article suggests that schools would best meet their legal obligation by providing *all* survivors with free legal services. The Article then puts its theoretical discussion into perspective by describing the University of Oregon's unique on-campus program that provides free legal counsel to student survivors. The Article concludes by recommending that the Office for Civil Rights clarify campuses' legal obligation to provide free attorneys for some survivors and by suggesting that campuses offer *all* survivors this service. The result would be a better campus response to sexual violence, a decline in the overall rate of post-assault traumatic distress, a likely reduction in the rate of campus sexual violence, and greater progress toward the goal of gender equality.

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INTRODUCTION

Since the U.S. Department of Education's Office for Civil Rights (OCR) issued its policy guidance about sexual violence in a 2011 *Dear Colleague Letter*,[1] college and university administrators have been scrambling to address campus sexual violence in a manner that complies with Title IX of the Education Amendments of 1972.[2] No institution wants to be known as the "rape school"[3] or to incur the financial costs of getting its response wrong.[4] Presumably, campus administrators also want to enable student survivors to complete their education.[5]

Despite the flurry of new activity, campuses rarely provide free legal counsel to students who claim to have been victimized. This is unfortunate because students face real barriers to obtaining lawyers, and lawyers can greatly advantage survivors. A student survivor encounters a wide variety of choices with legal implications, including whether to report the assault to the school, whether to use

1. Office for Civil Rights, *Dear Colleague Letter from Assistant Sec'y for Civil Rights Russlynn Ali*, U.S. DEP'T EDUC. (Apr. 4, 2011), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

2. Mark Herring et al., *Report and Final Recommendations to the Governor*, GOV. TERRY MCAULIFFE'S TASK FORCE ON COMBATING CAMPUS SEXUAL VIOLENCE 8 (May 28, 2015), http://ag.virginia.gov/files/Final_Report-Task_Force_on_Combating_Campus_Sexual_Violence.pdf ("Across the U.S., colleges and universities have promulgated services, educational campaigns, policies, and adjudication processes in an effort to raise awareness and respond properly to reports of sexual violence."); Office for Civil Rights, *Title IX Enforcement Highlights*, U.S. DEP'T EDUC. 9 (June 2012), https://www2.ed.gov/documents/press-releases/title-ix-enforcement.pdf ("Since the guidance's release, dozens of colleges and universities have made changes to their policies and procedures consistent with the guidance.").

3. *See* Complaint at 18-20, 59, Eramo v. Rolling Stone LLC, 314 F.R.D. 205 (W.D. Va. 2016) (No. 3:15–MC–00011), https://www.documentcloud.org/documents/2077913-eramo-v-rolling-stone-complaint.html (alleging that *Rolling Stone* magazine defamed a University of Virginia administrator when it reported that she allegedly said sexual assault statistics are "hard to find" at the University "because nobody wants to send their daughter to the rape school"). The administrator prevailed in her defamation suit. T. Rees Shapiro, *Jury Awards $3 Million in Damages to U-Va. Dean for Rolling Stone Defamation*, WASH. POST (Nov. 7, 2016), https://www.washingtonpost.com/local/education/jury-to-deliberate-damages-to-u-va-dean-in-rolling-stone-defamation-lawsuit/2016/11/07/e2aa2eb0-a506-11e6-ba59-a7d93165c6d4_story.html?utm_term=.097446b26cf5. Even if the administrator never uttered that line, it illustrates what many university administrators may, in fact, think. One researcher opined that schools substantially undercount campus sexual assault because "if a school stands out as having a high rate of sexual assault versus peer schools, it risks attracting fewer students and suffering long-term reputational damage." *See* Corey Rayburn Yung, *Concealing Campus Sexual Assault: An Empirical Examination*, 21 PSYCHOL. PUB. POL'Y & L. 1, 6 (2015).

4. An institution can lose federal funding for violating Title IX. *See* 28 C.F.R. §§ 42.108, 54.605 (2016). In May 2016, OCR had 235 investigations at 185 institutions underway. *About* The Chronicle*'s Title IX Investigation Tracker*, CHRON. HIGHER EDUC. (July 17, 2016, 5:28 PM), http://projects.chronicle.com/titleix/about/. In addition, survivors can sue for damages if a school violates Title IX. Franklin v. Gwinnett Cty. Pub. Sch., 503 U.S. 60, 76 (1992). Liability is predicated on the school being deliberately indifferent to a student's victimization. Davis *ex rel.* LaShonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 633 (1999). There can also be liability pursuant to 42 U.S.C. § 1983 (2012). Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 258 (2009).

5. The terms "survivor" and "complainant" are used interchangeably throughout the Article to refer to the person who alleges to be a victim of sexual violence. The term survivor is not meant to imply that the allegations have been founded. Occasionally, the Article employs pronouns. The female pronoun is used to refer to the survivor and the male pronoun is used to refer to the alleged perpetrator. These pronouns reflect the generally gendered nature of campus sexual assault. However, the use of these pronouns is not meant to imply that same-sex sexual violence or female-on-male sexual violence does not exist.

the civil legal system to address the repercussions of the victimization, and whether to participate in a criminal process. Legal advice is very valuable because these complex systems overlap in complicated ways; involvement in any of them is not necessarily voluntarily; and information gathering and decision making can become more difficult because of a survivor's traumatic distress. In addition, a lawyer's presence shields the survivor from direct contact with the accused student's attorney and increases the chance that a survivor will obtain her desired outcomes in the three systems. In short, an attorney can militate against the factors that may impede a survivor's recovery and, relatedly, her education. A survivor who received a free attorney from an on-campus program at the University of Oregon summarized the value of such a service: "If it was not for [the attorney] . . . I would not have been able to graduate."[6] That comment captures the reason Title IX addresses campus sexual assault at all—and the reason free attorneys for survivors are so vital.

Because of the ways in which legal counsel can benefit survivors, institutions should make free legal services available to them. Part I of this Article demonstrates that very few campuses currently provide legal services to survivors. Neither the provision of information about the availability of legal services nor the provision of advocacy services is an adequate substitute. Part I then observes that this service gap has received scant attention from legislators and scholars, and that recognizing it is an important first step toward addressing it.

Part II provides more detail about why institutions of higher education should provide free legal services to student survivors. It discusses in concrete terms what legal counsel can do for survivors, and illustrates that attorneys' importance goes far beyond the advantages that they offer in disciplinary hearings. It reveals that attorneys have a critical role to play in helping students who may be in traumatic distress navigate three separate systems, obtain the needed relief in those systems, ward off the unsavory tactics of some defense lawyers, and ensure the institution's compliance with Title IX.

Part III considers some of the reasons why schools may push back against this proposal. In particular, a school might cite the juridification of disciplinary proceedings, the cost of providing free legal services, potential conflicts of interest for the lawyer involved, the university's increased exposure to legal liability, and the implications for the accused. This Part suggests that these reasons mostly lack merit or can be addressed satisfactorily, and that they fail to outweigh the benefit of providing survivors with free legal services.

Part IV argues that regardless of an institution's disposition toward this proposal as a matter of policy, all institutions of higher education have a legal obligation to provide free legal services to survivors in some instances. This Part

6. Letter from Fatima Roohi Pervaiz, Dir., ASUO Women's Ctr., to Ellen Rosenblum, Or. Attorney Gen. (June 14, 2016) (on file with author) (quoting a letter from a student survivor who worked with the attorney in Student Survivor Legal Services).

briefly describes why institutions of higher education must address sexual violence between students at all, and then uses OCR Guidance to show that providing legal counsel to survivors is consistent with, and sometimes required by, Title IX.[7] The Article will show that an institution's obligation to provide legal counsel is tied to the institution's obligation to provide interim measures to students who report, to prevent sexual violence, to remedy the effects of sexual violence, and to take responsibility for remedying its own contributions to or shortcomings in responding to sexual violence.

Finally, Part V describes the program at the University of Oregon (UO) that provides free on-campus legal services exclusively to survivors. The program, Student Survivor Legal Services (SSLS), illustrates one possible approach to providing free legal services to survivors and affords one example of how an institution resolved the various legal and policy questions addressed in this Article.

Given the immense work still to be done to reduce the prevalence of campus sexual violence, the Article concludes by suggesting two steps the government and universities should take to further survivors' access to attorneys: OCR should tell universities that an effective campus response to sexual violence requires them to provide free legal services to some survivors, and universities should provide free legal assistance to all survivors because it is best practice.

I. THE INADEQUACY OF THE STATUS QUO

A. The Gap in Legal Services for Campus Survivors

Despite the recent campus efforts to address sexual assault (and now also domestic violence, stalking, and dating violence[8]), very few campuses provide

7. This Article does not address whether high school students should also have easy access to legal counsel, in part because less sexual violence exists among that population. OCR reports that among public high school students, there were "nearly 3,600 incidents of sexual battery and over 600 rapes and attempted rapes in a recent year." Office for Civil Rights, *supra* note 2, at 8. Compare that to more than 402,500 rapes each year among college women, a figure obtained by assuming there are 35 rapes per year for every 1,000 women attending college, *see* Bonnie S. Fisher, Francis T. Cullen & Michael G. Turner, *The Sexual Victimization of College Women*, NAT'L INST. JUST. 11 (Dec. 2000), https://www.ncjrs.gov/pdffiles1/nij/182369.pdf, and that there were approximately 11.7 million women attending college in 2016, *see Fast Facts: Back to School Statistics*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/fastfacts/display.asp?id=372.

8. *See generally* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304, 127 Stat. 54, 89-92 (2013) (codified at 20 U.S.C.A. § 1092(f)(1)(F)(iii), § 1092(f)(8)(A)-(B) (West, Westlaw through Pub. L. No. 114-327)) (requiring campuses to issue public reports that detail the extent of this type of violence against students, their programs to prevent it, their procedures to address it, and their educational activities aimed at prevention and response). Campuses probably have the same obligation to address domestic violence, dating violence, and stalking as they have to address sexual assault because these other types of violence are also gender-based, that is, they are "directed against a woman because she is a woman or . . . affect[] women disproportionately." Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 19, ¶ 6, U.N. Doc. CEDAW/C/1992/L.1/Add. 15 (1992), http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm; *see also* United

legal services to survivors of sexual violence. A national study of 440 four-year institutions of higher education found that only 13% of campuses offered "campus legal service counseling" to students who reported that they experienced a sexual assault.[9] Moreover, while 85% of campuses in the survey said that they used a team approach for responding to sexual violence on campus,[10] those teams had fewer representatives from legal services than from any other service mentioned. Campus legal services were part of the team at only 6% of the institutions, and community legal services (which 70% of the campuses claimed offered services to survivors[11]), were part of the team at only 22% of the institutions.[12] In contrast, the teams often included campus or community health services (60% and 46%, respectively), campus or community mental health services (78% and 45%, respectively), housing/residential services (69%), and campus or community victim assistance/advocacy services (44% and 51%, respectively).[13]

The problem is even more acute at two-year institutions. In general, community colleges have far fewer resources to address sexual violence than four-year colleges and universities.[14] Consequently, "[c]ommunity college students impacted by sexual assault are more likely [than students at four-year institutions] to withdraw or just stop attending class rather than pursue formal complaints or file lawsuits."[15]

States v. Morrison, 529 U.S. 598, 629 n.2, 631-32 (2000) (Souter, J., dissenting) (noting that Congress thought domestic violence was a crime motivated by gender when it enacted the civil rights remedy in the Violence Against Women Act). The Association of Title IX Administrators assumes campuses have an obligation under Title IX to address all of these types of violence. *See* Juliette Grimmett et al., *The Challenge of Title IX Responses to Campus Relationship and Intimate Partner Violence*, ASS'N TITLE IX ADMIN. (2015), https://atixa.org/wordpress/wp-content/uploads/2012/01/Challenge-of-TIX-with-Author-Photos.pdf.

9. SEXUAL VIOLENCE ON CAMPUS: HOW TOO MANY INSTITUTIONS OF HIGHER EDUCATION ARE FAILING TO PROTECT STUDENTS, U.S. SENATE SUBCOMMITTEE ON FINANCIAL & CONTRACTING OVERSIGHT app. § C2.5 (July 9, 2014), http://www.mccaskill.senate.gov/SurveyReportwithAppendix.pdf.

10. *Id.* § C5.1.

11. *Id.* § C2.11. It is unclear from the report if community legal services included private attorneys. It is also unknown whether survey responders only included community resources that actually served student survivors given the legal service providers' other priorities.

12. *Id.* § C5.6.

13. Law enforcement was also frequently part of the teams: campus law enforcement (80%), community law enforcement (59%), and local prosecutors (25%) were often involved. *Id.* §§ C5.2- C5.13; *see also* President's Task Force on Preventing & Responding to Sexual Violence and Sexual Assault, *Initial Report to the President*, UNIV. CAL. 9, 14-15 (Sept. 2014), http://ahed.assembly.ca.gov/sites/ahed.assembly.ca.gov/files/hearings/UC%20Task%20Force%20-%20Preventing%20and%20Responding%20to%20Sexual%20Assault.pdf (recommending a "response team" model at all campuses sans an attorney for the complainant, and recommending an "independent confidential advocacy office" on all campuses sans an attorney); *id.* at 23-25 (including "sample best practices" for reporting and support options from other institutions, specifically the University Southern California, Yale University, and Frostburg State University, none of which indicate that they include legal services as a resource either within or outside of the institution).

14. *Community Colleges and Sexual Misconduct: Unique Challenges and Opportunities*, ASS'N STUDENT CONDUCT ADMIN. 4 (Apr. 18, 2015), http://www.theasca.org/Files/2015%20Community%20Colleges%20%26%20Title%20IX.pdf ("[M]any two-year institutions either do not have any or have very limited offerings for on-campus mental health resources, health services, and victims' services programs.").

15. *Id.* at 5.

Campuses today typically only inform students about the existence of legal services on campus and in the community, as they are legally required to under the Violence Against Women Reauthorization Act of 2013 (also known as the Campus SaVE Act)[16] and the regulations adopted pursuant to it.[17] Yet information about the identity and location of legal service providers is not always provided,[18] and even when provided it can be rather uninspiring if not meaningless: the information need not describe the legal remedies that are available or the value of legal representation.[19] The content and tone of the information about legal services contrasts sharply with the information about medical services, which is sometimes even mandated by state law. For example, an institution of higher education in Virginia must tell victims about "the importance of seeking appropriate medical attention,"[20] but neither federal nor Virginia law requires an institution to tell victims about the importance of seeking appropriate legal services. As a result, institutional materials do not inspire survivors to seek legal services.[21]

16. Violence Against Women Act Reauthorization of 2013, § 304, 127 Stat. 54, 89-92 (2013) (codified at 20 U.S.C.A. § 1092(f)(1)(F)(iii), § 1092(f)(8)(A)-(B) (West, Westlaw through Pub. L. No. 114-327)) (requiring that the annual security report containing the institution's current policies must include "[a] statement that the institution will provide written notification to students and employees about existing counseling, health, mental health, victim advocacy, legal assistance, visa and immigration assistance, student financial aid, and other services available for victims, both within the institution and in the community").

17. Violence Against Women Act, 79 Fed. Reg. 62752, 62774 (Oct. 20, 2014) (codified at 34 C.F.R. § 668.46 (2016)).

18. For example, New York University has a Web page entitled "Resources for Student Complainants." It is devoid of information about legal service providers. *Resources for Student Complainants*, N.Y.U., https://www.nyu.edu/life/safety-health-wellness/sexual-respect/sexual-misconduct-resources-and-support-for-students/resources-for-student-complainants.html. NYU's "Know Your Rights" page simply says that students have "[t]he right to be referred to on- and off-campus counseling, mental health, or other student services for survivors," but legal services are not mentioned. *Know Your Rights*, N.Y.U., https://www.nyu.edu/life/safety-health-wellness/sexual-respect/sexual-misconduct-resources-and-support-for-students/know-your-rights.html.

19. *See, e.g.*, *Middlebury C.V. Starr Schools Abroad: Resources in the Event of Sexual Harassment, Sexual Assault, and/or Interpersonal Violence/Misconduct*, MIDDLEBURY C., http://www.middlebury.edu/study-abroad/health/assault; *Resources and Services: Sexual Harassment and Violence Resources and Information Index*, U. CHI., https://csl.uchicago.edu/node/1190; *Resources for Student Complainants*, *supra* note 18; *Sexual Assault: Pomona College Processes & Resources*, POMONA C., https://www.pomona.edu/students/sexual-assault; *Sexual Violence Resources & Information*, MIDDLEBURY C., http://www.middlebury.edu/student-life/health-wellness-education-and-safety/campus-policies/sexual-violence-policies-resources/emergency; *Violence Prevention and Advocacy*, CLAREMONT C., http://7csexualmisconductresources.claremont.edu/support/support-resources/.

20. *See, e.g.*, VA. CODE ANN. § 23.1-806(L) (West, Westlaw through 2017 Reg. Sess.) (listing information the institution must provide to the alleged victim).

21. For example, the University of Michigan's resource guide describes the benefit of having a sexual assault forensic exam, but not the benefit of consulting with an attorney. *Our Community Matters: Addressing Sexual Assault, Intimate Partner Violence, and Stalking*, U. MICH. 2 (Sept. 29, 2016), http://dpss.umich.edu/docs/community-matters-brochure.pdf ("Even if you are not sure that you want to file a police report, it can be helpful to have any available evidence collected in case you decide to file a report with law enforcement at a later date. The nurse can also provide emergency contraception, treatment for sexually transmitted infections (STIs), and other needed medical care."). Rather, under "Legal Assistance," the guide merely lists three resources. One of the resources will not represent students against other students and the other two require the student to be "low-income." One of those two providers further requires a referral from the SafeHouse Center. *Id.* at 6.

It is unknown whether the information provided pursuant to the Campus SaVE Act has any positive effect on student survivors. Nor is it known if individuals on campus are providing verbal encouragement to students to seek legal assistance, although it is unlikely. The Office on Violence Against Women stated at the end of 2015, "Many students are unaware of their legal options and unfamiliar with the resources available for legal representation."[22] Regardless, information about legal resources and civil legal remedies (to the extent that information is provided) may mean little to a student who does not know if she will qualify for legal services, if she is eligible for legal remedies, or why she might need legal services in the first place.

Even if directory-like information or encouragement by someone on campus does motivate survivors to seek legal counsel, often the existing on-campus and community legal services are inappropriate for or inaccessible to them. Numbers differ, but at best only 400 colleges and universities have Student Legal Service offices.[23] These offices handle a wide range of civil, criminal, and administrative matters for students, but they vary widely from place to place in terms of their staffing and sources of funding; they also vary in the breadth and depth of services offered. Some provide only advice and referral.[24] On-campus legal services are also sometimes inaccessible to survivors because their perpetrators are students or employees of the university. Julie Novkov reports that the on-campus offices that offer legal assistance "may rule out providing counsel if a potential case could have students structurally aligned against each other."[25] One example of such an office is the Associated Students of the University of Oregon (ASUO) Legal Services. This legal services office is funded by student fees and provides free legal advice to students in a wide range of civil legal matters. However, it will not take a case if the opposing party is another student, a University of Oregon employee, or the University.[26] In addition, ASUO Legal Services generally

22. Office on Violence Against Women, *OVW Fiscal Year 2016 Legal Assistance for Victims Grant Program Solicitation*, U.S. DEP'T JUST. 5 (Dec. 15, 2015), https://www.justice.gov/ovw/file/798876/download.

23. Donald C. Heilman, *Student Legal Services: An Emerging Provider of Legal Aid on Campus*, AM. B. ASS'N ACCESS TO JUST. (July 31, 2014), http://apps.americanbar.org/litigation/committees/access/articles/summer2014-0714-student-legal-services-emerging-provider-legal-aid-campus.html. *But see* Kelly A. Mroz, *Meeting the Legal Needs of College Students*, 58 RES GESTAE 32, 32-33 (2015) (noting that "[t]he National Legal Aid & Defender Association . . . lists 98 offices in 38 states that provide some form of direct legal services for students," but "[t]welve states have no programs at all, and only five states boast four or more institutions with SLS offices").

24. Mroz, *supra* note 23, at 32 ("While consistent in that they are legal offices designed to provide services for students at a college or university, these programs do not follow a single model. Some offices provide advice and referral only; others also offer representation. Services may be provided by contract attorneys, staff attorneys or law school clinics. The funding sources can be endowments, general funds, activity fees or organizational fees. Yet SLS offices retain a key shared characteristic in that services are either free or inexpensive (think health insurance co-pay) to qualifying students.").

25. Julie Novkov, *Equality, Process, and Campus Sexual Assault*, 75 MD. L. REV. 590, 605 (2016) (citing SUNY Albany and the University of Vermont's Student Legal Services).

26. ASUO STUDENT LEGAL SERVICES, http://asuolegal.org/.

will only provide advice and consultation (for example, assistance with paperwork and maybe some letter writing), and will not provide full representation. Consequently, it would rarely if ever represent a survivor in a contested restraining order case, even if the perpetrator were not another student.

At least theoretically, students might access legal services in their communities, including private attorneys, legal aid organizations, and sexual assault organizations that have attorneys on staff.[27] Or they might reach out to a national organization that provides assistance to campus survivors.[28] While off-campus legal services often exist,[29] survivors have trouble accessing those services for various reasons.[30] It is a lot to ask a student who may be experiencing traumatic distress and who is busy with classes and campus activities to go to an off-campus service provider, especially when the benefit of seeing a lawyer may be unclear. As Lois Kanter observed, "while rape often has a ripple effect by creating many civil legal problems, it often disables its victim from seeking the legal services she needs."[31] The survivor may also be unfamiliar with the agency and question whether her information will be kept confidential.[32] Most important, the survivor may not understand why she should speak with a lawyer unless and until she actually has an opportunity to do so.

Students also might not seek legal services off-campus because they lack the financial resources to hire an attorney. While free legal services may exist in a community, free off-campus providers are often legal aid providers with income restrictions. Most students don't conceive of themselves as "poor," even though

27. In 2005, Lois Kanter found that "only a handful [of rape crisis centers] have been able to fund in-house lawyers to provide direct services to victims." Lois H. Kanter, *Invisible Clients: Exploring Our Failure To Provide Civil Legal Services to Rape Victims*, 38 SUFFOLK U. L. REV. 253, 257 (2005). A search of the Legal Assistance Grants database of award recipients indicates that from 2010 to 2016, the Office on Violence Against Women gave out 485 Legal Assistance to Victims Grants (between 59 and 77 grants per year), but only 4 went to organizations that were obviously rape crisis centers. *See* Office on Violence Against Women, *Awards*, U.S. DEP'T JUST., https://www.justice.gov/ovw/awards.

28. SurvJustice is the only such national organization. *See* SURVJUSTICE, http://www.survjustice.org/ (claiming "it is still the only national organization that provides legal assistance to survivors in campus hearings across the country").

29. SEXUAL VIOLENCE ON CAMPUS, *supra* note 9, at app. § C2.11 (indicating that 70% of colleges say "community legal services" offer services to students who have reported that they have experienced sexual violence).

30. Janet Napolitano, *"Only Yes Means Yes": An Essay on University Policies Regarding Sexual Violence and Sexual Assault*, 33 YALE L. & POL'Y REV. 387, 391 (2015) (recognizing that "access to resources for students, staff, and faculty must be readily and easily available"); *see also* text accompanying notes 312-313, *infra*.

31. Kanter, *supra* note 27, at 278.

32. Some programs, such as the Victims Rights Law Center (VRLC) in Oregon, require the survivor to identify herself as a survivor of rape or sexual assault and leave contact information on an answering machine. An attorney will then call her back, but it can take up to two business days. Phone call by author to VRLC (July 20, 2016). SurvJustice asks the survivor to fill out an online form in which she describes the incident. *See Legal Assistance Intake Form*, SURVJUSTICE, http://www.survjustice.org/uploads/9/2/9/6/92967220/form_-_survivor_inquiry.pdf.

they often are,[33] and so they don't investigate the legal aid option.[34] Even if a survivor were to contact the free off-campus service provider, she may be refused service. SurvJustice, the only national organization that provides legal assistance to survivors of campus sexual assault, is at capacity and cannot serve 50% of those who seek its assistance.[35] Legal aid providers regularly look at the resources of the student's family to see if the student qualifies for legal services.[36] Of course, even if a student's family has resources, they may still be unable or unwilling to provide funding for the student's legal services.[37] In addition, the survivor may be unable to access her family's resources if she feels uncomfortable telling her family about the rape. Even if a survivor's financial situation qualifies her for legal aid, she may be denied service because legal service organizations are oversubscribed,[38] and often prioritize clients with children who have family law matters.[39] Assuming a survivor manages to overcome all of these hurdles, the off-campus service provider may not be the best provider: the lawyer

33. Poverty is higher among pockets of college students than among the general population. "About 15.2 percent of the total United States population had income below the poverty level and more than half (51.8 percent) of students living off-campus and not living with relatives had income below the poverty level." ALEMAYEHU BISHAW, EXAMINING THE EFFECT OF OFF-CAMPUS COLLEGE STUDENTS ON POVERTY RATES, U.S. CENSUS BUREAU (May 1, 2013), https://www.census.gov/library/working-papers/2013/acs/2013_Bishaw_01.html.

34. For instance, Dana Woolbright, an attorney with Lane County Legal Aid's Survivors Justice Center, said that she had never been asked by a UO sexual assault complainant for representation. Diane Dietz, *Legal Aid Available to the Accused*, EUGENE REG.-GUARD (May 16, 2014), http://www.thefreelibrary.com/Legal+aid+available+to+accused.-a0371718734.

35. Email from ServJustice to author (May 3, 2017) (on file with author) ("Between 2014 to 2016, SurvJustice received over 600 requests for assistance regarding campus sexual assault cases from all 50 states and over 7 countries (regarding study abroad matters). Of these inquiries, SurvJustice provided direct assistance or consultation in approximately 30% of matters and referred out another 20% to qualified providers.").

36. Kanter, *supra* note 27, at 280. According to the Managing Attorney at Lane County Legal Aid:

> Legal aid is funded to provide free civil legal services to low-income households, including households with college students. Legal aid does not count student scholarships, loans, or similar payments that go directly to the college, or otherwise must be used to pay tuition and similar college costs, because that is not revenue currently and actually available to cover household expenses. Regular or recurring payments from parents would count as income for a student applying for legal aid. Household means people who maintain a household and function as a single financial unit. . . . In addition to applying regular income eligibility criteria to applicants who happen to be students, legal aid could agree to also serve over-income students, or to give students a heightened priority, pursuant to a contract that paid for those legal services that would not otherwise be provided.

Email from Erika Hente to Merle H. Weiner (Apr. 14, 2017) (on file with author).

37. *See Civil Legal Aid 101*, U.S. DEP'T OF JUSTICE (Oct. 21, 2014), https://www.justice.gov/atj/civil-legal-aid-101 (noting that "tens of millions of moderate income Americans . . . cannot afford legal help").

38. *See id.* ("According to the U.S. Census Bureau's 2011 statistics on poverty, 60 million Americans—one in five—qualified for free civil legal assistance. Unfortunately, more than 50 percent of those seeking help are turned away because of the limited resources available."); *see also* CRIMINAL JUSTICE SERVS. DIV., OR. DEP'T STATE POLICE, EDWARD BYRNE MEMORIAL STATE & LOCAL LAW ENFORCEMENT ASSISTANCE PROGRAM GRANT: STRATEGY FOR OREGON: FY 2004-2008, at 18 ("The availability of legal assistance for victims of domestic violence, sexual assault, and stalking remains critically short.").

39. Kanter, *supra* note 27, at 280.

may lack the necessary expertise about sexual assault or about the campus disciplinary process to serve the campus survivor of sexual assault well.[40]

For these reasons, student survivors rarely, if ever, have lawyers.[41] It is important to note that this is not necessarily true for accused students. Accused students frequently have legal counsel because the accused students and/or their parents realize the gravity of the accusations and are willing to pay for counsel. Web sites are dedicated to helping parents and students locate qualified attorneys.[42] Parents of accused students have organized conferences dedicated to developing the expertise of attorneys who represent accused students.[43] Even if parents of accused students cannot afford legal counsel, accused students sometimes receive free legal counsel. This can occur if there is a parallel criminal proceeding and the student is indigent. In addition, increasing numbers of institutions of higher education are providing free legal counsel for accused students.[44] Some schools provide accused students with legal counsel when there is a parallel criminal proceeding.[45] Other schools have on-campus organizations

40. *Id.* at 254 (stating that "traditional legal services programs, law school clinics, and bar association pro bono projects have never served rape victims, particularly high school and college-age females who are most likely to be sexually assaulted").

41. *See* Dana Bolger, *Gender Violence Costs: Schools' Financial Obligations Under Title IX*, 125 YALE L.J. 2106, 2120 (2016) (quoting Colby Bruno of the Victim Rights Law Center as saying that campus sexual assault "victims don't have lawyers"); Kanter, *supra* note 27, at 254 ("[T]he vast majority of rape victims never become involved in criminal or tort litigation, and they rarely have access to lawyers who can address their most pressing concerns, including: physical safety, education and employment disruption, housing relocation, economic consequences and financial stability, immigration problems, and the need for medical, mental health, and disability services.").

42. *See, e.g.*, *Call an Attorney*, SAVE OUR SONS, http://helpsaveoursons.com/call-an-attorney/; *Pro-Due Process Attorney List*, NAT'L COALITION FOR MEN CAROLINAS, http://www.ncfmcarolinas.com/#!attorneys/c9fw.

43. *Third Annual Symposium on Representing Students Accused of Sexual Assault: Winning School Discipline Cases Beyond the Motion to Dismiss*, SAVE OUR SONS (Feb. 17, 2017), http://helpsaveoursons.com/wp-content/uploads/2014/12/DC-Symposium-Brochure-2017-compressed-1.pdf.

44. As recently as 1999, it was reported that "[n]o school offers to find students [in disciplinary proceedings] an attorney, or to pay for one if the student is unable to do so." Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 COLUM. L. REV. 289, 339 (1999) (surveying 200 randomly chosen private and public universities). Today some institutions of higher education offer to provide counsel for those students who cannot afford their own. *See* AM. LAW INST., PROJECT ON SEXUAL AND GENDER-BASED MISCONDUCT ON CAMPUS: PROCEDURAL FRAMEWORKS AND ANALYSIS: PRELIMINARY DRAFT NO. 2, at 26 § 7.7 cmt. (citing policies at Harvard Law School and Columbia University). The Harvard Law School Policy says Harvard Law School will "provide financial assistance to parties unable to afford an attorney who would like to do so, subject to reasonable fee structures and limits determined from time to time by the Title IX Committee." *HLS Sexual Harassment Resources and Procedures for Students*, HARV. L. SCH. 6 (Dec. 18, 2014), http://hls.harvard.edu/content/uploads/2015/07/HLSTitleIXProcedures150629.pdf; *see also Gender-Based Misconduct Policy and Procedures for Students*, COLUM. U. 18 (Sept. 1, 2016), http://www.columbia.edu/cu/studentconduct/documents/GBMPolicyandProceduresforStudents.pdf ("University students may retain counsel independently or the University will arrange for an attorney-advisor upon request. The designated attorney-advisor will be provided at no cost to the University student. . . . If the University is requested to arrange for an attorney-advisor for either the Complainant or Respondent, it will notify the other party and upon request arrange for an attorney-advisor.").

45. *See, e.g.*, *Office of Affirmative Action and Equal Opportunity: FAQs*, UNIV. VT., http://www.uvm.edu/aaeo/faqs ("In the event that you have criminal charges pending related to the incident for which AAEO has contacted you, the following may be helpful: Students: Student Legal Services (SLS) is a student-run organization, funded by the Student Government Association, which aids students

that offer legal assistance to students accused of violating the student conduct code even if a parallel criminal proceeding is not underway. The lawyers who represent students in conduct code proceedings justify this defense-focused legal work by conceptualizing the case as university versus student, not student versus student. That is how the ASUO's Office of Student Advocacy (OSA) justifies its representation of accused students. This legal services organization is funded by student fees and provides free legal advice and assistance to students who are having trouble with the University of Oregon. It provides advocacy for the student within the University of Oregon's administrative processes.[46] Consequently, although OSA will not work with the survivor to file a grievance against another student, it will represent the accused student in the student conduct code proceedings.[47]

B. The Inattention to Legal Services for Campus Survivors

Remarkably little attention has focused on the gap in legal services for campus survivors or the importance of attorneys for this population. OCR did not discuss this topic in its two "significant guidance documents"[48] or in its "blueprint" resolution with the University of Montana-Missoula.[49] Other notable sources addressing campus sexual violence have also ignored the topic, including a White House task force report,[50] the American Law Institute's law reform project,[51] and trade publications that advise institutions of higher education about

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on campus with legal problems. Legal counsel is provided by two attorneys from a Burlington law firm, whose services SLS retains.").

46. *See* OFFICE OF STUDENT ADVOCACY, officeofstudentadvocacy.org.

47. OSA will help a survivor file a grievance if the perpetrator is an UO faculty or staff member, but OSA will not represent the survivor in any litigation against the employee or UO.

48. The 2011 *Dear Colleague Letter* and the 2014 *Questions and Answers on Title IX and Sexual Violence* were both labeled as "significant guidance document[s]." *See* Office for Civil Rights, *supra* note 1, at 1 n.1; Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, U.S. DEP'T EDUC. 1 n.1 (Apr. 29, 2014), http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf; *see also* Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007) (describing the significance of that designation).

49. *See* Resolution Agreement, University of Montana, OCR Case No. 10126001, DOJ DJ Number 169-44-9, at 9 (May 8, 2013), https://www.justice.gov/sites/default/files/crt/legacy/2013/05/09/montanaagree.pdf; *see also* Letter from Anurima Bhargava, Chief, & Gary Jackson, Reg'l Dir., Office for Civil Rights, to Royce Engstrom, President, & Lucy France, Univ. Counsel, Univ. of Mont., Re: DOJ Case No. DJ 169-44-9, OCR Case No. 10126001 (May 9, 2013), https://www.justice.gov/sites/default/files/opa/legacy/2013/05/09/um-ltr-findings.pdf ("The Agreement will serve as a blueprint for colleges and universities throughout the country to protect students from sexual harassment and assault.").

50. *See* NOT ALONE: THE FIRST REPORT OF THE WHITE HOUSE'S TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT 15 (Apr. 2014), http://www.changingourcampus.org/resources/notalone/WH_Task_Force_First_Report.pdfhttps://www.notalone.gov/assets/report.pdf (describing "Key Components of Sexual Assault Crisis Intervention/Victim Service Resources"). State task force reports are similarly incomplete. *See, e.g.*, GOV. TERRY MCAULIFFE'S TASK FORCE, *supra* note 2, at 10, 48-49 (describing "best practices for protocols . . . to respond to sexual violence on campus").

51. The American Law Institute's project, which is ongoing and currently in draft form, has given almost no attention to the role of the complainant's attorney. *See* AM. LAW INST., PROJECT ON SEXUAL AND GENDER-BASED MISCONDUCT ON CAMPUS: PROCEDURAL FRAMEWORKS AND ANALYSIS:

prevention and response.[52] The academic literature is also largely devoid of relevant analysis.[53] No one has formally suggested that institutions have a legal responsibility to provide free attorneys for campus survivors or identified such services as a best practice.

This virtual silence contrasts with the considerable attention legal commentators and professionals have given to the importance of legal counsel for the accused in disciplinary hearings.[54] The absence of counsel for the complainant in disciplinary hearings, however, can be as significant for the survivor as it is for the accused. After all, the outcome of campus proceedings can also determine whether a survivor is able to continue her education. In addition, while a few legal commentators have articulated the importance of legal counsel for survivors of sexual assault in criminal and civil legal proceedings,[55] this recognition

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PRELIMINARY DRAFT NO. 1 (Oct. 23, 2015); AM. LAW INST., *supra* note 44; AM. LAW INST., PROJECT ON SEXUAL AND GENDER-BASED MISCONDUCT ON CAMPUS: PROCEDURAL FRAMEWORKS AND ANALYSIS: PRELIMINARY DRAFT NO. 3 (OCT. 10, 2016).

52. W. Scott Lewis et al., *Deliberately Indifferent: Crafting Equitable and Effective Remedial Processes To Address Campus Sexual Violence*, NAT'L CTR. FOR HIGHER EDUC. RISK MGMT. (2011), https://www.ncherm.org/documents/2011NCHERMWHITEPAPERDELIBERATELYINDIFFERENT FINAL.pdf.

53. While this Article was in production, the author became aware of a then-forthcoming article by Kelly A. Behre, *Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call for Victims' Attorneys*, 65 Drake L. Rev. (forthcoming 2017). Behre's article effectively utilizes storytelling to illustrate the likely experience of a campus sexual assault victim and the benefit that legal counsel could afford her. Before Behre's article, the article that came closest to the topic was Lois H. Kanter's 2005 article, *Invisible Clients*. Professor Kanter's comment on the state of the academic scholarship is very telling. She notes: "The absence of civil legal services for rape victims is reflected in the lack of discussion regarding their civil legal need in legal literature. Among the thousands of articles that discuss rape, only a handful mention rape victims' need for legal counsel to address civil matters related to sexual assault." Kanter, *supra* note 27, at 254; *see also* Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467, 481-484 (2005) (briefly articulating why survivors need legal counsel in the criminal, civil, and disciplinary processes). While Behre's article contributes greatly to the literature, this Article goes beyond Behre's by arguing that the law requires schools to provide legal counsel to survivors in some instances, by documenting that this has not occurred in practice, and by analyzing the legal and practical obstacles to expanding legal representation for survivors.

54. *See, e.g.*, Ellen L. Mossman, *Navigating a Legal Dilemma: A Student's Right to Legal Counsel in Disciplinary Hearings for Criminal Misbehavior*, 160 U. PA. L. REV. 585 (2012); William E. Thro, *No Clash of Constitutional Values: Respecting Freedom and Equality in Public University Sexual Assault Cases*, 28 REGENT U. L. REV. 197, 216-17 (2015); Emily D. Safko, Note, *Are Campus Sexual Assault Tribunals Fair?: The Need for Judicial Review and Additional Due Process Protections in Light of New Case Law*, 84 FORDHAM L. REV. 2289 (2016); *see also Student Conduct Administration & Title IX: Gold Standard Practices for Resolution of Allegations of Sexual Misconduct on College Campuses*, ASS'N FOR STUDENT CONDUCT ADMIN. 11 (2014), http://www.theasca.org/files/Publications/ASCA%202014%20Gold%20Standard.pdf (noting "our field has often focused on protecting the rights of accused students"); *cf.* Jason J. Bach, *Students Have Rights, Too: The Drafting of Student Conduct Codes*, 2003 B.Y.U. EDUC. & L.J. 1, 25 (arguing that "accused students must be allowed to be fully represented by counsel at a disciplinary hearing"); Berger & Berger, *supra* note 44, at 338-44 (discussing the right to counsel in cases involving academic wrongdoing); Robert B. Groholski, *The Right to Representation by Counsel in University Disciplinary Proceedings: A Denial of Due Process of Law*, 19 N. ILL. U. L. REV. 739 (1999) (discussing the right to counsel in disciplinary proceedings generally).

55. *See, e.g.*, Kanter, *supra* note 27, at 256; Tom Lininger, *Bearing the Cross*, 74 FORDHAM L. REV. 1353, 1398-1400 (2005).

is rarely imported into the scholarly discussion about the needs of campus sexual assault survivors.[56]

As a consequence of this silence, legislators attending to the needs of campus survivors tend to focus on increasing the amount of advocacy by non-lawyers instead of legal services. Approximately half of the campuses responding to the survey by the U.S. Senate Subcommittee on Financial and Contractual Oversight said they have "advocates" on campus who work with survivors.[57] While advocates are an essential component of campuses' response to sexual violence,[58] advocates are usually not lawyers.[59] Despite the common terminology (lawyers are often called advocates), campus sexual assault advocates are typically social workers.

To see the focus of policy makers, consider the recent legislation proposed in the Senate by three champions of sexual assault survivors: Barbara Boxer (as sponsor), along with Kirsten Gillibrand and Tim Kaine (as original cosponsors). They introduced the Survivor Outreach and Support Campus Act (SOS Campus Act) in 2015.[60] If enacted, that legislation would require schools to create the role of "advocate," who would, *inter alia*, give the survivor "[i]nformation on the victim's rights and referrals to additional support services" and "[i]nformation on legal services."[61] These advocacy services might be provided on campus, but they need not be provided in consultation with a legal organization. The advocacy services could also be provided off campus "at a rape crisis center, legal organization, *or* other community-based organization."[62]

The description of the advocate's role suggests that the advocate would either be engaged in the unauthorized practice of law or would be far less effective

56. *But see* Behre, *supra* note 53.

57. SEXUAL VIOLENCE ON CAMPUS, *supra* note 9, at app. § C2.2 (reporting that 43% of schools said "[c]ampus victim assistance/advocacy programs" offered services to students who report that they have experienced sexual violence); *id.* at app. § C2.8 (reporting that 92% of schools said "[c]ommunity victim assistance/advocacy programs" offered services to students who report that they have experienced sexual violence).

58. *See* NOT ALONE, *supra* note 50, at 11 (calling the provision of an advocate "a key 'best practice'"). At the University of Oregon, these advocates respond to calls from survivors at any hour of the day or night. They perform a wide array of survivor-centered tasks, including accompanying the survivor to the hospital for an examination by a sexual assault nurse examiner (SANE), expediting services from campus mental health providers, contacting faculty to change examination dates, offering alternative dormitory housing, and providing emotional support. After a responsible employee reports an instance of domestic or sexual violence to their office, these advocates reach out to survivors to see if they need or want services or if they want to file a formal report.

59. For example, the University of Oregon has three advocates who work in the Crisis Intervention and Sexual Violence Support Services office and none is an attorney.

60. Survivor Outreach and Support Campus Act, S. 706, 114th Cong. (2015).

61. *Id.* at § 124(c)(1)(B)(ii),(iii); *see also* W. Scott Lewis, Saundra K. Schuster & Brett A. Sokolow, *Deliberately Indifferent: Crafting Equitable and Effective Remedial Processes To Address Campus Sexual Violence*, NAT'L CTR FOR HIGHER EDUC. RISK MGMT. 10 (2011), https://www.ncherm.org/documents/2011NCHERMWHITEPAPERDELIBERATELYINDIFFERENTFINAL.pdf (recommending schools provide "a trained cadre of advocates (or advisors, but advocates are more appropriate for sexual misconduct cases) who are familiar with the campus process, so that the complainant can choose a knowledgeable supporter, if desired").

62. S. 706 § 124(c)(1)(C)(i)-(ii).

than an attorney. The advocate is supposed to "[g]uide victims of sexual assault who request assistance through the . . . legal processes of the institution or local law enforcement"[63] and "[a]ttend, at the request of the victim of sexual assault, any administrative or institution-based adjudication proceeding related to such assault as an advocate for the victim."[64]

Similarly, the Campus Accountability and Safety Act, or CASA,[65] introduced by Senator Claire McCaskill in 2015 with fifteen other original cosponsors, suffers from some of the same problems as the SOS Campus Act. This proposed legislation would require schools to designate "confidential advisors" to help students navigate the campus and criminal systems.[66] The advisor is required to do things that border on the unauthorized practice of law.[67] The word "advise" is even used at one point in the bill:

> (I) The confidential advisor shall also advise the victim of, and provide written information regarding, both the victim's rights and the institution's responsibilities regarding orders of protection, no contact orders, restraining orders, or similar lawful orders issued by the institution or a criminal, civil, or tribal court.[68]

Without ever using the term "represent," the bill would have the confidential advisor "as appropriate" do things that generally should be done by a lawyer, including:

> (i) serve as a liaison between a victim and a higher education responsible employee or local law enforcement, when directed to do so by a victim who has been fully and accurately informed about what procedures shall occur if information is shared; and (ii) assist a victim in contacting and reporting to a higher education responsible employee or local law enforcement.[69]

Like the SOS Campus Act, CASA would have the confidential advisor accompany the victim "to interviews and other proceedings of a campus investigation and institutional disciplinary proceedings."[70] Such accompaniment would

63. *Id.* § 124(c)(2).
64. *Id.* § 124(c)(3).
65. Campus Accountability and Safety Act, S. 590, 114th Cong. (2015).
66. *Id.* § 4(a).
67. *Id.* (The advisor must "inform the victim— (i) of the victim's rights, (ii) of the victim's reporting options, including the option to notify a higher education responsible employee, the option to notify local law enforcement, and any other reporting options; (iii) if reasonably known, of the potential consequences of the reporting options described in clause (ii); and (iv) that the institutional student disciplinary proceeding has limited jurisdiction, scope, and available sanctions, and should not be considered a substitute for the criminal justice process").
68. *Id.*
69. *Id.*
70. *Id*.

obviously be more effective if the person accompanying the survivor could act as a lawyer when necessary.

In 2017, CASA was reintroduced with eighteen cosponsors.[71] The bill would require schools to have a "sexual assault response coordinator" (SARC) instead of a "confidential advisor."[72] The SARC is supposed to be someone with experience and the ability to provide effective victim services relating to domestic violence, stalking, dating violence, and sexual assault.[73] The person can be from the community, such as a community-based rape crisis center,[74] or an employee on campus, although the employee cannot be a responsible employee with reporting obligations. Although the bill permits the Secretary of Education to designate categories of employees that can serve in the role of SARC, and lists categories of professionals that may be included (such as health care staff, clergy, and staff at a women's center), the bill does not mention attorneys. In fact, it is unlikely that the SARC would be an attorney since the SARC is expressly prohibited from serving as an advisor during the disciplinary proceedings.[75]

Among other things, the SARC is supposed to provide a wide range of information to the victim, including the following: rights under federal law and state law; rights and options pursuant to university policy; the range of reporting options; a description of the processes at the university and in the criminal justice system; a description of jurisdiction, scope and sanctions of the disciplinary process and the criminal justice system; and an explanation that the criminal justice system differs from the disciplinary process.[76] The SARC is also supposed to liaise with the higher education institution and law enforcement to assist with reporting and arranging necessary interim measures.[77]

Whether the SARC would be a confidential resource is ambiguous. On the one hand, the bill would require the institution to designate someone who has state law protection to provide privileged communications.[78] On the other hand, the bill also says the person shall provide confidential services "to the extent authorized under State law."[79] In fact, while the SARC is generally excused from the obligation to report the crime to the institution or to law enforcement in a way that identifies a victim or accused individual, the SARC must do so if "required to do so by State law." The SARC is also supposed to inform students of the limits of the coordinator's ability to provide privacy or confidentiality.[80]

71. *See* Campus Accountability and Safety Act, S. 856, 115th Cong. (2017).
72. *Id*. § 4 (a).
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*

Neither version of CASA mentions the civil law system or the importance of having the confidential advisor or SARC be an attorney. There is no requirement that the school partner with a legal services organization when it allows an outside agency to provide the services of a confidential advisor or SARC, nor does either bill mention legal services organizations as a type of organization with which a school could partner.[81] Lawyers are disregarded as a critical resource for survivors, even though they are essential. In fact, while the most recent version of CASA would require the institution to have certain information on its Web site, such as hotline numbers and the name and location of the nearest medical facility that offers a sexual assault exam, neither the availability nor the importance of attorneys need be mentioned.[82]

The bottom line is that congressional initiatives are not addressing this issue effectively; instead, they are, at best, promoting mere "advocacy." This is despite the fact that legislators appear to consider legal advice essential. After all, the bills envision that advisors or SARCs will engage in what amounts to the practice of law, but mistakenly assigns that task to the wrong group: advocates or other nonlawyers. The proponents of these proposals incorrectly assume that a nonlawyer is a sufficient alternative to an attorney. While an advocate or a SARC can provide survivors with legal information, tell survivors about the legal resources that exist on campus and in the community, and try to connect survivors with these resources, this arrangement is not as beneficial as providing the survivor with easy access to her very own attorney. In fact, the adoption of these proposals may make survivors less likely to move forward in any system or may expose them to harm if they do. The information to be provided can be overwhelming, no one is necessarily qualified to answer their legal questions (assuming they know what questions to ask), and no one can steer them away from pitfalls that exist with the overlapping systems.

Though advocates are vital to survivors' wellbeing,[83] they simply are not a substitute for a lawyer. It is well recognized in the civil legal context that *both* advocates and lawyers play a critical role in meeting survivors' needs.[84] How-

81. Campus Accountability and Safety Act, S. 590, 114th Cong. § 4(a) (2015) ("The institution shall designate as a confidential advisor an individual who has protection under State law to provide privileged communication. The institution may partner with an outside victim services organization, such as a community-based rape crisis center or other community-based sexual assault service provider, to provide the services described in this paragraph.").

82. S. 856 § 4(a). The most recent CASA bill would authorize grants for institutions that could cover legal services. *See* S. 856 § 8.

83. *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).

84. *See, e.g.*, ILL. COALITION AGAINST SEXUAL VIOLENCE, A GUIDE TO CIVIL LAWSUITS: PRACTICAL CONSIDERATIONS FOR SURVIVORS OF RAPE AND CHILDHOOD SEXUAL ABUSE 1 (2007) ("Consult your attorney, rape crisis counselor and *therapist* (if you are in counseling) when making this decision. These professionals can help you determine whether a civil suit meets your needs."); *see also* AM. BAR ASS'N COMMISSION ON DOMESTIC VIOLENCE, STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING VICTIMS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT AND STALKING IN CIVIL

ever, people often assume that advocates can take the place of attorneys for campus survivors. Yet advocates cannot give legal advice because that would constitute an unauthorized practice of law.[85] Consider something as presumably straightforward as a restraining order. Lawyers give advice about whether getting a restraining order would be beneficial, given its potential impact on other legal proceedings; what type of restraining order to seek; and what relief should be sought within the order. Moreover, a lawyer can make a huge difference in the survivor's ability to obtain relief in court, especially when the accused student is represented, as he almost always is. The CourtWatch project in King County, Washington, found substantial differences between advocates and lawyers with regard to survivors' success in obtaining sexual assault protection orders (SAPO) in court:

> When legal advocates were involved with a case, there was an 80% success rate in getting the order granted, compared with a 34% success rate for petitions without an advocate. . . . In cases where the respondent had an attorney, but the petitioner did not, even when the petitioner had an advocate, the SAPO was always dismissed. Similarly, if the petitioner had an attorney and the respondent did not, the order was granted in almost all the cases. This shows that a party without an attorney is at a huge disadvantage if the other side is represented.[86]

Advocates also lack the ability to identify survivors' legal needs outside the protection order context. In reference to non-lawyer advocates at community-based rape crisis centers, one commentator noted that "the civil legal needs of rape victims are [not] understood."[87]

Survivors also need attorneys because advocates are not always confidential resources, but attorneys are. Campus lawyers, unlike campus advocates, are exempt from reporting obligations under both the Clery Act and Title IX.[88] This grant of confidentiality, buttressed by the attorney-client privilege, can be extremely reassuring to survivors. For example, it eliminates the risk of harm from

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PROTECTION ORDER CASES 27 (2007) (explaining that coordination with advocates can be "critical" and necessary for holistic representation).

85. *See generally* Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581 (1999). Some campuses indicate that they do undertake legal tasks as interim and supportive measures, but it is unclear if a lawyer undertakes these tasks. *See, e.g.*, *Policy on Sexual Misconduct*, CITY U. N.Y. 9-10 (2014), http://www.cuny.edu/about/administration/offices/la/Policy-on-Sexual-Misconduct-12-1-14-with-links.pdf (noting that "interim and supportive measures may include . . . providing the complainant assistance with filing a criminal complaint and seeking an order of protection" as well as "enforcing an order of protection").

86. Laura Jones, *Court Monitoring as Advocacy*, 26 CONNECTIONS 7, 8 (2012).

87. Kanter, *supra* note 27, at 265-66.

88. Office for Civil Rights, *supra* note 48, at 22 E-3 & n.26. While schools need not make victim advocates confidential resources, OCR "strongly encourages" them to do so. *Id.* at 23, E-3.

institutional betrayal,[89] the phenomenon that occurs when the survivor thinks she is speaking to a confidential resource, but then finds out the advocate cannot keep their conversation private. Not only do advocates lack the same privileges as attorneys in many states,[90] but some institutions of higher education designate their advocates as responsible employees with mandatory reporting obligations.[91]

C. The Detriment from the Gap and the Inattention

The failure of universities to provide free attorneys for survivors, and the failure of others to talk about this gap, has pernicious implications. The absence of attorneys for complainants has watered down the effect of all the rights given to address sexual violence.[92] Professor Catharine MacKinnon, who is credited with framing sexual harassment and sexual violence as sex discrimination and thereby enabling Title IX to address it,[93] would remind us that rules about "procedure" have substantive implications.[94] Providing survivors with attorneys would improve survivors' likelihood of obtaining relief in the civil, criminal, and campus contexts.

In addition, the absence of attorneys for survivors has contributed to the very violence campuses are trying to address. Nancy Cantalupo has argued that sexual assault survivors will not come forward without victim-centered best practices

89. Carly Parnitzke Smith & Jennifer J. Freyd, *Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma*, 26 J. TRAUMATIC STRESS 119, 122-23 (2013). "Institutional betrayal" is when an important institution, or a segment of it, acts in a way that betrays its member's trust. *Id.* at 120.

90. *See* Graceann Carimico, Thuy Huynh & Shallyn Wells, *Rape and Sexual Assault*, 17 GEO. J. GENDER & L. 359, 394-95 (2016) (noting that twenty-five states have an advocacy privilege and that the states vary in their laws' strictness, with some allowing "balancing the weight of the defendant's need to bring in the evidence against the victim's need to keep the evidence out").

91. *See* University Counseling Center, *Sexual Assault Victims' Resources*, LOY. UNIV. NEW ORLEANS, http://studentaffairs.loyno.edu/counseling/advocate-list ("[T]he Advocacy Initiative is a network of students, faculty, and staff who are trained to work with individuals in the wake of sexual assault. Advocates are both compassionate and knowledgeable, and they can provide the vital link between persons in need and available resources. Advocates will ensure privacy for discussion of sensitive topics and will maintain heightened sensitivity to personal information disclosed. However, Advocates cannot guarantee strict confidentiality. Advocates are required by federal law to report if they have knowledge of a sexual assault.").

92. *Cf.* Beverly Balos, *Domestic Violence Matters: The Case for Appointed Counsel in Protective Order Proceedings*, 15 TEMP. POL. & C.R. L. REV. 557, 574 (2006) ("The lack of appointed counsel for many victims of domestic violence who try to access the protection of the law by petitioning for a protective order means that an available remedy that has the potential to provide security and relief is in fact undermined.").

93. AM. LAW INST. (DRAFT NO. 1), *supra* note 51, at 2 (citing CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979)).

94. *See* CATHARINE A. MACKINNON, WOMEN'S LIVES, MEN'S LAWS 3-4 (2005) (noting that law "is substantive first," and that "abstract legal questions" have substantive implications for the distribution and reification of power in society); *cf. id.* at 34 (discussing burdens of proof and evidentiary standards that "tacitly presuppose the male experience as normative and credible and relevant"). Analyzing questions of legal representation as a function of "neutral principles of constitutional law," so that the issue takes on an aura of abstraction and neutrality, risks making "outcomes more manipulable by powerful substantive interests that can not be exposed or countered by the less powerful . . . ." *Id.* at 5.

on campus.[95] The Department of Justice concurs. It has said that "any policy that compromises or restricts the victim's ability to make informed choices about how to proceed may deter reporting."[96] If survivors do not report, then their educational institutions cannot deal with their perpetrators or protect other victims who may be at risk from repeat offenders.[97] If survivors do not report, potential first-time perpetrators are not deterred by the prospect of getting caught. Consequently, campuses must provide the essential services that survivors need to come forward. Otherwise, institutions perpetuate, and perhaps facilitate, gender inequality.

Educational institutions also send a damaging message to students when they fail to provide student survivors with legal counsel. The ALI Reporters for the *Project on Sexual and Gender-Based Misconduct on Campus: Procedural Frameworks and Analysis* observed that institutional responses send a message: "[I]n the way their disciplinary procedures are designed and applied, universities and colleges are modeling a way of thinking and behaving to its [sic] students."[98] When universities and colleges fail to provide attorneys for survivors, or even fail to encourage survivors to consult with one, they are also modeling a way of thinking and behaving. They are suggesting that either (1) the law is unimportant for remedying survivors' victimization and holding abusers accountable, or (2) their lack of information about the law is acceptable. Both messages seem inappropriate for an educational institution in a "constitutional democracy."[99]

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95. Nancy Chi Cantalupo, *Campus Violence: Understanding the Extraordinary Through the Ordinary*, 35 J.C. & U.L. 613, 680 (2009) ("Most critically, we need to take victims' needs as our starting point in crafting our responses to peer sexual violence, an approach which complies with the law and with best practices. The epidemic nature of peer sexual violence on campus, the overwhelming non-reporting of this violence, and the cycle of non-reporting and violence perpetuation lead to one overwhelming conclusion: we need victims to come forward and report. . . . The fact that 90% of campus sexual violence survivors are exercising their veto [not to report] demonstrates that we are not taking their needs into sufficient consideration when crafting our responses.").

96. ALBERTO R. GONZALES ET AL., NAT'L INST. OF JUSTICE, SEXUAL ASSAULT ON CAMPUS: WHAT COLLEGES AND UNIVERSITIES ARE DOING ABOUT IT 8 (2005).

97. The prevalence of repeat offenders is contested. *Compare* David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73, 80 (2002) ("A majority of the undetected rapists in this sample were repeat offenders. . . . These repeat rapists each committed an average of six rapes and/or attempted rapes and an average of 14 interpersonally violent acts."), *with* Kevin M. Swartout et al., *Trajectory Analysis of the Campus Serial Rapist Assumption*, 169 JAMA PEDIATRICS 1148, 1152 (2015) ("Many researchers, policymakers, journalists, and campus administrators have assumed that 1 small subgroup of men accounts for most rapes committed on college campuses. Our findings are inconsistent with that perspective."), *and* Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 YALE L.J. 2038, 2054 (2016) ("Reassuring as it is to think that a few bad apples commit most campus rapes, recent empirical work has found this conclusion to be seriously overstated numerically and flawed as a focus for policy.").

98. AM. LAW INST. (DRAFT NO. 1), *supra* note 51, at 7-8 § 1.2 (discussing procedures that are fair to student complainants and respondents); *id.* at 9 § 1.4 cmt. ("[T]he process for investigation and resolution has an educative function insofar as it conveys to participants and observers the university's or college's view about fair procedures.").

99. *Id.* at 9 § 1.4 rptr.'s nn. (discussing "[t]he mission of universities in a constitutional democracy").

The failure of campuses "to close the gap between legal promise and social reality"[100] affects more than just the educational context. Educational institutions are part of, and influence, our cultural understandings of violence and oppression.[101] If educational institutions are allowed to convey concern for survivors with a wink, then duplicity becomes normalized. It becomes harder to recognize and address similar duplicity in other contexts, such as the military, the criminal justice system, or the workplace.

Apart from these significant effects, the failure even to discuss the issue has meant that the prospect of providing legal counsel to campus survivors has been stymied. For example, absent are informed conversations about the sufficiency and proper allocation of federal funding for campus sexual assault. Members of Congress must learn about all potential services and responses to sexual violence that might benefit from more dollars.[102] Executive branch employees also need to have legal services in mind when they consider the optimal distribution of existing funding. Federal dollars fund rape crisis centers, including campus centers with advocacy positions,[103] and free legal services for victims of sexual assault, domestic violence, dating violence, and stalking (including for campus administrative proceedings),[104] but funding is not specifically earmarked for campus legal services. In fact, the meagerly funded Grants to Reduce Sexual Assault, Domestic Violence, Dating Violence and Stalking on Campus Program,[105] which permits the funding of legal services, only started awarding funds

100. MACKINNON, *supra* note 94, at 57; *see also* MacKinnon, *supra* note 97, at 2085 (recommending assessing the appropriateness to Title IX of a "deliberate indifference test . . . by asking how different is the reality survivors face today from the time before sexual harassment in education was recognized as a legal equality claim").

101. Novkov, *supra* note 25, at 608 (arguing that "activists" see university policies and Title IX as a way to "advance the pace of cultural change").

102. *See, e.g.*, Napolitano, *supra* note 30, at 401 (calling upon the federal government to "direct additional efforts and resources toward the discovery and dissemination of evidence-based best practices for prevention, education, investigation, and adjudication"). The proposed Campus Accountability and Safety Act would provide additional funding for campus sexual assault support services, and legal assistance providers could be recipients. Campus Accountability and Safety Act, S. 590, 114th Cong. § 8 (2015) (amending Title VIII of the Higher Education Act of 1965 (20 U.S.C. § 1161a (2012)) with Part BB, § 899(b)(2)(C)); Campus Accountability and Safety Act, S. 856 § 8, 115th Cong. (2017).

103. The Sexual Assault Services Formula Grant Program was created by the Violence Against Women and Department of Justice Reauthorization Act of 2005 Technical Amendments, 42 U.S.C. §14043g (Supp. II 2014). The Sexual Assault Services Formula Grant Program can be used to fund "rape crisis center[s]" on university campuses, and those centers can provide advocacy. *See* Office on Violence Against Women, *OVW Sexual Assault Services Formula Grant (SASP Formula) Program Frequently Asked Questions as of 10/6/2014*, U.S. DEP'T JUST. ¶¶ 10, 21, https://www.justice.gov/sites/default/files/pages/attachments/2014/10/07/sasp-faq_final.pdf.

104. *See, e.g.*, Violence Against Women Act, 42 U.S.C. § 13925(a)(19) (Supp. II 2014); Victim Compensation and Assistance, 42 U.S.C, § 10603 (2012); Justice System Improvement Act, 42 U.S.C.A. § 3796gg-6 (Supp. I 2013-14); 42 U.S.C. § 14045b (Supp. II 2014).

105. *See* Office on Violence Against Women, *Protecting Students from Sexual Assault*, U.S. DEP'T JUST. ("In Fiscal Year 2016, the program funded 45 projects, totaling more than $15 million."); Office on Violence Against Women, *supra* note 22, at 2. This program is known as the OVW Campus Grant Program.

for this purpose in 2016,[106] and the 2017 solicitation already makes new awards for campus legal services appear unlikely.[107]

Once the importance of legal services for campus survivors is recognized, a conversation can also be had about the best way for colleges and universities to provide those services. With 5,300 institutions of higher education in the United States, ranging from "beauty schools to Harvard,"[108] logistical questions exist regarding the provision of legal services. These issues should be teed up now so that lawyers, academics, and administrators can start addressing them, informed by the experiences of pioneering campuses that are already offering these services.

II. FIVE REASONS UNIVERSITIES SHOULD PROVIDE LEGAL COUNSEL TO SURVIVORS

Institutions should make legal counsel available to survivors who report their victimization to the institution, as well as to survivors who are trying to decide whether to report their victimization. For the first group, legal counsel assists the survivor as she journeys through the legal and administrative maze designed to address her victimization. An attorney allows the survivor to feel more in control as she engages with these systems, helps her actualize her rights, and protects her from being retraumatized by the various systems. For the second group, legal counsel facilitates an informed decision by the survivor.

A. Navigating Three Systems

An important function of the survivor's lawyer is to help the survivor navigate three separate systems: the civil law system, the criminal law system, and

106. In 2016, $25 million was awarded to 61 recipients to address sexual violence on campus. These funds came from both the OVW Campus Grant Program and the Legal Assistance to Victims program. However, only 16 grants were specifically made for organizations that will provide legal services on campuses. Press Release, Dep't of Justice, Justice Department Awards $25 Million to Address Sexual Violence on Campuses (Sept. 29, 2016), https://www.justice.gov/opa/pr/justice-department-awards-25-million-address-sexual-violence-campuses. The last report to Congress on the activities of grantees published on the OVW Web site did not show that any grant recipient funded attorneys through the program. *See* REPORT TO CONGRESS ON THE 2011 ACTIVITIES OF GRANTEES RECEIVING FEDERAL FUNDS UNDER THE GRANTS TO REDUCE VIOLENT CRIMES AGAINST WOMEN ON CAMPUS PROGRAM 4 (2012), https://www.justice.gov/sites/default/files/ovw/legacy/2014/04/25/2012-campus-rpt.pdf (detailing most of the fulltime employees and not mentioning any attorneys).

107. Office on Violence Against Women, *OVW Fiscal Year 2017, Grants to Reduce Sexual Assault, Domestic Violence, Dating Violence and Stalking on Campus Program Solicitation*, U.S. DEP'T JUST. 7-8, https://www.justice.gov/ovw/page/file/923431/download (detailing the requirement of hiring a full-time program coordinator and describing OVW priority areas).

108. Jeffrey J. Selingo, *How Many Colleges and Universities Do We Really Need?*, WASH. POST (July 20, 2015), https://www.washingtonpost.com/news/grade-point/wp/2015/07/20/how-many-colleges-and-universities-do-we-really-need/.

the campus disciplinary system. All of these systems are implicated, or are potentially implicated, by the survivor's victimization. Sometimes the survivor herself invokes these systems, but sometimes others invoke one or more of them in contravention of the survivor's wishes.[109] Sometimes a survivor needs a lawyer in order to actualize her rights in any of these systems; otherwise, she may forego moving forward in any of them because she becomes demoralized by her own lack of knowledge or by the effort she must expend to engage with these systems confidently. Alternatively, she may inadvertently undermine her rights in one system by her action in another.

No one should underestimate the complexity of each of these three systems for a person without legal training. That complexity is multiplied one hundredfold when a layperson has to navigate multiple systems simultaneously, even if the survivor has chosen to invoke them herself. Each system differs in its procedural and substantive rules, its emphasis on the survivor's autonomy, and its receptivity to remedying the type of victimization encountered by a survivor. Missouri Senator Claire McCaskill called the interaction of only two of the three systems (the criminal and campus processes) a "confusing" and "complicated thicket" and noted that the complexity discourages survivors from reporting.[110] This legal labyrinth compounds the complexity that already attends the factual and legal issues surrounding the acts of violence.[111]

Of course, student survivors who feel overwhelmed or confused by the overlapping systems are usually unaware of how much complexity truly exists and how it might affect them. Few students have ever heard of "collateral estoppel" or "discovery" and can't even begin to anticipate the ways in which the various types of proceedings could impact each other. For example, survivors will rarely consider, let alone know how to balance, the various factors that could influence

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109. "Responsible employee" reporting schemes may set both the campus disciplinary and criminal systems in motion. *See infra* note 192; *see generally* Colleen Flaherty, *Endangering a Trust*, INSIDE HIGHER ED (Feb. 4, 2015), https://www.insidehighered.com/news/2015/02/04/faculty-members-object-new-policies-making-all-professors-mandatory-reporters-sexual (noting concerns that mandatory faculty reporting will lead to reports in violation of students' wishes). As for the civil system, the accused may bring a civil suit against the survivor for defamation. *See, e.g.*, Ashe Schow, *Brown University Student Sues His Accuser for Defamation*, WASH. EXAMINER (Oct. 19, 2015), http://www.washingtonexaminer.com/brown-university-student-sues-his-accuser-for-defamation/article/2574442; *see also* Defendant's Answer, Affirmative Defenses, Counterclaims, and Demand for Jury Trial at 55-61, Kinsman v. Winston, No. 6:15-cv-00696-ACC-GJK (M.D. Fla. May 8, 2015), https://www.scribd.com/document/264695540/Winston-Answer (detailing counterclaims for defamation per se, defamation, and tortious interference with prospective business advantage).

110. Zoë Carpenter, *Whom Should College Students Really Call When They Are Sexually Assaulted on Campus?*, NATION (Dec. 10, 2014), https://www.thenation.com/article/who-should-college-students-really-call-when-they-are-sexually-assaulted-campus-0/.

111. *See, e.g.*, Napolitano, *supra* note 30, at 388 ("Even for law enforcement and criminal courts, investigating and adjudicating sexual violence and sexual assault cases often means grappling with the profound complexity inherent to these cases, and the difficulties that can arise are significant."); *see also* ASS'N FOR STUDENT CONDUCT ADMIN., *supra* note 54, at 8 ("These cases are complex. Many cases involve alcohol or other influences, partial or absent memories of what happened, few or no witnesses, and a student who has been harmed by someone whom he/she knows.").

a civil suit (such as a statute of limitations and a defendant's ability to invoke the Fifth Amendment), or know how to evaluate the potential impact of a civil suit on a criminal proceeding (such as the fact that "judges in criminal prosecutions permit scathing impeachment of accusers based on their parallel civil claims"[112]).

While it is usually not survivors' immediate concern, they also have rights that can be asserted against their educational institutions. For most survivors, this fourth area of law (which includes obligations under Title IX, Title VII, and the Clery Act, and may include obligations under Title II and Title VI too), is best viewed as a subset of the campus disciplinary process as it becomes relevant when a campus's response to the sexual violence fails to follow the law.[113] This area of the law is itself sufficiently complicated that an attorney who advises university lawyers about their institutions' obligations called it "The Tangled Web of Overlapping Legal Requirements and Enforcement Schemes."[114] Consequently, students will rarely know if their institutions are noncompliant, except perhaps in the most egregious cases. If a university told a survivor that federal law prevented the university from sharing the final disposition of the disciplinary proceedings with her, for example, the survivor might not know that the university's reading of the law was incorrect.[115]

Navigating multiple systems can be daunting, frustrating, time-consuming, and fraught with opportunities for survivors to make mistakes. The task itself can inhibit recovery. "Rape, sexual assault, and sexual harassment are traumatic in part because the victim loses control over his or her own body. A clearly established principle for recovery from these traumatic experiences is to rebuild trust and to reestablish a sense of control over one's own fate and future."[116] A trauma-informed, client-centered lawyer can help the survivor gain control over her fate and her future, or at least help her understand those parts of the various systems

112. Tom Lininger, *Is It Wrong To Sue for Rape?*, 57 DUKE L.J. 1557, 1561 (2008). Lininger's article sets forth many of the competing considerations. *See id.* at 1579-83.

113. For some survivors, Title IX would be relevant if the school's deliberate indifference or its policies caused their victimization. *See, e.g.*, Ross v. Corp. of Mercer Univ., 506 F. Supp. 2d 1325, 1346 (M.D. Ga. 2007). For a discussion of deliberate indifference in the context of an official policy, see Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1184-85 (10th Cir. 2007) (stating that a violation of Title IX exists "when the violation is caused by official policy, which may be a policy of deliberate indifference to providing adequate training or guidance that is obviously necessary for implementation of a specific program or policy of the recipient").

114. *See* Jeffrey J. Nolan, *Addressing Intimate Partner Violence and Stalking on Campus: Going Beyond Legal Compliance To Enhance Campus Safety*, *in* EMERGING ISSUES IN COLLEGE AND UNIVERSITY SECURITY 21, 22 (2015), 2015 WL 4512292, at *1; *see also* Napolitano, *supra* note 30, at 397 ("Standing alone, OCR's guidance regarding sexual violence is detailed and complex. That complexity is compounded when factoring in campuses' obligations under the Clery Act."); *id*. at 392 n.10 ("[S]tate laws add yet another layer of compliance complexity for universities.").

115. *See* Family Educational Rights and Privacy Act, 20 U.S.C.A. § 1232g(b)(6)(A) (Westlaw through Pub. L. No. 114-327).

116. Letter from Eileen Zurbriggen, Professor of Psychology, Univ. of Cal. Santa Cruz et al., to Daniel Hare, Chair, Acad. Senate of the Univ. of Cal. Sys. (Oct. 26, 2015), http://ucscfa.org/wp-content/uploads/2015/10/UCSC-faculty-comments-on-SVSH-policy-10.26.15.pdf (discussing reporting against the will of the survivor).

over which she may have little control. A lawyer knows what behavior can cause a client legal problems and can help navigate around the minefields. A lawyer's *raison d'etre* is to help the client achieve the client's legal goals. This service helps with the survivor's recovery.

Lawyers' usefulness is magnified because complainants, who are expected to navigate the interplay of these three systems (and four sets of rules), may be cognitively impaired as a result of their victimization.[117] It is estimated that seventy-one percent of sexual violence survivors experience traumatic distress.[118] Traumatic distress has various effects. Everyday tasks can become difficult and understanding complex concepts can become very challenging.[119] Even describing the traumatic event itself can become difficult.[120] The ALI cautions that sexual assault survivors can have trouble understanding the campus disciplinary system, and "may find it difficult in the immediate aftermath to decide what to do."[121] That is not surprising; after all, even long-time faculty can find their campus's disciplinary system perplexing. The ALI focused its comments about complexity on the campus disciplinary system alone; yet, the multiple legal and quasi-legal regimes complicate matters even further for a student survivor. Other factors may also compound the survivor's challenge, and these other factors may be common in the student population at some institutions of higher education, especially at community colleges.[122] For example, the survivor may not be a native English speaker or may be unfamiliar with the U.S. legal system, or she might be a high school student who is taking classes at the college.[123]

Consider, for a moment, the irony that exists in the way that many campuses currently respond to reports of sexual violence by law students. A university is likely to provide the survivor with an academic accommodation if she requests it; an academic accommodation is a well-recognized interim and supportive

117. AM. LAW INST. (DRAFT NO. 1), *supra* note 51, at 12 § 2.2 cmt. ("Students subject to sexual harassment or other sexual misconduct, and especially to severe forms of assault, may not be able to participate in educational activities due to physical or emotional trauma . . . .").

118. LYNN LANGTON & JENNIFER TRUMAN, U.S. DEP'T OF JUSTICE, SOCIO-EMOTIONAL IMPACT OF VIOLENT CRIME 3 (2014) (noting seventy-one percent of rape or sexual assault survivors experienced "moderate to severe distress resulting from their victimization").

119. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 271-80 (5th ed. 2013) (recognizing that threatened and actual sexual violence can cause post-traumatic stress disorder (PTSD), and that symptoms of PTSD may include changes in cognition and mood as well as difficulties with concentration, emotional regulation, and sleep); WHITE HOUSE COUNCIL ON WOMEN & GIRLS, RAPE & SEXUAL ASSAULT: A RENEWED CALL TO ACTION 2 (2014) ("Also, the trauma that often accompanies a sexual assault can leave a victim's memory and verbal skills impaired – and without trauma-sensitive interviewing techniques, a women's [sic] initial account can sometimes seem fragmented.").

120. M.J. Larrabee et al., *"The Wordless Nothing": Narratives of Trauma and Extremity*, 26 HUM. STUD. 353, 353 (2003).

121. AM. LAW INST. (DRAFT NO. 1), *supra* note 51, at 11 § 2.

122. ASS'N FOR STUDENT CONDUCT ADMIN., *supra* note 54, at 8.

123. *Id.*

measure.[124] However, the school is unlikely to provide the survivor with a lawyer to help her understand and use those very same rights that she can't currently absorb in the context of her academic studies. The university's incomplete response ignores the real-life importance of those rights and insufficiently helps the survivor gain control over her future. Most survivors are not law students, of course, and therefore lack even the basic training that might reduce their need for a lawyer.

If campuses truly want to give victimized students equal access to education, then campuses need to help survivors make sense of the multiple systems that address their victimization. They need to provide student survivors with lawyers who can answer their legal questions and offer them legal advice. At a minimum, this service will make the entire process less overwhelming and thereby promote recovery. Depending upon the survivor's needs and willingness to invoke the various systems, legal counsel can also facilitate the survivor's ability to obtain the relief she seeks. The relief, in turn, can prevent the reoccurrence of gender-based violence, remedy its effects, and hold the perpetrator accountable.

B. Obtaining Needed Relief in Three Systems

Consider what lawyers can do for student survivors in the civil legal system, criminal legal system, and campus disciplinary system. In the civil legal system, the lawyer helps the survivor consider all of the legal relief that might benefit her and then make good decisions about each potential remedy. In the criminal system, an attorney is vital to ensure that the survivor's rights as a crime victim are respected. Within the campus system, a lawyer has an important role to play before and after any investigation or fact-finding by the institution. This role includes helping the survivor decide whether to report, assisting her with filing the report, and protecting her from collateral consequences (such as invasion of privacy and retaliation).

1. The Civil Legal System

The survivor can use the civil legal system to address her immediate health and safety needs, which are essential prerequisites to her successfully partaking again in the educational program. Start by examining in detail the lawyer's role in securing a civil protection order. This type of relief is commonly identified as

124. *See* White House Task Force to Protect Students from Sexual Assault, *Sample Language for Interim and Supportive Measures To Protect Students Following an Allegation of Sexual Misconduct*, U.S. DEP'T JUST. 6 (2014), https://www.justice.gov/ovw/page/file/910296/download (discussing interim measures, including academic accommodations for student survivors).

potentially appropriate for a student survivor.[125] Unpacking the decisions related to this one potential remedy illustrates the sheer number of decisions that are required for each legal remedy and the value of legal advice for making informed decisions. It also illustrates the difficulty of obtaining legal relief without a lawyer, even for a remedy that is commonly thought to be accessible by survivors themselves. A brief canvas of some of the other civil relief shows the range of legal remedies for which such detailed decisionmaking is required and why representation is beneficial.

With regard to the civil protection order, a lawyer can inform a survivor whether she is likely to qualify for the order. Not every survivor will qualify for relief in the civil law system, even though the behavior she experienced may violate the student conduct code.[126] There are disadvantages to pursuing an order when it is legally impossible to obtain, and an attorney can stop the survivor's improvident application for relief. Otherwise, the survivor wastes her time, experiences the disappointment of having the judge deny a request for relief, and unnecessarily exposes facts that may implicate her privacy or her ability to achieve other relief (if her statements in the restraining order proceeding are inconsistent with later statements, for example).

If the survivor is likely to qualify for a civil protection order, she will want to know whether it is necessary to obtain one. After all, many campuses have campus protection orders as a remedy.[127] However, at times, the campus protection order will not protect the survivor adequately. If the campus stay-away order requires the mutual consent of the parties when it is entered before the conclusion of campus disciplinary proceedings, the perpetrator may not agree to the order. If the accused is not a student from the same university, the university's order may do nothing to keep the accused away from the complainant when she is off campus. If the complainant is considering transferring to another educational institution, she may need a court-issued stay-away order so that it has an effect when she attends the other institution. If she is considering moving to another state, only a court-issued order would receive full faith and credit in the new

125. The ALI Project, in an uncompleted part, says that "[c]olleges and universities should provide students who report having experienced sexual assault and related misconduct with information about obtaining orders of protection." AM. LAW INST. (DRAFT NO. 1), *supra* note 51, at xx § 11.4.

126. For example, in Oregon, derogatory name calling, or repeatedly texting or messaging on social media, might not qualify as "abuse" for purposes of a Family Abuse Protection Act order or "stalking" for purposes of a stalking order, but it could constitute gender-based harassment or bullying under the University of Oregon student conduct code. *Compare* OR. REV. STAT. §107.705(1) (West, Westlaw through Ch. 21 of 2017) (defining abuse), *and* OR. REV. STAT. §30.866(1) (West, Westlaw through Ch. 21 of 2017), *with* UO Student Conduct Code, Policy No. III.01.01, § 1(II)(16) (2015), https://policies.uoregon.edu/vol-3-administration-student-affairs/ch-1-conduct/student-conduct-code (defining "harassment" under the student conduct code). In addition, sometimes eligibility for a protection order requires a "relationship" between the parties that may not exist.

127. GONZALES ET AL., *supra* note 96, at 10 ("Most reports of sexual assault on campus are dealt with through binding administrative actions, such as no-contact orders.").

state.[128] If the complainant and the accused have a child in common, she may need the ancillary relief that a civil protection order typically provides.

Even if a campus stay-away order can protect her, she may prefer a civil protection order for various reasons. The campus order may require that she also stay away from the perpetrator, and she may resent a restriction on her liberty since she has done nothing wrong. Also, the school controls the campus stay-away order, just as a prosecutor controls a criminal no-contact order, and the victim may want more control over her order.

Assuming the survivor wants a civil protection order, she will need to know what type of order (or orders) she is eligible for and what would best meet her needs.[129] Legal advice is often necessary to understand the range of possible relief and the importance of certain remedies. For example, some restraining orders will not trigger the federal gun ban because the parties have only a dating relationship.[130] A survivor who wants to ensure her perpetrator cannot have a gun must know to ask the state court to dispossess the respondent of his weapon. In addition, orders are often effective only for a period of time. The survivor needs to know if her order can be renewed and, if so, what evidence she should gather to make her request successful.

Once she decides to seek an order, an attorney can bring the action for relief. It is well documented that survivors obtain better outcomes if counsel represent them when they seek a civil protection order.[131] Studies have also found that survivors with attorneys are much more likely to obtain a wider range of available relief than survivors without attorneys.[132]

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128. 18 U.S.C. § 2265(a) (2012).

129. In Oregon, for example, there are five types of restraining orders. *See* OR. REV. STAT. §107.700 et seq. (West, Westlaw through Ch. 21 of 2017) (Family Abuse Protection Act order); OR. REV. STAT. § 30.866 (West, Westlaw through Ch. 21 of 2017) (civil Stalking Protective Order); OR. REV. STAT. § 163.760 et. seq. (West, Westlaw through Ch. 21 of 2017) (Sexual Assault Protective Order); OR. REV. STAT. §124.005 et seq. (West, Westlaw through Ch. 21 of 2017) (Elderly Persons and Persons with Disabilities Abuse Prevention Act order); OR. REV. STAT. §133.035 (West, Westlaw through Ch. 21 of 2017) (ex parte peace officer's emergency protective order).

130. *See* 18 U.S.C. § 921(a)(32) (2012) (excluding as "intimate partners" dating partners who have not resided together).

131. Recall the evidence from CourtWatch that looked at the success rates in cases in which the alleged perpetrator was represented and the survivor had an advocate or an attorney. *See supra* note 86 and accompanying text; *see also* Jane Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges To Protect Battered Women*, 11 AM. U. J. GENDER SOC. POL'Y & L. 499, 511-12 (2003) (finding 83% of survivors with attorneys and 32% of survivors without attorneys had success in obtaining a civil protection order).

132. PETER FINN & SARAH COLSON, NAT'L INST. OF JUST., CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT 19 (1990) ("Most judges report that even with a simplified petitioning procedure and energetic lay assistance to victims, those victims who are not represented by counsel are less likely to get protection orders—and, if an order is issued, it is less likely to contain all appropriate provisions. . . . An attorney for the petitioner is especially important when the respondent appears with counsel."); Elizabeth L. MacDowell, *Domestic Violence and the Politics of Self-Help*, 22 WM & MARY J. WOMEN & L. 203 (2016) (reporting empirical research that demonstrated the real limitations of self-help courthouse programs for unrepresented domestic violence victims, including staff who have negative responses to survivors who seek legal help outside of narrow parameters or who are not the stereotypical victims, staff who ignore important economic remedies, and staff who fail to refer

Of course, restraining orders are not appropriate for all survivors. Sometimes advocates or law enforcement encourage survivors to get an order, and the student is surprised when the other side notices the survivor's deposition or the court sets the contested hearing for a date in the near future and the survivor is not prepared to put on a case. An attorney can help a client consider the benefits and drawbacks of obtaining a civil protection order and then prepare the client for the likely next steps.

The foregoing discussion illustrated an attorney's importance with respect to one remedy, but an attorney is also needed so that the survivor can consider the breadth of available legal relief. With respect to the perpetrator, a survivor might need to address issues of custody, separation, and divorce if the parties have a family relationship. Or a survivor might want to sue the alleged perpetrator in tort[133] or obtain relief made available by a civil rights statute.[134] The perpetrator has likely committed a tort, and the survivor needs information about these remedies because sexual violence has real economic and noneconomic costs for victims.[135] For some victims, a tort suit can "assist [a victim's] recovery and healing."[136] The survivor also needs information about the statute of limitations in order to preserve these options. A survivor "can get so bogged down in the criminal process that she misses the filing date."[137] Even if the scope of the

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survivors to other essential services); Lisa E. Martin, *Providing Equal Justice for the Domestic Violence Victim: Due Process and the Victim's Right to Counsel*, 34 GONZ. L. REV. 329, 334 (1998-99) (discussing the need for an attorney given a victim's emotional crisis and complex legal needs and noting how an attorney can "clearly be a tremendous asset").

133. Sarah L. Swan, *Between Title IX and the Criminal Law: Bringing Tort Law to the Campus Sexual Assault Debate*, 64 U. KAN. L. REV. 963, 965 (2016) (arguing that "tort law is also an important, though often ignored, means of redressing sexual assault"); *see, e.g.*, Weldon v. Rivera, 301 A.D.2d 934 (N.Y. App. Div. 2003); Blind-Doan v. Sanders, 291 F.3d 1079 (9th Cir. 2002).

134. *See* Krista M. Anderson, *Twelve Years Post* Morrison*: State Civil Remedies and a Proposed Government Subsidy To Incentivize Claims by Rape Survivors*, 36 HARV. J.L. & GENDER 223, 240-41 (2013) (discussing jurisdictions that have civil causes of action modeled after the federal VAWA remedy or other "civil causes of action for 'gender' or 'sex' bias").

135. One estimate is that a rape costs a victim $143,678 in 2015 dollars in "lost productivity, medical and mental health care, property loss, and lost quality of life." Bolger, *supra* note 41, at 2115; *see also infra* note 287; Nancy Chi Cantalupo, *For the Title IX Civil Rights Movement: Congratulations and Cautions*, 125 YALE L.J. F. 281, 295 (2016) ("Student survivors can lose financial aid, which may include valuable scholarships requiring a high level of academic performance that experiencing trauma makes challenging to achieve, at least in the short term. Survivors can lose valuable tuition dollars spent on classes that their health makes them unable to finish at all or finish on time."). Other costs include everything from "mental health services to medical treatment, lost tuition to lost income, transportation costs to housing expenses." Bolger, *supra* note 41, at 2116.

136. ILL. COALITION AGAINST SEXUAL VIOLENCE, *supra* note 84 at 4 (noting this as a "pro" of civil litigation); MACKINNON, *supra* note 94, at 248 ("Civil laws potentially offer accountability to survivors, a forum with dignity and control by them, the stigma of bigotry for perpetrators, a possibility of reparations, and the potential for social transformation by empowering survivors. This is not to say that perpetrators do not deserve incarceration, rather to say that jail has not tended to change their behavior, indeed has often entrenched and escalated it. Civil rights laws offer the prospect of redistributing power, altering the inequalities that give rise to the abuse."); LEE MADIGAN & NANCY C. GAMBLE, THE SECOND RAPE: SOCIETY'S CONTINUED BETRAYAL OF THE VICTIM 127 (1989) ("Civil suits are another means of survivor empowerment.").

137. MADIGAN & GAMBLE, *supra* note 136.

attorney's representation prevents the survivor's attorney from filing a tort suit on the client's behalf, the attorney can educate the client about her options and provide a referral to a tort lawyer. Currently, few survivors sue the accused student, in part because they are not in touch with lawyers who might discuss that option with them.[138]

For the survivor who wants to explore the possibility of a tort or civil rights suit, a lawyer can assess the likelihood that she would be able to collect on her judgment. The lawyer can investigate the perpetrator's assets, the availability of insurance, the length of time that a judgment is enforceable, and the potential for a third-party tort claim.[139] A lawyer can also advise the survivor about the implications of filing a civil claim. To make an informed decision about whether she wants to pursue that option, the survivor needs to hear about discovery and the potential for it to invade her privacy, including by permitting access in certain circumstances to her medical and therapeutic records, her journals, her computer records, and her past sexual history. She needs to think about how she will prove her harm and whether she will need to waive the privilege of confidentiality that she has with certain service providers. She must consider the defendant's ability to depose her friends and family. She also needs to consider the potential out-of-pocket costs that she could incur during civil litigation, and the possibility that the accused student would bring a counterclaim against her.

Survivors will not always want to avail themselves of all the rights the civil legal system offers to redress their victimization. That choice is fine. As a victim-services sexual assault agency once advised its clients, "A decision not to sue can be as empowering as a lawsuit, as long as you keep your needs in mind and are true to yourself."[140] The point is that the survivor is entitled to make an informed choice.

A campus survivor may also need legal information, advice, and assistance to deal effectively with third parties. For example, she may need to increase her financial aid or defer her education, in which case the attorney can review her loan documents or contact her lender. She may need help convincing her landlord to act in accordance with the law by changing her locks or by letting her out of a

138. Swan, *supra* note 133, at 968 ("[F]ew students have actually used tort law as a means of addressing campus sexual assault [because] . . . individuals who experience campus sexual assault do not often access the civil courts and bring tort claims.").

139. *See, e.g.*, Scheffel v. Oregon Beta Chapter of Phi Kappa Psi Fraternity, 359 F.3d 436 (Or. Ct. App. 2015) (reversing summary judgment in favor of local chapter of fraternity for negligence after plaintiff was raped by a chapter member); Ellen M. Bublick, *Tort Suits Filed By Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies*, 59 S.M.U. L. REV. 55, 63 (2006) (noting the rise in the number of cases filed and that "today cases filed by victims include two types of viable claims—claims against assailants themselves and claims against third parties").

140. *See, e.g.*, ILL. COALITION AGAINST SEXUAL VIOLENCE, *supra* note 84, at 28.

lease.[141] Similarly, she may need to invoke statutory protection to stop her landlord from evicting her because of her victimization.[142] The survivor is sometimes entitled to time off from work to attend the legal and disciplinary proceedings related to her assault, and her attorney can inform her of this fact.[143] The survivor may have injuries that require medical care, and she may need to utilize protections under the Family and Medical Leave Act or process an insurance claim. If her victimization occurred at her workplace, she may be entitled to unemployment compensation. If the campus newspaper or another publication wants to report on her victimization, she may need to use the law to stop them from publishing her name.[144] And when statutes do not contain legal protections and remedies, creative lawyering is essential to get the survivor what she needs.

In addition to the importance of legal advice for dealing with third parties, sometimes survivors need legal advice and assistance to deal effectively with the government. If the survivor suffered an injury or lost income, she may qualify for certain governmental benefits such as Temporary Assistance for Needy Families (TANF), the Supplemental Nutritional Assistance Program (SNAP), rental assistance, or social security disability benefits. An attorney can ensure a foreign student does not fall out of compliance with her visa if she needs to reduce her course load.[145] An attorney can also alert her if she may qualify for a U or T visa because of her victimization.[146]

A school is not adequately addressing the survivor's victimization if no one explores with her all of the civil legal implications of her assault. To the contrary, the institution is potentially allowing the student to miss an avenue of recovery, to flounder by herself trying to figure out answers, and to harbor resentment years later once she realizes that her decisionmaking was undermined because she lacked a lawyer. Handing her a pamphlet that tells her where to find a lawyer in the community hardly seems adequate, even if that pamphlet mentions some of her legal rights and even if she reads it. A survivor is unlikely to take initiative based on a piece of paper. She is unlikely to be able to make informed choices,

141. OR. REV. STAT. § 90.453 (West, Westlaw through Ch. 21 of 2017) (permitting termination of lease); OR. REV. STAT. § 90.459 (West, Westlaw through Ch. 21 of 2017) (permitting changing of locks).

142. OR. REV. STAT. § 90.449(1)(a) (West, Westlaw through Ch. 21 of 2017).

143. OR. REV. STAT. § 659A.192 (West, Westlaw through Ch. 21 of 2017).

144. Doe v. Bd. of Regents, 452 S.E.2d 776, 781-82 (Ga. Ct. App. 1994) (enjoining release of incident report to campus newspaper because of rape shield statute).

145. Office for Civil Rights, *supra* note 48, at 7-8 B-4 (noting that prior approval of the designated school official is needed for the student on a student visa to drop below full-time).

146. *See id*.; *see also* 8 U.S.C.A. § 1101(a)(15)(T) (West 2014) (defining the category of visa for nonimmigrant victims of human trafficking); 8 U.S.C.A. § 1101(a)(15)(U) (West 2014) (defining the category of visa for victims of certain crimes, including rape and other sexual assaults, who assist in the investigation or prosecution).

either.[147] She is also unlikely to remember that piece of paper years later, although she probably would recall the kind attorney who patiently answered all of her legal questions.

2. The Criminal Law System

Campus law enforcement must inform survivors of their right to file a criminal complaint,[148] but fewer than five percent of survivors report their victimization to the police.[149] While survivors may not file a criminal complaint for a variety of reasons,[150] the absence of legal advice contributes to the low numbers. Most sexual assault survivors know very little about how the criminal system works, and their misinformation or lack of information can inhibit them from filing reports.[151]

Some universities encourage survivors to report to the police despite the fact that survivors may not know the implications of reporting.[152] Other institutions will report sexual violence to the police without the survivor's permission.[153] In both of these situations, universities can undermine a survivor's recovery. Survivors are likely to be both surprised and dismayed by the lack of compassion and even outright hostility sometimes exhibited in the criminal justice system toward victims.[154] The police report can trigger a range of secondary victimization as well as safety risks.[155]

147. OCR has erroneously assumed that resource guides can contain "clear explanations of the criminal and non-criminal consequences that flow from complaining to particular entities," and thereby "ensure that any student who reports sexual harassment or assault will be given information needed to make informed decisions. . . ." *See* Letter from Anurima Bhargava et al. to Royce Engstrom et al., *supra* note 49, at 29.

148. Office for Civil Rights, *supra* note 1, at 7.

149. Fisher et al., *supra* note 7, at 23 (referring to completed or attempted rapes).

150. *Id.* at 23 ("[Reasons] included not wanting family or other people to know about the incident, lack of proof the incident happened, fear of reprisal by the assailant, fear of being treated with hostility by the police, and anticipation that the police would not believe the incident was serious enough and/or would not want to be bothered with the incident.").

151. Margaret Garvin & Douglas E. Beloof, *Crime Victim Agency: Independent Lawyers for Sexual Assault Victims*, 13 OHIO ST. J. CRIM. L. 67, 77 (2015) ("[T]he vast majority of sexual assault victims have never had advice from a private attorney about the process or their rights. As a result, many victims are inadequately or erroneously informed about what the system and what their participation can look like.").

152. *See* Nancy Chi Cantalupo, "*Decriminalizing" Campus Institutional Responses to Peer Sexual Violence*, 38 J.C. & U.L. 481, 487 n.28 (2012) (noting "many schools lead their list of reporting options with calling local or campus police and/or strongly encourage students to contact police").

153. *See, e.g.*, Jeremy D. Heacox, *S-A: Clery Act Responsibilities for Reporting Allegations of Peer-on-Peer Sexual Assaults Committed by Student-Athletes*, 10 WILLAMETTE SPORTS L.J. 48, 61 (2012) (noting "[Marquette] university now reports any allegations of sexual assault to the sensitive crimes unit of the local police department").

154. *See* AM. LAW INST., *supra* note 44, at 34 n.31, § 7.8 ("The problem of non-investigation, non-prosecution and disbelief of sexual assault claims is long-standing and has been the subject of critique and reform efforts for decades."); *see also* Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1959-69 (2016); Anderson, *supra* note 134, at 230-34.

155. *See infra* note 194.

The best way to facilitate reporting without revictimizing the survivor is to provide the survivor with legal advice about the implications of filing a criminal complaint and then allow her to make an informed decision. Before a survivor files a criminal complaint, she needs to know whether she will be able to protect her medical and therapeutic records, control the elicitation of her sexual history on the stand, and say no to a medical exam. She needs information about the prosecutor's authority to make the decisions, and about the prosecutor's reputation for having a victim-centered approach. She needs to know her rights as a crime victim, as defined by state law[156] and federal law.[157]

If she enters the system, whether voluntarily or not, an attorney can help minimize the secondary victimization that can come from reporting to and being investigated by the police. Rebecca Campbell's work demonstrated that when an advocate accompanies the survivor to meetings with the police, police officers are less likely to discourage the survivor from filing a report, more likely to take her report, less likely to say her case is not serious enough to pursue further, less likely to ask the survivor about her prior sexual history, and less likely to ask if the survivor had an orgasm during the assault.[158] Significantly, 89% of women without an advocate said "they were reluctant to seek further help after their experiences with the legal system," but only 61% of women with an advocate said the same.[159] While non-attorney advocates fill this accompaniment role well, research is needed to see if the outcomes could be even better if the survivor had an attorney with her. Presumably, survivors' negative experiences might decline further if they received legal advice and support during their interactions with the police, if the police were more responsive and respectful because of an attorney's presence, and/or if survivors knew they had an attorney who was able to help them achieve their objectives in the legal system.

The survivor will also need a lawyer to help her realize her rights as a crime victim.[160] She may want to give a victim impact statement at sentencing but need help composing it. She may want crime victim compensation but not know how to get it or to notify law enforcement in a timely manner to qualify.[161] She may

156. Robin Turner, *Examination of Victim Rights: Ensuring Safety and Participation in Court Process*, 40 MONT. LAW. 18, 19 (2015) ("Starting in the 1970s, a majority of U.S. states have enacted discrete constitutional amendments providing victims with rights in a criminal proceeding. Many of these amendments are modeled after CVRA [Crime Victims' Rights Act]. Other states do not enumerate all eight rights listed above, but typically grant the right to be heard, informed and present at all important stages of a criminal prosecution. As of the writing of this article, 32 states display a victim-rights amendment in their constitutions.").

157. Crime Victims' Rights Act, 18 U.S.C.A. § 3771 (West 2015) (applicable to federal crimes).

158. Campbell, *supra* note 83, at 8-9, 10 tbl.1.

159. *Id.* at 9, 10 tbl.1.

160. Garvin & Beloof, *supra* note 151, at 80-82.

161. *See, e.g.*, OR. REV. STAT. § 147.015 (West, Westlaw through Ch. 21 of 2017) (specifying that a person is only eligible for victim compensation if law enforcement was notified of the crime within 72 hours after the crime occurred "unless the Department of Justice finds good cause exists for the failure of the notification").

be eligible for an immigration benefit because she cooperated with law enforcement but be unaware of how to obtain it.[162] The attorney can advise the client about the benefits available to crime victims and help her obtain them.

The lawyer's job, however, often goes beyond accompanying the survivor to a police interview, conveying information, and obtaining crime victim benefits for her. Lawyers serve the important role of protecting their clients during the prosecution. Two experts in this area warn: "[V]ictims' rights and privacy protections that exist on paper can rarely be accessed without a lawyer by a victim standing alone. Sexual assault victims enter a system notorious for inflicting secondary victimization on them."[163] While some prosecutors are victim-focused and will take the time to provide information or to represent the victim's interest,[164] prosecutors cannot be relied upon to do so, especially if the victim's needs conflict with the prosecutor's effort to obtain a conviction.[165] Such conflicts can both hinder successful prosecutions[166] and traumatize victims,[167] but they may be avoidable if the survivor has an attorney.

Margaret Garvin and Douglas Beloof used the military to illustrate the benefits of providing a survivor with independent legal counsel.[168] The military, which is analogous to an institution of higher education in many ways, allows a survivor to decide whether to make a restricted or unrestricted report. The former does not trigger the involvement of law enforcement.[169] Regardless of the route chosen, the survivor receives services, including the services of a Special Victim Counsel (SVC).[170] For the survivor who chooses restricted reporting, the SVC educates her about the criminal process and helps her make an informed decision about whether to change her report to unrestricted. For all victims of sexual violence,

162. *See supra* text accompanying note 146.

163. Garvin & Beloof, *supra* note 151, at 75; *see also* Myka Held, *A Constitutional Remedy for Sexual Assault Survivors*, 16 GEO. J. GENDER & L. 445, 463-66 (2015).

164. For example, the Lane County prosecutor filed a motion to quash a deposition in a civil protective order case because the named victim in a criminal case has a right not to be deposed during the pendency of that criminal case. *See* OR. CONST. art. I § 42(1)(c); *see also* OR. REV. STAT. § 147.433 (West, Westlaw through Ch. 21 of 2017).

165. Garvin & Beloof, *supra* note 151, at 85-86 (noting the prosecutor's job is not to "facilitate agency").

166. *Id.* at 80-81.

167. *See generally* MADIGAN & GAMBLE, *supra* note 136, at 91-107 (discussing survivors' interactions with prosecutors and the revictimization resulting from prosecutors' handling of cases).

168. Garvin & Beloof, *supra* note 151, at 72-75. While the authors use the military's program as an example of the benefits that crime victims receive when they have legal counsel, the authors argue that all sexual assault victims should receive an independent lawyer so that they exercise their "crime victim agency" within the criminal law process; otherwise, they may become disempowered and stop participating in the process. *Id.* at 71. Their arguments are convincing, but their proposal is so sweeping that it seems politically infeasible, at least at present.

169. *Id.* at 72.

170. *Id.* at 73.

> [t]he primary duty of an SVC is to zealously represent his or her clients' rights and interests, including during the criminal investigation, preliminary hearing, pretrial litigation, plea negotiations, court-martial proceedings, and post-trial phase of a court-martial . . . . [The] SVCs educate clients on the military justice system, the roles of sexual assault response personnel, and the variety of medical and other non-legal assistance available to them.[171]

The description of the "significant legal support" that the SVC provides to the survivor "once the criminal process is engaged"[172] sounds almost identical to what the campus attorney's role is for her client. It includes such tasks as answering the client's questions, protecting the client's interests, and representing the client in communications with others in order to save the client from the burden of engaging in such communication herself.[173]

Survivors find legal services of this type very beneficial. Survivors in the military were overwhelmingly appreciative of this service and found that it was essential to "his or her ability to understand the process and participate effectively as witnesses against their accused."[174] An equivalent service for university students should have similar results. An attorney can make the criminal system more comprehensible to the survivor and more responsive to her needs. Those benefits are important for the survivor's healing and for encouraging her to participate in the criminal process.

Colleges themselves would be advantaged by helping the survivor become more successful in the civil and criminal systems. Some administrators complain that the campus adjudicatory system has become a "surrogate" for the civil and criminal justice systems.[175] Yet until survivors have attorneys who can help them navigate the civil and the criminal systems, survivors will rarely receive justice in those fora and will continue to find them intimidating and dissatisfying. While it is too idealistic to imagine that survivors' needs could be fully met in those systems by providing them with legal representation, and while universities and colleges will always have responsibilities to address campus sexual violence and ensure equal educational opportunity for their students, survivors might reduce their reliance on campuses to address their victimization if these other systems were more accessible and responsive.[176]

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171. *Id.*

172. *Id.* at 74.

173. *Id.* (describing, inter alia, extensive communications with and on behalf of clients; client accompaniment to interviews with defense counsel, law enforcement, and prosecutors; invocation of clients' privacy rights during discovery; representation of the client for "collateral misconduct" (that is, "improper conduct at the time of assault"); provision of advice about immunity; and assistance with filing, answering or responding to motions).

174. *Id.* at 75.

175. Napolitano, *supra* note 30 , at 400-01.

176. This, in turn, may help reduce the Department of Education's extensive regulation of campuses. *Id*. at 392, 401.

3. The University System

Although the university disciplinary system is not a legal system per se, its rules and policies can be just as complicated. The Association for Student Conduct Administrators suggested the limited capacity of some complainants to navigate it: "Think back to your sophomore year of college. What kind of policy would you understand and how would you even know to look for it?"[177] The ALI Project recognized that some campuses' policies contain complex terms and specialized vocabulary, and students "are at times besieged with information and policies" that can make information "a challenge to absorb."[178]

A review of Columbia University's *Gender-Based Misconduct Policy for Students* shows that the ALI's characterization is, if anything, an understatement.[179] The procedural part of the manual is ten pages long, with two columns of information on each page. The policy's timeline for the resolution of reports has eleven separate events with dates,[180] but it excludes the dates that require action by the complainant; instead, those dates are sprinkled throughout the document.[181] The policy lists thirteen potential notices the complainant will receive,[182] and eight protocols that will apply during the investigative process.[183] It contains legal terminology that some students may not comprehend completely, such as "potential or actual conflict of interest."[184] The policy also imposes requirements on complainants that may be incompletely understood, such as a requirement "to preserve any relevant evidence" and to avoid "improperly influenc[ing] the testimony of a witness."[185] Some rules have draconian outcomes if not followed.[186] Despite all of its detail, the policy leaves many questions unanswered. For example, the policy says that "[e]ach party has the right to request that evidence regarding his or her mental health diagnosis and/or treat-

177. ASS'N FOR STUDENT CONDUCT ADMIN., *supra* note 54, at 7.

178. AM. LAW INST. (DRAFT NO. 1), *supra* note 51, at 11 §§ 2-2.1 cmt.

179. *Gender-Based Misconduct Policy (Policy), Procedures for Responding to Student Gender-Based Misconduct (Procedures)*, COLUM. U. GENDER-BASED MISCONDUCT OFFICE (Sept. 1, 2015), http://sexualrespect.columbia.edu/files/sexualrespect/content/007-02606%20Gender%20Based%20Misconduct_JL_F.pdf.

180. *Id.* at 13-14. The dates include when the investigation begins, when it is completed, when the investigative report is completed, when the pre-determination conference is held, when the hearing is held, etc. *Id.*

181. *See, e.g.*, *id*. at 21 (requiring a written objection to the panel's membership for a conflict of interest within two days after notification of the panel's membership); *id.* (requiring a response from the complainant and respondent, confirming receipt of the notice that a report with allegations has been filed and the meeting time, within two days of receiving this notice); *id.* at 27 (requiring the complainant's written statement in response to the investigative report to be filed no less than two days prior to the scheduled hearing).

182. *Id.* at 20.

183. *Id*. at 23-24.

184. *Id*. at 21.

185. *Id.* at 23.

186. *See id*. at 19 ("Declining to schedule a meeting with investigators or refusal to respond to outreach by the Office . . . may preclude or limit participation in later stages of the process . . . .").

ment be excluded from consideration when responsibility is being determined,"[187] but the policy says nothing about the criteria for determining whether that request will be granted.

While a lot of care and attention obviously went into drafting Columbia's policy and procedures, the written materials will undoubtedly frustrate and overwhelm many survivors. The information in the document is important, but an attorney should be the one absorbing it. The attorney is the one who should learn the procedures and keep track of relevant dates. An attorney should be available to help the survivor with the many tasks that the manual describes. OCR has found that for some complainants the campus disciplinary process is "more upsetting and traumatizing than the initial sexual harassment."[188] Colleges should be making the survivor's life easier, not more challenging, and the way to do so is to provide her with legal counsel.

The attorney plays a critical role in the campus system apart from helping the survivor understand, comply with, and manage the process without despair. For example, at some point, a survivor has to make a crucial decision: should she report the assault to the university or not? As she makes this decision, the survivor needs to know how long she has to report,[189] and how to identify and preserve relevant evidence in case she decides to report later.

To make an informed decision, the survivor needs to know what obligations the university has to keep her report confidential,[190] and what the implications of filing a report with the Title IX office are. If the student decides not to report or is unsure about reporting, she must know who on campus is a "responsible employee" with mandatory reporting obligations and who is a "confidential" or "private" resource and what the difference is between them. Because of the often draconian reporting policies on campuses these days (almost all employees are

187. *Id*. at 23.

188. Letter from Shaheena Simons, Chief, Educ. Opportunities Section, & Damon Martinez, U.S. Attorney, U.S. Dep't of Justice, to Robert G. Frank, President, Univ. of N.M., Re: Title IX and Title IV Investigation of University of New Mexico 14 (April 22, 2016), https://www.justice.gov/opa/file/843901/download (noting length of investigations, lack of communication, misinformation, and delays).

189. At the University of Oregon, there is no statute of limitations for complaints against students. *See, e.g.*, UO Student Conduct Code, *supra* note 126, § 1(IV)(6) ("Allegations of sexual misconduct . . . may be considered at any time regardless when the alleged misconduct occurred."). Complaints against faculty or staff must be brought within 365 days, although the University will reach back to assess whether the aggregation of activity creates a hostile environment. *See* UO Discrimination Policy 580.015, § R(3), https://policies.uoregon.edu/discrimination-0; Oregon Bureau of Labor and Industries, OAR 839-003-0025(5) (noting that if the unlawful practice is of a continuing nature, the complaint is timely if filed within one year of the most recent unlawful act); *cf. Time Limits for Filing a Charge*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/employees/timeliness.cfm (discussing "ongoing harassment").

190. Office for Civil Rights, *supra* note 48, at 20 E-1 (explaining that the school "will need to determine whether or not it can honor such a request while still providing a safe and nondiscriminatory environment for all students"); *id.* at 21-22 E-2 (listing factors that a school considers in determining whether it can keep information confidential); 34 C.F.R. § 99.12(a) (2016) (discussing the accused student's right to see information in the educational record).

deemed responsible reporters),[191] the survivor should have access to a lawyer early in the process. Certainly, any confidential resource with whom the student connects (such as a confidential medical or mental health professional) should be encouraging the student to talk to a lawyer before talking to others.

In deciding whether to report to the university, a survivor needs to know if the university will inform law enforcement of the assault even without the survivor's consent. Some universities do so.[192] Domestic violence survivors especially need to know this information because disclosure to law enforcement can at times pose a direct threat to their lives. While Title IX coordinators are supposed to try to respect a complainant's wishes regarding confidentiality, the coordinator can override the complainant's wishes when ongoing safety concerns exist,[193] even if the safety risk relates only to the student herself. Yet involving the criminal system can be dangerous for a domestic violence victim,[194] and she may not be ready to assume that risk. If the survivor had an attorney, the attorney could alert her to the risks of reporting to the university and work with the university and law enforcement to address the client's safety concerns.

Apart from learning about the institution's position on privacy and confidentiality, the survivor may want to know whether she will face repercussions when she reports. She may have been in violation of the student conduct code herself at the time of her assault. For example, she may wonder whether being a minor in possession of alcohol will get her in trouble. The answer is not always clear. At the University of Oregon, the Conduct Code is ambiguous,[195] and the University of Oregon's Standard Operating Procedures contain exceptions to its general

191. *See infra* note 393 and accompanying text.

192. *See, e.g.*,VA. CODE ANN. § 23.1-806 (West 2016) (defining "responsible employee" broadly; requiring that person to report to the Title IX coordinator; requiring the Title IX coordinator to share the report, including personally identifiable information, with a review committee that includes a student and a member of law enforcement; and then requiring the committee, or the law enforcement representative if the committee cannot reach consensus, to disclose the information to a law enforcement agency if necessary "to protect the health or safety of the student or other individuals" and to a prosecutor if the act would constitute a felony").

193. Office for Civil Rights, *supra* note 1, at 5; AM. LAW INST. (DRAFT NO. 1), *supra* note 51, at 19 § 3.4. (recommending that "in exceptional circumstances" universities can overcome the "presumption in favor of complainant control" and report directly to local law enforcement).

194. Brief for the Domestic Violence Legal Empowerment & Appeals Project (DV LEAP) et al. as Amici Curiae in Support of Respondent at 4, Lozano v. Montoya, 134 S. Ct. 1224 (2014) (No. 12-820) ("Extensive research demonstrates that risks of violence against women and children are greatest at and after separation from the abuser."); *id*. at 20 ("This dynamic of control manifests in abusive behavior that often escalates if a victim leaves her abuser or seeks assistance from the legal system."). The ALI Project is quite paternalistic in stating that it strongly recommends reporting in the cases of "egregious or violent behavior . . . except where, in the institution's educational discretion, it concludes that this encouragement might be harmful to the student." AM. LAW INST. (DRAFT NO. 1), *supra* note 51, at 19 § 3.4 cmt. The student, with the advice of legal counsel, can make this decision for herself.

195. The UO Student Conduct Code states that "a violation of provisions of the alcohol or drug policy in the Student Conduct Code does not affect a person's ability to file a complaint regarding another person's Sexual Misconduct on the same occasion." UO Student Conduct Code, *supra* note 126, § 1(V)(3)(h)(B).

willingness to grant amnesty.[196] A lawyer could discuss the Code's ambiguity, the exceptions in the Standard Operating Procedures, and the university's standard practice. Such a conversation would allow the survivor to make an informed decision.

In making her decision, the complainant also needs to know that any information disclosed in disciplinary proceedings may be discoverable and used in a civil or criminal proceeding.[197] She needs to know that a lawyer can help protect the survivor's privacy if the accused student or his attorney requests counseling records, school records, and other private records. While the document custodian (for example, the counselor or educational institution) might fight the accused student's subpoena,[198] the survivor can assert any privileges directly.

The survivor needs to understand that she may lack the ability to stop the disciplinary process once it begins, even if she doesn't like how it is unfolding.[199] She needs to know that if she names her friends as witnesses and they fail to participate in the process, they may be in violation of the school's conduct code.[200] She needs information about the advantages of reporting, including how the school will make available interim measures that would not otherwise be

196. Office of the Dean of Students, *Student Conduct Standard Operating Procedures Regarding Sexual Misconduct, Sexual Harassment, and Unwanted Sexual Contact*, UNIV. OR. § 5 (Oct. 13, 2016), http://dos.uoregon.edu/sexual-misconduct ("To encourage reporting, neither a Complainant nor a witness in an investigation of sexual misconduct will be subject to disciplinary sanctions for a violation of university policy at or near the time of the sexual misconduct, *unless the Complainant's or witness(es)' conduct placed the health or safety of another person at risk, or was otherwise egregious*." (emphasis added)).

197. *See, e.g.*, Order Granting, in Part, Plaintiffs' Motion to Compel Production of Disciplinary Records and Denying Deponent-Intervenor's Motion for Protective Order, Simpson v. Univ. of Colo., 2004 WL 4187649 (D. Colo. May 26, 2004) (permitting disclosure of some disciplinary records after in camera review); *see also* Ellis v. Cleveland Mun. Sch. Dist., 309 F. Supp. 2d 1019, 1023 (N.D. Ohio 2004) (noting in dicta that FERPA "does not, by its express terms, prevent discovery of relevant school records under the Federal Rules of Civil Procedure," but that there is a "higher burden" to access them than other records). *See generally* In re Smith, 921 N.E.2d 731, 734 (Oh. Ct. Common Pleas 2009) (explaining that FERPA permits the production of student records pursuant to a judicial order or subpoena, and sometimes without notice to the student, if in response to a federal grand jury subpoena or other subpoena for law enforcement purposes); 20 U.S.C. § 1232g(b) (2012); 34 C.F.R. § 99.31 (2016). In addition, campus police records are specifically excluded from the definition of protected education records in FERPA. 20 U.S.C. §1232g(a)(4)(B)(ii).

198. *Confidentiality of Client/Patient Health Care and Survivors' Services Information*: *Policy No. III.05.02*, UNIV. OR. (Apr. 29, 2016), https://policies.uoregon.edu/III.05.02 (indicating that UO, as a non-party, will resist a subpoena for "confidential health care and/or survivors' services information . . . if there is a good faith basis under applicable law," "inform the client/patient of their right to seek independent legal advice, and release privileged information only in response to an order from a court or tribunal, a stipulated protective order that the client/patient has signed, or a written authorization from the client/patient").

199. AM. LAW INST., *supra* note 44, at 5 § 6.7 (recommending that the complainant and respondent should be able to end or suspend the proceedings "on mutual agreement," "except where the school has strong reasons to insist on a formal resolution").

200. Office of the Dean of Students, *supra* note 196, § 8 ("Witnesses named by the parties are expected to participate in interviews with the Decision-maker upon request of the Decision-maker, and are expected to be forthcoming with requested information. Witnesses are also expected to attend the administrative conference when requested by the Decision-maker. If a witness chooses not to participate and therefore denies the Decision-maker and the parties the opportunity to understand the information that they may have relevant to the allegations, the witness may be subject to disciplinary action for a failure to comply.").

available and, at the conclusion of the proceedings, various remedies. She also needs to know that the school might provide her supportive measures even if she doesn't formally report.[201]

Most survivors are likely to be concerned about retaliation, as it can have a devastating effect on them.[202] The lawyer can inform the survivor that retaliation is prohibited and that the institution must take action against it.[203] The lawyer can also identify retaliatory conduct for the survivor, and, with the client's consent, inform the institution about the conduct in order to ensure that it is addressed swiftly and appropriately.[204] Finally, the lawyer can reassure the survivor that throughout the process she will have someone at her side with as much professional stature as the accused student's attorney and the institution's general counsel; she will have her own lawyer who will advocate on her behalf.

OCR recognizes the importance of providing the survivor with a confidential person from whom she can obtain information. OCR once called it an "exemplary procedure" when the university provides "a variety of sources of initial, confidential and informal consultation concerning the incident(s), without committing the individual to the formal act of filing a complaint."[205] An attorney fills this role perfectly.

Once the student decides to report the sexual violence to the institution, a lawyer can help her determine which venue or venues are the most appropriate for reporting. Julie Novkov explained that there are often "too many" units charged with investigating and resolving the dispute.[206] According to Novkov, at some schools, a student assaulted in a dorm could proceed by reporting the assault to any of the following: Residential Life's peer-to-peer student mediation group; the disciplinary body (which might be lodged in Academic Affairs or the Office for Student Success); Diversity/Inclusion; or the university police and/or

201. "Interim measures" are those that are required once a victim gives notice of the alleged sexual violence but before the matter is formally resolved. "Supportive measures" are similar but they are discretionary; they usually are an option when the survivor has disclosed the violence to a confidential source such as a counselor, but has not formally reported the violence to the institution. White House Task Force, *supra* note 124, at 1. The difference tends to be whether the measure would involve action against the perpetrator. Such measures typically can only be taken after a formal report is filed.

202. Diane L. Rosenfeld, *Uncomfortable Conversations: Confronting the Reality of Target Rape on Campus*, 128 HARV. L. REV. F. 359, 368 (2015) (discussing the case of Lizzy Seeberg, who committed suicide after Notre Dame football players threatened her with retaliation in response to her accusation that a player raped her, and the case of Trey Malone, who committed suicide in part because of Amherst's "callous reaction" to his reported assault).

203. *See* Office for Civil Rights, *supra* note 48, at 42-43 K-1; *see also id*. at 18-20 E-1.

204. Office of the Dean of Students, *supra* note 196, § 18 ("Any act of retaliation against any individual participating in any part of this process may subject the party of [sic] participant engaging in retaliation to further disciplinary procedures.").

205. U.S. DEP'T EDUC., OFFICE FOR CIVIL RIGHTS, SEXUAL HARASSMENT: IT'S NOT ACADEMIC 4 (1988); U.S. DEP'T EDUC., OFFICE FOR CIVIL RIGHTS, SEXUAL HARASSMENT: IT'S NOT ACADEMIC 3 (1995). The 1997 and 2008 versions of this pamphlet do not contain this language.

206. Novkov, *supra* note 25, at 605.

the local police.[207] The "complexity" associated with the different fora increases if the accused student also brings charges against the complainant.[208]

The survivor's lawyer can also help the survivor draft the formal complaint alleging the conduct code violation. Because the other party's behavior will be measured against the student conduct code, an attorney can identify for the survivor elements of the offense for which relevant information should be provided to campus authorities. For instance, one type of "sexual misconduct" at the University of Oregon is "nonconsensual personal contact" short of unwanted penetration. It is defined as occurring when a

> student subjects another person to contact of a sexual nature when a reasonable person would know that such contact would cause emotional distress: A. Without having first obtained Explicit Consent; or B. When he or she knows or should have known the person was incapable of explicit consent by reason of Mental Disorder, Mental Incapacitation, or Physical Helplessness.[209]

The complainant should explain why the contact caused her emotional distress and why a reasonable person would experience emotional distress too. Depending upon the facts, it might be necessary for the student to suggest that the "reasonable person" is a person with the same characteristics as the complainant (for example, of the same gender or gender identity).[210]

Similarly, lawyering may be necessary to convince the university that it should assume jurisdiction over an off-campus assault, if that is the complainant's preference.[211] Factors that can influence the University of Oregon's decision to extend jurisdiction include if the conduct "produced a reasonable fear of physical harm," or "involved academic work or any records, documents, or identifications of the University."[212] A lawyer can remind the complainant to mention the fact that the assault occurred while the complainant and accused were working on an academic assignment, for example.

So far, almost everything described are acts that an attorney performs outside of the disciplinary proceedings. As will be described next in Section II.C, the attorney also undertakes many additional tasks that relate directly to the disciplinary hearing or that occur during the disciplinary hearing itself.

207. *Id*. at 605-06.
208. *Id.* at 606.
209. UO Student Conduct Code, *supra* note 126, § 1(II)(29)(b).
210. *See* Bryant v. Walker, 78 P.3d 148, 151 n.1 (Or. Ct. App. 2003).
211. Office of the Dean of Students, *supra* note 196, § 7.
212. UO Student Conduct Code, *supra* note 126, § IV(2)(b).

C. Managing the Disciplinary Proceedings

Now the focus shifts to the advantage legal counsel offers survivors during disciplinary proceedings. To be clear, not all schools allow legal counsel to participate in or even to be present during the disciplinary hearings,[213] and OCR has never required otherwise.[214] Nor do all schools follow an adjudicatory model as opposed to an investigatory model,[215] and this discussion is not meant to endorse one approach over the other. Similarly, this discussion is not meant to suggest that the process must involve fact-finding, as opposed to a process like restorative justice.[216] Rather, this section explores the function of the complainant's attorney during disciplinary proceedings, while acknowledging that the attorney often, but not always, engages in similar activities regardless of the model employed and typically plays a role within alternative dispute resolution processes too.[217]

Both the accused student and the complainant can have an "advisor" in the disciplinary proceeding.[218] If an institution permits one party to have an attorney,

213. Berger & Berger, *supra* note 44, at 339 ("Fewer than 60% of our sample respondents permit the student to hire an outside lawyer, and of the schools that do give students this option, many require that the lawyer remain silent during the hearing except to advise his client."); Mossman, *supra* note 54, at 598 ("The ability of a student to retain an advisor or attorney varies greatly between universities . . . .").

214. Office for Civil Rights, *supra* note 48, at 26 F-1 ("If the school permits one party to have lawyers or other advisors at any stage of the proceedings, it must do so equally for both parties. Any school-imposed restrictions on the ability of lawyers or other advisors to speak or otherwise participate in the proceedings must also apply equally.").

215. *See* Mary P. Koss, Jay K. Wilgus & Kaaren M. Williamsen, *Campus Sexual Misconduct: Restorative Justice Approaches To Enhance Compliance with Title IX Guidance*, 15 TRAUMA, VIOLENCE & ABUSE 242, 252 (2014) ("Under the investigative model, the student conduct professional considers all available information and retains decision-making authority for the factual determination regarding the responsibility of the accused student. In a hearing-based model, the student conduct professional organizes and administers an adversarial process to weigh the information in a manner that often resembles a quasi-judicial trial, hearing, or arbitration. Hybrid models employ components of each by, for example, utilizing an investigator to gather and present the underlying facts to a hearing board that is ultimately responsible for making a factual determination.").

216. *See generally id*.; *infra* note 217.

217. Among other things, restorative justice (RJ) is supposed to be designed to meet the victim's needs. *See* Koss et al., *supra* note 215, at 254. Consequently, an attorney could be essential at various stages of RJ in a campus setting, *see id.* at 250 (diagramming how RJ might be integrated into the campus processes), including for any, or all, of the following purposes: helping the victim report the sexual violence to the institution to ensure that it is viewed as actionable in the university process; counseling a student about the RJ process and its benefits and limitations so that she can make an informed choice when invited to participate; helping the victim during the repair stage request sanctions and remedies that will validate and provide reparation for the harm; reviewing the confidentiality agreement and explaining its meaning; exploring alternatives to RJ generally and as a resolution process; counseling on who should attend the various stages; helping craft the victim impact statement; developing the redress plan; advising on who should be involved in any sanctioning process; counseling on remedies if the plan is violated; reviewing any memorandum of understanding between local prosecutors, judges, and law enforcement personnel; and, proposing a memorandum of understanding that will be important for the victim's participation.

218. The Department has interpreted section 485(f)(8)(B)(iv)(II) of the Clery Act, as amended by VAWA, to include an attorney. *See* VAWA Final Rule, 79 Fed. Reg. 62752, 62774 (Oct. 20, 2014).

it must allow both sides to have an attorney.[219] Survivors have sued schools when they have been denied this right.[220] According to OCR, a proceeding is not unfair if only one student has an attorney and the other student has a non-attorney advisor, even though the disciplinary procedures must be "equitable,"[221] and there is an emphasis on "balance." All that is required is that the rules treat both parties and their advisors equally.[222]

As a result of these rules, it is legally permissible for the alleged perpetrator and his defense attorney to be pitted against the survivor and her lay advisor, although such a situation raises serious questions about balance and fairness in fact. A survivor is undoubtedly benefited when she has an attorney to match the accused student's attorney. As Tom Lininger observed, "there is a marked disparity between a lawyer's representation and a layperson's companionship."[223] Many of the reasons why a complainant needs a lawyer have been articulated before, but in the context of why the accused student should have a lawyer.[224] Berger and Berger, for example, explained why having a lawyer as an advisor, as opposed to a professor (if not a law professor), would benefit an accused student. The same explanation applies to the complainant.

> Presentation of the student's case often begins with fact-finding: Documents may need to be procured and examined, witnesses identified and interviewed, statements or affidavits drafted and signed. The seasoned lawyer has learned to become a good fact-finder. In addition, he under-

219. The regulations do not preclude the involvement of attorneys, *see* 34 C.F.R § 668.46(k)(2)(iii)-(iv) (2015). Their involvement was the result of the "advisor of choice" amendment to the Clery Act in the 2013 VAWA Reauthorization, informed by the Department of Education's response to comments about the proposed regulations. VAWA Final Rule, 79 Fed. Reg. at 62774 (stating that during the proceedings, the accused and the accuser will have the opportunity to be accompanied by the advisors of their choice); *see also* Office for Civil Rights, *supra* note 48, at 26 F-1. *See generally* AM. LAW INST., *supra* note 44, at 25 § 7.7 ("Although schools vary considerably in whether they allow students to bring advisers with them to disciplinary proceedings, both complainants and respondents should be allowed the opportunity to be 'accompanied . . . by an adviser of their choice.'").

220. *See* Motion for Temporary Restraining Order Preliminary Injunction and Permanent Injunction, Murray v. Univ. of North Carolina at Chapel Hill, No. 14CVS001200 (N.C. Super. Ct. Aug. 20, 2014), 2014 WL 8764256, at *4.

221. Office for Civil Rights, *supra* note 1, at 8 ("Any procedures used to adjudicate complaints of sexual harassment or sexual violence, including disciplinary procedures, however, must meet the Title IX requirement of affording a complaint a prompt and equitable resolution."); *id.* at 9; Office for Civil Rights, *supra* note 48, at 12-14 C-5.

222. Office for Civil Rights, *supra* note 48, at 26 F-1 (discussing the restrictions on the advisors' ability to participate); *id.* at 30 F-5 (discussing the presence of a party for the entirety of the hearing); *id.* at 31 F-6 (discussing the cross-examination of witnesses).

223. Lininger, *supra* note 55, at 1393.

224. *See* Berger & Berger, *supra* note 44, at 341 ("[F]ew students, even if innocent, have the sangfroid not to feel great emotional tension before their accusers and in front of the person or panel who will determine their education future . . . . This is hardly the environment in which we should expect anyone, let alone a young person (sometimes hardly past adolescence) to exercise cool judgment, to think clearly, to question effectively, or to testify helpfully."); Groholski, *supra* note 54, at 789 (discussing how a student's emotional response to the charges can interfere with his effective advocacy on his own behalf).

> stands the requirements of fair process and is likely to make timely application for access to potential witnesses, for a reasonable interval in which to assemble his client's defense, for a transcript or tape recording of the hearing, and for a written statement of the panel's findings and conclusions. He will compel the school to adhere to its own procedures that benefit his client and challenge those procedures that are prejudicial.
>
> If a full-blown hearing does ensue, a law-trained advisor, provided she is sensitive to the setting (it is not a courtroom, and the panel members are not judges or jurors) brings skills that lay advisors are far less apt to possess. The lawyer knows that written submissions, whether or not required, can often be useful in presenting a client's case before, during, and after the hearing. . . . Good lawyers have learned to draft such advocacy documents effectively.
>
> The right to cross-examine hostile witnesses, one of the pillars of due process, becomes far less sturdy when an untrained person . . . is questioning the witness. If the student himself testifies . . . his testimony should be rehearsed . . . . Also, a lawyer is better able than a lay person to make the initial assessment whether or not the client should speak at all.[225]

While no one has studied whether the accused student will be found responsible more frequently, or receive a more serious penalty, when the complainant has a lawyer as her advisor, those results seem probable. And when only the accused student has a lawyer, that lawyer is likely to dominate and "distort" the process, "particularly when adjudicators are not legally trained."[226]

A survivor may be comfortable with a lay advisor, such as an advocate, professor, or student, even though the accused student has a lawyer. However, she may instead recognize intuitively what the experts quoted in the prior paragraphs revealed: she is probably disadvantaged and therefore less likely to prevail. If she is uncomfortable without an attorney, then it disserves her not to provide her one. Otherwise the disciplinary proceeding will likely be less successful *and* more stressful than it should be for her. William E. Thro, the General Counsel at the University of Kentucky, stated,

> Regardless of the standard of proof used, a disciplinary proceeding is going to be an extraordinary stressful and traumatic event for the victim/survivor. At a minimum, the victim/survivor will have to recount the events of a sexual encounter that, at least in the victim's/survivor's

225. Berger & Berger, *supra* note 44, at 341-42.
226. AM. LAW INST., *supra* note 44, at 25 § 7.7 cmt.

> view, was nonconsensual. . . . To the extent a public institution can minimize the stress of the ordeal, it should do so.[227]

Campuses differ dramatically with respect to what the lawyer is allowed to do during the disciplinary proceedings. Institutions can limit the attorneys' participation.[228] The only constraint on the type of institutional rules is that a school must give to "the complainant any rights that it gives to the alleged perpetrator."[229] Using the University of Oregon as an example, the following description demonstrates that the complainant's attorney undertakes valuable tasks even when the attorney is not a full participant.[230]

First, the attorney ensures that the administrative conference, and the related steps such as the fact-gathering investigation, occur within sixty days, that delays are for good cause, and that the school follows OCR Guidance.[231]

Second, the attorney identifies relevant evidence, such as texts, photos, and medical information, and ensures it all gets to the decision-maker during the fact-gathering investigation. The lawyer also helps the client identify relevant witnesses within the tight timeframe.[232] The lawyer informs the client that the decision-maker can draw adverse inferences if the complainant selectively answers the investigator's questions,[233] and advises the client how best to answer if the investigator asks about topics the student wants to keep private. The attorney listens as her client practices telling her story, accompanies her client to the initial interview, and coordinates the presence of the District Attorney or police in order to reduce the number of times that the survivor has to explain what occurred. The attorney will also make requests for any interim measures.

Third, the attorney reduces the distress that the survivor may experience from the administrative conference itself. The attorney can invoke the survivor's right not to attend the hearing,[234] and then serve as the client's proxy to observe

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227. Thro, *supra* note 54, at 210.

228. 34 C.F.R. § 668.46(k)(2) (2015).

229. Office for Civil Rights, *supra* note 48, at 24-26 F-1. The ALI Project concurs and repeatedly recommends that hearings, in fact, be "evenhanded."; *see, e.g.*, AM. LAW INST., *supra* note 44, at 15 § 7.4.

230. *See also* AM. LAW INST., *supra* note 44, at 26 § 7.7 cmt. ("Having lawyers present but limiting their role does not mean that their presence has no function. They may provide guidance to their client student; they may draft questions for witnesses for their client to ask or to provide to panel members; they may help muster arguments using lawyerly skills that students can present, or that can be presented in written form."). At the University of Oregon, an accused student can have an "adviser of their choice present at the [administrative] conference," UO Student Conduct Code, *supra* note 126, § 2(5)(i). The complainant has the same right. *Id.* § 2(6)(g). An attorney is explicitly listed as someone who can assist the student. *Id.* at § 3(II)(2)(c); Office of the Dean of Students, *supra* note 196, § 15.

231. Office of the Dean of Students, *supra* note 196, § 10(2).

232. *Id.* § 8 (providing that any witness names or information that a student wants considered must be provided within ten days of receiving the Notice of Allegations).

233. *Id.*

234. Office for Civil Rights, *supra* note 48, at 31 F-7 (indicating that the hearing should not cause the complainant distress); *id.* at 30 F-5 (indicating that a school cannot "require a complainant to be present at the hearing as a prerequisite to proceed with the hearing").

and report to the client on what transpired. The attorney can seek special protections for her client if her client wants to attend the conference but is scared to do so. For example, the University of Oregon Student Conduct Code explicitly entitles a complainant, upon request, to be in a separate room from the accused.[235] If there is a need for a bifurcated hearing or special accommodations due to disability, the attorney can make a request.[236] If the complainant believes the decision-maker is biased, the attorney can file a petition for a new decision-maker.[237]

Fourth, the complainant's attorney prepares her client for what will occur at the conference and takes steps to ensure her client's participation is effective. For example, she tracks down her client's witnesses and asks them to attend. While the Student Conduct Code gives the complainant an "opportunity to offer a relevant response to any assertions made; [and] to propose relevant witnesses and submit suggested questions to the Director,"[238] the Standard Operating Procedures make parties responsible for contacting their own witnesses and ensuring they appear, although a party can request the decisionmaker's help to secure the attendance of opposing or difficult witnesses.[239]

In preparation for the conference, the attorney also works with the student to plan her response to the factual record.[240] This requires crafting responses to the accused student's assertions. The attorney prepares her client for the decisionmaker's or accused student's potential questions, helping the survivor organize her answers in a coherent way. Based upon what they read in the record, the attorney and client will formulate additional questions for the witnesses or the accused student and submit them in a timely fashion.[241] If the survivor needs to submit new evidence, the lawyer can craft the petition that explains why there is good cause for the evidence to be admitted.[242] The attorney and client also prepare the student's closing statement, which the survivor is allowed to give and which will generally suggest how the decision-maker should resolve conflicting evidence.

Fifth, at the conference, the attorney is allowed to advocate on her client's behalf by presenting a five-minute summary of the student's information.[243] Even though this is the only time the attorney can speak, the attorney plays a valuable role at other times by listening, taking notes, and capturing any errors that may give rise to an appeal. For example, the attorney watches to see if the director screened out questions that were "appropriate and relevant to the

235. UO Student Conduct Code, *supra* note 126, § 2(6)(h); *see* Office of the Dean of Students, *supra* note 196, § 10(5).

236. Office of the Dean of Students, *supra* note 196, §§ 10(3), 10(6).

237. *Id.* § 16.

238. UO Student Conduct Code, *supra* note 126, §2(6)(b)-(c); *see also* Office of the Dean of Students, *supra* note 196, § 10(8).

239. Office of the Dean of Students, *supra* note 196, § 10(4).

240. *Id.* § 9.

241. *Id.* § 10(9).

242. *Id.*

243. *Id.*

case."[244] The attorney also passes notes to her client, reminding her to submit additional questions, make certain arguments, or emphasize certain evidence.

Sixth, the complainant's lawyer responds to arguments and objections made by the accused student's lawyer and advances her own. This task can arise prior to, or at, the administrative conference. For example, the University of Oregon has its own evidentiary rules regarding admissibility that address relevancy, competency, prior conduct, sexual history, and more.[245] Parties can file a petition for exceptions to these rules.[246] Similarly, the complainant's lawyer would oppose efforts by the accused student's attorney to submit the results of a polygraph,[247] arguing that such evidence is unreliable.[248] Sometimes the accused student's attorney may attack the procedures themselves, such as by arguing that the "preponderance of the evidence" standard that OCR mandates[249] violates due process.[250] The complainant's attorney would reply.[251]

Seventh, the complainant's lawyer ensures her client receives notice of the investigation's findings and the disciplinary sanctions.[252] If the accused was found not to have violated the conduct code, or if the sanction was insufficient, the lawyer helps the complainant appeal if an appeal is allowed.[253] A party typically has to appeal within a narrow timeframe[254] and must articulate the basis for the appeal.[255] The grounds for appeal often require legal argument because they

244. Office for Civil Rights, *supra* note 48, at 31 F-6.

245. Office of the Dean of Students, *supra* note 196, § 11.

246. *Id.* § 11(h).

247. *Id.* § 11(f).

248. *See* United States v. Scheffer, 523 U.S. 303, 309 (1998) ("[T]here is simply no consensus that polygraph evidence is reliable."); *The Truth About Lie Detectors (aka Polygraph Tests)*, AM. PSYCHOL. ASS'N (Aug. 5, 2004), http://www.apa.org/research/action/polygraph.aspx.

249. Office for Civil Rights, *supra* note 48, at 24-26 F-1.

250. The accused student's attorney might assert that OCR's guidance on this point is invalid because OCR "did not engage in the public notice and comment process that is part of federal administrative rulemaking" when it adopted this "substantial change in procedures." *The History, Uses, and Abuses of Title IX*, AM. ASS'N U. PROFESSORS 10 (2016), https://www.aaup.org/file/TitleIXreport.pdf; *see also* Open Letter from Members of the Penn Law School Faculty at 2 (Feb. 18, 2015), http://media.philly.com/documents/OpenLetter.pdf (expressing concern about the use of guidance to impose the preponderance-of-the-evidence standard). Certainly the shift has been critiqued. *See, e.g.*, Doe v. Brandeis Univ., 177 F. Supp. 3d 561, 607 (D. Mass. 2016) (finding that "[t]he lower standard may thus be seen, in context, as part of an effort to tilt the playing field against accused students, which is particularly troublesome in light of the elimination of other basic rights of the accused").

251. The complainant's attorney could reply by demonstrating that OCR's guidance was not new and did not need to go though the formal rulemaking process. Katharine K. Baker, Deborah L. Brake & Nancy Chi Cantalupo, *Title IX and the Preponderance of the Evidence: A White Paper*, FEMINIST L. PROFESSORS 9-10 (2016), http://www.feministlawprofessors.com/wp-content/uploads/2016/08/Title-IX-Preponderance-White-Paper-signed-10.3.16.pdf.

252. 20 U.S.C. § 1092(f)(8)(B)(iv)(III)(aa) (2012); 20 U.S.C. § 1232g(b)(6)(A) (2013); Office of the Dean of Students, *supra* note 196, § 13(a).

253. Whatever right of appeal the school affords, complainants and accused students must have an equal right to appeal. Office for Civil Rights, *supra* note 1, at 12.

254. *See, e.g.*, UO Student Conduct Code, *supra* note 126, § 3., IV Appeals (1) (allowing fourteen days for appeal); Office of the Dean of Students, *supra* note 196, § 14 (same).

255. UO Student Condut Code, *supra* note 126, § 3., IV Appeals (1), (2).

include the following typical provisions:[256] the complainant did not have a "reasonable opportunity to present information"; the hearing was not administered "in conformity with the procedures required in this Code"; the sanctions were not "commensurate with violations"; or there was "new information sufficient to alter a decision" and the information was "not known to the person appealing at the time of the hearing."[257]

Eighth, if the accused is found to have violated the conduct code, the complainant's lawyer gives the survivor legal advice about whether she can disclose the outcome and the sanction.[258] The answer will turn on the type of sexual violence experienced by the survivor and the confusing interplay of FERPA and the Clery Act.[259] The attorney also ensures that the institution provides the survivor with resources to remedy the effects of the victimization. In addition, the attorney helps the complainant assess whether she has a tort claim, a civil rights claim, or a crime victim's compensation claim. A lawyer might pursue some of these remedies directly for the survivor or help the survivor find an attorney who can pursue these remedies for her.

Overall, the complainant's lawyer is an essential resource for the complainant during the disciplinary process and after the process concludes. The attorney is valuable whether or not the accused student has a lawyer, but becomes particularly important when the accused student is represented.

256. ASS'N FOR STUDENT CONDUCT ADMIN., *supra* note 54, at 14 (identifying "typical criteria" for an appeal).

257. UO Student Conduct Code, *supra* note 126, § 3., IV Appeals (1), (2).

258. Office for Civil Rights, *supra* note 1, at 13-14 (explaining the interplay of Title IX, FERPA, and the Clery Act).

259. The Clery Act now states that institutions must notify both parties of "the result of any institutional disciplinary proceeding that arises from an allegation of dating violence, domestic violence, sexual assault, or stalking." 34 C.F.R. §668.46(k)(2)(v)(A) (2016). The Act specifically says that doing so "does not constitute a violation of FERPA." *Id.* at 668.46(l). Yet the definitions in the Clery Act of sexual assault and dating violence are quite specific and do not necessarily cover all forms of sexual violence. For example, sexual assault is only "rape, fondling, incest, or statutory rape." *Id.* at 668.46(a). Dating violence requires "[v]iolence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim." *Id.* Consequently, the outcome of a disciplinary hearing of someone who has never been in a dating relationship with the victim and engages in behavior that is not sexual assault may fall outside of the categories for which the Clery Act permits disclosure. Whether the behavior falls within FERPA's definition of a "crime of violence" or a "non-forcible sex offense," which would allow the postsecondary institution to disclose the final results of the disciplinary proceedings, requires analysis. 20 U.S.C. §1232g(b)(6) (2012). The offenses that constitute a crime of violence or a non-forcible sex offense include arson, assault offenses, burglary, criminal homicide (manslaughter by negligence), criminal homicide (murder and nonnegligent manslaughter), destruction/damage/vandalism of property, kidnapping/abduction, robbery, forcible sex offenses, statutory rape, and incest. 34 C.F.R. § 99.39 (2016). While a survivor would not be liable for repeating anything that a school is required to disclose to her, *see* 34 C.F.R. § 99.33(c), she could be liable for repeating something that the institution was not required to release to her, and in fact was prohibited from releasing to her.

D. Protecting Against Defense Attorney Tactics

Another important function of the survivor's attorney is to shield the survivor from the defense attorney. Interacting with a defense attorney can be extremely upsetting for a complainant.[260] When the defense attorney is dealing with an unrepresented party, the defense attorney is supposed to let the opposing party know that the attorney represents the other side,[261] but that will not eliminate the complainant's distress from the contact itself and from any questions asked by the defendant's attorney. This distress can increase exponentially if the defense attorney's tone and questions are meant to agitate as much as to obtain information. At the University of Oregon, some accused students have had three attorneys representing them simultaneously. The sheer number of people working for the accused student can demoralize the survivor, especially if she has no attorney working for her.

Some defense attorneys engage in tactics that can inflict harm, and the complainant's attorney can sometimes curb this behavior. What motivates defense attorneys to act in these ways is uncertain. Perhaps it is frustration over the disciplinary system's lack of discovery and the absence of a *Brady*-type obligation to hand over exculpatory evidence, or perhaps it is the inability to subpoena witnesses, or perhaps it is their desire to have the complainant recant. Regardless, defense lawyers have engaged in their own "fact finding" that sometimes crosses the line of propriety. This has included hiring private investigators who, as part of their investigation, revealed the sexual assault allegations to others who were not privy to that information, including the complainant's relatives. Defense attorneys have also posted the complainant's name and picture on Facebook, asking people to contact them with information about her past. Defense attorneys have filed requests under the Oregon public records law with the university to obtain information about the complainant that was not contained in an educational record.

The complainant's attorney may be able to stop some of these practices. If the behavior can be characterized as retaliatory, the tactics can be brought to the attention of the university.[262] A school must protect the complainant when it "knows or reasonably should know of possible retaliation by other students or

260. *See* MADIGAN & GAMBLE, *supra* note 136, at 101-02.

261. MODEL RULES OF PROF'L CONDUCT r. 4.3 (AM. BAR ASS'N 1983).

262. *See* Office of the Dean of Students, *supra* note 196, § 15 ("If the Decision-maker determines that a student's advisor has engaged in unreasonable, disruptive, harassing or retaliatory behavior, the Decision-maker may require the student to proceed without an advisor or require the student to identify a new advisor."); *id.* § 18 ("Any act of retaliation against any individual participating in any part of this process may subject the party of [sic] participant engaging in retaliation to further disciplinary procedures. Examples of retaliation include, but are not limited to, contacting a witness or the other party in order to dissuade that person from participating in this process . . . .").

third parties, including threats, intimidation, coercion, or discrimination (including harassment)."[263] If the practices of the attorney or the attorney's investigator approach unprofessional conduct,[264] the survivor's attorney can advise the defense attorney of that fact. If lines are crossed, bar complaints can be filed. Where the attorney or investigator for the accused student commits a tort such as invasion of privacy, a tort suit may be appropriate.[265]

When the defense attorney's practices cannot be stopped, an attorney can discuss the tactics with the client and explain why the behavior is permissible. Victims should be advised about these possibilities at the outset of the process, remote though they may be in most cases. While a survivor would undoubtedly prefer that the practices stop instead of merely being told why they cannot be stopped, at least the survivor's attorney can provide relevant information and be a source of support.

E. Serving as OCR's Tentacles

A side benefit of providing survivors with legal services is that the attorneys who represent survivors often have an interest in shaping the disciplinary process so that it is fair and effective for their clients. With respect to a particular client's case, the survivor's lawyer can act like a private attorney general. If the institution isn't complying with Title IX in its handling of her client's case, the lawyer can help the institution become Title IX-compliant by articulating the problem. The Title IX coordinator—a position required by Title IX regulations—oversees the university's compliance with Title IX.[266] Yet Title IX coordinators are not infallible, and universities are not always in compliance. Almost all of the institutions currently under investigation by OCR have Title IX coordinators. If a survivor's attorney has a good working relationship with the Title IX coordinator, and the Title IX coordinator is receptive to concerns expressed by the survivor's attorney, then problems can be solved. If the institution ultimately does not comply with its Title IX obligations, then the survivor's attorney can inform the client of the institution's noncompliance. If the survivor wants to file a lawsuit

263. Office for Civil Rights, *supra* note 48, at 18-20 E-1. *See, e.g.*, Doe v. Univ. of Tenn., 186 F. Supp. 3d 788, 800, 809 (M.D. Tenn. 2016); Doe *ex rel.* A.N. v. E. Haven Bd. of Educ., 430 F. Supp. 2d 54 (D. Conn. 2006).

264. *See* MODEL RULES OF PROF'L CONDUCT r. 5.3(b) (AM. BAR ASS'N 2002) (explaining that "a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer"); *In re* Taylor, 23 Or. Disciplinary Bd. Rptr. 151 (2009) (finding a violation of disciplinary rules when an attorney's investigator in a rape case issued a subpoena and obtained victim's educational records in violation of the statute and the accused's lawyer used them); *see also* MODEL RULES OF PROF'L CONDUCT r. 4.4 (prohibiting methods of obtaining evidence that violate the rights of a third party); *id.* r. 8.4(d) (defining professional misconduct as conduct that is prejudicial to the administration of justice).

265. *Cf.* Clayton v. Richards, 47 S.W.3d 149, 154 (Tex. App. 2001) ("Even if the detective may have furnished only technical services in connection with acts constituting invasion of privacy, the private investigator may still be liable in tort if an actual invasion of privacy has been committed.").

266. 34 C.F.R. 106.8 (2016).

or an administrative complaint against the institution and this action is beyond the scope of the attorney's representation, the attorney should inform the client how to file an OCR complaint herself and offer the names of attorneys who can institute a lawsuit.

Independent of any particular case on which the attorney is working, the attorney can help formulate institutional policy that is responsive to survivors' needs. This does not require the lawyer to sue the institution for a violation of Title IX, but rather to advocate within the institution for policies and practices that make a lawsuit unnecessary. The attorney can do this on a solicited or unsolicited basis. This participation can benefit an institution by heading off future litigation for violations of Title IX. Because the attorney is on the ground doing the work— immersed in the law as well as the institutional policies, practices, and procedures —the attorney has the ability to spot problems and suggest solutions. For example, the attorney might provide feedback to improve the student conduct code procedures.

Having a lawyer available to serve this function is important because there are constant pressures to deviate from OCR recommendations. For example, OCR has advised that "questioning about the complainant's sexual history with anyone other than the alleged perpetrator" should not be allowed.[267] Yet the National Center for Higher Education Risk Management and others have suggested that schools could enact different rules.[268] A school might be tempted to emulate the exceptions to the rape shield law that exist in the Federal Rules of Evidence or state law.[269] The lawyer for survivors can educate the institution about why such exceptions are not required by law, are contrary to the spirit of Title IX, and/or are bad policy.

Overall, the attorney for the survivor serves a very important role for both her client and the institution. The attorney helps her client navigate three systems without despair and use the laws that were adopted for her benefit. The lawyer makes it less likely that the survivor will become overwhelmed by the complexity, prejudiced by missteps, traumatized by defense attorneys, or denied remedies

267. Office for Civil Rights, *supra* note 48, at 31 F-7.

268. *See* W. Scott Lewis et al., *Deliberately Indifferent: Crafting Equitable and Effective Remedial Process To Address Campus Sexual Violence*, NAT'L CTR. FOR HIGHER EDUC. RISK MGMT. 11 (2011), https://www.ncherm.org/documents/2011NCHERMWHITEPAPERDELIBERATELYINDIFFERENT FINAL.pdf (suggesting that schools may want to adopt an evidentiary rule that does not bar sexual history evidence, but that instead says "normally this kind of evidence is not permitted, unless it meets a high relevance threshold (that it would be 'manifestly unfair' not to consider the information)"). If there is a question about the applicable law, the lawyer can make the necessary arguments. Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 63 (2013) (implying that it might violate an accused student's constitutional rights not to have certain exceptions found in federal law).

269. *See* FED. R. EVID. 412; *see also* Lininger, *supra* note 55, at 1390 (explaining that the rules tend to recognize "the following permissible purposes for introducing the accuser's prior sexual conduct: (1) to show prior consensual sex between the accuser and the defendant; (2) to show that someone other than the defendant was the source of the bodily fluid and cause of the injury at issue in the prosecution; and (3) to introduce any evidence that the defendant has a constitutional right to introduce").

or rights in the civil, criminal, or campus systems. The attorney also helps the institution achieve Title IX compliance. Given these tremendous benefits, it is inexcusable that attorneys have been excised from the institutional response to sexual violence.

III. POSSIBLE CONCERNS ABOUT THIS PROPOSAL

Critics will no doubt raise objections to this proposal. Five of the most likely objections are addressed here: juridification of disciplinary proceedings; cost; conflicts of interest; legal risks to the institution; and implications for the accused. These policy concerns are addressed in turn, but none of them is sufficient to reject this proposal. As will be explained, providing counsel for survivors will not juridify the proceedings because the presence of lawyers says nothing about the procedural rules. However, if the institution does reform its rules, then involving survivors' legal counsel should enhance the rulemaking process tremendously. Nor is the cost of providing an attorney to survivors a reason to shy away from this proposal. The cost is not prohibitive, and the institution should bear it regardless. A legitimate concern is how to avoid conflicts of interest for the attorney, but fortunately various options exist. Nor does providing attorneys to survivors pose a large or unwarranted litigation risk for the institution; rather, survivors' attorneys can reduce the institution's liability exposure. Finally, this proposal may require a school to provide legal counsel for the accused student in some instances, but this is an advantage, not a disadvantage, of the proposal. In such instances, the school's process will be seen as more legitimate and caring overall.

A. Juridification of the Proceedings

Will providing a lawyer to the complainant cause the student conduct process to become unduly legalistic? Numerous courts have cautioned that "[a] university is not a court of law, and it is neither practical nor desirable it be one."[270] Judge Posner, in rejecting a due process challenge to proceedings in which a student's attorney could not participate, said he was "reluctant to encourage further bureaucratization by judicializing university disciplinary proceedings."[271] The increased cost of a more formalized system is often cited as a concern, as

270. Gomes v. Univ. of Me. Sys., 365 F. Supp. 2d 6, 16 (D. Me. 2005); *see also* Osteen v. Henley, 13 F.3d 221, 225-26 (7th Cir. 1993) ("To recognize such a right [of a lawyer who would function as a trial lawyer] would force student disciplinary proceedings into the mold of adversary litigation. The university would have to hire its own lawyer to prosecute these cases and no doubt lawyers would also be dragged in—from the law faculty or elsewhere—to serve as judges. The cost and complexity of such proceedings would be increased, to the detriment of discipline as well of the university's fisc.").

271. *Osteen*, 13 F.3d at 225.

well as the likelihood that a more trial-like process would undermine the disciplinary proceeding's "effectiveness as part of the teaching process."[272] Perhaps the most problematic repercussion, however, is that a courtroom-like process might discourage survivors from reporting.[273]

Many of these concerns are contested,[274] but fortunately this Article need not resolve where the line should be drawn. Nor need this Article weigh in on whether non-adversarial processes are better than adversarial processes, at least some of the time.[275] The provision of free attorneys and the juridification of disciplinary hearings are two separate issues. This Article's point is simple: a complainant should have an attorney participate in the proceedings if and to the extent that the school permits attorneys to participate. This position is not altered or affected by the fact that there is "an almost bewildering diversity in the details" regarding the processes campuses use to resolve these cases.[276] Whatever those processes are now or will become, complainants should have an attorney if the school permits attorneys to participate. Even if a school restricts attorneys' participation completely or significantly, attorneys can still play a valuable role for the survivor in the civil and criminal processes and in the campus process before and after the disciplinary hearing.

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272. *Gomes*, 365 F. Supp. 2d at 16 (citing Goss v. Lopez, 419 U.S. 565, 583 (1975)); Berger & Berger, *supra* note 44, at 340.

273. *Cf.* Berger & Berger, *supra* note 44, at 340 (discussing the effect of a more adversarial process on faculty members or fellow students who might report academic dishonesty); Cantalupo, *supra* note 135, at 284 (arguing that efforts to make Title IX proceedings more like criminal proceedings would undermine the goals of Title IX, which is to give equal educational opportunity to victims and to help establish equality); Anderson, *supra* note 154, at 1998 (arguing "procedural exceptionalism" for campus sexual assault would "harm the learning environment, deprive victims of equal educational opportunities, and violate students' civil rights under Title IX").

274. Berger & Berger, *supra* note 44, at 344 (noting that allowing lawyers to play an active role at the hearing did not appear to undermine "any school's education mission," and they could not imagine that it would do so). Sometimes commentators question the value of the lawyer's participation in the hearing itself. *Cf.* William E. Thro, *No Class of Constitutional Values: Respecting Freedom and Equality in Public University Sexual Assault Cases*, 28 REGENT U. L. REV. 197, 217 (2016) ("In most instances, being able to seek legal counsel prior to the hearing and having the lawyer present at the hearing will suffice. Legal cases rarely turn on a devastating cross-examination at trial or a brilliant answer in appellate oral argument; legal cases generally turn on comprehensive preparation for trial and lucid persuasive briefing on appeal. A lawyer can thoroughly prepare his client for a student disciplinary hearing and can script opening and closing statements as well as direct examination. Moreover, cross-examination often can be anticipated and counsel can provide on-the-spot advice."). For example, the ALI has questioned the value of cross-examination by lawyers in disciplinary proceedings. *See* AM. LAW INST., *supra* note 44, at 17 § 7.5 cmt. (noting cross-examination by lawyers may "be more combative and adversarial than truth-seeking or truth-revealing in character"). However, sixteen University of Pennsylvania law professors thought it had much value. *See* Open Letter from Members of the Penn Law School Faculty, *supra* note 250, at 4 ("[N]o one should think that questioning by panel members is an adequate substitute for the far more informative and effective cross-examination by a student's representative."). Often each side raises some valid points. *See* AM. LAW INST., *supra* note 44, at 25 § 7.7 cmt. (noting there are both "advantages and disadvantages of having lawyers involved").

275. Cynthia R. Farina, *Conceiving Due Process*, 3 YALE J.L. & FEMINISM 189, 274, 276-77 (1991); *see also* Novkov, *supra* note 25, at 616 (advocating a restorative justice model as one possibility).

276. Novkov, *supra* note 25, at 602.

As mentioned in the preceding section, an attorney for the survivor can help an institution think through its procedures for student conduct code proceedings, including its rules about attorney participation. Certain procedures can harm victims of sexual violence. That is why, for example, OCR "strongly discourages" schools from letting the students personally question each other at the hearing. That practice "may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment."[277] Lawyers too can be harsh when they interrogate survivors.[278] In contrast, prohibiting statements by lawyers during the proceeding may negatively impact survivors. Women (who disproportionately comprise the population of survivors), more than men, may lack a "legal voice."[279] Similarly, barring attorneys altogether might disproportionately disadvantage survivors and undermine society's efforts to end gender-based discrimination. After all, disciplinary hearings are a "private place," not subject to the checks and balances that come with public proceedings,[280] and women's victimization in private places, including the rapist's bedroom, is longstanding.[281] Survivors' attorneys can help colleges and universities consider whether various neutral rules have disproportionately negative effects on survivors.

But before definitive conclusions are drawn about the involvement or role of attorneys in disciplinary proceedings, much more information is needed, especially about outcomes. Survivors probably do better when they are represented by attorneys, but we really do not know that for sure, nor do we know what sort of attorney participation makes a difference. For the survivor, it is not inconsequential if her attorney's participation makes it more likely that her perpetrator will be held responsible in the disciplinary proceeding. Rather, a finding of responsibility can be an important part of the remediation. As MacKinnon has said,

> Law names authoritatively . . . . Remember the crumpled blankness on the faces of raped women when their violators are exonerated, the look of hope vanquishing disbelief when they are convicted. This—not closure, not incarceration, not money—is what law can mean. It can give people back the humanity that the violation took away.[282]

277. Office for Civil Rights, *supra* note 1, at 12.

278. Lininger, *supra* note 55, at 1362 (noting the "heavy-handed tactics used by lawyers").

279. *Cf.* MACKINNON, *supra* note 94, at 107.

280. Zoe Ridolfi-Starr, *Transformation Requires Transparency: Critical Policy Reforms To Advance Campus Sexual Violence Response*, 125 YALE L.J. 2156, 2159 (2016) (arguing that the "opacity creates a culture of impunity for campus officials entrusted with ensuring the safety of students"); *see generally id*.

281. *Cf.* MACKINNON, *supra* note 94, at 106-07.

282. *Id.* at 108.

B. Cost to the Institution

Lawyers cost money. The Association for Student Conduct Administrators, an organization with some hostility toward attorneys' involvement in the disciplinary process,[283] said what many readers may be thinking: "One can only imagine the costs associated with a scenario involving so many attorneys being paid to debate whether or not a student violated the rules set forth by a college."[284] Costs, of course, are a concern, and are probably a large concern for smaller colleges or institutions far from legal resources.[285]

However, trite as it might sound, there is also a price to pay for not having counsel for students. One hidden cost is that the school will see more survivors leaving school.[286] Moreover, the school will lose the alumni loyalty and student and parent satisfaction that come from providing counsel for survivors. Stories of good, supportive programs get around and can make the school more attractive to applicants. In addition, to the extent that legal counsel for survivors increases survivors' reporting, schools will deter more sexual assault and catch more perpetrators who might otherwise reoffend. When schools ignore the importance of attorneys for survivors, they contribute to the enormous social costs of the victimization[287] and increase demand on their own campuses for services to address survivors' needs.[288]

To the extent that OCR starts holding institutions responsible for their failure to provide necessary legal services to survivors, as it should, financial repercussions might follow administrative enforcement. The cost of an attorney is already

283. Tamara King & Benjamin White, *An Attorney's Role in the Conduct Process*, ASS'N FOR STUDENT CONDUCT ADMIN. 4, http://www.theasca.org/files/Best%20Practices/Attorney%20role%20in%20conduct%20process%20%202.pdf ("When attorneys are introduced into the equation, the focus shifts from taking responsibility for one's actions to 'getting the student off'. [sic] The attorney is not to blame for this mindset as that is how they have been trained.").

284. D. Matthew Gregory & Laura Bennett, *Courts or Campuses? Different Questions and Different Answers*, ASS'N FOR STUDENT CONDUCT ADMIN. L. & POL'Y REP. 6 (May 1, 2014), http://www.theasca.org/Files/Publications/LPR487May12014.pdf; *see also* Osteen v. Henley, 13 F.3d 221, 225 (7th Cir. 1993) (noting the cost to the university of hiring its own lawyer to counteract the student's lawyer as a reason to say that students are not entitled to lawyers).

285. *See also* AM. LAW INST. (DRAFT NO. 1), *supra* note 51, at 9 § 1.3 cmt. (noting some campuses are "in rural areas remote from legal resources").

286. *See supra* text accompanying note 6; *see also* Carol E. Jordan, Jessica L. Combs & Gregory T. Smith, *An Exploration of Sexual Victimization and Academic Performance Among College Women*, 15 TRAUMA, VIOLENCE, & ABUSE 191, 191 (2014) (finding that sexual assault negatively impacts students' grades).

287. *See* Laura Hilgers, *What One Rape Cost Our Family*, N.Y. TIMES (June 24, 2016), http://www.nytimes.com/2016/06/24/opinion/what-one-rape-cost-our-family.html (detailing one family's approximately $245,000 in out-of-pocket costs and lost wages to date from daughter's sexual assault); *see also* WHITE HOUSE COUNCIL ON WOMEN AND GIRLS, *supra* note 119 ("Each [of the studies] . . . found the costs to be significant: ranging from $87,000 to $240,776 per rape.").

288. In the short term, providing legal counsel for survivors may cause increased demand for on-campus services, such as mental health counseling. This outcome would result in a real cost if present personnel could not absorb the increased demand. Yet a policy that gave survivors counsel and thereby increased reporting should eventually cause demand for all services to decline as assaults are deterred.

an obligation of the institution in some cases,[289] and survivors have a claim against the institution if these costs are not paid.[290] Survivors who find private counsel might start asking for reimbursement after this Article is published. Lawsuits are also possible for "deliberate indifference,"[291] and the settlements can be large.[292] If the institution knows that a survivor needs an attorney in order to navigate the institution's process for eliminating the harassment and remedying its effects and the institution fails to provide her one, then the institution's response is arguably "clearly unreasonable"[293] and should be considered deliberately indifferent.[294] The institution should be held liable for the harm that could have been avoided had it responded appropriately to the survivor's victimization.

How can schools pay for legal counsel for survivors? Are there ways to contain the costs? Depending upon the size of the school, it may make sense to employ an attorney instead of paying lawyers in the community to do this work. To put two lawyers on staff, one for the survivors and one for the accused students, would not break the bank of any of those schools who compete in Division I sports.[295] Schools that spend millions of dollars on their sports programs, with

289. *See infra* notes 375, 380-382, 383-386, 388-389, 397 and accompanying text (describing the legal obligation to provide services for complainants in various contexts).

290. *See* Bolger, *supra* note 41, at 2112-13 (noting that OCR has required schools to reimburse "a variety of expenses, including . . . counseling treatment" when the school failed to remedy the hostile environment promptly and treatment was necessary to "ensure equal access to education programs").

291. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998).

292. There have been many well-publicized settlements lately. *See, e.g.*, Settlement Agreement and Release, Doe v. Univ. of Or., No. 6:15-cv-0042 (D. Or. Aug. 3, 2015) (agreeing to pay the plaintiff $800,000 plus a full waiver of tuition, housing, and student fees for four years of further education at the University), http://media.oregonlive.com/education_impact/other/Doe%20v%20UO%20Settlement%20Agreement%20%28fully-executed%29%20080315_Redacted%5B1%5D.pdf; Settlement Agreement and Release, Doe v. Univ. of Tenn., No. 3:16-cv-00199 (M.D. Tenn. July 5, 2016) (paying $2,480,000 to eight plaintiffs to settle all claims), https://assets.documentcloud.org/documents/2942750/Settlement-Agreement-University-Of-Tennessee.txt; Settlement Agreement and Mutual Release, Kinsman v. Fla. State Univ. Bd. of Trs., No. 4:25-cv-00235-MW-CAS (N.D. Fla. Jan. 25, 2016), http://www.gannett-cdn.com/experiments/usatoday/Sports/1-25-2016-FSU-Signed-Settlement-Agreement.pdf (agreeing to pay $950,000 to settle all claims).

293. *See, e.g.*, Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 648 (1999).

294. *See* Hernandez v. Baylor Univ., No. 6:16–CV–69–RP, 2017 WL 1322262, at *2, *6 (W.D. Tex. Apr. 7, 2017) (denying defendant's motion to dismiss student's Title IX claim when, *inter alia*, staff at counseling center and staff at health center were too busy to help victim); Kelly v. Yale Univ., No. Civ.A. 3:01–CV–1591, 2003 WL 1563424, at *4 (D. Conn. Mar. 26, 2003) (denying Yale summary judgment on plaintiff's Title IX claim because "Yale's failure to provide Kelly with accommodations, either academic or residential, immediately following Nolan's assault of her, was clearly unreasonable given all the circumstances of which it was aware"); *supra* note 113 and accompanying text; *cf.* United States v. Terrell Cty., 457 F. Supp. 2d 1359, 1367 (M.D. Ga. 2006) (granting plaintiff's motion for summary judgment pursuant to the Civil Rights of Institutionalized Persons Act in light of gross deficiencies in a jail because "the failure to implement interim measures to alleviate these conditions demonstrates deliberate indifference").

295. To avoid conflicts of interest, the lawyers should ensure that they are not in the same "firm." MODEL RULES OF PROF'L CONDUCT r. 1.10 & cmt. 1 (AM. BAR ASS'N 1983); *see also id.* r. 1.0(c) (defining "firm"). The determination depends upon the facts. *Id.* at cmt 2. It seems wise for the attorney for complainants and the attorney for accused students to operate as two independent law offices that also are not part of the university's legal department. Funding the attorneys from the same source, such as the university's general revenue, should not make them part of the same firm. Consider that both prosecutors and defense attorneys can be funded by the government, but they are not part of the same firm.

many schools spending upwards of $100 million a year, should not claim they lack resources for legal services for survivors.[296]

If the institution has a law school that can offer a post-graduate fellowship to a new member of the bar, the cost of a lawyer need not be high. Yet if the institution does not have a law school or if this amount of money is still too much, then schools can form a consortium and share a lawyer who will represent students alleging gender-based victimization. ALI recommended a consortium for "schools with smaller resources" with respect to investigators and decisionmakers,[297] and this recommendation makes sense with respect to attorneys too. The University of Oregon, Lane Community College, and Northwest Christian University will soon share the services of an attorney for survivors, and funders are currently considering a proposal that would expand the consortium to include four additional institutions of higher education in the area. Schools might also consider entering a memorandum of understanding with a legal service provider in the community and thereby negotiating a better rate. Or, as Harvard Law School does, a school can set a fee structure to contain the costs of providing legal assistance.[298]

There is also the possibility of outside funding. Existing grant programs are one possible resource.[299] "Campus Sexual Assault" was highlighted as a target area in the 2016 solicitation for the Legal Assistance to Victims program administered by the Office of Violence Against Women.[300] In addition, several authors have suggested that schools should create a list of local attorneys who are willing to provide pro bono representation to students.[301] The list might expand to include parents of students and former students when those parents are retired lawyers.[302] Sometimes law students might be able to provide the representation.[303]

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296. *NCAA Finances*, USA TODAY, http://sports.usatoday.com/ncaa/finances/.

297. AM. LAW INST., *supra* note 44, at 9-10 § 7.1 cmt.

298. *See supra* note 44.

299. *See* Office on Violence Against Women, *OVW Fiscal Year 2015 Grants to Reduce Sexual Assault, Domestic Violence, Dating Violence, and Stalking on Campus Program Solicitation*, U.S. DEP'T JUST. 7 (2015), https://www.justice.gov/sites/default/files/ovw/pages/attachments/2015/02/09/campus_program_solicitation2.pdf. *See generally supra* notes 103-107 and accompanying text. Some states' Victims of Crime Act programs also are highlighting campus sexual assault, and their funding can cover campus legal services. *See 2016-2019 Victims of Crime Act Competitive Project Grant Application*, OR. DEP'T JUST. 10-11 (2016), http://www.doj.state.or.us/victims/pdf/2016_voca_competitive_rfa.pdf (describing as a "priority area" programs that provide advocacy services to campus sexual assault or stalking survivors). UO's Student Survivor Legal Services receives VOCA funding for its program.

300. Office on Violence Against Women, *supra* note 22, at 5 ("OVW recognizes the need for comprehensive approaches to legal services for college and university students who are victims of sexual assault, domestic violence, dating violence, and stalking on and off campus").

301. Berger & Berger, *supra* note 44, at 344; Mossman, *supra* note 54, at 627.

302. Comment of Diane Rosenfeld, Title IX Advocacy in the Trump Era: A Coordinated Response, Stanford Law School, May 2, 2017.

303. *See* GOV. TERRY MCAULIFFE'S TASK FORCE, *supra* note 2, at 79 (recommending that "Virginia's public and private law schools should determine ways in which law students could participate in these programs through an academic clinic or a non-credit volunteer program"); Mossman, *supra* note 54, at 626 (suggesting a "network of law school students and professors" who would "provide pro bono advice or representation").

Because the competent representation of survivors requires an attorney trained to understand sexual and domestic violence, a school should educate its pool of pro bono and student attorneys about this topic specifically, which should not be a great expense.

Other possibilities exist, too. A school might limit free legal assistance to those students who are financially needy, although some flexibility seems warranted since complainants may be reluctant to ask parents for help to pay for legal counsel and parents may refuse even if asked. Alumni might set up a fund to assist complainants. Student government might allocate student fees to support an attorney position. Schools should explore all these possibilities.

Schools can obviously only afford what they can afford. But many colleges and universities can afford what this proposal requires. Even if only large or rich universities and colleges offered free legal services to survivors, a lot of students would benefit. In addition, Congress might consider requiring schools to disclose what free legal services they offer to survivors as part of their Clery Act obligations.[304] Schools would then have a financial incentive to provide survivors with attorneys. Consumers of higher education would be able to evaluate which institutions really care about helping survivors and ending sexual violence on campus.

C. Potential Conflicts of Interest

Campus administrators might wonder whether they can provide attorneys to survivors without creating conflicts of interest for the lawyers. Of course, a conflict of this type only becomes a concern if the university employs the survivor's attorney. There is nothing to stop a school from structuring the arrangement in another way. For example, the university could reimburse the student for the cost of her legal services or arrange free services for survivors from an outside organization, such as a local law firm.

However, the university could employ the survivor's attorney. The attorney need not have her loyalty torn between her client and her employer in a way that poses an ethical problem. In most instances, the institution and the survivor have similar interests and so no conflict exists. Both want to mitigate the effects of the victimization on the survivor. This is true even if the institution has contributed in some way to the victimization or the hostile environment; the institution is still legally obligated to remedy the effects.[305] In fact, student survivors' needs are typically best met by a largely collaborative relationship between the survivor's attorney and the college's administration.

The most obvious potential or actual conflict exists when the student has or might have a claim against the college. However, lawyers are allowed to limit

304. 20 U.S.C. § 1092 (f)(8)(b)(vi) (2012); 34 C.F.R. § 668.46 (b)(11)(iv) (2016).
305. *See infra* text accompanying note 391.

the scope of their representation,[306] and clients are allowed to waive conflicts.[307] Therefore, the college could employ the attorney so long as the student was informed that the attorney was an employee of the college and that the attorney would not sue the college. The client would need to waive any potential conflict before representation began.

Yet there still may be concerns that the attorney would not fight as hard for her client if she fears the university could fire her for doing so.[308] The risk of a conflict seems low given the way in which the university's and the survivor's interests are generally aligned and given the consented-to limits of the attorney's representation. Nonetheless, the attorney should not be part of the general counsel's office and the general counsel should have no control over the attorney's employment, compensation, or client files. In addition, the source of the attorney's funding should be structured so as to minimize potential conflicts. To the extent possible, the attorney should have a multi-year contract, and decisions about refunding the position should be allocated to an entity with interests that align with survivors, like a law school's domestic violence clinic. It is also good practice for the attorney to have a policy, approved by the university at the outset of the project, that he or she will inform the client if the client has a potential legal claim against the university and will provide the client with the names of lawyers in the community who might represent her.

The fact that the U.S. military uses a similar model suggests its acceptability. The U.S. military employs the attorneys who represent survivors of sexual and gender-based violence in the military.[309] Federal legislation makes clear that the attorney and client have an attorney-client relationship,[310] and the attorney performs a wide-range of tasks for the survivor. However, the attorney cannot sue the United States.[311]

Despite the fact that it is a bit messier to have the university employ the survivor's attorney than to have the university hire outside counsel for the survivor, on-campus legal services have several advantages over the alternatives. First, on-campus legal services are the most convenient for survivors and their availability increases the likelihood that students will access the service, even if

306. MODEL RULES OF PROF'L CONDUCT r. 1.2(c) (AM. BAR ASS'N 1983).

307. *Id.* r. 1.7(b)(4).

308. Joe Drape, *Stanford Drops Lawyer Who Advised Students in Sexual Assault Cases*, N.Y. TIMES (Feb. 9, 2017), https://www.nytimes.com/2017/02/09/sports/stanford-lawyer-sexual-assault-accusations.html. *But see* Fernanda Zamudio-Suaréz, *Stanford U Says Lawyer Was Not Dismissed Over Criticism*, CHRON. HIGHER ED.: THE TICKER (Feb. 14, 2017), http://www.chronicle.com/blogs/ticker/stanford-u-says-lawyer-was-not-dismissed-over-criticism/116898.

309. *See supra* text accompanying notes 168-174 (describing special military program to address service members' victimization).

310. See 10 U.S.C.A. § 1044e(c) (West 2016).

311. *Id.* § 1044e(b)(4).

only to figure out how it might benefit them.[312] As the Director of Student Legal Services at Penn State said, "For college students, there are enormous barriers to legal services. Money and transportation are common problems."[313] While an outside lawyer could be given office space at the university and perhaps achieve a similar on-campus presence, the provision of the office space and the preferential treatment among outside lawyers creates the same potential conflicts as employment by the institution.[314] Second, on-campus services may be the least costly option for some universities, depending upon the number of students on campus who might want to access the service. Overall, campuses should strive to have the legal services accessible on campus and work to eliminate or reduce any potential conflicts of interest that such an arrangement might pose.

D. Litigation Risks to the Institution

Campuses may not want to provide attorneys for survivors or encourage survivors to consult with attorneys because administrators may believe this service is not in institutions' own best interest. General counsel may perceive that "lawyering up" survivors would expose his or her campus to liability, especially when it is still adjusting to a complex regulatory environment.

No empirical evidence exists that suggests this proposal would cause more survivors to file complaints with OCR or to sue their institutions. In fact, the survivor might have *less* reason to complain when the institution provides her with an attorney because that attorney can help her obtain the remedies she needs, both within the university and in the civil and criminal systems. A student might also be less likely to sue the university because she would be more likely to feel that its process made sense.

Admittedly, a certain risk might exist because the lawyer could identify the institution's shortcomings to the survivor. The likelihood that the survivor would act on this information, however, is probably slight. Even if the university makes egregious errors, most survivors have a lot to worry about in the aftermath of their victimization. Complaining about their universities is not typically high on their list of priorities. If it were otherwise, institutions would have seen far more

312. *Cf.* Aarti Nasta et al., *Sexual Victimization: Incidence, Knowledge and Resource Use Among a Population of College Women*, 18 J. PEDIATRIC & ADOLESCENT GYNECOLOGY 91, 95 tbl.5 (2005) (reporting that 22% of participants who reported being sexually assaulted utilized on-campus resources but only 6% utilized off-campus resources); *Making the Grade? Findings from the Campus Accountability Project on Sexual Assault Policies*, STUDENTS ACTIVE FOR ENDING RAPE & V-DAY 9 (2013), http://www.vday.org/~assets/downloads/2013-Campus-Accountability-Project-Full-Report.pdf (noting that "[o]n-campus counseling centers may be more accessible to survivors as compared to off-campus therapeutic resources" and "on-campus counseling centers could facilitate survivors' access to mental health services").

313. Mroz, *supra* note 23, at 32.

314. *See supra* note 308 and accompanying text.

suits than they have so far. If the survivor's lawyer limits the scope of her representation to exclude suing the institution, then the survivor would have to take initiative either to find another attorney or to file an OCR complainant, and that is a significant barrier.

Most important, it seems wrong to allow an institution to claim that these sorts of risks are a reason to defeat this proposal. A suit would arguably serve the useful purpose of giving the institution notice of problems within the institution so that they could be remedied. Moreover, the survivor would simply be enforcing her legal rights, and the institution should bear the cost of its own non-compliance. In addition, the university can insure against the risk of a suit.[315]

E. Obligations to the Accused Student

Does the provision of free legal counsel to survivors then require a school also to give free legal counsel to accused students? If the law requires this, or if a school would want to do this to avoid accusations that it treats some of its students unfairly, then the school might again be concerned about cost. Yet, the concern about cost has already been addressed above, and it is not a sufficient reason to reject this proposal.

As it turns out, OCR Guidance gives a school some flexibility with regard to whether it must provide accused students and survivors with legal counsel to the same extent. While the school must treat the students equally during the disciplinary proceedings, the school need not treat the students similarly after a finding of responsibility. In addition, it is debatable whether counsel is required for accused students in the period before the disciplinary proceedings (when interim measures are provided to the survivor). Nonetheless, it is good policy to treat both students similarly before a determination of responsibility because, as described below, providing the accused student with counsel produces its own benefits. A brief discussion of these three time periods illustrates that schools have some flexibility regarding whether to treat the survivor and the accused student identically.

First, nothing prohibits a school from treating the students differently *after* a finding of responsibility. In fact, institutions have the *obligation* to offer the survivor legal services during this period if they are needed "to remedy the hostile environment."[316] Also, at this point in time, offering only the complainant an attorney raises no constitutional concerns because the proceedings have ended and the students are not similarly situated.

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315. *See* Robb Jones, *Title IX Sexual Violence Claims and Insurance Coverage: The Basics*, UNITED EDUCATORS: EDUC. MATTERS BLOG (July 15, 2016), https://www.ue.org/about-ue/education-matters/?id=2147485465.

316. Office for Civil Rights, *supra* note 48, at 34 H-1 ("*[A]ll* services needed to remedy the hostile environment should be offered to complainant." (emphasis added)); *see also* Office for Civil Rights, *supra* note 1, at 15-17; *infra text* accompanying notes 383-387.

Second, and in contrast, OCR Guidance makes it likely that a school must offer an attorney to both students for the disciplinary proceedings if it offers free counsel to either student. OCR has emphasized the importance of "[a] balanced and fair process that provides the same opportunities to both parties."[317] OCR has recognized that a balanced process does not require that both sides actually have legal counsel,[318] but a school must treat both students the same way if it allows the participation of legal counsel.[319] While OCR has never addressed whether a school could provide a free attorney only to the complainant if the accused student could bring an attorney or other advisor to the proceedings, this scenario seems unbalanced and that is enough to prohibit it. It is beyond the scope of this Article to analyze whether it would be constitutional for a state institution of higher education to treat the students asymmetrically during the disciplinary proceedings, assuming OCR were to change its guidance to permit it.[320]

317. Office for Civil Rights, *supra* note 48, at 25-26 F-1 (stating that "a school's Title IX investigation must be adequate, reliable, impartial, and prompt and include the opportunity for both parties to present witnesses and other evidence").

318. Violence Against Women Act, 79 Fed. Reg. 62752, 62774 (Oct. 20, 2014) (codified at 34 C.F.R. § 668.46 (2016)).

319. Office for Civil Rights, *supra* note 48, at 26 F-1.

320. While an asymmetrical approach would obviously raise concerns under both the Due Process and Equal Protection Clauses, at first glance it does not appear that either provision would necessarily be violated. Any Due Process Clause claim would be analyzed under *Mathews v. Eldridge*, 424 U.S. 319 (1976), and would turn on case-specific information. *See, e.g.*, Gabrilowitz v. Newman, 582 F.2d 100, 105 (1st Cir. 1978); *see also* Gomes v. Univ. of Me. Sys., 365 F. Supp. 2d 6 (D. Me. 2005) (citing Gorman v. Univ. of R.I., 837 F.2d 7, 12 (1st Cir. 1988)). In some instances, the private interest at stake would be small and in some cases it would be large, depending upon the nature of the accusation. *See Gomes*, 365 F. Supp. at 16 (noting that the private interest was "compelling" when the charges of sexual assault could have caused the accused to be expelled, did cause the student to be suspended for one year, and had a potential impact beyond the university on the student's future opportunities for employment or higher education). The risk of error would also vary dramatically from case to case and place to place. It would require an assessment of the entire process, including the type of participation allowed for lawyers. *See* AM. LAW INST. (DRAFT NO. 1), *supra* note 51, at 24 § 4.4 ("Universities and colleges should recognize the interrelationship between different aspects of procedure in achieving overall fairness."); AM. LAW INST., *supra* note 44, at 42 § 7.8 rptr.'s nn. The government's interest would also vary from case to case and institution to institution. For example, while a school might be concerned about the fiscal burden of providing attorneys for accused students, *see Mathews*, 424 U.S. at 348, that concern might have much less weight if the school already has an attorney on staff who could provide the representation. Notably, a court in 2015 found that the provision of legal counsel only to the complainant did *not* violate the accused student's due process rights. Tanyi v. Appalachian State Univ., No. 5:14–CV–170RLV, 2015 WL 4478853, at *1 (W.D.N.C. July 22, 2015).

The Equal Protection Clause might not prohibit asymmetrical treatment either. Heightened scrutiny should not be triggered because there is no fundamental right to legal counsel outside the criminal context, *see* WAYNE R. LAFAVE ET AL., 3 CRIM. PROC. § 11.2(a) (4th ed. Dec. 2016 update), and the proposal draws distinctions between sexual assault complainants and accused students, not between men and women, *see* Doe v. Univ. of Mass.-Amherst, No. 14–30143–MGM, 2015 WL 4306521, at *8–9 (D. Mass. July 14, 2015); *cf.* Doe I v. Univ. of Cincinnati, 173 F.Supp.3d 586, 606–07 (S.D. Ohio 2016) (holding that alleged unfair procedures, such as not permitting cross-examination of witnesses and denying students' request for an advisor, were not motivated by gender bias, but perhaps by bias in favor of alleged victims of sexual assault and against students accused of sexual assault). So long as it is rational to offer legal services during disciplinary hearings to sexual assault complainants and not to the respondents, then, arguably, no violation of equal protection exists. The rationality of asymmetry is perhaps reflected in the fact that Congress provides funds for civil legal assistance for low-income victims of domestic violence, sexual assault, and stalking, and no one argues that Congress must give equal funding for legal services

Third and finally, it is unclear whether a school could provide free legal counsel as an interim measure only to complainants. Title IX guidance certainly allows asymmetry in the provision of free services that are required as interim measures.[321] But legal services pose a unique problem not raised by other services like counseling. At some point, the complainant's attorney is likely to start preparing for the disciplinary proceedings or engaging in tasks that will affect the disciplinary proceedings, and these acts could arguably undermine the balance required during the disciplinary process itself if the accused student lacks an attorney from the outset.[322]

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to the alleged perpetrators. In the context of campus disciplinary proceedings, asymmetry is rational because of the epidemic of sexual violence on campus, with one in five college-aged women reporting that they have been the victim of a completed or attempted rape. *See* Christopher P. Krebs et al., *The Campus Sexual Assault (CSA) Study: Final Report*, NAT'L INST. JUST. § 5-3 (2007), https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf. Courts should also consider the ability of sexual violence to rob victimized students of their educational opportunities, the role attorneys can play in averting this outcome, and the need to have students report sexual violence so that colleges and universities can get the problem under control.

321. OCR Guidance expressly permits asymmetry outside the disciplinary process itself as the institution responds to the allegations of sexual violence. For example, the regulations adopted to implement the Campus SaVE Act specifically require colleges and universities to tell complainants about their rights and options, including available legal services, 34 C.F.R. § 668.46 (b)(11)(vii) (2016), but the regulations do not require the same for the accused student, Violence Against Women Act, 79 Fed. Reg. at 62763-64 ("Although we encourage institutions to provide written notification of this sort to an accused student or employee, the statute does not refer to or support requiring it."). The Department of Education acknowledged that the accused student may need similar services, and that the provision of relevant information is probably desirable, but not required. *Id.* at 62763 ("[W]e note that responding to these sorts of allegations, whether in the criminal justice system or in an institution's disciplinary procedures will likely be very stressful for the accused as well as the accuser. Therefore, institutions should consider providing the accused with information about existing counseling, health, mental health, legal assistance, and financial aid services both within the institution and in the community."). The permissible asymmetry extends beyond the provision of information about resources to the formalization of arrangements that would make certain services more available. See Office for Civil Rights, *supra* note 48, at 32 G-1 (noting that schools should enter a memorandum of understanding with local victim service providers if possible when the university lacks services that the complainant might need). The permissible asymmetry also extends to the actual provision of the services themselves because interim measures are only required for students who report sexual violence. *See supra* note 201; *infra* note 372; *see also* Henrick, *supra* note 268, at 68 n.83 (citing Indiana Univ., OCR Complaint No. 05-06-2138 (Mar. 6, 2007) (finding no violation of Title IX when the complainant received advocacy assistance about the disciplinary process and during the hearing but the accused student was refused an advocate)). It also extends to the fact that interim services must be provided for free. OCR Guidance on counseling services is illustrative. Consider Office for Civil Rights, *supra* note 48, at 33 G-3:

> If a school provides all students with access to counseling on a fee basis, does that suffice for providing counseling as an interim measure? Answer: No. Interim measures are determined by a school on a case-by-case basis. If a school determines that it needs to offer counseling to the complainant as part of its Title IX obligation to take steps to protect the complainant while the investigation is ongoing, it must not require the complainant to pay for this service.

Consequently, a university must provide free counseling services to a complainant even though all other students, including the accused student, are required to pay for this service. This asymmetry is permitted even though the accused student might suffer trauma after learning that he has been identified as a perpetrator of sexual assault.

322. The fact that attorneys start their work for the disciplinary proceeding before the proceeding begins was recognized recently in the Fair Campus Act, a bill that was introduced in 2015 to require campuses to permit students to have attorneys during the disciplinary process (at the student's own expense). The bill would also require that students have access to the lawyer in time for the lawyer to engage in an investigation and other preliminary matters related to the hearing. Fair Campus Act of 2015, H.R. 3408, 114th Cong. § 163(a)(4) (2015).

While schools may have some flexibility prior to the disciplinary hearing with respect to the allocation of free legal assistance, they should provide access to free legal counsel to both students before the finding of responsibility for at least three reasons. First, if the accused student has an attorney, then the result will seem more legitimate to the accused student, and arguably to others as well. Drawing upon social science research, Deborah Epstein has argued that procedural justice is important for achieving compliance with orders by batterers.[323] In fact, she cites research suggesting that processes that undermine a person's dignity may "result in an increase in future offending."[324] While Epstein's observations may not translate perfectly into the context of campus sexual assault,[325] they provide food for thought. Moreover, Epstein's work leads to a broader conclusion that is definitely applicable here: If the university is trying to inculcate a message that sexual assault and gender discrimination are wrong, then it should insulate the results of disciplinary hearings from the attack that the process was unfair and gender discriminatory.[326]

Second, the accused student's attorney can actually improve the survivor's situation. Some survivors will be more willing to come forward and report when they feel the process is fair to the accused. Also, the availability of attorneys for both students may minimize any due process concerns about other parts of the procedure,[327] some of which may be designed to protect the complainant. Moreover, defense attorneys can help educate clients so that they are less likely to reoffend. Epstein reminds us that defense attorneys don't always have to affirm a client's view that the system is operating unfairly. Rather, "it is at least as important to let clients know when they believe a judge has acted fairly, a prosecutor is being reasonable, or a sentence is not overly harsh."[328] The defense attorney, who typically is trusted, can share with the accused student information about counseling programs, alcohol and drug treatment, and the importance of gender equality.[329] Unfortunately, not all defense attorneys care about gender equality and ending campus sexual violence. Consequently, schools that provide

323. Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1845-46, 1874-84 (2002).

324. *Id.* at 1877.

325. Among other things, the college sexual assault perpetrator (who commits sexual assault outside an intimate relationship) probably has a different profile than the domestic violence perpetrator captured in the studies Epstein relies upon (even assuming the domestic violence perpetrator also commits sexual assault against his partner). In addition, there may be differences between the likely compliance with a campus restraining order and a legal restraining order.

326. Lewis et al., *supra* note 52, at 10 ("[G]iven the imperative for gender equity, what is offered to complainants in terms of advisor/advocate must also be afforded to the accused student.").

327. See AM. LAW INST. (DRAFT NO. 1), *supra* note 51, at 24 § 4.4 cmt. ("[T]he presence of counsel or trained advisors for both complainants and respondents may enhance overall fairness even if other formal procedural safeguards are more limited. There is thus, in a sense, a hydraulic relation between the different components of procedure in formal contested proceedings.").

328. Epstein, *supra* note 323, at 1893.

329. *Id.*

free counsel for accused students should ensure that the attorneys they fund respect the values of the institution. While an accused student can always spend his own dime to hire the attorney of his choice, the institution does not have to pay for representation by a misogynist or someone who lacks concern for survivors.[330]

Third, and most important, providing attorneys to both students will help model the type of care and concern for others that the institution wants all of its students, and especially students accused of sexual assault, to exhibit. Cynthia Farina's thought-provoking article, *Conceiving Due Process*,[331] proposed an alternative to the *Mathews v. Eldridge* test by drawing upon feminist principles. In doing so, Farina argued that to further the ethic of care and responsibility, "a citizen's interaction with the state [including when it acts as "educator" or "discipliner" may not] become[] an experience of frustration, self-loathing or despair."[332] Rather, institutions must "enshrine and nurture" "compassion, responsibility and respect," without losing sight of the fact that these institutions "have also been the sites of the most terrible violence to personhood."[333] Farina convincingly argued that it matters "how government treats its people"[334] and that there exists an "interplay of substance and procedure."[335] Consistent with Farina's vision, the institution should make available an attorney for the accused student at the same time the survivor is offered one because that indicates that the institution cares about the accused student, wants to listen to his position, and does not want to wield power in a way that makes him feel devalued. By providing him an attorney, the institution recognizes his humanity and sees his vulnerabilities, even while acknowledging that patriarchy has given him power over his alleged victim. It says that regardless of whether accused students are "masculine norm-hyper-conformists, group culture-followers, reckless unconscious misogynists, insecure strivers for male bonding, narcissistic egotists, aggressively oblivious nonempathetic advantage-takers, [or] . . . conscious[ly] predatory,"[336] the institution will treat them with "compassion, responsibility and respect" because that is how all members of the community should treat each other.[337] The

330. *See supra* text accompanying notes 260-265 (describing tactics of attorneys that should perhaps disqualify them from employment by the university).

331. Farina, *supra* note 275.

332. *Id.* at 266.

333. *Id.* at 268.

334. *Id.* at 270.

335. *Id.*

336. MacKinnon, *supra* note 97, at 2055.

337. Farina, *supra* note 275 at 268. This approach is consistent with new institutionalism. *See* Kristy L. McCray, *Intercollegiate Athletes and Sexual Violence: A Review of Literature and Recommendations for Future Study*, 16 TRAUMA, VIOLENCE & ABUSE 438, 441 (2015) ("[N]ew institutionalism posits that individuals 'reflect the values of institutions with which they are associated" and "[i]nstitutions may be defined as 'webs of interrelated rules and norms that govern social relationships, comprise the formal and informal social constraints that shape' the choices of individuals within an institution." (citations omitted)). *See generally* Meryl Kenny, *Gender, Institutions, and Power: A Critical Review*, 27 POLITICS 91 (2007).

institution teaches by example. This approach seems especially appropriate for a university that strives to educate its students about appropriate behavior.

For these reasons, schools should offer the accused student a free attorney on the same terms as the complainant. The recommendation to make free legal services accessible to both students at the same time is in accord with the ALI Project's recommendation of "evenhandedness in extending appropriate support services."[338] The recommendation is also already reflected in the current practice of some schools.[339]

Regardless of the merit of the five aforementioned policy concerns (and frankly, they are neither individually nor collectively compelling enough to reject this proposal), schools must still provide some survivors with free legal counsel in some instances. As described next, the law already imposes an obligation on institutions of higher education to provide survivors with legal counsel in some situations, and this legal obligation cannot be avoided by the policy considerations just mentioned.

IV. THE LEGAL OBLIGATION TO PROVIDE FREE LEGAL SERVICES TO SURVIVORS

At present, schools are sometimes legally obligated to provide free legal counsel to students who allege they are victims of campus sexual assault. This Part demonstrates that the obligation to provide free legal counsel to campus survivors exists because: A) Title IX requires campuses to address student-on-student sexual violence; and B) OCR Guidance requires institutions of higher education to eliminate the violence, prevent its reoccurrence, and, if appropriate, remedy its effects. While OCR Guidance has never addressed directly the institutional obligation to provide free legal services to survivors, its open-ended language suggests that such a legal obligation sometimes exists.

A. The Connections Among Title IX, Sexual Violence, and Student-on-Student Conduct

It is not obvious why Title IX, which prohibits sex discrimination in educational institutions,[340] obligates institutions of higher education to address sexual violence between students at all. When Title IX was first proposed, legislators

338. *See* AM. LAW INST. (DRAFT NO. 1), *supra* note 51, at 14 §2.3 cmt.

339. *See id.* at 14 n. 11, § 2.3 cmt. (discussing respondents' services in the UC campus system).

340. *See* 20 U.S.C. § 1681 et seq. *See id.* § 1681(a) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."). The implementing regulations are found at 34 C.F.R. pt. 106. The law applies to any educational program or activity that receives federal financial assistance, and its protection extends to the entire institution. Civil Rights Restoration Act of 1987, 102 Stat. 28 (1988).

were primarily interested in addressing gender discrimination in faculty and administrative hiring, student admissions, and vocational programs.[341] However in 1981, after compelling arguments by Catharine MacKinnon,[342] OCR issued a policy memorandum that said sexual harassment was a form of gender discrimination covered by Title IX.[343] While the definition of sexual harassment in that memorandum encompassed sexual violence,[344] and while courts acknowledged that sexual violence was a form of sexual harassment,[345] OCR really only emphasized the connection between sexual harassment and sexual violence in 2011: sexual violence was sexual harassment because sexual violence was "unwelcome conduct of a sexual nature."[346]

A school's responsibility to address sexual violence perpetrated against a student arises when the "conduct is sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the school's program."[347] The 2011 *Dear Colleague Letter* noted that very severe conduct might create a hostile environment even if it occurred only one time.[348] However, since "sexual violence" covers a range of behavior,[349] including "sexual battery" and "sexual coercion" as well as "rape" and "sexual assault,"[350] a school's legal obligations (and a survivor's legal redress in the civil and criminal systems) will vary depending upon the particulars of the student's experience.[351]

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341. *The History, Uses, and Abuses of Title IX*, *supra* note 250, at 2-3.

342. *See supra* note 93 and accompanying text; Alexander v. Yale, 631 F.2d 178 (2d Cir. 1980) (accepting the theory that sex harassment constituted sex discrimination in violation of Title IX).

343. Memorandum from Antonio J. Califa, Dir. of Litig., Enf't & Policy Serv., to Reg'l Civil Rights Dirs. (Aug. 31, 1981) (cited in U.S. DEP'T EDUC., *supra* note 205, at 2).

344. *Id.* ("Sexual harassment consists of verbal or *physical conduct of a sexual nature*, imposed on the basis of sex, by an employee or agent of a recipient that denies, limits, provides different, or conditions the provision of aid, benefits, services or treatment protected under Title IX." (emphasis added)). A similar understanding of sexual harassment appeared in later guidance too. *See, e.g.*, Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, U.S. DEP'T EDUC. vi (Jan. 2001), https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf (defining sexual harassment as "conduct of a sexual nature [that] is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from the education program or to create a hostile or abusive educational environment"). Official notice of the 2001 guidance's release can be found at 66 Fed. Reg. 5512 (Jan. 19, 2001).

345. Soper *ex rel.* Soper v. Hoben, 195 F.3d 845, 854-55 (6th Cir. 1999); Doe *ex rel.* Pahssen v. Merrill Cmty. Sch. District, 610 F. Supp. 2d 789, 808 (E.D. Mich. 2009).

346. Office for Civil Rights, *supra* note 1, at 3.

347. *Id.*

348. *Id.*

349. OCR defines "sexual violence" as "physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to the victim's use of drugs or alcohol. An individual also may be unable to give consent due to an intellectual or other disability." *See* Office for Civil Rights, *supra* note 1, at 1. Consequently, sexual violence includes everything from using a firearm to rape someone to using guilt to pressure someone to consent to a kiss. *See* Lisa Fedina et al., *Campus Sexual Assault: A Systematic Review of Prevalence Research from 2000-2015*, TRAUMA, VIOLENCE & ABUSE 1, 11 (2016). The most prevalent sexual violence is "unwanted sexual contact and sexual coercion . . . followed by incapacitated rape and attempted or completed forcible rape." *Id.* at 13.

350. Office for Civil Rights, *supra* note 1, at 1-2.

351. OCR attaches responsibility to an institution when "the harassment rises to a level that it denies or limits a student's ability to participate in or benefit from the school's program based on sex." Office for Civil Rights, *supra* note 344, at 5; *see* Fedina, *supra* note 349, at 15 (noting the diversity in experience

Early cases against schools tended to involve allegations against people who had authority over the student, such as coaches or teachers,[352] but by the mid-1990s courts were holding schools liable for their responses to student-on-student sexual harassment.[353] In 1999, the Supreme Court decided *Davis v. Monroe County Board of Education*,[354] and eliminated any remaining doubt about whether Title IX imposed obligations on institutions to address such behavior.[355] OCR had already recognized that Title IX reached this behavior two years before *Davis* was decided. OCR had issued guidelines entitled, "Sexual Harassment Guidance: Harassment of Student by School Employees, *Other Students*, or Third Parties.[356] OCR's Revised Guidance in 2001 kept the same title and the same interpretation of Title IX.[357]

"has substantial implications for victim services, including the provision of . . . legal services"). For example, to the extent that interim measures are supposed to be "proportional," then legal services might not be required for a student who suffers the most minimal type of sexual violence, like an unwanted kiss, although determinations should be made on a case-by-case basis, not categorically. *See* AM. LAW INST. (DRAFT NO. 1), *supra* note 51, at 13 § 2.2 cmt. ("misconduct that is relatively minor, for example, would ordinarily not warrant temporary measures as intrusive as those imposed for the most egregious reported misconduct"); AM. LAW INST., *supra* note 44, at 2 § 6.2 rptr.'s nn. (noting that conduct "that is relatively minor in scope" may be "more appropriately addressed through an informal educational process than a disciplinary process").

352. *See, e.g.*, Alexander v. Yale Univ., 631 F.2d 178 (2d Cir. 1980) (former female student and male music professor); Lipsett v. Rive-Mora, 669 F. Supp. 1188 (D.P.R. 1987) (female resident and male staff surgeon), *rev'd sub nom.* Lipsett v. Univ. of P.R., 864 F.2d 881(1st Cir. 1888); Bougher v. Univ. of Pittsburgh, 713 F. Supp. 139 (W.D. Pa.) (female student and male professor), *aff'd on other grounds*, 882 F.2d 74 (3d Cir. 1989).

353. *See* Doe v. Petaluma City Sch. Dist., 54 F.3d 1447, 1452 (9th Cir. 1995) (noting that a counselor might not be entitled to qualified immunity in 1995, but at the time of the peer-on-peer harassment in 1992, it was not clearly established that a school had a responsibility to deal with peer-on-peer harassment). *But see* Seamons v. Snow, 84 F.3d 1226, 1232 n.7 (10th Cir. 1996) (reflecting that a school's liability for the actions of students is unclear).

354. 526 U.S. 629 (1999). That case involved a fifth-grader who for months was subjected to sexual harassment by a classmate. The school did virtually nothing to stop the abuse, leading the victim to suffer in her studies and contemplate suicide. *Id.* at 634. The perpetrator's actions deprived the victim of an educational opportunity because the violence was "severe, pervasive, and objectively offensive." *Id.* at 651.

355. In finding that a claim existed against the school board, the Supreme Court explained that the school board was not directly responsible under Title IX for the perpetrator's acts. Rather, the school board was responsible for "its *own* decision to remain idle in the face of known student-on-student harassment in its school[]." *Id.* at 641. The school had the "authority to take remedial action," *id.* at 644, and "control over the harasser and the environment," *id.* at 644, but the school did almost nothing to stop the abuse. The school did not "respond to known peer harassment in a manner that [was] not clearly unreasonable," *id*. at 648-49, and this "deliberate indifference" subjected the school district to liability, *id.* at 647. In *Davis*, the standard that the Supreme Court articulated for liability (deliberate indifference) applies to a private lawsuit and not to an administrative enforcement proceeding. *See id.* at 639; Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 283 (1998); *see also* Office for Civil Rights, *supra* note 344, at iv.

356. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034, 12039 (Mar. 13, 1997) (emphasis added).

357. Office for Civil Rights, *supra* note 344.

B. OCR's Guidance on Institutional Obligations Under Title IX

1. An Undiscussed Issue

OCR Guidance details the ways in which colleges and universities must address student-on-student sexual violence. Generally, "[i]f a school knows or reasonably should know about student-on-student harassment that creates a hostile environment, Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects."[358] The institutional response has to be prompt and effective. It must include providing survivors with interim measures pending the resolution of any disciplinary hearings. In addition, a school must remedy any effects caused by its own failure to respond appropriately to the sexual violence and any effects caused by sexual violence for which it is responsible, most notably when its employee was the perpetrator.[359]

These general obligations, which are described in more detail below, trigger an obligation to provide free legal services to some survivors in some instances. While OCR Guidance does not expressly say that schools must provide free legal services, its language is broad enough to require the provision of free legal services. The goals of Title IX are also advanced by this interpretation. Nor has OCR ever excused schools from this obligation when it would otherwise arise under its guidance.

Admittedly, opponents of such an idea can point to language that might support the opposite conclusion. For example, the 2011 *Dear Colleague Letter* merely "recommends" that schools "make victim resources, including comprehensive victim services, available."[360] OCR's 2014 *Questions and Answers* spell out a "school's basic responsibilities to address student-on-student sexual violence," and suggests that schools only need to make survivors "aware" of any available legal resources. It says,

> Title IX requires a school to protect the complainant and ensure his or her safety as necessary, including taking interim steps before the final outcome of any investigation. . .If the school determines that the sexual violence occurred, the school must continue to take these steps to protect the complainant and ensure his or her safety, as necessary. *The school should also ensure that the complainant is aware of any available resources*, such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, *and*

358. Office for Civil Rights, *supra* note 1, at 4; *see also* Office for Civil Rights, *supra* note 344, at 12.

359. *See infra* text accompanying notes 372-402.

360. Office for Civil Rights, *supra* note 1, at 14.

> *legal assistance*, and the right to report a crime to campus or local law enforcement.[361]

OCR's Letters of Findings and Resolutions, issued after an investigation, sometimes suggest that schools need to provide information about legal resources,[362] including by developing resource guides,[363] but they do not chastise schools for their failure to provide legal services to complainants.

Yet statements like those in the prior paragraph do not say that schools *only* need to make survivors aware of available legal resources instead of provide them. Rather those statements merely indicate that schools must provide information about legal resources, not that such information is *sufficient* for a school to meet its Title IX obligations. Nor does OCR's failure to hold schools accountable for their failure to provide legal services mean that the obligation does not exist; it may simply indicate that OCR has not focused on the importance of this service for survivors. Because other language in OCR's Letters of Findings and Resolutions indicates that colleges sometimes must provide resources to survivors, like academic support, housing assistance, or counseling,[364] there is good

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361. Office for Civil Rights, *supra* note 48, at 3 A-5 (emphasis added); *see also id.* at 13 C-5 (stating that "Title IX grievance procedures should also explicitly include . . . in writing . . . sources of counseling, advocacy, and support"); *id.* at 32 G-1 ("The school should also ensure that the complainant is aware of his or her Title IX rights and any available resources, such as . . . legal assistance . . . .").

362. *See* Letter from Shaheena Simons & Damon Martinez to Robert G. Frank, *supra* note 188, at 5-6 (discussing an appropriate response and noting that "[t]he school should also ensure that the complainant is aware of any available resources, such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance"); Letter from Alice B. Wender, Reg'l Dir., Office for Civil Rights, to Teresa A. Sullivan, President, Univ. of Va., Re: OCR Review No. 11-11-6001, at 7 (Sept. 21, 2015), https://www2.ed.gov/documents/press-releases/university-virginia-letter.pdf ("Recipients should also ensure that the complainant is aware of his or her Title IX rights and any available resources, such as advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance, and the right to report a crime to campus or local law enforcement.").

363. Letter from Anurima Bhargava & Gary Jackson to Royce Engstrom & Lucy France, *supra* note 49, at 28-29 ("With respect to students, the Agreement requires the University to . . . develop a resource guide on sexual harassment, including sexual assault, to be posted on the University's website and distributed to students in hard copy and/or electronically upon receipt of complaints of sexual harassment and sexual assault. The guide will contain information on . . . *contact information for all on and off-campus resources for victims of sexual assault;* . . . [and] where complaints can be directed, with clear explanations of the criminal and non-criminal consequences that flow from complaining to particular entities. . . . The guide will ensure that any student who reports sexual harassment or assault will be given information needed to make informed decisions in writing and all in one place that can be referenced easily in the future." (emphasis added)).

364. *See, e.g.*, Voluntary Resolution Agreement, Lyon College, OCR Docket No. 06-12-2184, at 2 (2013), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/06122184-b.pdf (stating that the College's grievance procedures must include a statement regarding remedial actions, including "counseling for the individual(s) alleged to be harassed as well as witnesses and the broader student body"); Letter from Taylor D. August, Reg'l Dir., Office for Civil Rights, to David L. Beckley, President, Rust College 9, https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/06122139-a.pdf (mentioning counseling and academic support as remedies for the effects of sexual harassment); Letter from Anurima Bhargava & Gary Jackson to Royce Engstrom & Lucy France, *supra* note 49, at 16 (identifying the failure to provide a student with an escort while on campus and to provide another student with counseling services as examples of insufficient interim measures); Letter from Taylor D. August, Reg'l Dir., Office for Civil Rights, to Donald V. Weatherman, President, Lyon College, OCR Reference No. 06-12-

reason to think that legal services would also be included if OCR were to focus on this service.

The Department of Education's specific statement about legal counsel within the context of the Campus SaVE Act rulemaking process might seem like more damning evidence against the idea of a legal obligation, at least initially. The 2013 Violence Against Women Reauthorization Act states that schools must give students and employees "written notification . . . about existing counseling, health, mental health, victim advocacy, legal assistance, and other services available for victims both on-campus and in the community."[365] After the Department of Education solicited comments about potential regulations to implement the law, it expressly rejected the idea that schools must provide attorneys for students in disciplinary proceedings if one side was represented. It rejected the suggestion because Congress did not adopt "clear and unambiguous statutory authority" to that effect and it would be a "burden" on schools.[366]

This one statement in the Federal Register certainly doesn't resolve the issue and deserves little weight. First, the comment addresses the general obligation to provide free legal services. It is not focused on the specific scenarios identified by this Article below that trigger the obligation. Second, at best, the statement only addresses the general obligation to provide counsel in "a meeting or disciplinary proceeding." As Part II discussed, attorneys serve many functions outside of the disciplinary process and the Department of Education's language here does not rule them out. Third, although the statement appeared in the Federal Register, it was made in response to a commenter's question and the topic of the question was not itself being considered for a rule. The Department of Education's rationale is so conclusory that its conclusion itself is suspect.[367] For example, it did not articulate the nature of the institutional "burden" or explain why a university shouldn't have this "burden" if it is necessary to remedy its own violation of Title IX. Nor was there any thought about the "burden" on survivors who need but lack legal counsel. Certainly, this statement deserves far less weight than OCR's

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2184, at 10-11, https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/06122184-a.pdf (finding that Lyon College took appropriate steps to remedy the effects of sexual harassment, including but not limited to: allowing the student to finish degree requirements elsewhere at Lyon College's expense and receive course credit toward his degree and reimbursement for services received related to the harasser's conduct).

365. 20 U.S.C.A. § 1092 (f)(8)(B)(vi) (West, Westlaw through Pub. L. No. 114-327).

366. 79 Fed. Reg. 62752, 62774 (Oct. 20, 2014) ("We do not believe that the statute permits us to require institutions to provide legal representation in any meeting or disciplinary proceeding in which the accused or the accuser has legal representation but the other party does not. Absent clear and unambiguous statutory authority, we would not impose such a burden on institutions. We would note, however, that the statute does require institutions to provide written notification to students and employees about legal assistance available for victims, both on-campus and in the community. We encourage institutions to also provide information about available legal assistance to the accused.").

367. *See* S. Utah Wilderness All. v. Dabney, 222 F.3d 819, 828-29 (10th Cir. 2000) (noting that informal agency decisions are not entitled to *Chevron* deference; they may be interpretative rules if the agency's interpretation is "well reasoned" and "has the power to persuade").

guidance in two "significant guidance documents,"[368] although admittedly they are not legally binding either.[369] Most important, the comment was made with respect to the requirement that schools provide students and employees with information about legal resources, as mandated by the 2013 Violence Against Women Reauthorization Act. Yet OCR has stated very clearly that the VAWA Reauthorization Act did not alter a school's Title IX obligations, including as set forth in OCR's guidance.[370] Consequently, the key question is whether an obligation to provide free legal services to some survivors existed prior to the Department of Education's comment. An argument can be made that it did.

2. The Language that Supports the Obligation

This section now discusses OCR Guidance in more detail and identifies four situations in which schools have an obligation to provide free legal services to survivors as part of their responsibility to address student-on-student sexual violence. The situations are the following: when legal counsel is a necessary interim measure;[371] when the school's response would not be prompt and effective without the provision of legal counsel; when the school has failed to respond promptly and effectively to the violence; and, when the school is directly responsible for the student-on-student violence.

i. Interim Measures

Schools must sometimes provide free services to the complainant as "interim measures" in order to mitigate the effects of the victimization. These measures allow the survivor to continue with her education pending the outcome of the disciplinary process.[372] Necessary interim measures are assessed on a case-by-

368. *See* Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007) (describing the significance of that designation); *see also* Office for Civil Rights, *supra* note 1, at 1 n.1 (noting that the letter "does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations").

369. 72 Fed. Reg. at 3436 (mentioning the non-legally binding nature of a significant guidance document).

370. Office for Civil Rights, *supra* note 48, at 44 M-2.

371. *See also* Office for Civil Rights, *supra* note 1, at 15 ("Title IX requires a school to take steps to protect the complainant as necessary, including taking interim steps before the final outcome of the investigation."); Office for Civil Rights, *supra* note 48, at 3 A-5; Sexual Harassment Guidance, 62 Fed. Reg. 12034, 12043 (Mar. 13, 1997) ("It may be appropriate for a school to take interim measures during the investigation of a complaint. . . . In cases involving potential criminal conduct, school personnel should determine whether appropriate law enforcement authorities should be notified.").

372. An "interim measure" is a service or accommodation provided to the student after she files a report but before the matter is formally resolved. *See* White House Task Force, *supra* note 124, at 1. "Interim measures" are sometimes divided into "supportive measures" and "protective measures." The former typically is an option even before the filing of a formal report and includes resources or accommodations for the complainant. The latter category involves restrictions against the respondent, such as moving the respondent from housing, and typically requires a formal report.

case basis by looking at, *inter alia*, the "specific need expressed by the complainant" and "any continuing effects on the complainant."[373] While administrators themselves can provide many of the necessary interim measures, such as changing the complainant's residence hall or class schedule, OCR has never limited interim measures to these types of responses. For example, providing "[m]edical and mental health services, including counseling" are well-recognized as necessary interim measures.[374]

Interim measures must be provided for free: "If a school determines that it needs to offer [a service] to the complainant as part of its Title IX obligation to take steps to protect the complainant while the investigation is ongoing, it must not require the complainant to pay for this service."[375] OCR suggests that a school "enter into an MOU [Memorandum of Understanding] with a local victim services provider if possible" if the school itself does not offer the particular service.[376] Consequently, while schools must ensure that complainants are aware of available legal resources on and off campus,[377] sometimes they will need to provide that service free of charge if it is needed as an interim measure.

For all of the reasons that Part II discussed, schools should recognize that legal services are often a necessary interim measure. Legal services are frequently needed to ensure the victim's safety and her equal access to an education. In fact, asking a survivor to navigate multiple legal and quasi-legal systems without legal assistance is almost certain to impede her recovery and her education.

ii. A Prompt and Effective Response

OCR Guidance makes clear that an institution must have a prompt and effective system for addressing sexual harassment.[378] This responsibility requires a school to take various steps, including having an appropriate grievance process, taking action that will prevent the recurrence of the violence, and remedying its

373. Office for Civil Rights, *supra* note 48, at 33 G-2 ("A school should consider a number of factors in determining what interim measures to take, including, for example, the specific need expressed by the complainant; the age of the students involved; the severity or pervasiveness of the allegations; any continuing effects on the complainant; whether the complainant and alleged perpetrator share the same residence hall, dining hall, class, transportation, or job location; and whether other judicial measures have been taken to protect the complainant (e.g., civil protection orders).").

374. White House Task Force, *supra* note 124, at 5; *see, e.g.*, Letter from Anurima Bhargava & Gary Jackson to Royce Engstrom & Lucy France, *supra* note 49, at 16 (criticizing the University of Montana for failure to "consider or discuss with the complainant any options for her to avoid contact with the other student" and for failure to offer another student "interim measures" to "ensure her safety" once she "began expressing suicidal ideation").

375. Office for Civil Rights, *supra* note 48, at 33 G-3 (discussing counseling); *see also* NOT ALONE, *supra* note 50, at 5 (identifying a "cab voucher" as one potential interim measure).

376. Office for Civil Rights, *supra* note 48, at 32 G-1.

377. *Id.*

378. Office for Civil Rights, *supra* note 1, at 16 ("When OCR finds that a school has not taken prompt and effective steps to respond to sexual harassment or violence, OCR will seek appropriate remedies for both the complainant and the broader student population.").

effects. Sometimes the institution needs to provide survivors with legal counsel in order to meet each of these obligations.

First, institutions must have in place a prompt and equitable grievance procedure. This goes beyond merely publishing a sexual violence policy and letting students know how to report the harassment.[379] OCR has explained: "A grievance procedure applicable to sexual harassment complaints cannot be prompt or equitable unless students know it exists, *how it works*, and how to file a complainant."[380] Some students need legal services to understand how the campus system works. When the university's system for reporting or addressing sexual violence is sufficiently complicated that a lawyer would be useful, or when even a well-written description of the system overwhelms a survivor, then the failure to provide the survivor with an attorney renders the institution's process inadequate. Without a lawyer, student survivors can find themselves confused, exhausted, and demoralized. They can be deterred from reporting.

Second, when schools know of the violence, they must act to "eliminate the hostile environment and prevent its recurrence."[381] If a lawyer would make the prevention of future violence more likely, such as by helping remove the perpetrator from campus, obtaining a civil protection order, or securing the perpetrator's incarceration, then the school's failure to provide the survivor with one is an insufficient response.[382]

Third, a prompt and effective response requires that the institution address the effects of the victimization after the perpetrator is found responsible.[383] The 2014 guidance qualified the institutional obligation to "remedy its effects" by including the phrase "as appropriate."[384] That phrase harkens back to earlier guidance that limited the school's obligations to redress the effects of sexual harassment to situations when it was responsible in some way for the attack or for not addressing the attack promptly and effectively.[385] Nonetheless, the 2014 guidance also says, without limitation, that "[a]ll services needed to remedy the hostile environment should be offered to the complainant."[386] OCR's list mentions, among other things, "[p]roviding comprehensive, holistic victim services

379. *See, e.g.*, Office for Civil Rights, *supra* note 344, at 14.

380. *Id*. at 20 (emphasis added).

381. Office for Civil Rights, *supra* note 1, at 4 n.32.

382. Sexual Harassment Guidance, 62 Fed. Reg. 12034, 12043 (Mar. 13, 1997) ("Finally, a school should take steps to prevent any further harassment . . . .").

383. Office for Civil Rights, *supra* note 1, at 15.

384. Office for Civil Rights, *supra* note 48, at 2-3 A-5.

385. Office for Civil Rights, *supra* note 344, at 10, 12 (discussing situations in which a school's employee perpetrated the victimization or the school fails to respond promptly and effectively upon notice).

386. Office for Civil Rights, *supra* note 48, at 34 H-1; *see also* Office for Civil Rights, *supra* note 1, at 15 (noting that "effective corrective action may require remedies for the complainant"); *id.* at 16 ("[R]emedies for the complainant might include, but are not limited to: . . . providing counseling services; providing medical services; providing academic support services, such as tutoring . . . .").

including medical, counseling and academic support services, such as tutoring."[387] While legal services are not specifically called out, OCR says that its list is not exclusive. To the extent that an institution must remedy the effects of the violence even when the institution has no responsibility for the violence itself or for making the survivor's situation worse, then legal services should be provided because they are often needed by the survivor.

iii. A Remedy for the Institution's Inadequate Response

It has always been clear that if the institution's response falls short of being "prompt and effective" for ending the harassment and preventing its reoccurrence,[388] then it must remedy "the effects on the victim that could reasonably have been prevented had it responded promptly and effectively."[389] The appropriateness of the institution's response "will differ depending upon the circumstances."[390] However, if the school contributes to the hostile environment in any way after the attack, then the school must remedy the effects of its own post-attack actions or inactions.[391]

There are two ways a school can have an inadequate response. As just suggested, in some cases, the inadequacy will be the school's failure to provide a lawyer, such as when a lawyer is critical for the student's ability to decide whether to report to the institution or when the survivor needs a legal remedy to end the violence. In other cases, the inadequacy will exist for a reason unrelated to the provision of legal services, but the inadequacy itself will trigger the institution's obligation to provide legal services as a remedy.[392] For example, if a

387. Office for Civil Rights, *supra* note 48, at 35 H-1.

388. *See, e.g.*, Office for Civil Rights, *supra* note 344, at 12.

389. *Id.* at 13; *see also* Office for Civil Rights, *supra* note 1, at 16.

390. Letter from Shaheena Simons & Damon Martinez to Robert G. Frank, *supra* note 188, at 6.

391. Office for Civil Rights, *supra* note 48, at 3 A-5; *see also* Sexual Harassment Guidance, 62 Fed. Reg. 12034, 12037 (Mar. 13, 1997) ("[I]f a school's liability depends on its failure to take appropriate action after it receives notice of the harassment, e.g., in cases of peer harassment, the extent of a school's liability for remedying the effects of harassment will depend on the speed and efficacy of the school's response once it receives notice. For instance, if a school responds immediately and appropriately to eliminate harassment of which it has notice and to prevent its recurrence, it will not be responsible for remedying the effects of harassment, if any, on the individual. By contrast, if a school ignores complaints by a student that he or she is persistently being sexually harassed by another student in his or her class, the school will be required to remedy those effects of the harassment that it could have prevented if it had responded appropriately to the student's complaints, including, if appropriate, the provision of counseling services."); Office for Civil Rights, *supra* note 344, at 12 (noting that if "upon notice, the school fails to take prompt, effective action . . . the school is responsible for taking effective corrective actions to stop the harassment, prevent its recurrence, and remedy the effects on the victim that could reasonably have been prevented had it responded promptly and effectively").

392. Office for Civil Rights, *supra* note 1, at 16-17 (recommending that "[s]chools should proactively consider the following remedies when determining how to respond to sexual harassment or violence. These are the same types of remedies that OCR would seek in its cases"; specifically mentioning offering, to both survivors and to the broader student population, "counseling, health, mental health, or other holistic and comprehensive victim services to all students affected by sexual harassment or sexual violence, and notifying students of campus and community counseling, health, mental health, and other student services").

school has a broad mandatory reporting policy, whereby virtually every employee must report sexual violence to the Title IX office, and if the school inadequately or ineffectively warns students about the policy, then its reporting policy can cause a student to experience institutional betrayal and related harm when she discloses to a trusted ally.[393] When that student must then decide whether she wants the disciplinary process to move forward (and perhaps also a criminal investigation that was triggered by the university report), the institution must provide her with a lawyer because it has placed her in a situation that has made her situation worse. Similarly, if the institution encourages survivors to file police reports without giving them legal counsel so that they can make informed decisions, then the institution must provide survivors with lawyers to help them navigate the criminal system. After all, involvement in the criminal justice system is an "emotionally draining experience that, more often than not, re-victimizes the rape survivor and increases her need for an array of legal services."[394]

iv. A Remedy for the School's Responsibility for the Sexual Violence

Finally, if the school itself was responsible for the sexual violence then a school has an obligation to remedy the effects. The examples of responsibility provided in OCR Guidance involve an employee of the school,[395] such as a professor who victimizes the student.[396] Schools often employ students, such as resident assistants or teaching assistants, and institutional responsibility arises when these students victimize other students. OCR has indicated that when the school bears responsibility because its employee committed the sexual violence, the school may have to provide free services to the survivor to address the effects of the abuse.[397] Of course, one of the effects of a sexual assault is that the survivor needs to navigate various legal and quasi-legal systems and doing so without a competent attorney can enhance, as opposed to reduce, the effects of the abuse. Consequently, if the school's agent created the hostile educational environment, then the school would be directly responsible for remedying the survivor's harm and free legal services would need to be provided to the survivor.

A school's responsibility for remedying the effects of the abuse exist so long as the school has culpability for the perpetrator's attack. Culpability can exist even apart from a school employing the perpetrator. For example, culpability

393. *See* Merle H. Weiner, A Principled Approach to Responsible Reporting (2017) (unpublished manuscript) (on file with author). *See generally* Smith & Freyd, *supra* note 89.

394. Kanter, *supra* note 27, at 260.

395. *See, e.g.*, Office for Civil Rights, *supra* note 344.

396. *Id.*

397. *See, e.g.*, Sexual Harassment Guidance, 62 Fed. Reg. 12034, 12043 (Mar. 13, 1997) ("In some situations, a school may be required to provide other services to the student who was harassed if necessary to address the effects of the harassment on that student. For example, if an instructor gives a student a low grade because the student failed to respond to his sexual advances . . . the school may be required to . . . offer reimbursement for professional counseling; or take other measures that are appropriate to the circumstances.").

may exist when the university knew of an obvious risk and failed to address it, thereby exposing the survivor to the sexual violence. Courts have already recognized this type of responsibility. In *Williams v. Board of Regents of the University System of Georgia*,[398] for instance, the appellate court remanded the case, recognizing that the school could be responsible when the coach recruited a student athlete with a history of sexual assault, allowed the student to live in the dorm, and failed to educate the student about the campus sexual assault policy. In another well-known case, *Simpson v. University of Colorado Boulder*,[399] the court held the institution responsible for a violation of Title IX when the university ran a recruiting program for student athletes that posed a risk of sexual violence, the university knew of the risk, and the university inadequately addressed it. Recently, in *Doe v. University of Tennessee*,[400] the court recognized the potential for institutional responsibility based upon the school's "failure to acknowledge and address the acute risks to female students by a certain segment of its student body [i.e., male athletes] that are well above and beyond the general risks of student-on-student harassment."[401]

An institution needs to remedy the effects of the sexual violence when the institution's prevention efforts were insufficient in light of the known risks. Because certain populations of students on campus pose a high risk of offending (most notably athletes and fraternity members),[402] a school's failure to institute effective prevention efforts will make a school responsible for addressing the effects of the sexual violence. Addressing the effects includes addressing the legal effects, and that requires a lawyer. To be clear, the lawyer would not be provided to the student for the purpose of suing the institution. Rather, the lawyer is needed to address the immediate effects of the assault itself, that is to help the survivor navigate and participate in the three systems that are meant to redress the abuse.

398. 477 F.3d 1282 (11th Cir. 2007).

399. 500 F.3d 1170 (10th Cir. 2007).

400. 186 F. Supp. 3d 788 (M.D. Tenn. 2016).

401. *Id.* at 807.

402. *See* Kristy McCray, *Intercollegiate Athletes and Sexual Violence: A Review of Literature and Recommendations for Future Study*, 16 TRAUMA, VIOLENCE & ABUSE 438, 440 (2015) (citing studies that link athletic participation and sexual violence, but noting "a significant gap in the research"); Sarah K. Murnen & Marla H. Kohnman, *Athletic Participation, Fraternity Membership, and Sexual Aggression Among College Men: A Meta-Analytic Review*, 57 SEX ROLES 145, 153 (2007) (describing a statistically significant association between participation in athletics and/or fraternity life and attitudes related to sexual aggression and self-reports of sexual aggression); Robin G. Sawyer et al., *Rape Myth Acceptance Among Intercollegiate Student Athletes: A Preliminary Examination*, 18 AM. J. HEALTH STUD. 19, 23 (2002) (finding male athletes participating in team-based sports had higher rape-myth acceptance than male athletes participating in non-team sports); Belinda-Rose Young et al., *Sexual Coercion Practices Among Undergraduate Male Recreational Athletes, Intercollegiate Athletes, and Non-Athletes*, VIOLENCE AGAINST WOMEN 1, 11 (2016) (finding student athletes engage in higher rates of sexual coercion than non-athletes, but that self-reported rates of sexual coercion among club, intercollegiate, and recreational athletes were similar).

3. The Benefit of Further Guidance

Because free legal services are arguably required in all of the above scenarios (i.e., when legal services would be appropriate as an interim measure, when a prompt and effective response requires it, when the institution failed to respond appropriately to the survivor's injury, or when the institution caused the survivor's injury), institutions should consider providing free legal counsel to all survivors. A uniform policy is sensible because of the breadth of situations that may trigger an institutional obligation to provide free legal services to a survivor.[403] A uniform response reduces the chance that an institution would get its response wrong by misjudging whether, in fact, it was obligated to provide an attorney in a particular instance. Also, by providing all survivors with free legal counsel, the institution eliminates the burden of case-by-case determinations.

Despite the logic of this argument, some institutions will predictably fail to provide legal counsel to any survivors and will cite the lack of clear language from OCR about the obligation to do so. The possibility of resistance is evident from the recent past: Congress had to pass federal legislation with very explicit obligations to ensure colleges and universities would even tell survivors about the existence of legal services.[404]

Therefore, OCR should clarify its guidance and state that Title IX sometimes requires institutions to provide free legal services to students who have experienced sexual or gender-based violence. If an institution does not provide free legal counsel automatically to all campus survivors, OCR should require the school to assess each situation on a case-by-case basis to determine if the institution must offer the survivor legal counsel. Moreover, OCR should explain that regardless of the school's legal obligation, it is a best practice to make comprehensive services available to all survivors, including free legal services. A Virginia Task Force on Combatting Campus Sexual Violence summed up the proper orientation in 2015: "From the moment a victim of campus sexual violence discloses an assault to campus personnel or other allied professionals (law enforcement, forensic nurses, etc.), it is vital that they receive immediate support, have access to comprehensive services, and understand available options."[405] It notes that "a multidisciplinary, victim–centered approach . . . can help mitigate the trauma that victims experience."[406] Providing the survivor with a lawyer is necessary if the institution wants a victim-centered, comprehensive approach to service delivery. If OCR is reluctant to make these statements to clarify its guidance, then Congress must adopt a law with such language.

403. *Cf.* ASS'N FOR STUDENT CONDUCT ADMIN., *supra* note 54, at 8 (advising that "[t]he same standards should apply to any act of sexual harassment, whether by a student, employee, or campus visitor").

404. *See supra* text accompanying note 16.

405. *Cf.* Herring et al., *supra* note 2, at 14.

406. *Cf. id.* at 11.

V. THE UNIVERSITY OF OREGON'S STUDENT SURVIVOR LEGAL SERVICES

It is now time to give a concrete example of how the foregoing analysis can actually be implemented at an institution of higher education. The University of Oregon is perhaps the first university in the United States to have an on-campus service that offers legal counsel exclusively to survivors of campus sexual assault, domestic violence, dating violence, and stalking, including in campus disciplinary proceedings. This author started the program because the need for this service was obvious. Accused students often hired private attorneys, and sometimes teams of attorneys, to defend themselves when an allegation of sexual assault was leveled against them, but complainants typically lacked legal counsel. Few student survivors had the resources to hire an attorney and free legal services are limited in our community. Survivors were sometimes reluctant to ask a parent for financial help to hire an attorney, in part because this would require the student to tell her parents what had happened and in part because the student (and often the parents) did not realize the importance of an attorney for the survivor's protection and wellbeing. To make matters worse, accused students received free on-campus legal services if they wanted them because a legal organization funded by student fees provided representation to students facing student conduct code proceedings.[407] The accused student might even have two free lawyers if he had received a public defender in the criminal system. Complainants lacked similar services.

Although the project began in response to complainants' need for representation in disciplinary proceedings, it soon became clear that the disciplinary proceedings were only one aspect of why survivors needed an attorney. Survivors often needed legal assistance to address the repercussions of their assault and to help them navigate the three systems that were simultaneously implicated by their victimization: campus, civil, and criminal. Survivors also often needed an attorney at the conclusion of the disciplinary proceedings, when they were trying to figure out questions like, "Can I tell people that X is suspended?" or "What other legal remedies exist?" As the attorney at Student Survivor Legal Services (SSLS) worked with complainants, we also noticed that the lawyer could advocate for survivors' interests as the campus administration formulated policies and funded services.

407. The Associated Students of the University of Oregon (ASUO) funds the Office of Student Advocacy, which provides attorneys to represent students accused of student conduct code violations. *See supra* text accompanying notes 46-47.

A. The Structure

The University of Oregon houses the attorney for complainants in its Domestic Violence Clinic. The Domestic Violence Clinic is located on the University of Oregon campus. It is a law school program that provides free legal services to low-income survivors of domestic violence, sexual assault, and stalking, and almost none of its clients are University of Oregon students. Clinic services are provided by law students under the supervision of two law faculty who are members of the Bar. The Clinic is an educational program and students receive credit for their work.

The program that serves University of Oregon student survivors is called Student Survivor Legal Services (SSLS). Although University of Oregon law students provide most of the services offered by the Domestic Violence Clinic, law students *do not* provide legal services to campus survivors. Student attorneys do not participate in these cases in order to assure survivors that their privacy and confidentiality will be respected, even though, of course, student attorneys must learn the ethical rules that bind attorneys and must practice under the supervision of an attorney who is bound by those rules.[408] Instead, an attorney with no formal teaching responsibilities serves student survivors.

When SSLS began, its attorney was a recent graduate of the University of Oregon Law School. Because the Domestic Violence Clinic's primary mission is education, the attorney position in SSLS was created as a two-year post-graduate fellowship with a starting salary of $37,000. The more senior supervising attorneys in the Domestic Violence Clinic mentored the attorney. In this way, the University of Oregon law school could fulfill its educational mission while also providing a badly needed service for survivors on campus.

As a testament to the importance of the service, the SSLS attorney is staying on in the same position even though the attorney's post-graduate fellowship has now ended. Her salary is being covered primarily by a grant and by funds from the Domestic Violence Clinic, although the Dean of Students and the Title IX office have contributed some funding. The Domestic Violence Clinic will continue to control the hiring, firing, and supervision of the attorney and the position will remain totally independent of the General Counsel's office.

Because the post-graduate fellowship was such a good mechanism for educating a new lawyer to do this important work, the Domestic Violence Clinic has created another post-graduate fellowship. The new attorney will serve student survivors at a nearby community college and at a private college, and if a new grant comes through, the attorney will also serve survivors at four other smaller

408. OR. RULES FOR ADMISSION OF ATTORNEYS § 13.20(1)(d) (2017) (requiring students who are to appear before a court to have taken a class on legal professionalism or to have passed the Multistate Professional Responsibility Examination); *id.* § 13.10(2) (requiring that an Oregon Bar Member supervise the student attorneys); OR. RULES OF PROF'L CONDUCT r. 1.6 (2015) (describing the obligation of confidentiality).

colleges in Lane County. The attorneys in the Domestic Violence Clinic, including the SSLS attorney who serves University of Oregon students, will mentor the new attorney.

B. The Limits of the Representation

Lawyers can define the scope of their representation.[409] Before the SSLS attorney takes on the representation of a student, the attorney makes two points very clear. First, SSLS can't represent the student in a suit against the University of Oregon, although SSLS can represent a survivor in the campus disciplinary proceedings. Second, SSLS can't represent the student in tort litigation, even against the perpetrator.

For various pragmatic reasons, SSLS will not represent a complainant in a suit against the University of Oregon. After all, the University of Oregon employs the SSLS attorney. This restriction has not proven problematic because the needs of SSLS clients are typically best met with a largely collaborative relationship with the administration. Nonetheless, because there is a potential or actual conflict of interest due to the fact that the attorney is employed by the University of Oregon and will not sue the University,[410] clients are asked to waive the conflict expressly.[411] The attorney tells the client that if the client ever has a legal claim against the University, the attorney will tell her and will provide her with the names of lawyers in the community who can represent her, but that the SSLS attorney cannot sue the University of Oregon.

The second limitation is imposed on SSLS by a funding source. Many federal grants prohibit attorneys from bringing tort suits, including the Legal Assistance to Victims program, the Grants to Sexual Assault, Domestic Violence, Dating Violence, and Stalking on Campus Program (Campus Program), and the Victims of Crime Act program.[412] Again, the SSLS attorney explains the limits of her representation and offers to provide clients with the names of tort attorneys in the community if the clients want this information. The SSLS attorney is available, however, to answer survivors' questions about potential tort remedies.

Despite these limitations, the SSLS attorney is able to provide a variety of important services for her clients. The scope of the representation varies depending upon the client's needs. Sometimes the client merely wants brief services, such as someone to answer her questions. Sometimes the client wants full representation and the attorney helps her at the various stages of the different processes.

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409. OR. RULES OF PROF'L CONDUCT r. 1.2(b) (2015) ("A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.").

410. *Id.* r. 1.7(a)(2).

411. *Id.* r. 1.7(b)(4).

412. *See, e.g.*, 42 U.S.C. § 10603d(b) (2012) (describing limits of the Crime Victim Fund); Office on Violence Against Women, *supra* note 22, at 6.

C. Counsel for the Accused Student

The University of Oregon provides free legal representation to complainants and accused students if the other side is receiving free legal representation from an entity at the University of Oregon. Its student conduct code explicitly states, "To the extent the University provides free legal representation to students who are party to student conduct proceedings, it will ensure that free legal representation is equally available to student respondents and student complainants."[413] This policy ensures "procedural fairness" and advances "general principles of equal treatment," both of which are express objectives in the conduct code.[414]

This provision was adopted at a time when accused students received representation from ASUO's Office of Student Advocacy and SSLS was just beginning. The faculty who proposed the language wanted to ensure that a survivor always had access to legal representation when the accused student had a lawyer. So long as the Office of Student Advocacy and SSLS continue to exist, all University of Oregon students, both the accused and the complainant, have access to legal counsel.

D. An Example

To see why a lawyer is so helpful, examine briefly the actions of the attorney in one of the cases handled by Student Survivor Legal Services. During the nine-month representation of a student rape survivor, the attorney took on the full representation of all aspects of the survivor's case. At the time the survivor sought help, she was trying to navigate a criminal and campus investigation, while also still fearing for her safety despite the existence of a campus protective order. The attorney helped the student obtain a Sexual Abuse Protective Order (SAPO), which prevented the perpetrator from having any contact with her. The attorney and client discussed how to manage the SAPO hearing to prevent the defense from using the hearing as an opportunity for discovery. They also discussed timing of the proceedings: a criminal no-contact order would have precluded the client's ability to obtain a SAPO.

The perpetrator had hired numerous lawyers to represent him on the civil protective order case, the criminal case, and the campus student conduct code case. The defense team was very aggressive, but the survivor's attorney successfully coordinated with the local district attorney to prevent a deposition of the survivor. The SSLS attorney also advocated for her client's position during the criminal process. She attended all meetings with the survivor and the District Attorney, and worked with the District Attorney in reaching a plea deal

413. UO Student Conduct Code, *supra* note 126, at Policy No. III.01.01 § 3(II)(2)(e) (addressing student conduct procedures).

414. *Id.* at Policy No. III.01.01 § 2 (addressing student rights).

that was acceptable to the survivor. She also worked with the survivor on her victim impact statement that was given before sentencing. The criminal case eventually concluded with the perpetrator pleading guilty to a felony that required him to undergo a sex offender evaluation and any recommended treatment. The attorney also successfully represented the complainant during the campus administrative process, which ultimately lead to the perpetrator being permanently expelled from campus with a notion on his transcript that he violated the student conduct code.

CONCLUSION

Survivors of campus sexual violence benefit tremendously when they are afforded free legal counsel to help address their victimization. A lawyer can help a survivor complete her education because the lawyer provides invaluable assistance as the survivor navigates the complicated interplay of the civil legal system, the criminal legal system, and the college disciplinary system. Instead of the survivor foregoing legal remedies (including reporting to the university) because she is demoralized by the complexity, overwhelmed by the required steps to access legal remedies, or frightened by the prospect of encountering the accused student's lawyer, the survivor is empowered by an attorney and given the means to take advantage of the laws that were enacted for her benefit. The lawyer is critical to the survivor's ability to gain and maintain control over her situation.

Government officials and campus administrators who believe that lawyers don't matter (or don't matter much) are complicit in perpetuating the gender discrimination that is endemic on higher education campuses. OCR should be more explicit about universities' obligations under Title IX to provide free legal counsel to survivors of sexual violence in some instances. In addition, the Secretary of Education should disseminate to institutions of higher education information that identifies on-campus legal services as one of the "best practices" for responding to incidents of domestic violence, dating violence, sexual assault and stalking.[415] Universities should provide these services to all sexual violence survivors regardless of their legal obligation to do so because doing so is a best practice. If these things don't occur, Congress should pass legislation to make sure they occur.[416]

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415. 20 U.S.C. § 1092(f)(16)(B)(2012) ("The Secretary shall seek the advice and counsel of the Attorney General of the United States and the Secretary of Health and Human Services concerning the development, and dissemination to institutions of higher education, of best practices information about preventing and responding to incidents of domestic violence, dating violence, sexual assault, and stalking, including elements of institutional policies that have proven successful based on evidence-based outcome measurements.").

416. If Congress were to enact legislation, it might consider providing institutions with a safe harbor from survivors' suits if the institution provided all survivors with free attorneys. Institutions shouldn't be totally shielded from liability, but some sort of additional protection might be warranted.

The decisions of OCR and campus administrators to follow this Article's recommendations will "deeply shape women's realities, but from high up and a long way off."[417] Those decisions will be grounded in survivors' experiences, however. Survivors greatly appreciate and value receiving the help of an attorney who can provide them with trauma-informed, client-centered, confidential legal services. Survivors find the attorney's services essential for successfully navigating the confusing campus, civil, and criminal systems that are so important to their safety and recovery. Survivors are grateful for how they can focus more on their studies instead of addressing their victimization, because their attorneys can assist them. By listening to survivors, society can close the gap in services and more effectively address gender discrimination on campuses.

417. MACKINNON, *supra* note 94, at 35.