

**Reconsidering the Red Dot:  
Mapping the Possibilities for Restorative Justice in  
Middlebury's Policy Against SMDVS**

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Senior Thesis

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Middlebury, Vermont

May 2016

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## List of Abbreviations

RJ	Restorative Justice
RJ-SMDVS	A term used to envision a sexual misconduct process at Middlebury to address direct, sexual victimization that is based fully on the principles of restorative justice (see McCold).
RP	Responsible Party
SMDVS	Middlebury's Policy Against Sexual Misconduct, Domestic Violence, Dating Violence, and Stalking as it stood during the fall of 2015
SV	Survivor-Victim

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## Introduction

During the summer of 2015, I became fascinated by the idea of “studying up,” that is, to critically study sources of social power (see Harding).<sup>1</sup> In particular, I pondered what it would mean to study institutions of higher education, the very sites privileged for their knowledge production. I resolved to (somewhat subversively) turn the gaze of the university upon itself.

Broadly speaking, this thesis will explore restorative justice (RJ) as a feminist response to sexual violence on the Middlebury campus. In studying campus rape, it is not my intent to insinuate that college campuses are the geographies of sexual violence; on the contrary, we have long known that experiences with sexual violence occur at substantially higher rates among 18-24 year-old women who are *not* attending university.<sup>2</sup> My interest in writing on this topic was never a given; this line of inquiry was largely (if not wholly) inspired by my experience navigating a rape claim within Middlebury’s Office of Judicial Affairs during the spring and summer of 2014.<sup>3</sup>

This thesis will explore the limits of Middlebury’s Policy Against Sexual Misconduct, Domestic Violence, Dating Violence, and Stalking (SMDVS) as reflected during the fall of 2015. It will also explore the potential for employing RJ as a feminist response to sexual and relationship violence at Middlebury College. This project involves not only the writing reflected in the ensuing pages, but also a related stream of activism and advocacy that I have been involved with during my time at Middlebury, including:

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<sup>1</sup> This is not to suggest that educational institutions are all-powerful and that its subjects are entirely powerless. On the contrary (and in the Foucauldian sense), power exists everywhere. Nevertheless, when scholarship largely focuses on oppressed communities, it may ignore the dynamics of power at play (i.e. - how power is exercised and maintained).

<sup>2</sup> To be certain, men or non-binary people can be SVs, and that women can be RPs.

<sup>3</sup> I do not assume that my experience within the Office of Judicial Affairs at Middlebury is representative of every person’s experience. I am a white, cisgender, upper-class, able-bodied female, and those identities afford me certain privileges and influence both the ways in which I am seen as well as the ways in which I see the world.

- *It Happens Here*, an anonymous storytelling platform that provides a place for survivor-victims (SVs) to share their experiences with the broader Middlebury community (“It Happens Here”).<sup>4</sup>
- *Middlebury Unmasked*, a video-narrative project published on YouTube during March 2015, which discusses six SVs’ experiences navigating Middlebury’s Policy Against SMDVS (Middlebury Unmasked).
- *Dear Campus*, an editorial that I wrote and published during April 2015 to articulate how my assault fractured my sense of trust in the Middlebury community (Orcutt).
- *Go/doe*, a blog which argued that Middlebury should be allowed to follow through with its expulsion of an RP (John Doe) despite his decision to file a civil suit against Middlebury College (“Doe Must Go”).
- *Paperclip Webinar on Sexual Misconduct and Restorative Justice*, a webinar attended by Title IX administrators and a few students during December 2015 to explore the possibilities for restorative justice in Middlebury’s Policy Against SMDVS.
- A monologue that I presented during December 2015 at an event entitled *Taboo*, put on by Feminist Action at Middlebury, which detailed my journey to see the humanity in my own RP (see Appendix B).
- *The Community Dinner on Sexual and Relationship Respect*, a dinner that I held during January 2016 to create a space for students and administrators to articulate the current climate of (and desired norms for) sexual & relationship respect at Middlebury College.
- An interview that I did with *Cosmopolitan.com* in March 2016 describing my decision to remain on campus after being raped and what I’ve learned about the Middlebury community in the process (Smothers).
- A blogpost that I wrote in April 2016 entitled “The Guy Who Raped Me Saw Me Naked (and I liked it),” which unpacks my decision to participate in performance activism at Middlebury and what it meant for to me to finally see shame in the eyes of my RP (“The Guy Who Raped Me Saw Me Half-Naked [and I Liked It]”).

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<sup>4</sup> It is worth noting that “community” here does not just imply Middlebury students, faculty, and staff, but also people who reside in Addison County and are *not* directly affiliated with the College.

After filing my own SMDVS complaint (and subsequently coming into contact with dozens of other SVs who had contemplated that same decision), I became convinced that adjudication-only models are failing to meet the justice needs of many survivor-victims. More recent work has demonstrated that accused parties may be deeply unsatisfied with Middlebury's current model as well ("Reexamining Our Sexual Assault Investigative Process").

At the beginning of each chapter of this thesis, I offer a related personal vignette in italics. It is in no way my intent to assert that my experiences navigating a SMDVS claim are "typical" (see footnote 3). On the contrary, I have elected to include personal narratives in this thesis for three primary reasons. First, my vignettes are offered as a way of blurring the lines between the researcher and the researched. In this way, I offer my lived experience to (a) highlight the *situatedness* of this project and (b) challenge positivist notions of objectivity in a rather confrontational manner. Second, my vignettes are offered to demonstrate how the process of writing this thesis has transformed its author. Finally, my vignettes are offered to underscore the ways in which implementing this thesis at Middlebury College would likely require a massive shift in our collective understanding of sexual assault.

When I first contemplated how to address the violence that had happened to me in my freshman dorm, I was thirsty for information regarding how to best deal with the aftermath of rape. I Googled anything and everything, a quest fueled by insomnia and my enduring skepticism of Middlebury's adjudication-only model. It was during this period of inquiry that I first came across a set of practices that made much more sense to me than those outlined by Middlebury's Policy Against SMDVS, a set of practices referred to as "restorative justice." During the spring of 2014, I was told in no uncertain terms by College administrators that I would not be able to address my rape using restorative principles. My commitment to RJ was only heightened after subsequently

engaging with Middlebury's adjudication-only SMDVS process, a process that, among other things, fractured my sense of trust in the Middlebury community and isolated me from my peer support networks in the name of "confidentiality."

The title of this thesis, *Reconsidering the Red Dot*, deliberately references Middlebury's current bystander intervention program, Green Dot. At present, Green Dot is Middlebury's most visible attempt to address acts of power-based, personal violence on a community scale.<sup>5</sup> Middlebury's Green Dot website defines the terms "Green Dot" and "red dot" as follows:

A 'Green Dot' is defined as any action, choice, word, or attitude that counters or displaces a 'red dot' of violence, reducing the likelihood that someone will be hurt ("Green Dot Violence Prevention Strategy").

Broadly speaking, this thesis urges campus administrators to consider this community's response to sexual and relationship violence after these acts of violence have already happened; it is my aim to challenge Middlebury College to view "red dots" as much more than individualized sites of institutional risk or legal liability. By titling this thesis *Reconsidering the Red Dot*, I aim to interrogate what it would mean for Middlebury College to move beyond violence prevention ("green dots") by developing community-wide investments in (and responses to) the acts of violence that continue to occur on our campus. In this way, the title of my thesis further reinforces my commitment to "studying up" by analyzing the ways in which the Green Dot Violence Prevention Strategy identifies the appropriate site for community-wide intervention as *prevention*. It is my aim to suggest that there may be a role for community members to play that goes far

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<sup>5</sup> As understood by the Green Dot Violence Prevention Strategy, power-based, personal violence includes many of the acts covered under the Policy Against SMDVS, including dating violence, domestic violence, sexual assault, stalking, and harassment.

beyond bystander intervention, namely by permitting affected community members to participate in restorative conferencing in instances of direct sexual victimization.

Part of writing this thesis has involved making sense of how RJ has been fast-tracked at Middlebury from a set of practices that were resoundingly rejected to a set of practices that are now actively endorsed by this institution. As Paul McCold notes, restorative justice is an expansive term that often means “all things to all people” (McCold 358). Admittedly, restorative justice encompasses a rather broad set of practices; my challenge in writing this thesis was to define RJ in a way that reflected a more precise vision for the Middlebury campus. Chapter I of this thesis will explore definitions of restorative justice in greater detail. The understanding of restorative justice employed in this thesis is rooted in the scholarship of McCold, who conceptualizes RJ in terms of degrees of restorative-*ness*. By conceptualizing RJ in this way, I hope to encourage administrators to consider what must be done in order to claim the buzzword of “restoration.” For the time being, it is worth noting two things about restorative justice. First, RJ postulates that crime (or in Middlebury’s case, policy violation) injures people and relationships; “it is axiomatic that justice is a search to repair the injuries between and among those affected” (McCold 399). Second, such injuries involve three key stakeholders: the victim (SV), the offender (RP), and the affected community. I argue that the paradigm offered by restorative justice is a radical break from the prevention culture offered by Green Dot, displacing models where trained “experts” tell audiences what they need to know to usher in models that make community conversation and consensus central.<sup>6</sup>

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<sup>6</sup> During April 2016, as this thesis was coming to a close, Campus PRISM released *A Report on Promoting Restorative Initiatives for Sexual Misconduct on College Campuses*, which contains information on the intersection of prevention culture and RJ.

Chapter II of this thesis will explore RJ in instances of sexual violence, and will offer four case studies to suggest that RJ may indeed be appropriate for some cases of direct sexual victimization. Chapter III of this thesis will explore campus judiciary proceedings at Middlebury College, highlighting (a) campus legalism, (b) professionalized adjudication processes, and (c) a shrinking space for the input of students, faculty, and staff. In underscoring Middlebury's quasi-obsession with legal liability and risk management, Chapter III asks whether the College's overarching goal of student education is compatible with Middlebury's current Policy Against SMDVS. The final chapter of this thesis envisions a fully-restorative model on the Middlebury campus where affected parties can opt to use RJ conferencing (RJ-SMDVS) in the place of Middlebury's current model (SMDVS), which is both single-pathway and adjudication-only in nature.

The intended audience of this thesis has always been administrators at Middlebury College. Due to the limited scope of this project, this thesis contains some notable silences, especially regarding the relationship between RJ and the carceral state. There seems to be a need for further research regarding the relationship between RJ and the surveillance of RPs. In particular, I remain interested in the linkages between Foucault's *Discipline and Punish*, bystander intervention programs such as Green Dot, and restorative practices (including the practices and processes outlined in Chapter II).

Throughout the entirety of this thesis, the term survivor-victim (SV) will be used to replace terms such as "survivor," "victim," and "claimant." This term was largely selected because of its hybridity.<sup>7</sup> The power of the term survivor-victim is that it distances itself from the compulsory

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<sup>7</sup> In the study of rape in particular, the term "victim" is highly problematic. Acquiring the label "victim" is understood as a process that is connected to notions of the "ideal victim," that is, the victim of a Little Red Riding Hood fairytale: a young, innocent, do-gooding female who is attacked by an unknown stranger (Walklate 28). The problem with such constructions is that they create a chasm between deserving and undeserving victims; some

transformation from victim (passive, weak) to survivor (productive, empowered, healing) by linking these two terms and suggesting that they may operate simultaneously. Moreover, this thesis will employ the term responsible person (RP) to replace terms such as “rapist,” “assailant,” “abuser,” and “respondent.” Because this thesis broadly explores restorative justice and RPs’ capacities for learning, growth, and change, the term “responsible person” is used to challenge labels which contain deeply static and negative connotations. By acknowledging both responsibility and personhood, this term attempts to assert that dealing with student misconduct requires *both* accountability and support (for more, see “The RESTORE Program of Restorative Justice for Sex Crimes Vision, Process, and Outcomes” 1626). Recognizing the personhood of someone accused of rape is indeed a marked shift from current Middlebury policy, where individuals who engage in sexual violence are largely (if not exclusively) treated as modern-day pariahs (see Karp et. al. 13).

I am reminded of the image of the red dot, and of what it would mean for the Middlebury community to move beyond professionalized systems and prescriptive policy language towards a model that addresses misconduct by involving and empowering the affected community throughout its justice processes (Karp et. al. 23). As I reflect upon this thesis, I know that I am deeply indebted to the people in my life who have helped me realize my vision for justice in ways that Middlebury’s Policy Against SMDVS simply did not. First, I would like to thank members of the It Happens Here project for helping me make sense of my trauma through activism, especially Luke Carrol Brown, Michelle Peng, Katie Preston, and Shariell Crosby. Next, I’d like to thank Scott Barnicle, Sue Ritter, Angie Walker, and Carter Curran for their profound patience and

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people who are labeled as “undeserving” can never have access to the label of victimhood (Walklate 28). I use the term “survivor-victim” here to both further the conversation surrounding self-identification and to highlight the politics of victimization (politics which, according to Jimenez & Abreu in Chapter III of this thesis, are highly racialized).

kindness. I'd also like to thank Karin Hanta, Dr. Anson Koch-Rein, Catharine Wright, Sandra King, and M. King for putting up with me as I wrote most of this thesis in their place of work. I am also grateful to Dr. Baishakhi Taylor, the Dean of Students, for always keeping her office door open and for (bravely) agreeing to be my second reader. Finally, I am deeply indebted to Dr. Sujata Moorti, who was the first person to teach me that I am indeed a feminist and who has been incredibly gracious in her time with me, especially (but not exclusively) when advising this thesis.

## I. Defining Restorative Justice

*It is October 2015. I am sitting in my carrel in Davis Family Library, working diligently to meet an upcoming thesis deadline. Out of the corner of my eye, I see Him. In an instant, I am brought back to Daniel\* raping me in my freshman dorm. My education, again interrupted.*

*In a flurry of emotion, all I can think about is throwing my shoe. I rationalize that my shoe would be perfect for this purpose; it's easy to remove, aerodynamic, and heavy enough to really hurt. I tell myself that I am strong enough to hurl my shoe through the bookshelves. For the better part of ten minutes, all I can think about is knocking Him out. Point Maddie. One of my many fantasies about revenge.*

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*I am brought back to my impending thesis deadline. Here I am writing about restorative justice- about common ground and healing and reintegration. Feeling like a hypocrite, I decide to pack up my laptop and call it a night.*

*As I head back home, I am left with a sense of great unease. Because I'm still not sure what it is that I so desperately want to knock out of His thick skull.*

\* A pseudonym

### i. Origin Myths of RJ

Admittedly, restorative practices have many origins; they are concurrent, overlapping, and at times contradictory. For example, Elmar G.M. Weitekamp asserts that RJ has been used for the larger part of human existence. Along somewhat similar lines, there is a substantial amount of scholarship linking RJ to indigenous practices (Yazzie; Morris, Maxwell, & Robertson). Yet linkages between RJ and its alleged “roots” in indigenous communities remain highly contested (Coker; Deer; Daly; Tauri). The development of RJ is also linked to various religious practices (Hadley) as well as to U.S. protest movements during the 1960s and 70s (Daly). The proceeding section aims to map the origin myths of restorative justice in an attempt to highlight the expansiveness of this term. This discussion of origin myths will make way for the more precise

typology offered by Paul McCold, which guides the vision of RJ put forth in this thesis (see section III of this chapter).

The ideological origins of restorative justice are highly disputed. Perhaps the most radical view on the origins of RJ asserts that humans have used restorative justice for the larger part of their existence (Weitekamp 97). Citing sources as varied as the Code of Hammurabi and the *Iliad*, Elmar G.M. Weitekamp traces the history of monetary restitution as a form of restorative justice (Weitekamp 83-84). To Weitekamp, monetary restitution in acephalous societies was restorative in that it was centered on the compensation of the victim, not the punishment of the criminal. Weitekamp also discusses the erosion of restorative elements at the turn of the 12<sup>th</sup> century, particularly as the result of the increasingly prosecutorial role played by the state and the church as the result of the Medieval Inquisitions (Weitekamp 89). Ultimately, Weitekamp argues that the use of RJ in both acephalous and early state societies provides promising answers to the current ills of crime and punishment today (Weitekamp 97).

Indeed, much of the literature focusing on the early uses of RJ centers on the changes that occurred in England during the 8<sup>th</sup> to 11<sup>th</sup> centuries (“Restorative Justice: The Real Story” 63). Advocates of this perspective note that after the Norman invasion of 1066, offenses committed against feudal lords were transformed into offenses against the state (“Restorative Justice: The Real Story” 63). For restorative justice advocates, the transformation of disputes as offences between individuals to offences against the state is one element that marked the end of pre-modern forms of restorative justice (“Restorative Justice: The Real Story” 63). Under this narrative, a system of kin-based dispute settlement gave way to a court system dominated by the interests of

feudal lords (“Restorative Justice: The Real Story” 63).<sup>8</sup> In this way, some scholars suggest that shifts in political systems are central to shifts in our collective understanding of modes of justice.

Another common RJ origin myth focuses on the roots of RJ within indigenous or First Nations’ communities. Similar to the scholarship of Weitekamp, this perspective contains a problematic “return to our roots” subtext; many descriptions of RJ in tribal contexts are little more than a paternalist romanticization of the ways in which indigenous peoples can transport colonizing societies out of the toils of twenty-first century justice. In this strain, RJ literature focuses heavily on family conferencing in Maori culture. Under this perspective, the state of New Zealand’s current use of restorative models was highly influenced by traditional Maori practices (Morris, Maxwell, and Robertson 305). This view stresses the importance of Maori traditions requiring atonement for an offense, restitution to the affected party, and the reintegration of an offender back into the community (Morris, Maxwell, and Robertson 305). Yet as criminology scholar Kathleen Daly notes, the modern idea of group conferencing in New Zealand does not have its direct roots in Maori culture (“Restorative Justice: The Real Story” 63). On the contrary, Daly asserts that family group conferencing is “the devising of a (white, bureaucratic) justice practice that is flexible and accommodating towards cultural differences” (“Restorative Justice: The Real Story” 63). As Maori scholar Juan Tauri notes, the development of family conferencing represents “a reaction to Maori counter-hegemonic discourse and activity, rather than the judicial empowerment of Maori” (Tauri 175). Indeed, Tauri argues that the use of RJ in New Zealand amounts to indigenization, that is, (a) the involvement of indigenous peoples in the delivery of *existing* socio-legal services and programs and (b) the recruitment of indigenous peoples and organizations to enforce the laws of the colonial power (Tauri 169; also see Havemann). In this way, these authors suggest that the

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<sup>8</sup> Scholars in this camp further argue that the decline of kin-based dispute settlement in England was demonstrated by an increasing reticence to compensate impacted parties for their losses (“Restorative Justice: The Real Story” 63).

uses of RJ within New Zealand's criminal justice system should not be mistaken for Maori self-determination.

Restorative practices have also been linked to indigenous communities in North America, and particularly to the Navajo practice of Peacemaking. Robert Yazzie,<sup>9</sup> Chief Justice of the Navajo Nation, argues that the Navajo understanding of justice is egalitarian, a system based upon discussion, consensus, relative need, and healing (Yazzie 120). Similarly to Weitekamp, Yazzie notes that Navajo justice practices frequently involve payment to affected or otherwise injured parties (Yazzie 123). Yazzie states that such compensation is not equivalent to Western understandings of "restitution" or "just payment"; alternatively, compensation to affected parties is framed as what it would take (both materially and symbolically) to make an injured person feel better (Yazzie 123-124).

Yet scholars elsewhere have noted the significant differences between Peacemaking and understandings of RJ under U.S. law. For example, when looking at cases involving domestic violence, Donna Coker finds that Peacemaking and hegemonic understandings of RJ are different in several ways. First, Navajo culture provides its own unique concepts and norms for addressing interpersonal violence that are not present in colonizing states, including Navajo understandings of gender harmony (Coker 69). Second, unlike many processes operating in conjunction with U.S. law, such as the RESTORE program outlined in Chapters II & V of this thesis, Peacemaking does not require a RP's admission of responsibility on any level. Finally, unlike many white,

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<sup>9</sup> Deer offers a Native feminist critique of scholars such as Yazzie, "many scholars of indigenous law, mostly men, have suggested that one of the solutions to violent crime in Indian country is to develop 'peace-making' sessions to address criminal behavior. Most of these models purport to be more 'indigenous' than the Anglo-American model because they include talking circles, family meetings, and restorative principles. A Native feminist approach necessarily perceives this construct with a skeptical lens, for it is possible that any system of jurisprudence to play unwittingly into the hands of predators, many of whom use any and all means to excuse, mitigate, or minimize their behavior" (Deer 155).

bureaucratic forms of justice, Peacemaking allows for self-petitioning, where SVs are empowered to initiate Peacemaking without contact with police officers or any other legal processes which would otherwise determine their eligibility for such a program (Coker 69).<sup>10</sup>

Other scholars offer Native feminist critiques regarding the use of RJ to address sexual and relationship violence. In particular, they note that most Native activists and scholars agree that sexual violence was a rare occurrence in their communities prior to contact with Western systems (Deer 160). Deer consequently argues that:

...Imposing a "traditional" remedy for behavior (sexual violence) that is not "traditional" is counter-intuitive. There is a tendency to over-romanticize the peacemaking process as one that can "foster good relationships" and heal victims. In fact, traditionally, many tribal cultures imposed the death penalty (as well as banishment) for sex crimes (Deer 157).

Elsewhere, scholars have interrogated the spiritual roots of restorative justice, particularly with respect to the principles of repentance, forgiveness, and reconciliation (Hadley 9). Indeed, scholars have discussed the relationship between restorative justice and First Nations' spirituality, Chinese philosophy, Christianity, Hinduism, Islam, Judaism, and Sikhism (see Hadley). These perspectives tend to argue that RJ is a deeply spiritual process which has its roots in major world religions (Hadley 8-9).

Another camp of scholars critiques their peers who seek a definitive origin for restorative practices. Daly argues that rather than romanticizing non-Western methods of judgement,

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<sup>10</sup> Deer also notes that the American doctrine of "innocent until proven guilty" is not necessarily consistent with indigenous principles of justice (Deer 154).

restorative justice should be viewed as spliced justice (“Restorative Justice: The Real Story” 64). Under a framework of spliced justice, informal restorative justice processes are seen as piggybacking on a formal, traditional method of prosecuting and sanctioning offenses (“Restorative Justice: Moving Past the Caricatures” 8). Harry Blagg takes this argument a step further, suggesting that attempts to create and romanticize a cohesive origin myth for restorative justice may be both ethnocentric and orientalist (Blagg). Under this view, the many elements that are now referred to as “restorative” evolved from different groups of people (often unknown to each other) who were experimenting with various justice practices concurrently. This perspective stresses the need to question why specific histories and practices of justice in premodern societies are “smoothed over and a lumped together as one justice form” (“Restorative Justice: The Real Story” 63). As a result, Daly suggests that we should abandon individual, ethnocentric “histories” of restorative justice and instead begin to conceptualize a different history “which depicts the multiple streams of activism and social thought that have fed into -- and have been part of -- this global entity called restorative justice” (“Restorative Justice: Moving Past the Caricatures” 3).

One crucial organizing point for the adoption of restorative methods by states were the social movements of the 1960s and 1970s, including the Black civil rights movement and the indigenous and women’s movements (“Restorative Justice: Moving Past the Caricatures” 3). Among other things, these movements challenged the relationship between “offenders” and “victims” under criminal law; both parties increasingly came to see themselves as having common experiences of unfair and unresponsive treatment within existing criminal justice systems (“Restorative Justice: Moving Past the Caricatures” 3). This perspective highlights the new programs and practices emerged in the 1970s and 1980s, including prison abolition, community justice boards, victim-offender reconciliation programs, victim advocacy work, family group

conferences, sentencing circles, and reparation boards (“Restorative Justice: Moving Past the Caricatures” 4-5). In this way, the activism of the 60s and 70s has left a legacy in the present day, particularly in calls to move criminal justice away from the relationship between the state and the defendant/offender towards a model that also views victims and the affected community as key stakeholders (Ashworth 578).<sup>11</sup>

## ii. The Expansiveness of Restorative Justice

Perhaps unsurprisingly, Daly suggests that a search for *the definitive* origins of RJ is futile; “as soon as one nominates a ‘start point,’ others will find even earlier ones, so this will be an on-going revisionist history” (“Restorative Justice: Moving Past the Caricatures” 3). Indeed, given the diverse array of influences contributing to current understandings of RJ, the field is not unanimous about its core values and definitions (Bazemore & Walgrave 46). Thus, rather than nominating a starting point for restorative justice, this thesis alternatively posits that restorative practices have many origins that are concurrent, overlapping, and at times contradictory.

As a result of these histories, restorative justice has a number of different definitions and interpretations; some authors limit restorative justice to face-to-face processes, while others are open to a variety of processes and procedures which run concurrently within formal justice systems (Bazemore & Walgrave 47). One early definition of restorative justice came from Tony Marshall, who defined “restorative justice” as a “process whereby the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future” (Marshall 5). Yet over time, this definition has been widely criticized for not being restorative enough, that is, for not explicitly referring to the reparation of harm as its

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<sup>11</sup> Indeed, the legacy of the Norman invasion of 1066 is that our understanding of justice continues to be rooted in a belief that crime is a violation of state law. By contrast, RJ views crime not as a violation of hierarchal authority, but as a violation of people and relationships (Hadley 9).

central goal (Bazemore & Walgrave 48). Definitions of RJ elsewhere, such as the understanding put forward by Paul McCold, emphasize that crime and wrongdoing create needs and obligations:

Crime is personal. A crime is an injury to people and relationships. Justice is a search to make things right as much as possible. This is a quite different definition from the retributive definition of crime, which considers it as a transgression of a general juridical-ethical rule (McCold 363).

Despite a plethora of research, the term “restorative justice” is riddled with conceptual ambiguity. Indeed, restorative justice has been framed as *both* a general framework as well as a prescriptive model. Daly notes the following:

Although restorative justice means many things to people, there is a general sense of what it stands for. It emphasizes the repair of harms and of ruptured social bonds resulting from crime or other kinds of conflict. It focuses on the relationships between disputants, or between crime victims/offenders, and the families, communities, and societies in which they live (“Restorative Justice: Moving Past the Caricatures” 2).

At its core, RJ orients justice around what people *need* after harm has already occurred (Oudshoorn, Amstutz, & Jakkett 26). Rather than enforcing a one-punishment-fits-all approach to crime, RJ processes are guided by key stakeholders, that is, the affected party, the responsible person(s), and the community (Ashworth 578). Furthermore, restorative justice offers the potential of moving beyond the victim-offender zero sum that espouses that what is good for “victims” must be bad for “offenders.”

Along these lines, Howard Zehr articulates a series of questions to guide restorative inquiry:

- (1) Who has been hurt?
- (2) What are their needs?
- (3) Whose obligation are these?
- (4) Who has a stake in this situation?
- (5) What is the appropriate process to involve stakeholders in an effort to make things right (*Changing Lenses* 48)?<sup>12</sup>

One challenge that emerges when defining RJ involves determining who is a stakeholder in a particular situation. Andrew Ashworth (2002) complicates our understanding of an affected community by asking *who is affected* when a person is targeted because of their identity, including hate crimes articulated along the lines of race, religion, and sexual orientation (Ashworth 583). In such instances, Ashworth suggests that our conception of community might be broader than a geographical entity (Ashworth 582). Furthermore, by allowing different communities to adopt different standards, Ashworth implies that RJ may lack consistency, amounting to “justice by geography” or the “location lottery” (Ashworth 582). Indeed, Ashworth’s analysis asks us to consider the extent to which our understanding of community is both a political and historical construction.<sup>13</sup>

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<sup>12</sup> An “appropriate process” may be difficult for readers to understand at first, particularly given that we are conditioned to expect single-, one-size-fits-all pathways to resolve crime or misconduct. The sentiments offered by Zehr here suggest that RJ processes may be more flexible in their design than those offered elsewhere, including under Middlebury’s current, single-pathway Policy Against SMDVS. McCold echoes this sentiment, noting that RJ takes a case-by-case rather than assembly-line approach to justice (McCold 401-402). Section VI of this chapter, entitled *Care Discourse and Sexual & Relationship Violence*, will discuss the appropriateness concern further. Many scholars assert that to ensure appropriateness, SVs should always freely decide to engage with RJ; when RJ processes are forced upon SVs, the “care” espoused by RJ is anything *but* caring (“Restorative Justice: The Real Story” 69). This belief is further evidenced by the scholarship of Mary Koss, as well as the design of her RESTORE Program in Pima County, Arizona, which stresses the voluntary engagement of the SV when using RJ to address direct sexual victimization (see Chapter II).

<sup>13</sup> One challenge presented by RJ involves defining the affected community in any given case. Scholars interested in the use of RJ on college campuses widely argue that universities are well-defined communities given the limited scope of campus policies (“Introducing Restorative Justice to the Campus Community” 8). Although I do not offer

### iii. Purist and Maximalist Approaches

Paul McCold (2000) notes that theories of restorative justice are largely divided between two camps, the Purist model and the Maximalist model. Importantly, the Purist model is entirely voluntary and does not exercise social control through diagnosing or treating offenders or inducing sanctions (McCold 375). The Purist model utilizes a cooperative and entirely voluntary problem-solving approach involving recognition, reparation, reconciliation, and reintegration (McCold 372). The Maximalist model, on the other hand, views restorative justice not as a process, but as the ameliorative actions that come out of a conference or circle (McCold 377). In this way, the Maximalist model provides non-judicial, voluntary processes where it can, but requires formal coercive processes when cooperation is not possible (McCold 377-378). These coercive measures frequently involve court-imposed community service and financial restitution to affected parties.

McCold notes that a number of criticisms are typically leveled against the Purist model, namely:

- (1) The Purist model fails to articulate repair of harm as its goal
- (2) The Purist model fails to address the needs of the wider community for sanctioning an offender's behavior
- (3) At the point that some offenders will not cooperate, voluntary programs cannot be comprehensive
- (4) When restorative processes operate alongside more punitive structures, the restorative cases and issues are marginalized
- (5) Diversion to restorative processes fails to challenge or subvert the existing justice system

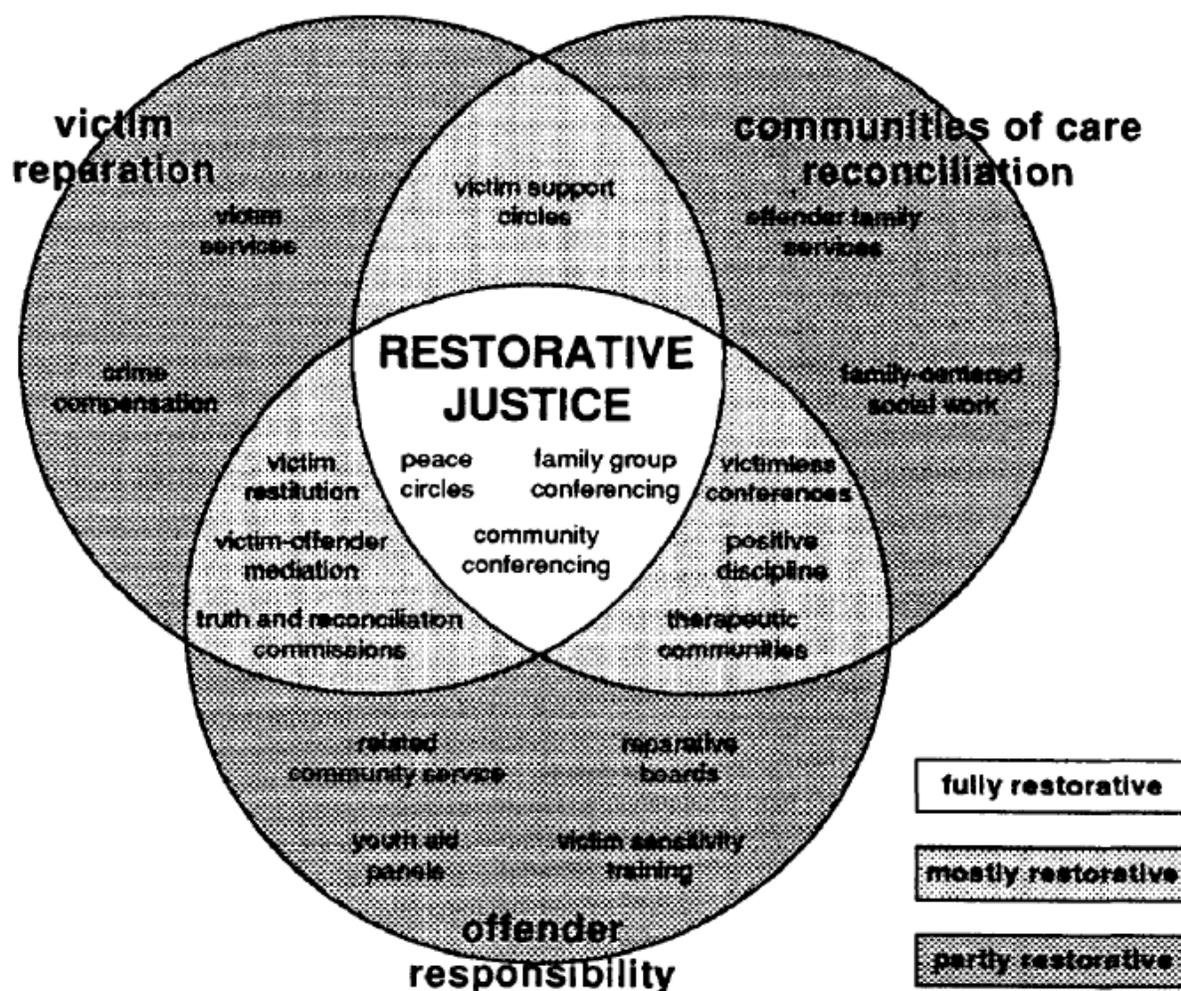
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any easy answers here, it is worth considering how such understandings might reinforce "town-gown" divides. Furthermore, conceptualizing campuses as well-defined may contribute to understandings of campuses as sexual security zones rather than helping us conceptualize sexual assault as a much broader, structural and societal concern (see Doyle).

McCold also outlines five primary objections to the Maximalist model, including that (1) the model lacks theoretical clarity by integrating restorative and rehabilitative goals, (2) the model fails to adequately address the personal and relational nature of crime, (3) the approach unnecessarily includes formal coercion, (4) it reinforces existing justice systems, and (5) an intention-based definition of RJ provides no objective way of evaluating programs (McCold 388).

As a result of the debates between Purists and Maximalists, McCold offers an alternative typology of RJ practices:

FIGURE 1.1



(from McCold 401)

McCold's typology identifies the three objectives of restorative justice, namely RP responsibility, affected party reparation, and reconciliation with communities of care (McCold 401).<sup>14</sup> Processes which meet one of these three objectives are coded as "partly-restorative," those which meet two objectives are deemed "mostly-restorative," and those that meet all three objectives are classified as "fully-restorative" (McCold 401). McCold's model of the types (RP/SV/community) and degrees (partly, mostly, and fully) of restorative justice provides the space for practitioners to visualize restorative justice in terms of degrees of restorative-ness.

Out of all of the definitions of restorative justice available, the understanding put forth by McCold seems best situated for the Middlebury context for a number of reasons. As will be discussed at greater length at the end of Chapter IV, I fear that Middlebury will adopt mostly- or partly-restorative measures within single-adjudicator, adjudication-only models and will still claim the buzzword of "restoration" in an uncomplicated way. As McCold notes, restorative justice is often an expansive term that means "all things to all people" (McCold 358). Moving forward, the McCold typology will allow us to sort through restorative practices in a way that makes Middlebury accountable to the following question: *Who* (the SV, the RP, and/or the community) is being restored?

#### **iv. The Restoration/Retribution Binary**

Restorative justice is frequently contrasted to retributive justice. Writing in the 1990s, Howard Zehr solidified the restoration-retribution binary by listing each of these terms in a t-chart

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<sup>14</sup> McCold's understanding of communities of care is based in the scholarship of Zehr, and does not necessarily define community in geographical terms (i.e.- participants must be located within a college campus). Rather, Zehr understands communities of care as the people who care about both the SV/RP and the offense at hand (*The Little Book of Restorative Justice*).

(*Changing Lenses* 185). For example, while the retributive lens ignores an affected party's needs and rights, the restorative lens is said to make an affected party's needs and rights central (*Changing Lenses* 185). Additionally, while the retributive lens deems interpersonal relationships irrelevant, the restorative lens is said to grant interpersonal relationships high importance (*Changing Lenses* 185).

Yet Daly asserts that the notion that RJ stands in opposition to retributive justice is a myth; this binary is problematic because it assumes that restorative practices *should* exclude retribution or an attitude of hostility ("Restorative Justice: The Real Story" 59). When observing conferences, Daly notes that oftentimes, participants engage in the flexible incorporation of multiple justice aims, including some elements of retributive justice (i.e. - censure for past offenses), rehabilitative justice (i.e. - by asking what can be done to encourage future law-abiding behavior), and restorative justice (i.e. - by asking how the offender can make up for what they did to all affected parties) ("Restorative Justice: The Real Story" 59). In this way, the restoration/retribution binary is critiqued for its lack of accuracy in practice.

#### **v. Restorative Justice and Feminist Thought**

Feminist legal scholars have long argued that although the voice of law and legal reasoning claims to be gender-neutral, it is actually male ("Criminal Justice Ideologies and Practices in Different Voices: Some Feminist Questions about Justice" 1).<sup>15</sup> Particularly during the "difference discourse" of the 1980s, some U.S. feminists suggested that women have a different, and perhaps superior, moral orientations to those of men ("Criminal Justice Ideologies and Practices in

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<sup>15</sup> It is worth noting here that Middlebury uses the reasonable person standard to determine the presence or absence of consent. It is not the aim of this thesis to determine the degree to which "reasonable-ness" may be gender-linked. Suffice it to say that this is an interesting question that I believe merits further discussion, particularly within university settings. For more on this, see Moran 1236, where the author argues that the "reasonable person" is actually understood to be the "common or ordinary *man*" (emphasis mine).

Different Voices: Some Feminist Questions about Justice” 3). Indeed, Carol Gilligan’s *In a Different Voice* (1982) heavily influenced feminist legal theory during the 1980s (see Daly & Stubbs). Among other things, Gilligan critiques previous theories of moral development for devaluing girls’ concerns, namely concerns for preserving relationships with others. Gilligan asserts that the moral domain should include considerations of both care and justice, but because these moral orientation are gender-linked, women’s voices (care) are often drowned out by those of men (justice) (“Criminal Justice Ideologies and Practices in Different Voices: Some Feminist Questions about Justice” 3).<sup>16</sup> Gilligan notes that women’s understandings of moral decisions evolve around the central insight that the self and other are *interdependent*:

But just as the conventions that shape women’s moral judgment differ from those that apply to men, so also women’s definitions of the moral domain diverges from that derived from the studies of men. Women’s construction of the moral problem as a problem of care and responsibility in relationships rather than one of rights and rules ties the development of their moral thinking to changes in their understanding of responsibility and relationships, just as the conception of morality and justice ties development to the logic of equality and reciprocity. Thus the logic underlying an ethic of care is a psychological logic of relationships, which contrasts with the formal logic of fairness that informs the justice approach (Gilligan 73).

Although Gilligan’s ethics of care were highly influential during the 1980s, her scholarship since been criticized for lacking both complexity and contingency. In particular, Gilligan’s framework

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<sup>16</sup> By highlighting the devaluation of care, Gilligan’s work not only impacted understandings of justice, but other fields such as those of education and developmental psychology.

is critiqued for lacking the capacity to address other power relations, including those of race and class (“Criminal Justice Ideologies and Practices in Different Voices: Some Feminist Questions about Justice” 15).

Invoking Gilligan’s framework, Daly explores the relationship between justice and care in terms of state responses to crime. She notes that while the logic of justice portrays offenders as individuals, the ethic of care sees offenders in the context of their connectedness to others (“Criminal Justice Ideologies and Practices in Different Voices: Some Feminist Questions about Justice” 6). In this way, Daly finds that many of the attributes of justice/care also map onto the restorative/retributive binary (“Restorative Justice: The Real Story” 64).

**FIGURE 1.2**

<i>Restorative justice</i>	<i>Retributive justice</i>
Pre-modern	Modern
Indigenous (informal)	State (formal)
Feminine (care)	Masculine (justice)
Eastern (Japan)	Western (US)
Superior justice	Inferior justice

(from “Restorative Justice: The Real Story” 64)

## **vi. Care Discourse and Sexual & Relationship Violence**

Under traditional campus disciplinary processes, such as those experienced under Middlebury’s Policy Against SMDVS, the central question is whether or not sexual misconduct happened. Unlike a traditional hearing, RJ would likely require the RP to admit some degree of wrongdoing before the process even begins; the question at issue is what can be done to remedy

the harm, not whether it happened (Brodsky). As a result, RJ may bypass the problematic “he said, she said” constructions of rape by challenging the RP-SV zero-sums that assert that what is good for SVs is necessarily bad for RPs. Many young, feminist activists, including Columbia’s Emma Sulkowitz, have called for restorative options under Title IX, arguing that it is not a question of *whether* RJ should have a place under Title IX, but *how* to best do so (Brodsky). Absent RJ options, some SVs are currently deciding to forgo filing complaints at their institutions at all (Brodsky).

As this thesis explores RJ specifically within Middlebury’s Policy Against SMDVS, it is worth pausing to explore the ways in which our understandings of rape, care, and restorative justice are gendered. Indeed, the rhetoric of care is invoked in many aspects of RJ, and particularly within the practice of community conferencing. In instances of sexual or gender-based violence, for example, professionals called conference coordinators deliberately structure conferences in ways which reduce power imbalances between a given SV and RP (Braithwaite & Daly 323).<sup>17</sup> In most cases, conference coordinators are tasked with assembling people who care deeply about both parties to participate in the community conference and help foster the reintegration of social relationships (Braithwaite & Daly 301). Moreover, by including family members and close friends in these processes, the communities surrounding an offender are invited to exercise periodic surveillance over an offender in place of (or alongside) the state (Braithwaite & Daly 302).<sup>18</sup>

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<sup>17</sup> In the model provided by Koss in the RESTORE Program, conference coordinators met with the RP, the SV, and their respective communities of care ahead of the conference itself to discuss what may (and may not be) said within the conference setting. This desire to avoid victim-blaming is reinforced by the language used within restorative conferences-- When the RP speaks, he/she/they describe the incident and his/her/their *responsibility* for it. When the SV (or Surrogate SV) speaks, he/she/they describe the incident and how it has *affected* him/her/them as well as his/her/their friends and family.

<sup>18</sup> In terms of surveillance, it’s worth noting that there are no easy answers; there are notable silences in the RJ literature on the issue of surveillance. Returning to *Discipline and Punish*, it may be worth considering Foucault’s panopticon. In the Vermont context, for example, RJ programs may have targeted offenders who commit minor offenses and are at low risk of reoffending (Levrant et. al. 8). In this way, RJ may be more successful at controlling the lives of non-serious offenders who may have otherwise received no form of supervision than it is at diverting offenders away from more intrusive forms of punishment (electronic monitoring, probation, incarceration, etc.)

Notably, the friends and/or family members of SVs and RPs are commonly referred to as their “communities of care.” Particularly as the result of social justice movements of the 1970s and 1980s, criminal justice processes were marked as lacking empathy or fundamental fairness. Community involvement in restorative conferencing seeks to redress these criticisms by reducing isolation and loneliness, modeling problem-solving, inviting responsible persons into social networks, connecting offenders to resources, modeling appropriate relationships, and demonstrating caring behavior (Koss, Wilgus, & Williamsen 248).

Yet some scholars argue that the construction of RJ-as-care is rather simplistic. Daly notes that in some situations, “care” may revictimize SVs; “care” is anything *but* caring (“Restorative Justice: The Real Story” 66). Indeed, there is much literature regarding the perils of forcing or coercing SVs to participate in RJ processes (for example, see Deer 159). There is also literature highlighting the perils of coercing RPs to engage with restorative justice (Levrant et. al. 8). In this way, Daly calls to reject care-justice dualisms and alternatively conceptualize justice in terms of hybridity:

I am struck by the frequency with which people use dichotomies such as the male and female voice, retributive and restorative justice or West and East, to depict justice principles and practices. Such dichotomies are also used to construct normative positions about justice, where it is assumed (I think wrongly) that the sensibility of one side of the dualism necessarily excludes (or is antithetical to) the sensibility of the other. Increasingly, scholars are coming to see the value of

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(Levrant et. al. 8). It may also be helpful to consider the extent to which bystander intervention programs, such as Green Dot, are panoptic, and whether RJ’s shift away from prescriptive policy language to harmed human relationships might displace the panoptic eye of power.

theorizing justice in hybrid terms, of seeing connections and contingent relations between apparent oppositions (“Restorative Justice: The Real Story” 66).

There remain many questions regarding the degree to which the ethic of care should be institutionalized within existing criminal processes, especially within cases involving interpersonal violence. This situation is further complicated by the extent to which care and justice are caricatures; Daly suggests that neither care nor justice exist (or have existed) in pure form (“Criminal Justice Ideologies and Practices in Different Voices: Some Feminist Questions about Justice” 7).

### **vii. Implications Moving Forward**

This chapter explored the origin myths of restorative justice, as well as some of the implications of such histories. To be certain, this is no neat tale. Yet a number of scholars cited in this chapter provide useful tools to think about RJ moving forward. First, the typology provided by Paul McCold in Figure 1.1 should push us to think of RJ in terms of degrees of restorative-ness. The McCold typology challenges us to evaluate restorative practices in terms of three central objectives: RP responsibility, affected party reparation, and reconciliation with one’s community. Indeed, initiatives or practices which claim the banner of RJ may be partly-, mostly-, or fully-restorative in nature. Additionally, the framework offered by Gilligan should motivate us to think about the ways in which care and justice are gendered terms. One aspect of restorative justice involves reconciling an RP with their community. In the area of interpersonal violence in particular, the notion of caring for an offender may be particularly challenging, especially on campuses which have previously relied heavily upon suspension and/or expulsion.<sup>19</sup> As a result, rather than calling for an all-or-nothing approach to care and justice or restoration and retribution,

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<sup>19</sup> This is not to suggest that expulsion and/or suspension have no place in RJ, but rather that RJ may offer a wider array of resolution options than current models.

this thesis aspires to create a space to consider the following question: How can we respond *effectively* to those who inflict injury on others without relying upon the exact script and means that they do (Daly *Criminal Justice Ideologies* 14)?

## II. Restorative Justice and Sexual & Relationship Violence<sup>20</sup>

*During class today, my professor posited that rape culture is perpetuated by sociopaths. I stood up and challenged the simplicity of her binary, the Normal and the Aberrant. “All rapists are sociopaths. Sociopaths are not normal, Maddie.” That classroom has never felt smaller. My peers were perplexed by my lively rebuttal, confusing my sentiments with a leniency towards rape culture. “Wait... the Gender Studies major? Does she seriously think that rapists can be Normal?”*

*Their concerned gazes caused me to question my previously resolute tone. I rushed home to Google the term “sociopath” just to be sure:*

*Sociopath (n.):  
Behavior demonstrating a lack of conscience.  
Antisocial.  
Lacking empathy.  
Glib.*

*The Aberrant/Normal dichotomy continued to race through my mind. I wondered whether I would classify my own RP as a sociopath. To be clear, this is not a question of guilt or innocence; it is a question of capacity for conscience. Yet I must admit that my quest to define His psyche is a complicated one.*

*During my sexual misconduct proceeding, He-who-must-not-be-named helped me make sense out of utter senselessness. I deliberately abstracted Him into an unintelligible monster. The trial coerced me into performing a role that I wasn’t entirely comfortable with; in an attempt to affirm that I was the Angel in the House, I constructed the Devil in my Dorm. I did my best to deprive He-who-must-not-be-named of his very humanity- worthy of my exnomination. He-who-must-not-be-named is many things; He is nothing. In this rare moment of clarity, I realize that both my professor and I were correct. Climbing out of bed, I knew that it was time to kill Him.*

*He-who-must-not-be named is not my rapist; He is his placeholder. A caricature. My professor was absolutely correct; He-who-must-not-be-named is most certainly a sociopath. But Daniel\*? I’m not so sure.*

\* A pseudonym

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<sup>20</sup> I use the term “sexual and relationship violence” to include all of the interpersonal offenses covered under Middlebury policy during the fall of 2015, including (but not limited to) sexual harassment, rape, stalking, domestic violence, and dating violence.

### **i. Concerns about Appropriateness**

The use of restorative processes in instances of sexual violence is a source of debate and dispute (McGlynn, Westmarland, and Golden 213). Historically, much of the feminist response to sexual and relationship violence has centered on the incarceration of perpetrators, or what Daly terms the feminist law-and-order stance (“Criminal Justice Ideologies and Practices in Different Voices: Some Feminist Questions about Justice” 13). To be certain, communities of color have consistently resisted such turns to the state. Other scholars offer a more nuanced view of the feminist-law-and-order phenomenon, suggesting that the relationship between violence prevention and the carceral state is not entirely deliberate on the part of feminists, but is rather an inevitable consequence of neoliberal politics (Bumiller 2). Under this perspective, grassroots, feminist rape crisis centers struggled to meet women’s needs, causing them to seek out stable sources of funding, and eventually, the support of the state (Bumiller 4).

In any event, the state’s power to accuse and punish wrongdoing falls disproportionately upon minority men and women, raising questions regarding the extent to which incarceration reveals (rather than combats) injustice (“Criminal Justice Ideologies and Practices in Different Voices: Some Feminist Questions about Justice” 12). The campaigns against domestic violence, rape, and pornography during the 1970s and 1980s, for example, focused heavily upon criminal justice sanctions (Gottschalk 451). However, by focusing so heavily on the criminal justice system, feminists helped foster a slew of tough sanctions entirely unrelated to sexual and relationship violence (Gottschalk 451). These legal remedies did not necessarily curb violence against women, but have instead created greater state control over the bodies of poor women (Gottschalk 451).<sup>21</sup>

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<sup>21</sup> For example, there are a rising number of women behind bars for minor drug violations for being unwitting or reluctant accomplices to abusive partners involved in the illegal drug trade (Gottschalk 451). On the relationship between rape and class, Phipps notes that the unruly, uncivilized, violent working-class Other is a repository for the qualities that the middle class fears and rejects (Phipps 670). It is a painful irony that this construction of a brutal,

This is not to say that restorative measures will necessarily lead to dramatic reversals in this trend; restorative elements often coexist along retributive and rehabilitative models, and scholars insist that not all sexual violence cases are appropriate candidates for restorative processes.

While some proponents of RJ praise the fact that it centers on the needs of stakeholders without necessarily relying on mass incarceration, others question the extent to which restorative processes will reinforce power imbalances and revictimize SVs (i.e.- if RJ processes blame the SV rather than assign clear responsibility to the RP). Consequently, a number of concerns have been articulated regarding the use of restorative justice in instances of sexual and relationship violence, including:

- (1) **SV safety**, particularly where restorative processes are unable to address power imbalances and abusive behavior is reinforced
- (2) **Manipulation of the process by RPs**, where RPs try to minimize guilt or blame SVs
- (3) **Pressure on SVs** who may not be able to advocate on their own behalf
- (4) **The role of the community**, particularly where community norms would reinforce SV-blaming
- (5) **Mixed loyalties**, where claimants and respondents share friends and family
- (6) **Impact on the RP**, particularly regarding whether or not restorative processes can impact an RP's behavior

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working-class rapist does not garner more sympathy for the working-class rape survivor (Phipps 670). Rape has long been viewed as an inevitable hazard for working-class women, and their experiences with sexual violence are devalued by the same class politics that positions them at the most risk for victimization (Phipps 670).

- (7) **Symbolic implications**, particularly where offenders view restorative processes as “too easy” (“Feminist Theory, Feminist and Anti-racist Politics, and Restorative Justice” 10-11)

Additionally, a number of potential benefits of RJ processes have been outlined:

- (1) **SV voice and participation**, where SVs have the opportunity to voice their story and be heard
- (2) **SV validation and offender responsibility**
- (3) **A communicative and flexible environment**, where the process can be tailored to SVs’ needs and capacities
- (4) **Relationship repair (if this is a goal)** (“Feminist Theory, Feminist and Anti-racist Politics, and Restorative Justice” 11)

## ii. Concerns about Needs and Accountability

Because restorative justice centers on the needs of SVs, it is a useful exercise to think through the potential justice needs of SVs at Middlebury.<sup>22</sup> One early document that articulates the needs of SVs is the Stern Review. Compiled in 2010 in England and Wales, the Stern Review is the product of Baroness Vivien Stern’s five month investigation into the treatment of rape complaints by public authorities in England and Wales. Interviewing over 200 SVs, Baroness Stern finds that many SVs view criminal justice outcomes as only one part of their process; the prosecution process is a therapeutic intervention where the point of court is not a conviction but to break the silence (Stern 101). In summary, Stern concludes that SVs wish for processes dedicated to “honouring the experience” (Stern 101). As McGlynn, Westmarland, and Golden note,

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<sup>22</sup> In the spirit of RJ, it is also worth considering the potential justice needs of RPs and the affected community. This topic is not broached in this thesis because, among other things, the justice needs of RPs and communities seem to be far less developed.

“honoring the experience does not necessarily equate to securing a conviction, but encompasses being believed, dignified treatment, safety, support services, feeling in control, and the ability to make informed choices” (McGlynn, Westmarland, and Golden 231).

Along somewhat similar lines, Oudshoorn, Amstutz, and Jackett interrogate the potential needs of survivor-victims of sexual abuse:<sup>23</sup>

- (1) **Safety and Care**, where consistent, authentic, and patient caregivers allow victims an opportunity to trust again
- (2) **To be believed, absolved, and vindicated**, allowing SVs to stop blaming themselves and reinforcing that sexual abuse is harmful and is not okay
- (3) **To experience voice and empowerment**, whereby SVs generating and articulating their own choices moves them towards regaining a sense of agency over their own lives
- (4) **To have a space for grieving and expression**, as many SVs desire a space to mourn their pains and express the impacts of this abuse
- (5) **Support and education**, including explanations of the ways in which abuse affects memory and may cause PTSD
- (6) **Information and options**, such as connecting SVs to resources and allowing them to ask questions (sometimes to the RP)
- (7) **Accountability**, including learning healthy coping strategies (Oudshoorn, Amstutz, & Jackett 28)

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<sup>23</sup> The authors define sexual abuse in the following way, “any unwanted, nonconsensual, attempted, or completed, sexual contact perpetrated by an offender against someone. It includes rape, sexual assault, incest, molestation, sexual harassment, inappropriate touch, indecent exposure, and child pornography” (Oudshoorn, Amstutz, & Jackett 11-12).

Although the needs of SVs are of primary importance to restorative processes, RJ also aspires to hold offenders accountable within their own context of support (Oudshoorn, Amstutz, & Jackett 29). As a consequence, RJ attempts to strike a balance between offender accountability and offender support (Oudshoorn, Amstutz, & Jackett 29). The hope is that the more we treat a person with kindness, the more they will learn to do the same (Oudshoorn, Amstutz, & Jackett 29). Yet due to the lack of seriousness with which interpersonal violence has been taken historically, some scholars fear that the relative kindness awarded to RPs under restorative models may create a process that is not nearly stern enough (see Hudson 622).

### **iii. The Intersection of RJ and Sexual/Relationship Violence**

Although there is much research on RJ—from RJ in preschool classrooms to RJ for property crimes—program enrollment statistics reveal very little about the use of restorative justice in instances of sexual assault (“Restorative Justice for Acquaintance Rape and Misdemeanor Sex Crimes” 218). In this way, the discussion of restorative justice in instances of sexual assault is largely conceptual (“The RESTORE Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcomes” 1625). Indeed, many RJ programs ignore instances of sexual and relationship violence either in policy or in practice (“Restorative Justice for Acquaintance Rape and Misdemeanor Sex Crimes” 218). In many instances, these offenses are viewed as being “too sensitive” or “too serious” to be handled by RJ (“Restorative Justice and Sexual Assault: An Archival Study of Court and Conference Cases” 334). Because few restorative justice programs have been specifically designed for sexual assault in particular, little experience exists to inform scholarly debate and community practice (“Restorative Justice for Acquaintance Rape and Misdemeanor Sex Crimes” 218).

The following sections will explore two studies, one interview, and one report which all interrogate the use of restorative justice to address sexual and relationship violence. The first,

Kathleen Daly's Sexual Assault Archival Study (SAAS), was selected because her research represents the largest dataset on the intersection of sexual/relationship violence and restorative justice to date. Daly's study is particularly useful because it tracks both court cases and restorative conferences. By studying both court and conference cases, Daly's research is best positioned to address what happens when RJ is used as a form of diversion from more punitive processes. Within the context of this thesis, however, Daly's research is limiting in that it reflects youth perpetrators who are often much younger than those seen in university settings.<sup>24</sup>

The second study chosen for analysis in this chapter, the RESTORE Program in Arizona, was selected for further review because it represents the first (and only) peer-reviewed, quantitative analysis of restorative justice conferencing for adults accused of sexual assault. Furthermore, it offers insight into the use of restorative justice in instances of acquaintance rape, a prevalent theme on college campuses today. It is limiting, however, given its small sample size (n=22).

The third case study is an interview with a SV of rape who went through a restorative conferencing process in Britain.<sup>25</sup> It was selected for review because it represents one of the few instances where a SV who has gone through a restorative process has told their story in the first person. Much like my use of personal narrative at the beginning of each chapter of this thesis, this case study is valuable because it describes what may motivate an SV to pursue RJ. The final case study, that of a restorative process at Dalhousie University, was selected because of its focus on sexual harassment and its location within a university setting. Campus PRISM, the largest collective currently exploring the use of RJ under Title IX, issued a report in April 2016 calling

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<sup>24</sup> There may be a correlation between age and reliance upon RJ practices; many RJ programs are targeted towards youth. There seems to be some assumption that young people make better candidates for RJ because they are still developing and learning, as opposed to older RPs who are understood as less malleable or more set in their ways.

<sup>25</sup> This interview was produced in collaboration with the Restorative Justice Council.

for colleges and universities to consider piloting RJ responses to sexual- and gender-based misconduct, such as the process completed by Dalhousie in 2015 (Karp et. al. 41). In the interim of further multi-campus piloting in U.S. contexts, these four case studies offer a diversity of perspectives on the intersection of RJ and sexual misconduct. Moreover, the following case studies offer perspectives that are grounded in experience, perspectives which should illuminate and inform future RJ pilots under Title IX.

#### a. Case Study: The South Australian Sexual Assault Archival Study (SAAS)

Noting lacunae at the intersection of RJ and sexual assault, Kathleen Daly embarked upon the Sexual Assault Archival Study (SAAS), which collected data from 365 juvenile cases<sup>26</sup> in South Australia from January 1995 to July 2001. The study tracks over three hundred variables in two datasets. The first dataset, the cases dataset, codes information for each case using the Police Apprehension Report, the Family Conference File, and the Youth Court Certificate of Record (“Restorative Justice and Sexual Assault: An Archival Study of Court and Conference Cases” 341).<sup>27</sup> The second dataset, the criminal histories dataset, evaluates youth perpetrators’ criminal histories over time (“Restorative Justice and Sexual Assault: An Archival Study of Court and Conference Cases” 340).

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<sup>26</sup> For both court and conference cases, the median age for youth RPs was between 14.1 and 15.6 years of age at the time of the offense; the median age for SVs was between 8.6 and 13 years of age (“Restorative Justice and Sexual Assault: An Archival Study of Court and Conference Cases”).

<sup>27</sup> To translate these processes to a U.S. setting, Police Apprehension Reports are similar to police reports, detailing the reasons for and context of an arrest from the perspective of law enforcement officers, including naming the initial charge. Family Conference Files are unique to the Australian context, and reflect the records kept during restorative conferences, including information regarding who was present at a conference, the agreement or penalty that was reached, and whether the RP complied with the outcome of the conference (“Restorative Justice and Sexual Assault: An Archival Study of Court and Conference Cases” 340). A Youth Court Certificate of Record is similar to the records maintained during criminal court proceedings in the U.S., tracking scheduled court appearances, the legal history of a case, the penalty posed, and other related information (see “Restorative Justice and Sexual Assault: An Archival Study of Court and Conference Cases” 340).

In the system that Daly studies, some youth offenders were dealt with in court, while others were referred to restorative conferences.<sup>28</sup> Youth whose cases were finalized in court were more likely to have offended before; they lived in more disadvantaged areas, more often sought legal advice, and were less likely to be characterized by the police as being either cooperative or remorseful (“Restorative Justice and Sexual Assault: An Archival Study of Court and Conference Cases” 342). In this way, Daly’s study outlines the ways in which, when faced with a decision between conference, court, or formal caution options, youth from disadvantaged backgrounds were likely to be referred to court more often than their more affluent counterparts (a trend which is replicated in the U.S. context in the case study of the RESTORE Program). Furthermore, Daly finds that Aboriginal Australians were a somewhat higher share of those in court (13 per cent) than conference (8 per cent) or caution (5 per cent) cases (“Restorative Justice and Sexual Assault: An Archival Study of Court and Conference Cases” 342). When conferencing options are offered alongside criminal court pathways, Daly’s study complicates the argument that RJ remedies racial and social inequalities. In this way, if campus processes are to offer restorative methods of conflict resolution alongside adjudication-only models, there remains anti-oppression work to be done to critically unpack which bodies are deemed worthy of “restoration.”<sup>29</sup>

In terms of recidivism, Daly’s SAAS finds that overall, recidivism rates were higher for court youth (66 percent) than for youth who participated in restorative conferencing processes (48 percent) (“Restorative Justice and Sexual Assault: An Archival Study of Court and Conference

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<sup>28</sup> Participants in RJ conferences often included the SV, the RP, an adult family member, youth workers, legal advocates, and, less frequently, friends and/or siblings (see “Restorative Justice and Sexual Assault: An Archival Study of Court and Conference Cases”).

<sup>29</sup> There are no easy answers as to how this sort of anti-oppression work might be done. Where RJ exists alongside adjudication-only measures, a process of vetting is likely to occur (through prosecutors, Judicial Affairs Officers, etc.). A starting point to envision necessary anti-oppression work for those who vet cases in multi-pathway scenarios lies in “The RESTORE Program of Restorative Justice for Sex Crimes Vision, Process, and Outcomes,” where Mary P. Koss reflects on how to create more equitable encounters with RJ through intentional program design.

Cases” 348-349). That being said, the youth cases referred to court were generally deemed more severe in nature, and offenders in courtroom settings displayed higher rates of prior repeat offending than their conference counterparts. Additionally, Daly finds that court cases took twice as long to finalize as RJ conference cases (“Restorative Justice and Sexual Assault: An Archival Study of Court and Conference Cases” 342). This is due, in part, to the fact that all conferencing processes began with an offender’s admission of guilt on some level, whereas court cases had to engage with both investigation *and* adjudication. In this way, even though conferences tend to maintain flexibility in their structure, they do not necessarily have to be longer than court proceedings. In the Middlebury context, such timeliness is important because the four-year cycle of students and current *Dear Colleague Letter* mandates.

#### b. Case Study: RESTORE in Pima County, Arizona

RESTORE (Responsibility and Equity for Sexual Transgressions Offering a Restorative Experience) began in Pima County, Arizona in 2001 (“Restorative Justice for Acquaintance Rape and Misdemeanor Sex Crimes” 218). The mission of RESTORE is to “facilitate a victim-centered, community-driven resolution of individual sex crimes that creates and carries out a plan for accountability, healing, and public safety” (“Restorative Justice for Acquaintance Rape and Misdemeanor Sex Crimes” 218-219). The RESTORE study includes 22 cases occurring from March 2003 to August 2007. Significantly for this thesis, 14% of RPs participating in RESTORE were college students (“The RESTORE Program of Restorative Justice for Sex Crimes Vision, Process, and Outcomes” 1632). RESTORE was federally funded, with cases arriving at the project through a process of prosecutor referral. A year prior to opening RESTORE, researchers tracked ethnicity and race data from all sexual assaults reported to the largest police department in RESTORE’s jurisdiction, allowing researchers to estimate racial/ethnic composition as justice

progressed from police report to prosecutor referral to participation in the RESTORE program (“The RESTORE Program of Restorative Justice for Sex Crimes Vision, Process, and Outcomes” 1649-1650). Pending referral from a prosecutor,<sup>30</sup> the decision to engage with RESTORE (or, alternatively, court proceedings) was entirely voluntary. As Mary Koss<sup>31</sup> and her colleagues admit, their data indicates disturbing trends (“The RESTORE Program of Restorative Justice for Sex Crimes Vision, Process, and Outcomes” 1650). Notably, Caucasian RPs and SVs were far more likely to participate in RESTORE, trends which were reversed for African American and Hispanic participants (“The RESTORE Program of Restorative Justice for Sex Crimes Vision, Process, and Outcomes” 1650):

#### **RP Race as a Percentage of Police Reports, Prosecutor Referrals, and Consent to**

##### **Participate in RESTORE\***

	<i>Police Reports</i>	<i>Prosecutor Referrals</i>	<i>RESTORE Cases</i>
Caucasian RPs	33%	54%	77%
African American RPs	25%	9%	9%
Hispanic RPs	42%	25%	14%

\* Note that percentages for RPs may not add up to 100%, as some participants chose not to self-identify their race, or did not know their race. None of the prosecutor referrals (or RESTORE cases) involved persons who self-identified as American Indian.

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<sup>30</sup> Similarly to the findings of Daly’s SAAS study, there is something to be learned from the relationship between prosecutor referrals and the types of bodies which are deemed “restore-able.”

<sup>31</sup> It is worth noting that in addition to her contributions to the field of restorative justice, Mary Koss is a leading feminist scholar studying gender-based violence in the U.S. Koss was the first person to coin now-ubiquitous terms such as “date rape” and “acquaintance rape.”

Importantly, Koss notes that the patterns observed by race among SVs were similar, particularly given the high number of Caucasian SVs who ended up in the RESTORE program (“The RESTORE Program of Restorative Justice for Sex Crimes Vision, Process, and Outcomes” 1650).<sup>32</sup> Although there was no data collected on the sexual orientations of SVs or RPs, in all 22 cases, the RPs identified as male (“The RESTORE Program of Restorative Justice for Sex Crimes Vision, Process, and Outcomes” 1635). Of the 22 cases, 6 SVs identified as male, none of whose cases were felonies (“The RESTORE Program of Restorative Justice for Sex Crimes Vision, Process, and Outcomes” 1635).

Because participation in RESTORE was entirely voluntary and hinged upon prosecutor referral, RESTORE staff could not directly control the racial/ethnic makeup of the cases that ended up in the program (“The RESTORE Program of Restorative Justice for Sex Crimes Vision, Process, and Outcomes” 1650). Koss highlights the measures taken to make RESTORE attractive to diverse groups, including partnerships with community agencies, the presence of focus groups, and the selection of a diverse staff (“The RESTORE Program of Restorative Justice for Sex Crimes Vision, Process, and Outcomes” 1650). Koss speculates that structural factors may have played a role in these trends, especially fears related to one’s immigration status (“The RESTORE Program of Restorative Justice for Sex Crimes Vision, Process, and Outcomes” 1650). She also notes that in future iterations, cultural competence training should be offered to those who investigate, prosecute, and refer cases of sexual assault (“The RESTORE Program of Restorative Justice for Sex Crimes Vision, Process, and Outcomes” 1650).

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<sup>32</sup> Similar breakdowns by race are not available for SVs in the same way that they are for RPs in the above table. In terms of SV demographics, we only know that Caucasian survivor victims comprised 64% of police reports, 64% of prosecutor referrals, and 88% of RESTORE cases (“The RESTORE Program of Restorative Justice for Sex Crimes Vision, Process, and Outcomes” 1650).

Like cases studied under the SAAS, responsible persons under the RESTORE framework had to admit some responsibility for the act's occurrence in order to be selected for participation in the program ("Restorative Justice for Acquaintance Rape and Misdemeanor Sex Crimes" 219).<sup>33</sup> The starting point for the RESTORE Program was the conferencing model, which proceeded in four stages: (a) referral and intake, (b) preparation, (c) the conference itself, and (d) accountability and reintegration ("Restorative Justice for Acquaintance Rape and Misdemeanor Sex Crimes" 229).

Data collection was done by self-report with measurement points at intake and within a week of the conference process ("The RESTORE Program of Restorative Justice for Sex Crimes Vision, Process, and Outcomes" 1639).<sup>34</sup> Koss found that the average length of the RESTORE program from referral to conference for SVs was close to 3 months ("The RESTORE Program of Restorative Justice for Sex Crimes Vision, Process, and Outcomes" 1641).<sup>35</sup> For RPs, these processes often took much longer, as the fourth stage, accountability and reintegration, could take an RP up to a year.

The psychological status survey administered to SVs revealed a decrease in PTSD symptoms from intake to post-conference ("The RESTORE Program of Restorative Justice for Sex Crimes Vision, Process, and Outcomes" 1641).<sup>36</sup> All RPs indicated that they felt sincerely

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<sup>33</sup> This does not mean that RPs necessarily entered guilty pleas or admitted to committing a crime. Instead, it is believed that in agreeing that the act happened on some level, RPs opened themselves up to progressing in their cognitive understanding over time ("The RESTORE Program of Restorative Justice for Sex Crimes Vision, Process, and Outcomes" 220).

<sup>34</sup> This study also includes data from surrogate SVs, responsible persons, and support networks.

<sup>35</sup> To offer a comparison, this is well under the amount of time that it takes for some cases to move through adjudication under the Policy Against SMDVS; one participant in Middlebury Unmasked recounted that their SMDVS process took 145 days to conclude.

<sup>36</sup> These decreases in SV revictimization, however, were not statistically significant; statistical pre-post comparisons revealed no significant negative or positive impacts on SVs' emotional or physical health ("The RESTORE Program of Restorative Justice for Sex Crimes Vision, Process, and Outcomes" 1651).

sorry for what happened (“The RESTORE Program of Restorative Justice for Sex Crimes Vision, Process, and Outcomes” 1643). Koss notes the following:

All survivor victims strongly agreed that taking back their power was a major reason to select RESTORE over other justice options. Most also agreed that it was particularly important to have input into the consequences for the responsible person... Contrary to expectations that a public apology is validating, no survivor victims chose to attend the exit meeting where the responsible person presented a letter he had written expressing his reflections over his acts, the harm he caused, and the changes he had made to avoid hurting others in the future (“The RESTORE Program of Restorative Justice for Sex Crimes Vision, Process, and Outcomes” 1652).

In terms of SVs’ reactions to RP apologies, many SVs preferred private closure (“The RESTORE Program of Restorative Justice for Sex Crimes Vision, Process, and Outcomes” 1653). Significantly, out of all of the participants in RESTORE conferences (SVs, RPs, community volunteers, surrogate victims, and SV/RP supporters), survivor-victims who attended their conferences were the group most satisfied by their experiences with RESTORE (“The RESTORE Program of Restorative Justice for Sex Crimes Vision, Process, and Outcomes” 1647).<sup>37</sup> Ultimately, more than 90% of all participants would recommend RESTORE conferences to others (“The RESTORE Program of Restorative Justice for Sex Crimes Vision, Process, and Outcomes” 1647).<sup>38</sup>

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<sup>37</sup> Koss uses six items to measure satisfaction with RESTORE. 100% of all SVs who had participated in their conference were “satisfied” or “very satisfied” with at least five out of the six satisfaction measures (“The RESTORE Program of Restorative Justice for Sex Crimes Vision, Process, and Outcomes” 1647).

<sup>38</sup> Note the difference between the rates of satisfaction expressed in the RESTORE Program and those expressed in Middlebury Unmasked.

### c. Case Study: Joanne Nodding

Joanne Nodding of Britain openly identifies as a SV of rape, and has discussed her pursuit of RJ using both paper and digital media (Williams).<sup>39</sup> Nodding pursued restorative conferencing after her RP had already been found guilty under criminal law; the conference took place nearly five years after the rape itself (Williams). Although SV readiness is a recurring concern in restorative processes, and particularly for processes which occur face-to-face, Nodding describes her readiness and preparedness to confront her RP, given the pseudonym “Darren” (Williams). Nodding cites the particular moment that motivated her to pursue a conference with Darren; the judge in her criminal case told Darren that he had ruined a young woman’s life (Williams). Nodding wanted Darren to know that he didn’t have continuing power over her, and that he also didn’t have to carry the judge’s burden forever (Williams). Moreover, Nodding notes that she was told that Darren was doing victim-empathy work, but she couldn’t wrap her head around how this was being done absent her own voice (The Restorative Justice Council).

Similarly to the findings of Koss in the RESTORE Program, Nodding comments that although Daren apologized to her, an apology which she interpreted sincerely, she did not go through the conference process aspiring for an apology (The Restorative Justice Council). She emphasizes that she didn’t go into the conference wanting to hear anything particular from Darren; she merely wanted to be heard (The Restorative Justice Council). Nodding concludes by noting that the conference had made her “a better and stronger person,” and that she was grateful for the opportunity to tell Darren how he made her feel (The Restorative Justice Council).

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<sup>39</sup> Neither Joanne (the SV) nor Darren (the RP) offered any demographic data, including along the lines of race, class, etc.

#### d. Case Study: Dalhousie University

In December 2014, four female students in Dalhousie University's Faculty of Dentistry filed complaints of sexual harassment under University policy (Llewellyn. MacIsaac, and McKay 2).<sup>40</sup> The students' complaint involved their awareness that thirteen of their male colleagues had participated in posting information about them in a private Facebook group (the "Gentleman's Club") that demonstrated misogynist, sexist, and homophobic attitudes (Llewellyn. MacIsaac, and McKay 2).<sup>41</sup> In a public letter, the SVs articulate the ways in which a restorative process made sense to them, particularly given the small size of the dentistry program: "we were looking for a resolution that would allow us to graduate alongside men who understood the harms they caused, owned these harms, and would carry with them a responsibility and obligation to do better" (Llewellyn. MacIsaac, and McKay 9). The ensuing restorative process lasted roughly five months. Due to the public nature of this incident,<sup>42</sup> all parties involved thought that it was important to apprise the public of what happened during their restorative process by publishing a record of this process after it had occurred; all of the SVs and RPs involved were motivated to share the ideas and commitments that they developed as the result of their engagement with RJ (see Llewellyn. MacIsaac, and McKay).

The use of RJ to address the Dalhousie case was no accident; Nova Scotia has a long history of engaging with restorative justice at the provincial level, particularly in cases of youth property crime (Llewellyn. MacIsaac, and McKay 17).<sup>43</sup> Moreover, Dalhousie University has produced a

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<sup>40</sup> Because of the digital nature of the Dalhousie case and the number of SVs involved, the group nature of this claim may have bolstered these women's stories and experiences in ways which are not possible for individual SVs of sexual assault.

<sup>41</sup> The most publicized component involved a poll asking "Who would you hate fuck?"

<sup>42</sup> The Dalhousie incident was covered by publications such as the Huffington Post, Vice, Change.org, and local and regional media such as CBC News.

<sup>43</sup> For more on RJ in Nova Scotia, see Rubin. RJ in Nova Scotia was not included as a case study in this thesis because the Royal Canadian Mounted Police confirmed in 2003 that no cases of woman abuse or sexual assault have been

rather large body of research on the subject (Llewellyn, MacIsaac, and McKay 17). It is within this context that the four SVs decided to move forward with a restorative process:

We were clear from the beginning, to the people who most needed to hear it, that we were not looking to have our classmates expelled as 13 angry men who understood no more than they did the day the posts were uncovered. Nor did we want simply to forgive and forget. Rather, we were looking for a resolution that would allow us to graduate alongside men who understood the harms they caused, owned these harms, and would carry with them a responsibility and obligation to do better (Llewellyn, MacIsaac, and McKay 9).

The process ultimately held by Dalhousie involved a number of conferencing circles, including (1) a series of meetings with the 2015 dental class, Dalhousie Faculty, and administrative leadership to discuss their use of Facebook as a medium, (2) a series of meetings with the 2015 dental class, Dalhousie Faculty, and administrative leadership regarding the climate and culture at the Faculty of Dentistry in both personal and professional interactions, (3) RP participation in additional educational sessions dealing with topics such as inclusion and diversity in educational environments, building supportive communities, and conflict resolution, (4) a “Women in Dentistry” circle to express experiences regarding being a woman in the profession, and (5) a “Day of Learning,” where students, faculty members, administrators, SVs, and particularly RPs presented their findings on what they had learned personally, professionally, and institutionally as a result of this incident (Llewellyn, MacIsaac, and McKay). The report concludes that the Dalhousie process not only held RPs accountable, but also encouraged SV learning surrounding

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handled under RJ programming. Also, see Rubin for a detailed study of women’s perspectives on RJ who have not gone through restorative programming in Nova Scotia, but have considered such models theoretically.

the underlying, systemic issues of this case, including the pervasive objectification of women (Llewellyn, MacIsaac, and McKay)?<sup>44</sup>

Although the Dalhousie process did not result in a step-by-step action plan, the process did produce some interim recommendations, including forming a Community Wellness Initiative, holding a permanent Women in Dentistry circle, and supporting the ongoing work and reflection of RPs involved with the Facebook group. Among other things, the Dalhousie case provides a model for how other institutions of higher education might mobilize RJ to address sexual and relationship violence, particularly (but not exclusively) with highly-publicized incidents.

#### **iv. The Four Case Studies and the Middlebury Context**

The four case studies offered within this chapter represent a cross-national body of work, yet these sites are not so different that they cannot be translated to the Middlebury context. Indeed, differences in scope, legal systems, geographic location, and age highlight the variances in practices across contexts while still providing the opportunity to illuminate similarities that emerge across studies and experiences. In Chapter IV of this thesis, these case studies will be used more directly to re-envision Middlebury's Policy Against SMDVS in a more restorative light.

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<sup>44</sup> More specifically, the events occurring from January to April 2015 included: a session with Halifax fire fighters previously involved in an restorative justice process who shared their experiences with the process to address systemic inequalities, an interim reporting circle regarding the RPs' potential return to the clinic, a bystander intervention workshop, a workshop on understanding rape culture and misogyny, a session on healthy and supportive educational communities, a session on reporting structures and conflict resolution, sessions on inclusion and diversity, including the issues of race, culture, gender and sexual orientation and their interplay, a group process to plan and draft statements, circles with restorative justice student participants and President Florizone, a circle with the Facebook members and the Board of Governors, circles among the DDS2015 class members, a circle with the Nova Scotia Dental Association, collaborative research review meetings, planning and preparation meetings for the Day of Learning (including meeting with experts from the Human Rights Commission), the Provincial Restorative Approach in School Project, meetings on curriculum reform and behavioral science, and the Day of Learning (Llewellyn, MacIsaac, and McKay. 37).

In addition to the four case studies offered above, there is currently a project that aims to incorporate RJ into responses to campus sexual violence in U.S. contexts. The Campus PRISM project, led by Dr. David Karp of Skidmore, has four primary objectives:

- To consider the potential and challenges of RJ in light of the national controversy about campus sexual misconduct
- To apply lessons from the use of RJ in criminal justice sex offenses
- To gather and disseminate knowledge about RJ practice and research
- To explore the potential for multicampus RJ pilots

During December 2015, Middlebury announced that it had decided to join the Campus PRISM project, where the institution will hopefully continue to explore these themes alongside its peer institutions in greater detail.<sup>45</sup>

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<sup>45</sup> During April 2016, as this thesis was coming to a close, Campus PRISM released *A Report on Promoting Restorative Initiatives for Sexual Misconduct on College Campuses*.

### III. Campus Judiciary Proceedings

*It is December 2, 2015. I am sitting alongside a number of administrators to participate in a webinar on restorative justice and campus sexual assault. I have spent the better half of the afternoon preparing myself for this meeting. When grabbing a notebook that morning, I chose my trauma journal. The selection felt natural. On the one hand, I am grateful that these administrators have taken time out of their busy days to contemplate these issues. On the other hand, I associate many of these people with the most painful and adversarial moments of my life. I am caught in a liminal space, simultaneously hoping for what could be and mourning what was.*

*I don't ask myself the difficult questions, and I certainly don't speak from personal experience. I begin bargaining with myself: it is the system that maligned me, not the people sitting to my left and right. I remind myself to breathe. At the end of the webinar, I feel immensely proud of how much I've learned in the course of writing this thesis; I had read every single author on the citations list.*

*Yet my extensive reading leaves me with a pervasive sense of emptiness. On this issue, knowledge alone will never be sufficient. My project has always been a political one, and change simply cannot come soon enough. I try my best to maintain a sense of professionalism and composure; I learned long ago that my feelings are subordinate to the Facts. I smile, shake hands, and leave the conference room without incident.*

*I return home and curl up on my couch in the fetal position. More than sadness, I feel defeat. Because in an attempt to champion the merits of survivors' needs and feelings, I once more silenced the value of my own lived experience. In order to change the Middlebury system, I feel an overwhelming need to cite research studies and theoretical models and Facts. I remain nestled in the crease of my couch because I ache for the day when, in the eyes of this institution, my feelings will finally count.*

#### i. Title IX and Risk Management Discourse

“Title IX is meant to address a toxic, abusive set of actions as they unfold within a sexist social structure. Each crisis, as it is administered, is individuated. And yet each crisis vibrates with the largest and deepest of existing structural flaws.”

~ Jennifer Doyle, *Campus Sex Campus Security*

As I am writing this thesis, Middlebury College's Policy Against Sexual Misconduct, Domestic Violence, Dating Violence and Stalking (SMDVS) stands at over 19,400 words. Much

of this language is mandated by the U.S. federal government as part of the implementation of Title IX. Title IX, a portion of the Federal Education Act of 1972, was enacted after a series of hearings held by the House Subcommittee on Education (Anderson 326). In its initial form, Title IX was understood as a continuation of the Civil Rights Act of 1964 (Anderson 326). Finally enacted into law, Title IX provided that “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” (“Title IX and Sex Discrimination”). Although no part of Title IX explicitly referenced sports, the law was initially associated with its ability to combat gender discrimination in athletics.<sup>46</sup>

The scope of Title IX would grow substantially during the coming decades, up to and including requiring universities to respond to campus sexual and relationship violence. It is not the aim of this thesis to provide a comprehensive history of Title IX, subsequent legislation such as the Clery Act, or guidance on these issues from the Office for Civil Rights (for more on this topic, see Anderson). Suffice it to say that Title IX posits that any educational institution which does not comply with gender equity provisions is at risk for losing its federal funding.

As of December 2015, over one hundred colleges and universities in the U.S. were under investigation by the Office for Civil Rights (OCR) for mishandling misconduct under Title IX. Colleges and universities see Title IX as a huge liability, both in terms of reputational losses and any litigation resulting from the misapplication of this law (see Cantalupo). As will be discussed

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<sup>46</sup> For more on why sports came to the forefront of Title IX in this way, see Edwards. Edwards cites a number of factors that led to Title IX’s widespread use in athletics, including (a) the role of advocacy groups like the American Intercollegiate Athletic Association for Women, (b) the social and political visibility of female athletes like Billy Jean King, and (c) a series of court cases brought against universities by the fathers of athletically talented daughters (Edwards). Edwards further discusses how gender inequality in sports may have been easier for the public to understand and visualize than the sex role stereotyping and discrimination present in other aspects of women’s everyday lives (Edwards).

later in this chapter, Middlebury's Policy Against SMDVS has changed substantially over the past four years, shifting towards a more professionalized, less community-centered model of adjudication. At present, the adjudication mechanisms at Middlebury primarily center on the relationship between a given claimant (SV) and respondent (RP). The College now imagines itself as a neutral arbiter of, rather than a party to, campus sexual misconduct:

The accused's behavior is in conflict with policy. This, however, is usually administered as a conflict between the victim and the assailant, as if (for example) a rape resulted from a failure to negotiate (Doyle 39).

Under the current Middlebury process (Appendix A), there are only two guaranteed sites for input outside of witnesses: a designated "support person" who is authorized to attend all campus meetings<sup>47</sup> and a character reference submitted near the end of a judicial process. While past processes drew upon community members to adjudicate SMDVS claims,<sup>48</sup> this practice was abandoned in 2014. The result is that current SMDVS processes contain very few, if any, consistent sites for community involvement.

By contrast, restorative processes require an enlarged circle of stakeholders; the three primary parties affected are the SV, the RP, *and* the community (*The Little Book of Restorative Justice: Revised and Updated*). Howard Zehr notes that restorative justice contains three central pillars: harms/needs, obligations, and engagement (*The Little Book of Restorative Justice: Revised and Updated*). At minimum, restorative justice attempts to identify the harms and needs experienced by all three parties, with priority being given to the harms experienced by (and the

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<sup>47</sup> There seems to be an increasing trend of parties electing to nominate their legal representation in this "supportive" role.

<sup>48</sup> Historically, this included Middlebury students, faculty, and staff members, typically with each panel consisting of two students and two faculty/staff. There was a concerted effort to attain a "gender balance" in these bodies, namely by ensuring that each panel consisted of 2 men and 2 women.

subsequent needs of) the SV (*The Little Book of Restorative Justice: Revised and Updated*). Restorative proceedings also strive to identify the obligations of *both* the RP and the community when addressing such harm (*The Little Book of Restorative Justice: Revised and Updated*). Central to RJ is the notion that violations create obligations to harmed parties.

Whereas Middlebury's current SMDVS policy views the College as a neutral arbiter of harm, restorative processes urge campus communities to view themselves more expansively as potential sources of harm, recipients of harm, and active agents transforming harm. As a result, rather than deferring to protectionism or an inability to recognize the human impact of violence, restorative justice calls for a more nuanced, multilayered understanding of what causes and perpetuates these acts.

The recent proliferation of regulations surrounding sexual and relationship violence has seemingly coincided with an increase in risk management discourse at the university level. At Middlebury College, auditors and the College's trustees recently concluded that its governing boards were unprepared to address the rapid changes in higher education and the associated financial and educational risks (Rivard). As Jennifer Doyle highlights in *Campus Sex Campus Security*, "university resources—time, energy, thought and compassion—are absorbed by a managerial world averse to the interpersonal, lateral and dynamic work of education" (Doyle 111-112). Following this trend, the College recently embarked upon an initiative to restructure its boards and institutional oversight (Rivard). Moreover, midway through writing this thesis, the College announced that it had hired Karen Miller under a new position entitled the Vice President for Human Resources and Risk.

Michael Power notes that "risk talk" and risk management politics allow institutions to maintain myths of control and manageability (Power 10). Under such rhetoric, educational

institutions are constructed as highly vulnerable; there are consistent streams of scandals, failures, and disasters which challenge the organization (Power 10). Within the past four years at Middlebury alone, a number of positions have been created or expanded to address campus sexual misconduct: the position of Title IX coordinator was created, a peer-to-peer advocacy service for sexual and relationship violence has been implemented, and four new administrative positions have been hired: a Director of Health and Wellness, two new Human Relations Officers, and a second Judicial Affairs Officer. Importantly, three of these new hires have law degrees. Nevertheless, these new measures have not insulated Middlebury from legal liability, as is evidenced by the case *Doe v. Middlebury* (Duffort).

What is lacking in a risk-reduction model is the conscious decision to support individual growth in areas such as moral and ethical decision making, social identity development, and cultural competency (Taylor & Varner 23). As noted by Simone Himbeault Taylor and Donica Thomas Varner:

In our one-dimensional effort to protect people from disparate treatment, arbitrariness, and capriciousness, there is insufficient latitude to grapple with the complexity of the individual student that an institutional commitment to student learning, diversity, and inclusiveness demands. Similarly, in our isolated effort to minimize liability and risk (e.g. legal exposure, bad publicity, stakeholder backlash), we may simply postpone or even escalate the emergence of more serious problems by placing narrow policy standards *over the individual needs and experiences of people* (Taylor & Varner 23, emphasis mine).

Thus, in a quest to minimize liability and risk, student learning may have become an unintended consequence rather than an intentional outcome of campus judiciary processes (Taylor & Varner 23).

## ii. The Management of Bodies

Another way to read this trend is through the lens of the management of bodies, that is, the paternalistic myth of women's vulnerability donning the neoliberal cloak of risk management (Hall 1).<sup>49</sup> Assessing risk works by objectifying difference amongst members of the population in its quest to file and profile them (Hall 2). In the issue-area of rape, risk assessment works to reinforce essentialist treatments of difference through prevention discourse; a woman's sexual anatomy becomes one risk factor listed among others (Hall 2). The RP is the embodiment of dangerousness; potential SVs are the embodiments of risk (Hall 3). In this way, risk as a technology of governing is intrinsically gendered (Gotell 878).<sup>50</sup> Vulnerability is transformed into responsibility; the ideal, feminine sexual subject is a "reaction hero" with an "expert awareness of her own vulnerabilities" (Gotell 879).

Importantly, the potential victim addressed by women's safety pedagogy is most often white and middle class (Hall 13). Women of color have repeatedly made the point that not all women are considered equally violable (Hall 13). The most extremely marginalized women who are victimized become defined by their "high-risk lifestyles" (Gotell 884).<sup>51</sup> In addition, rape prevention and responses to rape are deeply implicated in the reification of race-based myths (see

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<sup>49</sup> This is not to suggest that sexual and/or relationship violence only occurs in a heterosexual context where a male is the RP and a female is the SV. Such phrasing is not used unproblematically in this thesis.

<sup>50</sup> On the risk of Man's violence as Woman's subjectivity, Elizabeth A. Stanko notes the following: "men's violence against women is so extensive, these studies suggest, that as women, we are *all* potentially at risk. The main message is that *Woman* is at risk of *Man's* violence: as women, 'victims R us.' Risk of men's violence is associated with the *subjectivity* of Woman- with all of the imperfections of the universalism, *Woman*" (Stanko 482).

<sup>51</sup> Gotell cites that lifestyles which are marked as "high-risk" have included women in the sex trade, aboriginal women, hitchhiking women, and drug-addicted women (Gotell 884-885). The impact of this categorization is that, in the aggregate, riskiness becomes tied to incredibility (Gotell 885).

Jimenez & Abreu).<sup>52</sup> The negative ideal of the rapist is most often imagined as a stereotypical man of color; at worst, rape prevention discourse leads to the everyday mistreatment of men of color as menacing, intimidating, threatening, and scary (Hall 13). One product of neoliberal governmentality is the socialization of risk, that is, replacing the ideas of fate, fortune, and destiny (individual matters) with risk, “the combination of factors over which the collective may exercise vigilance and management” (Macleod & Durrheim 47). Dispelling the myth of fear-as-responsible-citizenship will undoubtedly require identifying and challenging the ways in which dramatic and fearful discourses about rape reinstall race- and class-based discrimination (Hall 11). Indeed, it is my goal here to suggest that Middlebury College is currently seeing like the state through both its bystander intervention program (Green Dot) and its Policy Against SMDVS by exercising bio power within a corporatized academy.<sup>53</sup>

It is worth pausing here to examine the development of our understanding of “risk” within American colleges and universities. Until the early 1960s, American universities were protected from legal actions of almost all varieties:

Where appropriate, the university was immunized as a parent (*in loco parentis*),<sup>54</sup> charity, or a government; or protected like a “social host” would be regarding alcohol use, or shielded by rules of proximate causation or by all-or-nothing affirmative defenses. The net result was minimal legal/judicial intrusion in college affairs regarding student rights and safety (Lake 4).

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<sup>52</sup> In the study conducted by Jimenez & Abreu, acquaintance rape vignettes were manipulated along the lines of SV/RP race. Caucasian women consistently demonstrated greater empathy for the European American SV (“Julie”) than for the Latina SV (“Juanita”). The authors posit that the lack of sympathy for Latina SVs is likely linked to stereotypes surrounding Latina sexuality, including portrayals of Latinas as “hot blooded, passionate, teasing, and flirtatious” (Jimenez & Abreu 255).

<sup>53</sup> For more on this topic, see Doyle, who argues that “campus sex (as a condition of possibility for campus rape) haunts campus security discourse” (Doyle 32).

<sup>54</sup> *In loco parentis*, meaning “in the place of a parent,” refers to a legal relationship in which a temporary guardian or caretaker of a child takes on some or all of the responsibilities typically expected of a parent.

During (and after) the civil rights movement, university insularity was breached by a series of cases which asserted that public universities must provide basic constitutional rights to students (Lake 3). It was during this time period, in the wake of the civil rights era, that gender equity provisions such as Title IX were born. Indeed, by the early 1970s, *in loco parentis* was a relic of the past (Lake 76). Moreover, the 26<sup>th</sup> Amendment changed the voting age from 21 to 18, making it difficult for colleges to justify their parental or supervisory status over students (Lake 76). The shifting relationship between universities and students was further shaped by campus activism:

While most students wrapped anti-*in loco parentis* arguments in the language of maturity, responsibility, and individual rights, the underlying concern of administrators and parents regarding morality and sexuality on campus permeated campus debates. The *in loco parentis* ideology ultimately proved obsolete as campus officials realized that they could not codify and enforce individual morality in the face of increasingly strident student demands for privacy and self-determination (Lansley 2-3).

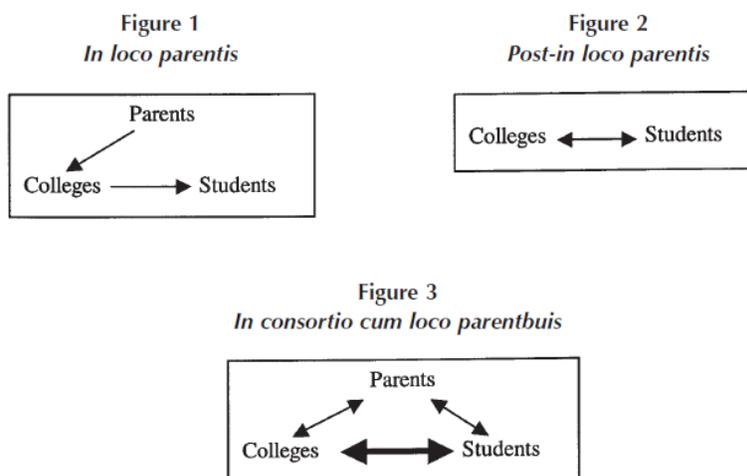
Some scholars are currently suggesting a return to the *in loco parentis* model, particularly given the uptick in liability cases against colleges for students' injuries (see Szablewicz & Gibbs).<sup>55</sup> These scholars argue that by bringing legal claims against colleges, students are once more asking colleges to act as parents and protect them in the way that parents would (Henning 544).

Robert Henning alternatively posits that rising rates of legal claims against colleges do not mark a return to *in loco parentis*, but rather *in consortio cum parentibus*, that is, in partnership with parents (Henning 551). *In consortio cum parentibus* involves trilateral, two-way relationships

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<sup>55</sup> Examples include *Mullins v. Pine Manor College* (1983), *Peterson v. San Francisco Community College* (1984), and *Whitlock v. University of Denver* (1985) (see Henning 543).

between colleges, students, and parents (Henning 551). Although the primary relationship remains between colleges and students, parents are seen as a valuable addition to the model, particularly given parents' increasing presence in their students' day-to-day lives (Henning 550-551):



(from Henning 551)

Perhaps the transition to *in consortio cum loco parentibus* is best exemplified by Middlebury's former consent education video, produced by Tate USA, where two white, heterosexual individuals are portrayed as giving consent through a prolonged negotiation with their lawyers bedside ("18 Shockingly Common Things You Didn't Know About College Rape Culture").<sup>56</sup> This video, which was played during Middlebury's freshman orientation within the past five years, portrays consent through the use of a "sexual consent form." While the two students, Penny and Judah, remain in bed, their lawyers negotiate their clients' limits regarding each particular sex act. By suggesting the sexual consent form, Judah is largely excused from his subtle sexism by being labeled a "nice guy." Sexist stereotypes abound in this video, which largely

<sup>56</sup> This BuzzFeed article was authored by a former Middlebury student.

focuses on male pleasure and needs; although Penny does not originally want to have sex, she is eventually persuaded by Judah, who doesn't seem to accept her boundaries at face value. The video portrays Penny as manipulating Judah into dating her so that she can protect her purity, creating little space for casual, college hookups to seem acceptable for women. Additionally, while a flashlight is shot into Penny's eyes to ensure her sobriety, this action is not replicated for Judah. In a heterosexual context, the message is that while female sobriety is essential to consent, male drunkenness does not denote risk in a similar manner.

What is frightening about this video are the ways in which it portrays the trilateral college-student-parent relationship that is central to *in consortio cum loco parentibus*. In the context of freshman orientation, Middlebury College used this video to minimize its likelihood of legal liability by providing incoming freshman with consent "education." Students' involvement was also portrayed within the rhetoric of risk management, with Judah calling consent an "awkward formality" ("18 Shockingly Common Things You Didn't Know About College Rape Culture"). Parents' involvement is assumed through the provision of lawyers within the bedroom. In this way, the portrayal of sex as a site of great risk overshadows the potential of sex as a site of great pleasure. Per Gotell, Penny's (assumed) vulnerability as a woman is transformed into responsibility through the use of the sexual consent form. Penny must curb her participation in a "high-risk lifestyle" by securing a dating relationship with Judah prior to having sex with him. In this way, Middlebury's foray into risk management through this video is deeply implicated in the regulation of bodies, particularly by transforming Penny's body from a site of institutional risk to a site of her own responsibility. Among other things, such individualizing discourse completely ignores the ways in which coercion and consent contain much larger questions than those embodied by Penny and

Judah, including historical and structural differences in power. On narratives of rape, Doyle notes the following:

The woman and the man who violates her are moving parts within the paranoid narrative of a world that cannot imagine itself not at war. Each of these “wars” evidences the campus’s vulnerability. Each situation is a cellular expression of the organism’s disease. Each singular case is proof that sexism is real, and systemic. Once each case is resolved, an uneasy truce is struck (Doyle 40).

This video, in trying to neatly condense consent into a contract, fails to acknowledge that consent is an ongoing process, and that consent can be revoked at any time during a sexual encounter. In “teaching” consent, this video renders feeling, from pleasure to hurt, completely insignificant and subordinate to the Facts outlined by contract. Above all, the interaction between Penny and Judah raises some interesting questions regarding how law and affect operate, and how we can reconcile a sexually assaulted subject with the normative liberal subject of contract law.

### **iii. Combatting Campus Legalism**

Middlebury’s Policy Against Sexual Misconduct, Domestic Violence, Dating Violence and Stalking (SMDVS) is a combination of both federally-mandated and Middlebury-generated policy language. John Wesley Lowery notes that since the landmark decision in *Dixon v. Alabama State Board of Education* (1961), campus judicial proceedings have become increasingly driven by both legalism and proceduralism (Lowery 15). Moreover, this trend has been exacerbated by the federal government’s increasing involvement in higher education through legislation concerning student life, particularly since the 1980s (Lowery 17).

One node of federal oversight involves Title IX, and the ways in which the federal government has been communicating its expectations related to Title IX through *Dear Colleague*

Letters written by officials working within the Office for Civil Rights (OCR). The grievance procedures outlined in the 2011 *Dear Colleague Letter* are of particular interest to this thesis, as they serve as the basis for outlining a quasi-criminal justice model of SMDVS adjudication:

Table 3. Dear Colleague Letter Guidance on Grievance Procedures.<sup>a</sup>

Adopt and publish grievance procedures		
Task	Required	Recommended
Procedures must apply to complaints filed against employees, students, or third parties	✓	
If disciplinary procedures are used, Title IX coordinator should review them to ensure consistency	✓	
Clarify that mediation will not be used to resolve sexual assault complaints		✓
Complaints must not be addressed solely by Athletics if complaint involves an athlete	✓	
Provide for adequate, reliable, and impartial investigation	✓	
Designate reasonably prompt time frames for major stages of complaint process	✓	
Notify parties of outcome of complaint and any appeal consistent with FERPA and Clery	✓	
Provide parties with notice of outcome concurrently <sup>b</sup>		✓
Use language understood by the audience	✓	
Notify complainant of right to file criminal complaint and do not dissuade from doing so	✓	
Do not wait for criminal investigation or proceeding to conclude before beginning investigation	✓	
Ensure that any agreement or MOU with local law enforcement is consistent with DCL	✓	
Use "preponderance of the evidence" standard or equivalent	✓	
Provide parties with equal opportunity to present relevant witnesses and evidence	✓	
Provide parties with similar and timely access to information that will be used at the hearing	✓	
If lawyers are permitted to participate, provide equal participation rights to each party	✓	
Forbid parties to personally question or cross-examine each other		✓
Provide an appeals process		✓
If appeals proceed, provide access equally to both parties	✓	
Maintain documentation of all proceedings	✓	
Train all individuals responsible for implementing procedures or ensure relevant experience	✓	
Disclose any real or perceived conflict of interest that fact finder or decision maker may have	✓	
Provide due process to alleged perpetrator without unnecessarily delaying Title IX protections of complainant	✓	
Provide periodic status updates to parties	✓	
Do not require complainant's to accept or sign nondisclosure agreements concerning the outcome of a disciplinary proceeding	✓	

<sup>a</sup>The table text is based on the DCL (Ari, 2011).

<sup>b</sup>The recommendation for concurrent notification was elevated to a mandatory action in the 2013 Violence Against Women Act.

(from Koss, Wilgus, and Williamsen 246)

To be certain, campus administrators who are interested in alternative resolution processes, including RJ, operate within the constraints provided by *Dear Colleague Letter* guidance (Koss, Wilgus, and Williamsen 254). Many administrators throughout the U.S. have noted that the recommended and required measures outlined in the 2011 *Dear Colleague Letter* often conflict with the goals of (1) remedying the effects of sexual misconduct on SVs, and (2) preventing the repeated occurrence of misconduct at the hands of a given RP (Koss, Wilgus, and Williamsen

254). In this way, the intent of Title IX to “remedy the effects” of sexual and relationship violence may run into the OCRs’ procedural dictates.

One example of this tension between prescriptive policy language and intent lies in the 2011 *Dear Colleague Letter*’s recommendation that mediation should not be used to resolve any sexual assault complaints (Koss, Wilgus, and Williamsen 246). Indeed, Koss and her colleagues have done substantial work on the differences between mediation and restorative justice (see Koss, Wilgus, and Williamsen). Nevertheless, many schools, including Middlebury, remain hesitant to integrate RJ practices into their institutions pending clarification from the OCR regarding whether or not RJ is viewed as a form of mediation.

As Koss et. al. note, the conceptual foundation of RJ is that harm has been done and that someone is responsible for repairing it (Koss, Wilgus, and Williamsen 246). This framework stands in stark contrast to mediation, where the neutrality of the mediator remains central (Koss, Wilgus, and Williamsen 246). Projects such as Campus PRISM are currently working to seek clarification from the Office for Civil Rights regarding the possibilities to use RJ to address campus sexual misconduct. In particular, there is a great need for the OCR to clarify whether restorative justice can be used to *resolve* sexual assault complaints (McCold’s “fully restorative”).

Yet in the interim of clarification regarding the legal relationship between RJ, mediation, and case resolution, schools have remained hesitant to implement restorative aspects into their existing procedures. Nevertheless, there are several sites for schools to implement restorative elements in sexual assault cases short of using RJ for case resolution. One such site involves offering circles of support for SVs after a sexual misconduct proceeding has already occurred. As Koss, Wilgus, and Williamsen note:

There is a consensus of published studies is that sexual assault victims need to tell their own stories about their experiences, obtain answers to questions, experience validation as a legitimate victim, observe offender remorse for harming them, receive support that counteracts isolation and self-blame, and above all have choice and input into the resolution of their violation (Koss, Wilgus, and Williamsen 246-247).

The work of Koss et. al. suggests that there is currently space for SVs to engage in Survivor Support Circles after their adjudication-only proceedings have concluded as a way of demonstrating community care. By uniting the SV, their friends, and members of the community that are otherwise important sources of care, Survivor Support Circles may meet SVs' justice needs more fully than mere adjudication in the interim of OCR clarification regarding the use of RJ for case resolution. In a similar manner, circles may be implemented as a portion the reintegration of RPs to a campus community.<sup>57</sup> Moreover, using RJ in non-SMDVS cases, including cases of academic dishonesty and property crime, is likely an important interim step to build RJ infrastructures at Middlebury.

There is hope that projects such as Campus PRISM will be able to expand the horizon of possibility for the use of RJ in SMDVS case resolution (McCold's "fully" restorative). Yet in the interim, there are clear sites where restorative methods may be used to provide more successful

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<sup>57</sup> Oftentimes, circles for RPs are referred to as COSAs (Circles of Support and Accountability), which began in 1994 when a group of people from a local church gathered around a formerly incarcerated RP in a mid-sized Canadian city (Wilson, Huculak, and McWhinnie 375). COSAs aim to recognize the humanity of the RP by creating a supportive and responsive community of volunteers around the RP (Wilson, Huculak, and McWhinnie 375). The primary concern is that there will be no more SVs, and consequently, COSAs have evolved to require both RP support as well as RP accountability. In this way, although community volunteers may support a RP, they also work to hold this individual accountable for their past and enduring attitudes and actions within the community (Wilson, Huculak, and McWhinnie 375).

SV and RP reintegration into the community after a decision has already been reached (McCold's "mostly-" or "partly-" restorative; also see Chapter IV of this thesis).

#### **iv. Current Trends in Campus Judicial Affairs**

At present, there is a trend in higher education to adopt less legalistic and more developmental policy language, as is evidenced by renaming the Association for Student Judicial Affairs to the Association for Student Conduct Administration (Giacomini & Schrage 8). Recognizing the revolution in this field, the *Chronicle of Higher Education* published a three-part series in 2009 to discuss the profession's move away from its formalistic and punitive past (Giacomini & Schrage 8). Best practices now require "that we actively explore, endorse, and normalize conflict resolution and social and restorative justice practices as equally viable conduct management approaches in a spectrum of conflict and conduct resolution" (Giacomini & Schrage 8).

Part of this trend has involved a questioning of both single-process, adjudication-only, and single-adjudicator models.<sup>58</sup> Single-process policies reflect systems that permit only one pathway for student conduct or conflict resolution. One recurrent problem with single-process policies is that they often fail to appreciate the diversity of the campus population; "a campus incident response model that offers adjudication under the conduct code as the only or predominantly favored venue for resolving a conflict ignores the variety of needs associated with the many student identities, experiences, and conflict cultures within the population" (Giacomini & Schrage 17). Additionally, adjudication-only models neither address the underlying behavior brought to the attention of student conduct administrators nor do they act to intentionally restore the community harmed by a student's actions (Giacomini & Schrage 17).

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<sup>58</sup> Middlebury's current Policy Against Sexual Misconduct, Domestic Violence, Dating Violence, and Stalking (SMDVS) is all three of these things.

Middlebury's Policy Against SMDVS is further complicated by the fact that Middlebury has recently adopted a single-adjudicator model. This means that the outcome of a case is ultimately determined by one Human Relations Officer, replacing a previous system which adjudicated cases using a panel of four students and staff. Additionally, Middlebury's Sexual Assault Oversight Committee (SAOC) was discontinued at the end of the 2014-2015 school year. The SAOC was "a body of students, faculty and staff dedicated to supporting the efforts of the Middlebury community to end sexual misconduct, domestic violence, dating violence, and stalking (SMDVS) at Middlebury." Unlike the current model, which largely divorces policy language from student, faculty, and staff input, the SAOC (in theory) provided a space for broader representation when conceptualizing this community's response to rape. Indeed, Middlebury's response to campus sexual violence in the wake of the *Dear Colleague Letter* era has largely been to professionalize student conduct adjudication by embracing the risk-reduction model and providing only limited, *ad hoc* sites for student, staff, and faculty input.

#### **v. A Call for Community Participation**

Unlike many punitive or adjudication-only models, restorative justice encourages a harm-centered discourse where SVs' feelings and lived experiences become central to a case as it moves forward. As a result, it is worth asking how SVs may conceptualize justice. Drawing upon her interviews with 22 SVs who had witnessed or experienced sexual or relationship violence, Judith Lewis Herman notes the following:

Justice, from the perspective of these informants, was neither restorative nor retributive in the conventional sense. Their vision of justice combined retributive and restorative elements in the service of healing a damaged relationship, not between the victim and the offender but between the victim and his or her community. The retributive element of the survivors' vision was most apparent in

their virtually unanimous wish to see the offenders exposed and disgraced. Their aims, however, were not primarily punitive. The main purpose of exposure was not to get even by inflicting pain. Rather, they sought vindication from the community as a rebuke to the offenders' display of contempt for their rights and dignity (Herman 597).

The justice needs that Herman articulates are similar to earlier concepts of restorative justice as "reintegrative shaming" (Braithwaite & Daly 301). Yet before RPs are shamed with an aim towards their reintegration to the community (to the extent that this is possible), many SVs first need to relieve themselves of the shame that they feel:

Their vision was restorative, also, in their emphasis on the importance of community acknowledgement and denunciation of the crime. Their focus, however, was on their own need for reintegration with their communities, rather than the offenders' need for reintegration. They recognized the central importance of shaming the offender; however, first, they needed to be relieved of their own burden of shame (Herman 598).

In terms of SVs being relieved of their own burden of shame, the SVs in Herman's study highlight the important role to be played by the community:

Community denunciation of the crime was of great importance to the survivors because it affirmed the solidarity of the community with the victim and transferred the burden of disgrace from victim to offender. The survivors were keenly aware that the crimes were intended to dishonor and isolate them; they sought, therefore, the restoration of their own honor and the reestablishment of their own connections with the community (Herman 586).

Despite SVs' persistent calls for their own restoration to the community, Herman is clear that the community of support that victims so ardently desire *does not at present exist* (Herman 599). Communities such as Middlebury cannot be counted on to do justice to SVs at present because public attitudes toward these crimes are conflicted and ambivalent at best; by design, these crimes shame and stigmatize the SV (Herman 598). Thus, although Herman highlights the important role to be played by communities in meeting SVs' justice needs, she also calls for strong feminist leadership in making sure that the standards of patriarchy are not replicated within attempts at community support; "adapting restorative justice principles to crimes of sexual and domestic violence would require active feminist leadership and extensive community organizing to create a reliable context of public support for victims" (Herman 598). Colleges and universities are merely microcosms of the larger society; as long as bias remains in society, it will inevitably find its way into the processes of higher education (Holmes, Edwards, and DeBowes 61).

In campus settings, community norms supporting SVs are of great importance. John Wesley Lowery argues that an important first step in creating "communities of justice and principle" involves assessing personal and shared community values, or what Lowery terms "culture and values audits" (Lowery 20-21). Culture and values audits help colleges better understand "the collective, mutually shaping patterns, norms, values, practices, beliefs, and assumptions that guide the behavior of individuals and groups" (Lowery 21). Culture and values audits are, in many ways, the first step in developing campus-wide creeds and/or community standards.<sup>59</sup> As indicated by Herman, the continued leadership of feminists in creating reliable contexts of community support for SVs remains essential (Herman 598).

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<sup>59</sup> Creeds are defined by Lowery as a positive expression of institutional values drafted by a broad-based student group with representation from the entire university community (Lowery 21). Community standards, on the other hand, involve a more hierarchal approach with the potential for institutional enforcement.

Similar to the work of Herman, this thesis recommends that a starting point for the administration on these issues is to systematically review the stories of Middlebury SVs on both the It Happens Here project website as well as the video entitled *Middlebury Unmasked*. Over the past five years, the It Happens Here project has collected nearly 80 stories of students' experiences with sexual and relationship violence, a number greater than the official number of reports made under Title IX during this same time period. Many of these stories describe SVs' engagement with Middlebury's judicial process, as well as the rationale for a decision to not report. Reviewing SVs' stories provides administrators with the opportunity to assess where campus policy has failed to meet SVs' justice needs in the past. Moreover, many of these stories outline what SVs would have liked to have experienced instead, providing administrators with the opportunity to add SVs' voices to considerations of policy revisions moving forward.

Additionally, a 2015 video narrative project entitled *Middlebury Unmasked* outlines the experiences of six SVs who discussed their experiences within (and hopes for) Middlebury's SMDVS process. Reviewing both the It Happens Here site as well as *Middlebury Unmasked* will provide administrators with the opportunity to gauge trends in SVs' experiences. Since there is, at present, no systematic way to collect qualitative data on SVs' experiences within Middlebury's sexual misconduct process, these two sources of personal narrative provide administrators with critical feedback to consider when looking at SVs' perceptions of the culture and values of this institution.<sup>60</sup>

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<sup>60</sup> Like many of its peer institutions, Middlebury will be conducting a survey on sexual and relationship violence at Middlebury during the spring of 2016 (*the Sexual Assault, Dating Violence, and Stalking: Prevalence, Perceptions, and Community Responses Survey*). This survey did not contain spaces for respondents to include personal, first-person narratives.

## vi. Learning Outcomes for Conference Participants

Another important question raised by restorative models is the extent to which the community should be involved in student conduct administration; restorative conferences and circles offer the potential of not only RP education, but also the education of participants within the broader Middlebury community. Jeremy Rinker and Chelsey Jonason have written on their experiences during the implementation of a restorative justice initiative at DePauw University's Conflict Studies Program (the CSP/RJ Project). They describe the project as a liberal arts practice initiative, providing a space and structure for undergraduate students to learn through experience (see Rinker & Jonason). They note that RJ has the potential to bolster participant education because of the ways in which restorative justice models pro-social communication, collective problem solving, and conflict intervention:

Most campus-wide justice systems are too focused on punitive measures, which do not place enough emphasis on learning outcomes for participants or the wider community. RJ processes have the potential to create a collective relationship of trust, respect, and understanding between college administration and students, town and gown, and faculty and students (see Rinker & Jonason).<sup>61</sup>

As is further emphasized by Donald Gehring, administrators may want to include students as participants of judicial processes for the educational benefits such services provide to participating students (Gehring 479). In contrast to the excessive formalism of the current SMDVS model, Gehring opens up a space for us to imagine student misconduct as a dynamic process where members of the community, as well as the institution as a whole, may be impacted by (and evolve in response to) experiences within student misconduct processes.

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<sup>61</sup> For an analysis of RP responsibility in restorative justice processes other than those involving sexual misconduct, see Karp & Sacks.

Among other things, Gehring argues that campus judicial proceedings have a tendency to be too procedural and adversarial.<sup>62</sup> Gehring further asserts that judicial affairs officers have an *obligation* to foster the personal and social development of students (Gehring 467):

The types of formal, criminal trial procedures Dannells (1990) found to be used by a majority of colleges and universities, in which students are pitted as adversaries or enemies of their institutions or other students, negate the educational climate and positive educational benefits of discipline. The “creeping legalism” and “full blown adversarial hearings” simply do not create environments conducive to deeper teaching or learning in which both sides win—the students by enhancing their ethical development, and the institution by accomplishing its developmental mission (Gehring 468).

Similarly, the most recent bylaws from the Association for Student Conduct Administration are quite clear on this matter:

The development and enforcement of standards of conduct and conflict resolution for students is an educational endeavor *that fosters students’ personal and social development. Students must assume a significant role in developing and enforcing such standards in order that they might be better prepared for the responsibilities of citizenship* (Association for Student Conduct Administration Bylaws, emphasis mine).

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<sup>62</sup> Koss has defined adversarial forms of justice as follows: “Justice is adversarial when two sides of the case square off to uncover truth and affix responsibility by examining evidence through the questioning of witnesses” (“Blame, Shame, and Community: Justice Responses to Violence Against Women” 1333). Note the similarity here to Middlebury’s fall 2015 process as outlined in Appendix A.

In the past, sexual misconduct proceedings at Middlebury have provided space for students, faculty, staff, and community members to engage with these issues, such as when the Sexual Assault Oversight Committee (SAOC) provided a regular forum for stakeholders to explore sexual misconduct policy and healthy norm-generation at Middlebury. Similarly, students and staff members were previously active participants in the adjudication of sexual misconduct cases. Yet within the past two years, the SAOC has been suspended indefinitely and Middlebury has transitioned to a single-person adjudication model. In light of the broader goal of judicial affairs to provide for students' personal and social development, Middlebury needs to ask itself whether a process with no clear and consistent site for student participation and input can meet the objectives outlined by the Association for Student Conduct Administration. This is not to say that the SAOC or adjudicatory panels were perfect bodies; we must continue to critically examine the types of people that are allowed to meaningfully participate in such spaces. Yet because SVs' justice needs frequently involve a reliable context of public support, Middlebury would be wise to consider how to better create communities of justice and principle. Institutions must seek to ensure that the rights of students are protected by appropriate policies governing conduct and student life, yet this thesis challenges Middlebury College to envision a community that seeks *higher levels of human possibility* (see Lowery 26).

## IV. The Middlebury Process: Adjudicatory Trends and Restorative Possibilities

*Tomorrow I turn 22, and today I have received a wonderful birthday gift. After months and months of activism, lobbying, thesis-writing, and education, the Title IX team at Middlebury has announced that they have joined the Campus PRISM project, which aims to incorporate restorative justice principles into campus sexual misconduct proceedings. I am overcome with emotion.*

*Later on in the day, at a town hall meeting, President Patton announced that Middlebury's commitment to restorative justice would soon run far deeper than sexual misconduct; the campus would begin exploring restorative justice as one of thirteen steps to promote community, diversity, and inclusion on our campus. In her address in Mead Chapel, President Patton referenced a conversation that we'd had about my research in early November, a conversation involving the importance of harmed-centered discourse.*

*Yet this emergent discussion is so much more than the work that has been done over the past couple of months; it represents decades of activism and lobbying. I remember being looked at like I had lost my mind when I expressed my desire to pursue a restorative process with my own RP. I remember that less than two years ago, I was told that "the data" just didn't support RJ. I was crushed. And now I'm left wondering how to negotiate the fact that an all-too-comfortable "us vs. them" has so suddenly become a "we." That those who rejected the process are now claiming the product. I lie awake at night tying my mind in knots, struggling to understand this sudden paradigm shift.*

*More than anything, I don't know how to move forward without first acknowledging the pain and trauma that has already been caused. How do I accept President Patton's gift of listening amidst my enduring sense of mourning and loss?*

### i. Current Middlebury Policy

"If we are interested in arresting cycles of violence to produce less violent outcomes, it is no doubt important to ask what, politically, might be made of grief besides a cry for war."

~ Judith Butler, *Precarious Life: The Powers of Mourning and Violence*

As of the fall of 2015, Middlebury's SMDVS policy represents a single-adjudicator, adjudication-only model.<sup>63</sup> This means that the outcome of any given SMDVS case is ultimately decided by one Human Relations Officer, and that traditional discipline vis-à-vis sanctioning is the only method of resolution offered. This section will outline Middlebury's current process for adjudicating claims in the hope of better understanding of the relationship between RJ and the current Middlebury model (see Appendix A).

The current Middlebury process may begin when a SV ("claimant") files a SMDVS complaint at Middlebury. A process may also begin without the consent or participation of the SV, such as when the College takes up a claim without an SV's enduring participation in the Middlebury process.<sup>64</sup> After the initial complaint is filed, an investigator is assigned to the case, the RP ("respondent") is notified of the impending claim, and a No Contact Order<sup>65</sup> is put in place to minimize the contact between affected parties throughout the duration of the judicial process (and potentially beyond).

Next, both parties are invited to give separate statements to the investigator, typically in the form of an interview.<sup>66</sup> Each party may recommend witnesses and submit other evidence for

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<sup>63</sup> "The person providing the character reference is invited to introduce the party to the investigator and to the HRO outside of the context of the incident in question. The person providing the reference is not permitted to offer testimony or commentary related to the incident in question, or to include that person's assessment of the case or the party's role in it in any way" ("Policy Against Sexual Misconduct, Domestic Violence, Dating Violence and Stalking").

<sup>64</sup> For example, Middlebury faculty and staff, with a few exceptions, are now mandated reporters under Title IX, meaning that if they know about a student's experience with sexual or relationship violence, they are required to forward this information along to the Title IX team. If a SV in a mandated reporter situation does not want to pursue a formal complaint, the College may nevertheless elect to proceed without the SV for a variety of reasons. For more on the potential impact of proceeding in this manner without a SV's consent, see *Middlebury Unmasked*.

<sup>65</sup> No Contact Orders (NCOs) may certainly have a place within fully restorative processes, but in the long-term, they reinforce separation and isolation (what Kaaren Williamsen refers to as a "Cold War" between SVs and RPs) (Karp, Williamsen, and Zehr). Further study is needed to determine the relationship between NCOs' separation and isolation, the heightened sense of anxiety and risk that such orders create in the long term, and the restorative and reintegrative aims of RJ.

<sup>66</sup> At present, there is no publicly available information regarding who Middlebury hires to investigate such claims. Middlebury's current policy does, however, indicate that individuals conducting investigations and adjudications must receive training annually on "issues related to sexual misconduct, domestic violence, dating violence,

consideration. Middlebury policy is clear that the investigator has complete discretion over the nature and content of interviews and in compiling evidence.

Next, all of the investigator's materials are compiled and shared with both the SV and RP. They are permitted to respond to the investigator's findings in writing, and are offered the chance to submit a written character reference at this time. Should the SV's or RP's responses generate a need for further investigation or inquiry, that is permitted to occur. If any materials accrue as the result of further investigation, both parties are also permitted to respond to any new material. Ultimately, the investigator compiles their findings into a written report that is shared with a Human Relations Officer. The investigator's report also contains a recommendation in terms of any violation of campus policy.

The Human Relations Officer assigned to the case at hand then reviews this report and the materials within it, and is permitted to consult with anyone as needed. The SV and RP are both invited to meet separately with the Human Relations Officer prior to the determination of a finding. The Human Relations Officer then announces a finding to the Judicial Affairs Officer, who informs the SV and RP of the College's decision.<sup>67</sup>

In the event that the RP is found to be not in violation on all counts, both parties are advised of the appeals process. If the RP is found to be in violation of campus policy, both the RP and the SV are invited to submit Sanction Statements detailing what they think an appropriate punishment would be. The Human Relations Officer then considers these documents and consults with their colleagues to determine an appropriate sanction. Once a sanction is determined, the Judicial Affairs

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stalking, and related retaliation and on how to conduct a prompt, fair, and impartial investigation and/or adjudication process that protects the safety of complainants and promotes accountability."

<sup>67</sup> The language used in many campus proceedings is not "innocence" or "guilt," but rather "not in violation" or "in violation" of campus policy. This can also be understood in terms of "responsibility" or a finding of "non-responsibility."

Officer separately discloses the sanction to both the RP and SV, and both parties are advised of the appeals process. Should either or both parties seek an appeal, they can do so on the grounds of (1) the discovery of significant new information not available at the time of the decision, (2) procedural error that prevented fundamental fairness, or (3) the abuse of discretion regarding the sanction. Exclusive of any appeals, Middlebury aspires to limit its process to a period of no more than 60 days. Recent activism by Middlebury SVs, however, has demonstrated that Middlebury processes may last as long as 145 days.<sup>68</sup>

## ii. Analysis of Current Middlebury Policy

Dr. David Karp, one of the prominent scholars on the use of RJ in campus settings, outlines the contexts which often surround student misconduct. He posits that RJ may respond to these contexts better than traditional forms of campus discipline. First, students arriving to campus as freshmen experience a dramatic loss of supervision and oversight, particularly among students who come from authoritarian households (“Introducing Restorative Justice to the Campus Community” 5). Second, new students overestimate the amount of alcohol and drug use by other students, and seek to conform to the perceived norm (“Introducing Restorative Justice to the Campus Community” 5). Third, Karp notes that student culture is at odds with mainstream society and legal codes with regards to alcohol and drug consumption (“Introducing Restorative Justice to the Campus Community” 5). I would further add that student sexual culture at Middlebury is similarly at odds with that of mainstream society and legal codes.<sup>69</sup> Moreover, campus life is strongly bifurcated under traditional forms of campus discipline. While students often describe

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<sup>68</sup> For more on this, watch *Middlebury Unmasked*.

<sup>69</sup> Elizabeth Stanko unpacks the trope of the Good Woman in her scholarship, that is, the Woman who deserves protection from the state because she exercises caution. Stanko notes that the Good Woman is prudent, law-abiding, middle-class, sensible, and risk-averse (Stanko 486). By contrast, much of Middlebury’s sexual culture as discussed at the Community Dinner on Sexual and Relationship Respect (see Introduction) is decidedly not prudent, modest, sensible, risk-averse, etc.

professors as their strongest, non-peer role models, the social control that faculty exert in the academic sphere does not translate to students' residential lives ("Introducing Restorative Justice to the Campus Community" 6). Fourth, colleges typically rely on coercive techniques to gain compliance with college policies because they think that they have little alternative ("Introducing Restorative Justice to the Campus Community" 6). Although campus public safety departments are rarely adequately staffed to accomplish coercive control, they nevertheless adopt many techniques of the police state in order to enforce campus policies, including surveillance ("Introducing Restorative Justice to the Campus Community" 6; also, see Doyle). Fifth, because a quarter of the student body is new every year, campuses cannot effectively respond to student disciplinary problems through apprehension and removal alone ("Introducing Restorative Justice to the Campus Community" 6). Instead, such continual turnover creates a need for institutions to continuously socialize students to be community members who are able to consider the consequences of their actions on the greater community ("Introducing Restorative Justice to the Campus Community" 6-7).

Karp's analysis of student misconduct produces some interesting insights on Middlebury as it currently functions. As Karp highlights, broad interventions are needed to remedy individual misbehavior and campus dissensus regarding community values. In contrast to liberal avoidance or conservative crackdowns, RJ offers the possibility of integrating (rather than compartmentalizing) academic learning, student participation in campus judicial processes, and communitarian principles ("Introducing Restorative Justice to the Campus Community" 7).<sup>70</sup> For Karp, the needs and misperceptions of freshmen, the challenges created by continual student

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<sup>70</sup> To reiterate a persistent theme of this thesis, in a quest to minimize liability and risk, student learning may have become an unintended consequence rather than an intentional outcome of campus judiciary processes (Taylor & Varner 23).

turnover, and the failures of “apprehension and removal”<sup>71</sup> as long-term solutions demand sustained student education (“Introducing Restorative Justice to the Campus Community” 7).

At present, much of the education regarding sex and relationships, as well as alcohol and drug use, comes from Middlebury’s Office of Health and Wellness Education. A central component of Middlebury’s current violence prevention strategy, Green Dot, centers on bystander intervention. The Green Dot model at Middlebury is premised on the notion that “no one has to do everything, but everyone has to do something”:

The Green Dot Violence Prevention Strategy is a national program that trains students, faculty, and staff in bystander intervention to help prevent instances of power-based personal violence .... When these moments of violence occur on our campus, they’re seen as red dots. A “Green Dot” is defined as any action, choice, word, or attitude that counters or displaces a “red dot” of violence, reducing the likelihood that someone will be hurt. This not only promotes safety for everyone in the Middlebury community, but also sends a clear message that we do not tolerate violence on our campus (“Green Dot Violence Prevention Strategy”).

There appear to be some points of disjuncture between Karp’s understanding of RJ and Middlebury’s Green Dot model. Most notably, while the Middlebury community at large is celebrating its “green dots”, there is no such broad, community investment after a “red dot” occurs. Tertiary prevention efforts at Middlebury, such as Parton Counseling and the MiddSAFE hotline, are limited to highly trained, often professionalized, and largely confidential support. Yet without ongoing community forums such as the Sexual Assault Oversight Committee, there is little space

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<sup>71</sup> As Karp later comments, expulsion likely displaces the problem from a campus community to another, less fortified or resourced community (“Introducing Restorative Justice to the Campus Community” 9).

for students, faculty, and staff to collaboratively interrogate issues related to SMDVS on the Middlebury campus. In a recently released webinar entitled *Restorative Responses to Sexual Assault on College Campuses*, David Karp and Kaaren Williamsen discuss the potential role for RJ in prevention, including through holding prevention circles (Karp, Williamsen, and Zehr). Nevertheless, in the current Middlebury context, we observe a shrinking space for consistent community input at the same time that the College's cadre of lawyers and risk managers appear to be ever-growing.

The College is providing increasing space to celebrate "green dot" victories, including on its online, interactive Green Dot Map.<sup>72</sup> Yet the College attempts to make no similar space for the community to confront the presence of "red dots." As is outlined in the third chapter of this thesis, SVs' justice needs often implicate their communities; many SVs desire to be believed, to have their voices heard, and to cease feeling shame for what happened to them (Oudshoorn, Amstutz, & Jackett; also, see Herman). At present, it is important to ask ourselves if this sort of institutionally driven, community investment in "red dots" occurs at Middlebury College.

In her book *Precarious Life: The Powers of Mourning and Violence*, Judith Butler asks the following questions: "Who counts as human? Whose lives count as lives? And, finally, What makes for a grievable life?" (Butler 20). In her meditation on the aftermath of 9/11, Butler notes that grief is not privatizing or depoliticizing, but rather furnishes a sense of political community by demonstrating our relational ties and dependencies upon one another (Butler 22). It is Butler's project to explore our exposure to violence and complicity in it, our vulnerability to loss and the sense of mourning that follows, and our ability to find a basis for community in such conditions (Butler 19).

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<sup>72</sup> See <http://sites.middlebury.edu/greendot/map/>

It is useful to pause here and reflect upon the birth of Title IX, the Clery Act, and later evolutions that created protective categories such as “victim” and later “survivor.”:

But perhaps we make a mistake if we take the definitions of who we are, legally, to be adequate descriptions of what we are about. Although this language may well establish our legitimacy within a legal framework ensconced in liberal versions of human ontology, it does not do justice to passion and grief and rage, all of which tear us from ourselves, transport us, undo us, implicate us in lives that are not our own, irreversibly, if not fatally (Butler 25).

This thesis challenges Middlebury College to reconsider the red dot, to contemplate how the Middlebury community could better respond to SVs, RPs, and the community at large after a violation has already occurred. Rather than framing our response to RPs in terms of suspension or expulsion alone, this thesis urges Middlebury to view rape as a violation of community trust that could (potentially) be reearned. How do we understand “green dots” and the emerging discourse of prevention-as-pride? Perhaps more importantly, what would it mean to view “red dots” not as sites of liability or institutional risk, but as sites of mourning, failure, or loss that tear us from ourselves, transport us, and implicate us in lives that are not our own (Butler)?

### **iii. Mapping Possibilities: A Fully-Restorative Process at Middlebury College**

This section will map a fully-restorative process at Middlebury College as understood by Paul McCold. Admittedly, restorative justice exists on a spectrum of restorative-ness, as is indicated by McCold’s typology of RJ (see Chapter I, Figure 1.1 of this thesis). Rather than introducing restorative sites into an otherwise adversarial or adjudicatory process, this thesis aims to more radically envision a process that is more fully founded on the principles of RJ (renamed

the “RJ-SMDVS process”). At the end of this chapter, there will be a much shorter discussion of what it would mean for smaller moments of RJ to operate alongside or within Middlebury’s current process (McCold’s “mostly” or “partly” restorative; see Figure 1.1). Nevertheless, this section will proceed as a rewriting (rather than a revision) of Middlebury’s current SMDVS process, and is loosely modeled after the RESTORE program in Pima County, Arizona (see “The RESTORE Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcomes”; also, see Chapter II of this thesis).<sup>73</sup> This is not meant to be a comprehensive rewriting that could readily replace Middlebury’s 19,400+ word policy, but is rather intended as a starting point for this dialogue.

The ensuing model will rely upon a number of assumptions, assumptions resulting from both space constraints and a desire to rewrite (rather than revise) Middlebury’s current single-adjudicator, adjudication-only process. The ensuing model assumes that the RP has taken responsibility for his/her/their actions, that the SV is deeply motivated to pursue RJ and initiates this endeavor, that both the SV and RP agree to pursue RJ, *and* that the RP complies with all steps outlined in their Redress Agreement (explained below). As a consequence, the model provided in this thesis does discuss what would happen if either the SV or RP refused to participate in the RJ process. The model further stipulates that all Middlebury College personnel involved in the RJ-SMDVS model will, in addition to current training regimens, receive extensive training in both (a) best practices regarding the use of restorative justice on college campuses<sup>74</sup> and (b) anti-oppression education to ensure that sexism, ableism, racism, etc. are left out of RJ proceedings.

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<sup>73</sup> At present, there are potential and actual constraints in place regarding the use of RJ to address SMDVS, including roadblocks created by federal, state, and local governments. Moving forward with RJ in cases of SMDVS will require not only sustained activism by projects such as Campus PRISM, but will also likely require further clarification from the Office for Civil Rights.

<sup>74</sup> One starting point for this could involve Middlebury administrators traveling to institutions where RJ is already in place, such as at Skidmore College, to learn more about their particular models. Additionally, the International Restorative Justice Conference will be happening in June 2016 at Dalhousie University, and will include presentations related to the mission of the Campus PRISM project.

### Phase I: RJ-SMDVS Intake<sup>75</sup>

- After initial reporting happens, a SV demonstrates clear and uncoerced interest in RJ. A meeting between a Judicial Affairs Officer and a SV is held, where the SV is given a RJ program manual, including an intended outline of an RJ-SMDVS process. All of the SV's questions are answered at this time. If the SV is still interested in pursuing RJ for their SMDVS claim, the SV is given a consent form to clarify their engagement with and desire to pursue this process. The SV is offered to have a civil attorney review the consent form and all other related documents, with the College covering the cost of this expense. The SV is provided with additional time to decide (if needed, with a deadline given). A No Contact Order is put into place at this time.
- After the SV consents to participate in a RJ-SMDVS process, the Judicial Affairs Officer contacts the RP and/or their legal counsel regarding using RJ-SMDVS. The RJ-SMDVS process is outlined, the RP is given a program manual, and any questions are answered at this time. The RP is given a deadline to decide whether or not to pursue RJ. The RP is then informed of the specifics of the No Contact Order currently governing their case.
- Both the SV and RP, or their representatives, may be in contact with the College throughout this period with any further comments or concerns.
- The RP agrees to participate in the RJ-SMDVS process and signs a consent form and all other relevant documents before proceeding to Phase II.

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<sup>75</sup> The model provided by Koss includes a psychosexual evaluation conducted by a forensic evaluator to determine the appropriateness of an RP's participation in conferencing. It is worth considering whether this is desirable (or feasible) at the university level.

## Phase II: Preparation

### SV Preparation

- The SV is given various options regarding their participation in the conference, including the use of a Surrogate SV (for more on Surrogate SVs, see “The RESTORE Program of Restorative Justice for Sex Crimes Vision, Process, and Outcomes.” 1632).
- The SV and a Judicial Affairs Officer meet to discuss safety concerns regarding participation in RJ-SMDVS. The Judicial Affairs Officer addresses the offer of support from trained counselors at Parton Health, the ground rules for participation in the program, the format of the conference and what the SV might say (including drafting an impact statement), the friends and/or family that might be invited to attend the conference, the things that the SV wants to hear from the RP during the conference itself, and what may be included in the Redress Agreement.
- Subsequent meetings may be scheduled for additional preparation.
- The SV and the RP do not have face-to-face contact until the conference.

### RP Preparation

- The RP and a Judicial Affairs Officer meet to review safety concerns regarding participation in RJ-SMDVS. The Judicial Affairs Officer addresses the offer of support from trained counselors in Parton Health, the rules governing participation in the program, the format of the conference and what the SV is likely to say, the RPs own statement, the things that the RP might be asked for during the process (i.e. forms of restitution), the friends and/or family that the RP would like to attend the conference, and what may be included in the Redress Agreement.
- Subsequent meetings may be scheduled for additional preparation.
- Regardless of the SV’s participation in the conference itself, it is the job of the Judicial Affairs Officer to assemble a community of support *and* accountability around the RP (potentially including friends, coaches, family members, Deans, etc.). The RP must attend the conference.



### Support Network Preparation

- The Judicial Affairs Officer has a meeting with the SV (and the Surrogate SV, if any), as well as any friends/family attending the conference. The Judicial Affairs Officer has a separate meeting with the RP and any of their stakeholders who have opted to attend the conference.
- In both meetings, all participants review: the RJ-SMDVS process, the rules of participation, how support networks may be of best use to the SV/RP, and what can (and cannot) be said during the conference.
- The process of completing the Redress Agreement is explained and discussed, and any safety concerns are listened to and dealt with. Friends and family received informed consent forms, which they must sign in order to participate in the conference.
- The family and friends are prepared to make their impact statement during the conference.
- Additional meetings are scheduled if necessary.

### Phase III: Conferencing Stage

- The Judicial Affairs Officer and a separate facilitator trained in RJ conferencing conduct the conference at a secure location.
- Prior to the conference, the SV will have to decide whether he/she/they or their RP should give their recollection of the events first.
- When the RP speaks, he/she/they describe the incident and his/her/their responsibility for it. When the SV (or Surrogate SV) speaks, he/she/they describe the incident and how it has affected him/her/them as well as his/her/their friends and family. At the end, the RP summarizes what the SV has said to provide an opportunity to correct his/her/their understanding.
- The members of the SV's support network then each, in turn, state how the incident has affected them. The RP is asked to summarize how the incident has impacted the SVs' network of support.
- The community of accountability and support surrounding the RP each, in turn, are asked to state how the incident has impacted them. The RP then is asked to summarize how the event has impacted their own community of accountability and support.
- The SV (or the Surrogate Victim) and the RP discuss the terms of the Redress Agreement with input from other conference attendees. The SV, RP, Judicial Affairs Officer, conference facilitator, and all participating friends/family/supporters sign the document. If a Surrogate SV is used, the Surrogate discusses the terms of the agreement as informed by the SV's requests, and the document is pending until the actual SV has signed off on it at another time. The Redress Agreement, among other things, will specify what will be done in terms of redress, a time frame for redress spanning no longer than one year, as well as the RP's enduring obligations to manage their own conduct, particularly regarding any ongoing safety concerns in the eyes of the SV.
- The SV may opt to attend a brief reception with beverages and snacks with the conference attendees to aid in closure and reintegration. If this is not desired, the conference is simply brought to a close by the Judicial Affairs Officer and conference facilitator after the previous step.
- After the Redress Agreement is signed, the SV's active participation in the conferencing process ends. The SV will be routinely notified of the RP's progress in written correspondences from the Judicial Affairs Officer.

### **Phase IV: Accountability and Reintegration Stage**

- For the period of time specified in the Redress Agreement, the Judicial Affairs Officer, alongside the Community Accountability and Reintegration Board, supervises the RP as they complete the terms of their Redress Agreement. The Community Accountability and Reintegration Board comprises of community volunteers who represent the community's ongoing interests in supporting the RP's progress (for more on this board, see "The RESTORE Program of Restorative Justice for Sex Crimes Vision, Process, and Outcomes" 1632).
- After all of the RP's obligations have been fulfilled, a final meeting between the RP and the Community Accountability and Reintegration Board is scheduled. The SV and anyone who participated in the conference are invited to attend that meeting. The RP then reads a prepared reflection and clarification letter regarding his/her/their progress throughout the redress process. This represents the RP's apology and their full reintegration back into the affected community

### **Phase V: Institutional Follow-Up**

- All conference participants are advised to contact the Title IX Coordinator should they have any feedback on the RJ-SMDVS process as they experienced it. This offer is not assumed; it is extended formally and in an ongoing manner.

#### **iv. The Limitations of Partly- or Mostly-Restorative Initiatives**

The model outlined above represents a fully-restorative conferencing model in that it involves McCold's three key stakeholders working in concert: the SV, the RP, and the community. To be certain, there are processes inspired by RJ which can be integrated into an otherwise adjudication-only model (McCold's "mostly- or partly-restorative"). Following the RJ typology provided by McCold, some sites for this type of mostly- or partly-restorative interventions could include victim support circles, whereby small communities of support (friends, family, Deans, coaches, etc.) are constructed around a SV to help them address their ongoing needs after adjudication, including their physical needs, emotional needs, economic needs, sense of isolation, sense of self-blame, ongoing fear, etc. (McCold 366).

There have already been some preliminary discussions at Middlebury regarding the extent to which victim support circles could be useful to help support and reintegrate SVs back to the

community after adjudication has already occurred. In lieu of advocating for or against mostly- or partly-restorative initiatives such as victim support circles, it is worth considering what such initiatives may lack. The central premise of restorative justice is that policy violations involve three primary stakeholders: the SV, the RP, and the community. We must continue to ask ourselves what it means when an adjudication-only model stands ready to support SVs, but not to engage with RPs in a similar manner. Such interim measures, although potentially better than nothing, create an asymmetry between SVs, RPs, and the community. Moreover, offering to support SVs after an adjudication process has already occurred does not hedge against SV revictimization during adjudication itself; rather than mopping up after a mess, it may be useful to interrogate the processes and mechanisms that caused such a mess in the first place.<sup>76</sup> Finally, continuing to reject RPs as legitimate stakeholders in the Middlebury community, especially through continued reliance upon suspension and expulsion, may only push sexual and relationship violence to less resourced communities elsewhere.

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<sup>76</sup> Again, the video *Middlebury Unmasked* serves as a good referent for SVs' experiences within Middlebury's SMDVS process.

## Conclusion

*It is March 2016, and I am nearing the end of my thesis. I am spending my days tying up a lot of loose ends, and not just the academic ones. Parting from Middlebury is an emotional experience for me. In some ways, I am celebrating. In some ways, I am mourning the trauma that it took to receive my diploma. I am once more reminded of what I have long known: Middlebury's SMDVS process was more traumatic than my rape itself. The assault lasted one night; feeling isolated and misunderstood by this institution has taken three and a half years and counting.*

*I've found a new therapist in town to help get me through these last few weeks. She practices a form of therapy where I first experience my trauma as it actually happened, and then I'm encouraged to respond to these events knowing what I know now. Hindsight is 20/20. Instead of feeling overpowered by his lawyers, I get to imagine a process that had better met my own vision of justice. Instead of being told what "survivors need" by College administrators, I am given the space to articulate my own needs on my own terms. Instead of leaving a party because he's getting uncomfortably close to me, I get to claim my right to take up literal and symbolic space at this institution.*

*Writing this thesis has been a similar act: I've told my trauma as I experienced it, but I'm also empowered to share what I wish had happened, what I've long requested. Instead of feeling beaten and broken after an adversarial judicial process, I've offered my vision for RJ on this campus. Instead of defining my trauma in terms that are intelligible to Middlebury College or Title IX, I've demanded that my feelings count. Instead of being told that "the data" just doesn't support RJ, I've handed administrators a nearly 100-page document suggesting otherwise.*

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*Days before I filed a formal complaint against Daniel\*, I confronted him. It was just the two of us. In retrospect, this was my last-ditch effort to avoid a judicial process. In vivid detail, I gave Daniel a play-by-play of what he had done to me during my freshman year. In no uncertain terms, I told Dan that what he did to me was wrong. More importantly, I described to Daniel the impact of his actions, how his actions made me feel. Needless to say, our interaction left me feeling neither heard nor supported.*

*In initiating this dialogue with Daniel, I had what David Karp might call a "restorative impulse." What I lacked—what we still lack—are the institutional structures to support such visions.*

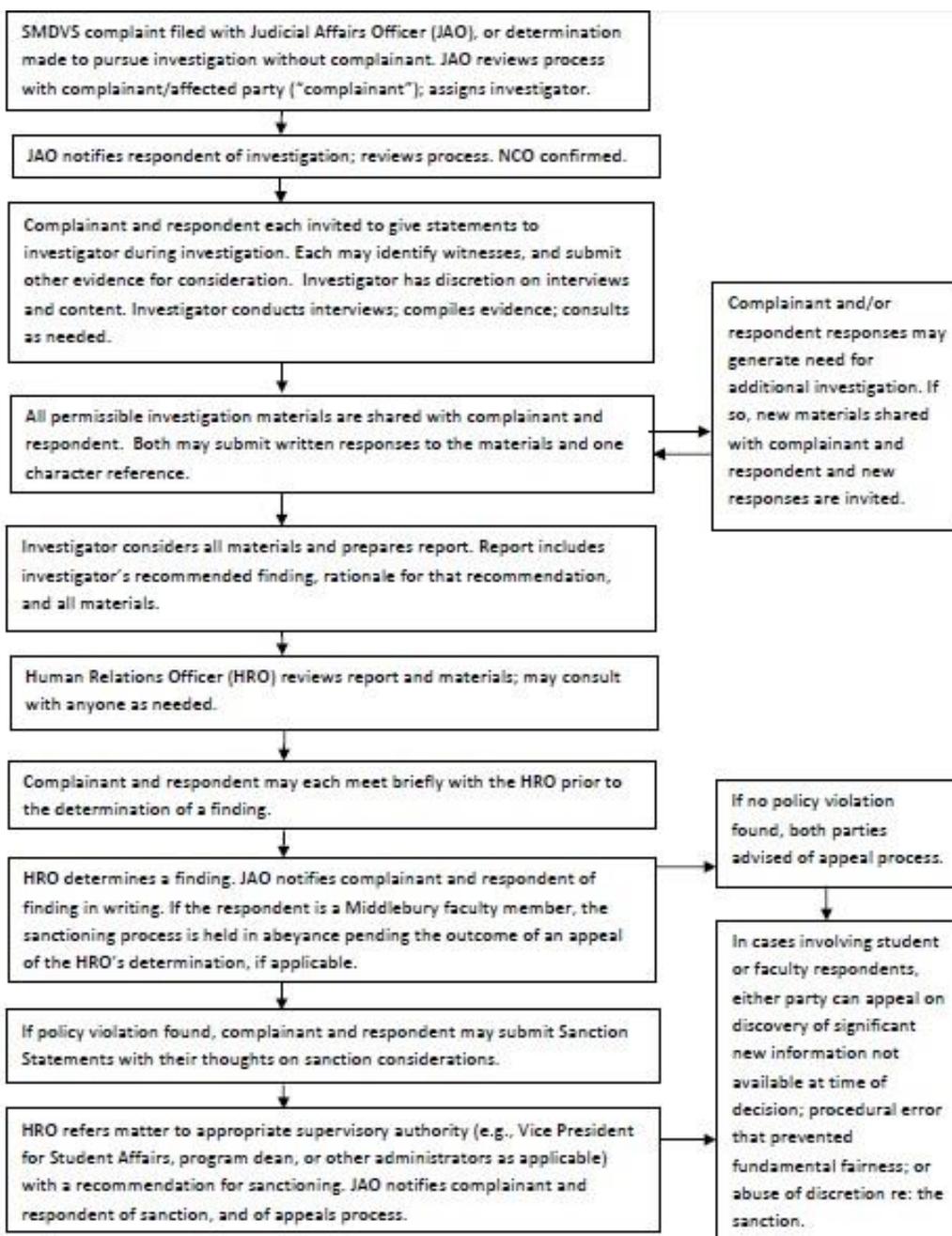
\* \* \* \* \*

*For the greater part of my senior year, I have struggled to name what has been driving this thesis—what has motivated a seemingly endless stream of sleepless nights and op-eds and open mics and webinars. As if on cue, an astute friend of mine recently commented on academia's ability to create worlds.*

*I suddenly realize that my motivation for this project is, in fact, a simple one: in reconsidering the red dot, I have created a world that I yearn for—a world that, at present, does not exist.*

\* A pseudonym

## Appendix A: Middlebury Policy Against SMDVS Process Outline



This chart reflects an informal summary of Middlebury's SMDVS process. No language in this document supersedes the language of the official Policy Against Sexual Misconduct, Domestic Violence, Dating Violence and Stalking found on Middlebury's Web site. Last updated: 7/2015.

*Provided by Karen Guttentag, Associate Dean for Judicial Affairs and Student Life, via email.*

## Appendix B: Gamut Room Monologue

*[Presented in the Gamut Room on December 10, 2015, at an event called “Taboo: Stories Unsilenced” put on by the student organization Feminist Action at Middlebury.]*

My name is Maddie Orcutt. I’m a senior here at Midd, and among other things, I help run the *It Happens Here* project. And I’m really excited to open up this event today. Really quickly, there are three quick ground rules for our particular chat tonight:

1. I will be speaking about a personal experience with sexual violence at Middlebury College. It’s my first time doing this in person, in front of an audience, so please be nice. It is my priority to take care of myself, and you should strive to take care of yourselves, too. So if you need to leave now or at any time during this discussion, you have my wholehearted support to do that.
2. My responsible party, a term which I will explain later, is a current Middlebury student. For a number of reasons, including legal ones, maintaining his confidentiality is very important to me. So please respect my vulnerability here today enough to not investigate who this guy is any further. It’s not interesting, it’s not your business, and it’s not helpful.
3. As a white, cis, college-educated, able-bodied female, I am an *imperfect* example of what sexual violence often looks like. While we focus on sexual violence in campus communities, we know that these incidences occur at higher rates in non-university settings. Please take my story as nothing more than one of far too many, and educate yourselves about the ways in which survivors with marginalized identities face even higher rates of violence with lower rates of “justice,” whatever the term “justice” even means anymore.

In that brief introduction, I’ve already disclosed to you that I was raped at Middlebury College. It happened during my freshman year, in Allen Hall. He was an acquaintance, and he remains on this campus. About nine months after I was raped, I decided to bring a case against my responsible person, or RP, under Middlebury’s Title IX process. We’ll get to why I use the term “responsible person” and not “assailant,” “perpetrator,” “respondent,” or “rapist” later.

Suffice it to say that my experience within Midd’s sexual misconduct structure was nothing short of heartbreaking and horrible. I’m honestly not sure what was more traumatic, being raped or having to tell that story over and over and over again. The word humiliating doesn’t even begin to touch it. Victim blaming is alive and well on this campus, and after a long, traumatic, and deeply adversarial process, my responsible party, my RP, was found to be not in violation on all counts. With time, I’ve grown pretty used to coexisting with him on this small campus, albeit out of necessity.

Let me be clear about one thing: my “taboo” is not that I was raped. My “taboo” is not that my responsible party was acquitted on all counts. After a lot of time and therapy, I bear no shame or stigma from either of those things. And if there’s anyone in the room tonight who has experienced sexual violence, Middlebury’s judicial process, or, God forbid, both, I want you to know that I wholeheartedly believe you, no questions asked. And I’d venture to say that there are other people

in this room tonight who would believe you, too, no questions asked. It is my politics to stand with survivors, including you, PERIOD.

My “taboo,” if anything, is that over the past semester, I have developed an unwavering belief that my responsible party has the capacity for empathy. My “taboo” is that my RP is not a monster, a villain, or a sociopath. With every ounce of my being, I know that my rape was not about “miscommunication” or “blurred lines”; this guy knew exactly what he was doing and he was turned on by it. My “taboo” is that despite this, I have chosen to see the humanity in my RP. To be clear, this is not a question of “innocence” or “guilt”; he is guilty as fuck. This is a question of capacity for conscience and change.

The belief that my RP is not a sociopath was not an easy conclusion to arrive at, nor was it ever a given. For a long time, I vilified my RP. My veins pulsed with bitterness. I had dreams at night about the ways in which I could maim or even kill him. I hated him. Deeply. Deeply. Deeply.

Whenever I tell the intimate details of “that night,” which is extraordinarily rare, I always ask people to not let the story of my assault define me. Because let’s be real--- so few of us are actually the “victim” or “survivor” stereotype. Sure, I’ve felt little, passive, afraid of intimacy, ABSOLUTELY, but that ship has sailed, and I refused to be perpetually labeled by one experience which, although traumatic, is but one facet of an otherwise rich and meaningful life.

But what I’m asking you to do tonight is much more radical--- I’m asking you to join me in entertaining the possibility that my “rapist” should not be perpetually be defined by the “rapist” label. To be certain, I’ve long struggled over what to call this guy since I can’t easily use his real name. For about a year, I referred to him as “Lord Voldemort” or “He-Who-Must-Not-Be-Named.” Early on in my healing process, I found humor to be an effective coping mechanism, but I also very literally perceived this guy as subhuman.

Why do I choose to see the humanity in my responsible party now? That’s a complex question. I guess it all comes down to this: I engaged in Middlebury’s sexual misconduct process out of a pervasive fear that the extreme violence that happened to me in Allen Hall would happen to other women’s bodies. Without legal representation or a rape kit, I decided to bring charges against my RP, if nothing else, as a sort of wake-up call. When entering this process, I was fueled by a desire for future prevention; I held on to hope that he could learn and grow.

My sexual misconduct process was extremely adversarial, cruel, and divisive, to both of us, and sometimes, in quiet spaces, I worry that my RP has become even more entrenched in his abuse towards women. Perhaps I’m being optimistic, but I have to believe that my judicial proceeding was not all for naught. Let us be perfectly clear: I’m not putting my own healing in the hands of my RP; whether he’s fully restored or has continued to commit gross acts of violence, I am so much more than the way his eyes see. I have to say that again: if you have experienced sexual or relationship violence, you are so much more than the ways in which your RP’s eyes see.

In any event, here’s my bucket list for this guy. There are just two things. Taboo city, or at least counter-cultural. Consider this an open letter to my RP:

1. I forgive you, if not for your sake, for my own. I want you to be happy and live your life full of empathy and love. While I will always hold you responsible, from this point forward I will never essentialize you into nothing more than a rapist. You made a terrible decision that altered my life forever, but you are so much more than that one decision.
2. I want you to look in the mirror and, as a responsible person, accept some responsibility for what you've done in the quiet of your own heart. To that end, I believe that you possess the capacity to accept women for the dynamic and wonderful and varied people that we are. Femininity is powerful, and rather than trying to control or coerce it, I challenge you to embrace it and be transformed by it. I believe that you possess the power to rewrite the script for masculinity in your life, and if you want, to serve as a role model for others.

I'm not going to stand here today and claim that I'm some big person. I still struggle with feelings of rage, sadness, shame on a daily basis. Much of this discussion remains intentional and aspirational. But, in any event, my taboo is to declare to you all tonight that being raped, though never acceptable, is far too pervasive and common to be labeled a "taboo." I think that my real "taboo," the deeply challenging message that I want to leave you with tonight, is that not all rapists are sociopaths. My own RP is not subhuman. He is not Lord Voldemort, not He-Who-Must-Not-Be-Named.

I am not going to pretend that this sort of a transformation within myself happened over night, or that this should be every survivors' path. It's not. The only thing I can say is this: I promised myself long ago that if I ever told my story in a public way, I'd be as transparent as possible. I believe that if I undercut the hurt and harm and trauma that I've felt these last three years, I, too, would be, in some sense, perpetuating rape culture. So sexual violence is violent, it is reprehensible, it has impacted myself, my friends, and my family in deep, traumatic, and enduring ways. I continue to mourn that. While I aspire for interpersonal growth, this growth has occurred at a site of such profound loss. This is not a neat narrative of progress by any means.

However, rather than punish my RP and blame him as I dig my own grave, I've opted to place my energy in championing a transformation that he is wholeheartedly capable of. Because for me to feel like I am effectively fighting rape culture, a cause which is now of deep importance to me, I've come to the conclusion that I can no longer meet his violence and hatred with violence and hatred of my own.

Thanks so much for listening.

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