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Restorative Justice and Responsive Regulation in Higher Education: The Complex Web of Campus Sexual Assault Policy in the United States and a Restorative Alternative

David R. Karp PhD

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ROUTLEDGE

Restorative and Responsive Human Services

EDITED BY GALE BURFORD | JOHN BRAITHWAITE | VALERIE BRAITHWAITE



RESTORATIVE AND RESPONSIVE HUMAN SERVICES

*Edited by Gale Burford, John Braithwaite and
Valerie Braithwaite*

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10

RESTORATIVE JUSTICE AND RESPONSIVE REGULATION IN HIGHER EDUCATION

The Complex Web of Campus Sexual Assault Policy in the United States and a Restorative Alternative

David R. Karp

Introduction

Sexual assault policy on college campuses in the United States is a complex system guided by federal policy, state policy, and local mandates. When students violate sexual misconduct policies, campuses primarily rely on suspensions and expulsions, paralleling the criminal justice system's reliance on incarceration as a solution based on stigmatization and separation. Since the 1990s, restorative justice has made inroads as an alternative response to student misconduct, but application to sexual misconduct is rare. The Campus PRISM Project (Promoting Restorative Initiatives on Sexual Misconduct) is a network of academics and practitioners exploring a restorative approach within a responsive regulatory framework (Karp et al., 2016). This chapter describes the current web of policy as an example of regulatory formalism, which follows from the federal Title IX legislation on sexual harassment. Then it explains the restorative approach promoted by the Campus PRISM Project. This approach embraces a "whole campus" response including restorative circles for sexual assault prevention efforts, restorative conferencing in response to misconduct, and reentry circles for students returning from suspension.

Sexual assault on college campuses is a regulatory nightmare. Sexual assault is pervasive and traumatic and intractably linked to a wider culture of hook-ups, binge drinking, and hegemonic masculinity (Mitchell & Wooten, 2016). Many assaults happen behind closed doors between individuals who are drunk and whose sexual encounter often begins with some level of mutual consent. Conduct hearing boards often have little evidence to review besides the impaired memories of parties involved. As a result, finding a student in violation of a campus sexual assault policy is a substantial challenge for conduct administrators. Under such conditions of uncertainty, mistakenly exonerating a student can further traumatize a victim and keep a campus at risk. Mistakenly finding a student in violation can deeply stigmatize them with lasting social, educational, and professional consequences. No other conduct adjudication outcome is as consequential for the students involved, but built on such a shaky platform of evidence. Implementing policies and procedures in response to allegations of sexual assault that leads to positive outcomes is a daunting administrative task.

This chapter examines the contemporary approach to campus sexual assault policy and an alternative restorative justice response. The analysis follows from Braithwaite's (2002) theory of responsive regulation. In this model, the contemporary approach in the United States is consistent with "regulatory formalism" (p. 29), while the restorative justice approach is an example of responsive regulation. According to Burford and Adams (2004, p. 15), "regulatory formalism is reactive, and directed at extracting compliance divorced from the influence of the persons harmed. The outcomes of adversarial interventions are typically seen as heavy-handed, uninformed and unfair and thereby promote reactivity even from people whose interests may be harmed by their own refusal to comply." While not writing about campus sexual assault, this is a strong and apt critique of the current formalist approach. The chapter describes how campus sexual assault policy is an example of regulatory formalism and delineates the counterproductive and unanticipated consequences of this model. It then defines a restorative approach that, in many cases, might lead to better outcomes.

Sexual and Gender-Based Misconduct on the American Campus: Defining the Problem

Campus sexual assault has received significant social attention through campus activism in higher education, in the media, and by the Obama and Trump Administrations. Organizations such as "Know Your IX," popular books, such as *Missoula* (Krakauer, 2015), magazines, such as *Rolling Stone* (Ederly, 2014) and *Time* (Gray, 2014), and documentaries, such as *The Hunting Ground* (Dick, 2015), have highlighted the social problem, and more recently, books such as *Unwanted Advances: Sexual Paranoia Comes to Campus* (Kipnis, 2017) argue that the recent response to the issue has created even more problems. While a broader movement to address violence against women has existed for decades (Brownmiller, 2000), this new wave has focused its attention on campus policies and procedures through online activism, lawsuits, federal complaints, and increased pressure on the federal government to mandate and enforce new rules for reporting, victim services, and conduct procedures.

Although popular accounting focuses on rape, regulatory responses to campus sexual and gender-based misconduct include a wide range of offending behaviors such as sexual harassment, stalking, sexual touching, and intimate partner violence. Table 10.1 summarizes findings from a recent survey of 26,417 students at eight institutions in the University of Texas system during the 2015–16 academic year (Busch-Armendariz et al., 2017). Victimization is lower among heterosexual male students and higher for LGBTQ students.

TABLE 10.1 Rates of Campus Sexual and Gender-Based Victimization (University of Texas)

Sexual harassment (unwelcome advances, gestures, exposure, sexting/photos/videos)	25%
Stalking (persistent threatening/harassing tactics)	13%
Intimate partner cyber abuse	12%
Intimate partner violence	10%
Sexual touching (unwanted, forced kissing, touching, groping)	12%
Rape (sexual penetration through force, threat of force or incapacitation)	6%

Higher Education Sexual Assault Adjudication: Title IX Guidance and Regulatory Formalism

Regulatory formalism is epitomized by legislative mandates. A complex web of policies now exists at the federal, state, and campus levels dictating how campuses should respond to sexual assault (see Figure 10.1). It has become so difficult to understand and keep up with various guidance documents, court cases, and public pressures that cottage industries have developed to help campuses navigate the legal landscape. For example, the student affairs professional association ACPA recently launched “Compliance U,” “the world’s first comprehensive 24/7/365 professional and career development digital training platform for law, policy, governance, jurisprudence and compliance in higher education” (ACPA, 2017). The major strands of the regulatory web are as follows:

- VAWA (Violence Against Women Act of 1994) is a federal law that provides funding toward the investigation and prosecution of violent crimes against women and established the Office of Violence Against Women (OVW) in the Department of Justice. OVW provides funding as part of its “Campus Grant Program” to higher education institutions to improve victim services and reduce campus sexual assault, domestic violence, dating violence, and stalking.
- Title IX (Title IX of the Education Amendments of 1972) is a federal civil rights law passed as part of a federal amendment to the Higher Education Act of 1965. Under this law, sexual harassment on college campuses, including sexual violence, should be understood as a form of gender discrimination that creates a hostile climate and an obstacle to educational opportunity. “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.” Colleges are required to respond immediately and appropriately to allegations of sexual harassment. Students who believe that their educational rights have been violated because the college did not respond properly can file a complaint with Department of Education Office of Civil Rights (OCR). At the time of this writing, from April 2011–September 2018, OCR has opened 502 campus investigations, and resolved 192 of them (Chronicle of Higher Education, 2018).
- The Clery Act (Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act of 1990) is a federal consumer protection law passed in 1990. The Clery Act was named after Jeanne Clery, a student who was raped and murdered in her residence hall at Lehigh University in 1986. The law requires colleges to track and publish crime statistics so that prospective students can be informed about the risks of attending a college. More recent amendments also require timely notifications to campus communities about incidents.
- The Campus SaVE Act (Campus Sexual Violence Elimination Act of 2013) was passed as an amendment to the Clery Act. Campus SaVE mandates educational programming for students, faculty, and staff on campuses to prevent campus sexual assault, domestic violence, dating violence, and stalking.
- State Laws. Several states have passed legislation to address campus sexual assault (Morse, Sponsler, & Fulton, 2015). Democratic states have supported campus efforts to promote affirmative consent, transcript notations, victim autonomy, and collaboration with law enforcement. In 2014, California passed a law that colleges must adopt “affirmative consent” policies requiring individuals to obtain “affirmative, conscious, and voluntary agreement to engage in sexual activity” (SB-967,

2014). Similar laws have been passed in Illinois, New York, and Connecticut (Affirmative Consent Laws, 2017). Republican states have sought to curtail what they believe to be federal overreach in campus guidance. Their primary concern has been to ensure due process for accused students by supporting their right to legal representation in conduct hearings. North Dakota, Arkansas, and North Carolina have passed legislation to guarantee this right.

- **Campus Policies.** Every higher education institution is responsible for developing its own student code of conduct and sexual and gender-based misconduct policy. Public universities may develop one policy across many campuses, such as the policy for the 64 State University of New York campuses (SUNY, 2017). Despite the general autonomy of campuses to develop individualized policies, they often rely on model policies developed by organizations such as ATIXA (Association of Title IX Administrators).

The result of national attention on campus sexual assault has been a complex regulatory system that operates at different levels of jurisdiction and now broadly includes a wide range of sexual behavior under its regulatory umbrella. Gersen and Suk (2016) describe this regulatory web as a new “sex bureaucracy,” which has had a net-widening effect, incorporating more varied sexual experiences under the sexual assault umbrella. They worry that “the bureaucratic tendency to merge sexual violence and sexual harassment with ordinary sex” trivializes sexual assault and is “counterproductive to the goal of actually addressing the harms of rape, sexual assault, and sexual harassment” (p. 882). This bureaucracy has so broadened the scope of sexual assault that

there is a significant disconnect between the current discussions in our country about the epidemic of campus rape, and the fact patterns involved in the allegations now routinely investigated as sexual misconduct. . . [Many] appear to be situations in which he and she (or he and he, or she and she) say much the same thing about the facts of the incident, but give different meanings to the experience. The different meanings need not be radically dissimilar to result in different determinations about sexual misconduct.

(p. 942)

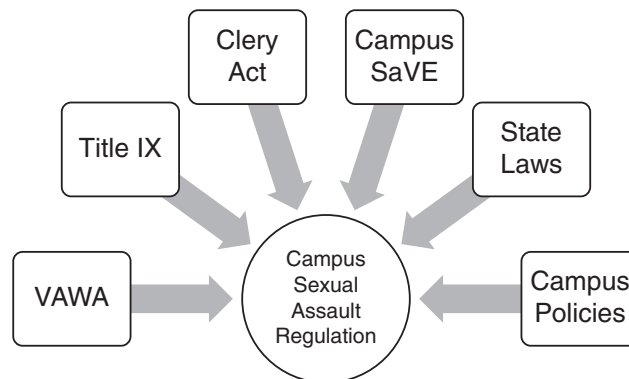


FIGURE 10.1 The Regulatory System for Campus Sexual Assault

These “different meanings” suggest that traditional definitions of sexual assault, rooted in a predatory conceptualization of offending, may no longer apply to many of the behaviors that are reported on college campuses.

Kevin and Amy: Unanticipated Consequences of Regulatory Formalism

The Association of Title IX Administrators (ATIXA) is an influential organization for interpreting the sex bureaucracy for campuses. The *ATIXA Gender-Based and Sexual Misconduct Model Policy* (Sokolow et al., 2015, pp. 13–14) provides the following case study as an educational tool to help sexual misconduct hearing board members make proper determinations in their cases.

Kevin and Amy are at a party. Kevin is not sure how much Amy has been drinking, but he is pretty sure it's a lot. After the party, he walks Amy to her room, and Amy comes on to Kevin, initiating sexual activity. Kevin asks her if she is really up to this, and Amy says yes. Clothes go flying, and they end up in Amy's bed. Suddenly, Amy runs for the bathroom. When she returns, her face is pale, and Kevin thinks she may have thrown up. Amy gets back into bed, and they begin to have sexual intercourse. Kevin is having a good time, though he can't help but notice that Amy seems pretty groggy and passive, and he thinks Amy may have even passed out briefly during the sex, but he does not let that stop him. When Kevin runs into Amy the next day, he thanks her for the wild night. Amy remembers nothing, and decides to make a report to the Dean. This is a violation of the Non-Consensual Sexual Intercourse Policy. Kevin should have known that Amy was incapable of making a rational, reasonable decision about sex. Even if Amy seemed to consent, Kevin was well aware that Amy had consumed a large amount of alcohol, and Kevin thought Amy was physically ill, and that she passed out during sex.

New Policies Do Not Increase Reporting by Survivors

It is highly unusual for a student like Amy to file a complaint against a student like Kevin. Since OCR issued guidance in 2011, campuses have vastly expanded their formal support systems (Brown, 2017). However, this has not necessarily led to an increase in reporting. Prior research indicates that students rarely report sexual victimization: less than 20% seek assistance from sexual assault or women's centers; less than 11% report to the police; and less than 6% file a formal complaint through the campus conduct process (Holland & Cortina, 2017; see also Sabina & Ho, 2014; Khan et al., 2018). No recent studies indicate that reporting rates have increased despite the greater dedication of campus resources and development of formal adjudication systems. This may be especially true for students of color (Murphy, 2015). Holland and Cortina (2017) surveyed 840 undergraduate females in 2015 at a Midwestern university, with 284 (34%) reporting at least one sexual assault as a student. Only 16 (5.6%) disclosed their victimization to any of the three campus support offices—Residential Life, Sexual Assault Center, or Title IX Office. Only five students (1.7%) filed a formal complaint. The researchers examined reasons for nonreporting and many of them point to the need for an alternative approach. They believed the assault was insufficiently severe to warrant the formalist response, they did not think their case would be treated confidentially, they thought a formal hearing process would be too disruptive to them and their offenders. “In our study, reasons that survivors did not use the Title IX Office's formal grievance procedures mirrored top reasons that survivors do not report to the police . . . Thus, it may be beneficial

to examine if there are effective alternatives to a quasi-criminal justice model. For instance, restorative justice” (p. 62). If survivors find the complaint process to be too intrusive, disruptive, and prolonged, they are not likely to make use of it as a resource.

Campus Communities Become Polarized and a Climate of Anxiety Grows

Adversarial processes heighten divisiveness on campus. For example, when Amy files a complaint against Kevin, one of the most common interventions by a university will be to invoke a “no contact order,” warning each student to avoid one another and stop any communication between them (ATIXA, 2017). This order is likely to remain in place until the students graduate (or Kevin is expelled). The goal is to protect Amy from further harm, particularly through retaliation by Kevin. Although no contact orders are often helpful, one of their unintended consequences is ongoing anxiety about maintaining them. Students continually look over their shoulders, worrying about seeing the other on campus. Friendship groups become divided. Conflicts arise between supporters of Kevin and supporters of Amy. Campaigns begin on social media that call Amy a liar or Kevin a rapist. Amy’s victim advocate is torn between encouraging Amy to pursue an increasingly stressful, quasi-public, adversarial process and a more private, inwardly focused healing process. Kevin begins to suffer from the public shaming common to sex offenders (Tewksbury, 2012). The adversarial response heightens anxiety, distrust, and campus polarization.

Adversarial Adjudication Exaggerates Biased Decision-Making

In this hypothetical case, so little information is provided that it is easy to embellish the story with a biased interpretation, one that is either favorable to a claim that Amy was assaulted or a claim that Kevin had legitimate consent. For many years, conduct administrators have been influenced by a study that suggests Kevin is likely to be a serial rapist. This study of college males was conducted in the 1990s by Lisak and Miller (2002). According to Coker’s (2016, p. 171) review of the impact of this research on campus sexual assault policy, the dominant narrative is “(1) that *most* undetected rapists are predators; (2) that repeat assaulters (predators) account for most rapes; and (3) that the only appropriate response to predators is to remove them.” If Lisak’s study is an informal guide for policy and procedure, then hearing boards are likely to be biased against Kevin, assuming his motivation was to take sexual advantage of Amy through incapacitation. ATIXA’s model policy encourages this conclusion.

Recent research complicates the dominant narrative by finding the serial predator model to be inadequate. A study by Swartout et al. (2015) does not dispute the severity of the campus sexual assault problem, but suggests that there is much more heterogeneity among those who commit sexual assault (or are accused of doing so), including those who, under the influence of alcohol, misperceive their partner’s sexual intentions and decision-making capacity. Further evidence that college males often misperceive female sexual desire and consent was found by Lofgreen et al. (2017). Hearing board members that reject the predator model may be more likely to rule in Kevin’s favor. Kevin, they might believe, may have had consent from Amy and not interpreted her behaviors as indications of incapacitation. Distinguishing “drunk sex” from incapacitation is complicated (McCreary, 2015). What is troublesome about Kevin is that he failed to observe or ignored warning signs of incapacitation. But what is troublesome about finding him in violation is Amy’s sexual advances and explicit expression of consent. Forced to choose, with limited evidence at hand, it is likely that conduct administrators will be influenced by

their beliefs about whether students are likely to be sexual predators. Presented with the same fact pattern, outcomes by hearing boards may be deeply influenced by adjudicator bias.

Accused Students Express Greater Denials of Responsibility

Regulatory formalism encourages rigid adherence to explicit policy. ATIXA seeks to provide clarity by stating unequivocally that Kevin is in violation. Kevin is likely to disagree. From his perspective, Amy initiated sexual activity and Kevin has verbally double-checked her consent. The line between drunk and incapacitated is not clear. He was not certain that she threw up or that she passed out. There are no other witnesses to attest to her incapacitation. Amy, herself, doesn't remember, which may indicate that she was incapacitated, but not a criterion that Kevin could have used to assess her ability to consent since she could lucidly verbally consent to sex in a "blackout" state, but not remember it.

Based on the scenario provided, we do not know if Kevin meant to cause harm or believed his behavior to be nonconsensual. We do know that Amy's harm was traumatic enough to persevere through the obstacles of reporting and file a complaint. In this case, the policy violation would typically lead to suspension or expulsion. In a zero-sum, high-stakes grievance process, Kevin is not likely to interpret this outcome as fair. Sherman (1993) argues that such a situation is more likely to lead to defiance than acceptance of responsibility. Rather than experiencing shame for causing harm, even if inadvertent, Kevin is likely to believe he is being unfairly labeled and stigmatized. This may increase gender hostility in accused students and lead to future transgressions. If Kevin is separated from the university, it is not clear that he will have learned anything except the system is unfair and that Amy is to blame for getting him in trouble. He will take these beliefs with him wherever he goes, perhaps to a place with little awareness about Kevin's behavior and fewer resources to support his growth, change, and development.

Accused Students Believe the Process Is Illegitimate and File More Lawsuits

If Kevin denies responsibility and believes he was treated unfairly, he may reject the legitimacy of the process (Tyler, 2006). Under the Obama administration, guidance by OCR was designed to clarify and make consistent the adjudication process, which might make it easier to find accused students in violation (Bartholet et al., 2017; Villasenor, 2016). For example, OCR has advocated for use of the preponderance of the evidence standard (the lowest standard of proof) and trauma-informed training of hearing board members (so they can see complainants as credible even when their actions may seem contradictory or unreliable due to memory impairment, changing statements over time, or behavioral reactions such as passivity during the incident). The backlash against these efforts has come in the form of lawsuits charging universities with failing to provide sufficient due process. Reviewing litigation of Title IX cases from 2014 to the first part of 2017, Pavela (2017) reports that accused students have prevailed in a majority of cases, either in preliminary or final rulings. Campuses are seeing more litigation as many students question the fairness of the hearing process. In 2018, the Trump administration has proposed changes that prioritize due process, which may shift the perception that the process is illegitimate from accused students to complainants (Carleton, 2018).

Disparities Grow between Rich and Poor, White and Black

If Kevin was poor or black, the likelihood that he would be found in violation may be increased (Halley, 2015; Rice Lave, 2016; Yoffe, 2017). Consider, for example, the Title IX case load at Colgate University

during the three academic years of 2012–13 to 2014–15 (Yoffe, 2017). Although only 4 percent of Colgate’s students are black, they accounted for 25 percent of sexual misconduct complaints and 15 percent of the students found responsible. Yoffe (p. 3) argues, “as the definition of sexual assault used by colleges has become wider and blurrier, it certainly seems possible that unconscious biases might tip some women toward viewing a regretted encounter with a man of a different race as an assault. And as the standards for proving assault have been lowered, it seems likely that those same biases, coupled with the lack of resources held by many minority students on campus, might systematically disadvantage men of color in adjudication, whether or not the encounter was interracial.”

The stigma of being found in violation of sexual assault, the likelihood of suspension or expulsion, transcript notation, and the accompanying possibility of criminal prosecution all encourage accused students to hire lawyers to assist in their defense. No research demonstrates the effectiveness of lawyering up, but it probably reduces the chances of a student being found in violation, just as litigation has been effective in overturning such findings. Hiring a lawyer can cost a student tens of thousands of dollars (Kipnis, 2017), a fee that is inaccessible to most. Chances are less that students of color come from wealthy families and longstanding prejudice makes accusations against them more likely. It would not be surprising if poor students and students of color are more likely to be both accused of sexual assault and be found in violation of it.

Regulatory Formalism Undermines Female Agency

Did Kevin and Amy have non-policy-violation sex, as complicated, dissatisfying, and unpleasant as that might be, or is this an instance of sexual assault? The challenge is that it is so hard to know. ATIXA’s solution is to tip in favor of the complainant. But in a recent case, charges were dropped against a University of Southern California student when a judge stated the complainant’s sexual overtures indicated consent despite her intoxication (Alani, 2017). Kipnis (2017) argues that assuming college women cannot make their own sexual choices while drinking undermines female agency and perpetuates a presumption of female helplessness. “In a sexual culture that emphasizes female violation, endangerment, and perpetual vulnerability (‘rape culture’), men’s power is taken as a given instead of interrogated: men need to be policed, women need to be protected. If rape is the norm, then male sexuality is by definition predatory; women are, by definition, prey. Regulators thus rush in like rescuing heroes, doing what it takes to fend off the villains” (p. 14). Similarly, Iverson (2016, p. 24) argues that current campus policies create a “discourse of dependency [that] situates victims as reliant on others, namely university personnel, to mediate their experience, support them, and keep them safe.” Not only does this discourse recapitulate a patriarchal framing of sexual assault as solely a victimization of women, it also marginalizes the sexual assault experiences of men and members of the LGBTQ community since they do not fit the prevailing heteronormative gender narrative (Wooten, 2016). While often referring to the goal of survivor empowerment, formalist policies may have the opposite effect of perpetuating gender stereotypes and discounting female agency.

The formalist approach was implemented to hold institutions accountable and strengthen campus responses to sexual assault. It has helped raise awareness and dedicate new campus resources to the problem. But it has also had troubling unintended consequences. It has not solved the problem of low reporting and may reify a concept of female helplessness. It helps perpetuate a serial predator model of male students, while failing to acknowledge the complexity of sexual encounters like Kevin and Amy’s.

It discourages accused students from acknowledging harm, heightening adversarial, inequitable, and stigmatizing responses. Instead, what is needed is more authentic exploration by students, an exploration less focused on determining if a policy was violated than helping students like Kevin understand and take responsibility for Amy's experience of physical and emotional violation. Unlike the regulatory formalism of the "sex bureaucracy," in many cases a restorative approach may better respond to the problem of campus sexual assault.

Restorative Justice as Responsive Regulation

Several recent critiques of the current regulations have called for a restorative justice alternative (AAUP, 2016; ABA, 2017; Coker, 2016; Harper et al., 2017; Kaplan, 2017; Kirven, 2014; Koss & Lopez, 2014; Koss et al., 2014; Rice Lave, 2016). The Campus PRISM Project (Promoting Restorative Initiatives for Sexual Misconduct) comprises an international team of researchers and practitioners committed to reducing sexual and gender-based violence by exploring how a restorative approach may provide more healing and better accountability. It has a goal to "create space for scholars and practitioners to explore the use of RJ for campus sexual and gender-based misconduct (which includes sexual harassment, sexual assault, and other forms of gender-based misconduct) as an alternative or complement to current practices" (Karp et al., 2016, p. 2). The project's approach aligns with Braithwaite's (2002) regulatory pyramid (see Figure 10.2) by integrating RJ into the current regulatory scheme and offering preventive and first-alternative responses before turning to more adversarial interventions. Ultimately, the Project gives primacy to addressing harm and to creating the conditions in which it is safe enough for a student like Kevin to acknowledge causing harm and be actively accountable for it rather than perpetuate the conditions that provoke denials and minimization of responsibility.

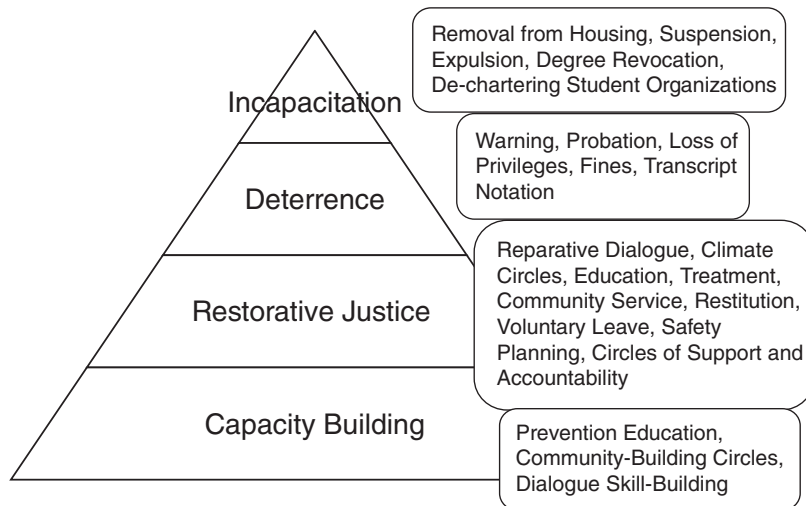


FIGURE 10.2 Braithwaite's Sanctioning Pyramid Adapted for Campus Sexual Assault Regulation

Sexual misconduct policies currently begin with the goal of offender incapacitation at the top of the pyramid. Most institutions recommend or mandate suspension or expulsion in a case like Kevin and Amy's. For a lesser violation, a student may be banned from campus housing. For a recent graduate, the degree may be revoked. If there was collusion by a student organization, such as a fraternity that conspires to incapacitate potential victims, the organization may be de-chartered and disbanded. These sanctions are designed to be retributive by providing a clear message of disapproval through the strongest punishments available to campuses. They also serve the purpose of incapacitation as measures intended to reduce the opportunity for reoffending.

The student may also be subject to deterrent sanctions, which are designed to impose a punitive cost. With these, the primary goal is an appeal to the rational decision-maker. By knowing the cost of misconduct, the student will choose to avoid it. This is lower on the pyramid because it still gives the student agency. Rather than banishment, the student is trusted enough to remain a member of the community, but expected to choose compliance. These sanctions include warnings, which are usually a letter maintained in a disciplinary file; probation, which may run for the duration of the student's attendance at the school and include a stipulation for more serious sanctions should the student reoffend; fines; and transcript notation, which becomes a permanent mark in the student record and disclosed to other educational institutions or employers upon request.

None of the above sanctions are designed to educate students, explore and address the harm caused by the incident, or treat students as moral beings capable of learning, growth, and development. It is possible, however, to begin with a restorative approach before resorting to deterrence or incapacitation. Most often, RJ is associated with face-to-face dialogue between victims and offenders. This is possible in sexual assault cases, but so are indirect forms of communication such as exchanges of writing or video recordings. Climate circles can be used to address broader community harms. Interventions focused on rebuilding trust and repairing harm include participation in educational workshops, counseling or treatment, restitution, and community service. Students may voluntarily take a leave of absence as a gesture of good faith. Overall safety planning may include the development of support and monitoring systems such as Circles of Support and Accountability (McMahon, Karp, & Mulhern, 2018).

One variation of Braithwaite's sanctioning pyramid includes a lower tier to highlight the importance of prevention efforts through capacity building (Braithwaite, 2017). Capacity building for the prevention of campus sexual assault would include prevention education, community-building circles, and skill-building education for campus community members to develop interpersonal communication competence. Community-building circles may enhance current prevention education efforts that primarily rely upon brochures, webpages, online workshops, and large auditorium presentations about campus sexual misconduct policy (Silbaugh, 2015). Circle practices offer members of the campus community a way to surface and explore issues related to sexual norms and behavior. They can be used for community building, personal and group reflection, facilitated discussions about sexual harm, rewriting cultural narratives about rape and hegemonic masculinity, and developing commitment to pro-social behavior along the stages-of-change continuum. RJ circles can be implemented as one-time events or a sustained series of dialogues.

In addition to Braithwaite's sanctioning pyramid, restorative justice practitioners, particularly in K-12 schools, often refer to a pyramid that illustrates a "whole school" approach that includes prevention, response, and reintegration. This pyramid does not order the priority of interventions, but instead

illustrates a holistic implementation of restorative practices within a school community. Its original rendition drew upon a public health model (Morrison, 2007). Figure 10.3 adapts the K–12 RJ pyramid for “whole campus” application to campus sexual assault.

The whole campus approach includes three tiers of intervention. The first is designed for prevention education and intended for all members of the campus community—students, faculty, and staff. The goal is to build and strengthen relationships, foster trust, and develop interpersonal communication and conflict resolution skills. Circle practice offers an innovation through its emphasis on the intersection of information sharing, education, reflection, and community building. A circle-based approach incorporates the sharing of important technical and legal information that is universal to prevention education, but does so in a meaningful and intimate learning space. Circles provide a context that allows students to collectively analyze their personal views and experiences, at the same time making the learning process individually relevant. In circles, participants develop shared norms and community-based action plans, which can promote individual and group accountability as well as inclusive, restorative responses to harm.

Tier I prevention circles can take up a variety of topics for dialogue (Pointer, 2018). They may be used to articulate and set sexual standards for members of the campus community. Although codes of conduct are prescribed, the purpose of these circles is for participants to explore their own sexual values collectively. They may discuss the communication strategies of affirmative consent, the relationship between sex and drinking, and pressures students may feel to participate in a “hook-up culture” (Bogle, 2008; Wade, 2017). Students might examine their own experiences within a larger campus climate that may be supportive to them or may promote a more insidious “rape culture” (Burnett et al., 2009). Circles may be organized to explore trauma and strategies of resilience. Or they may simply offer safe spaces for students to share concerns or personal experiences. The following case study provides an example of a Tier I prevention circle facilitated at the University of California at Santa Cruz (Assegued, 2017).

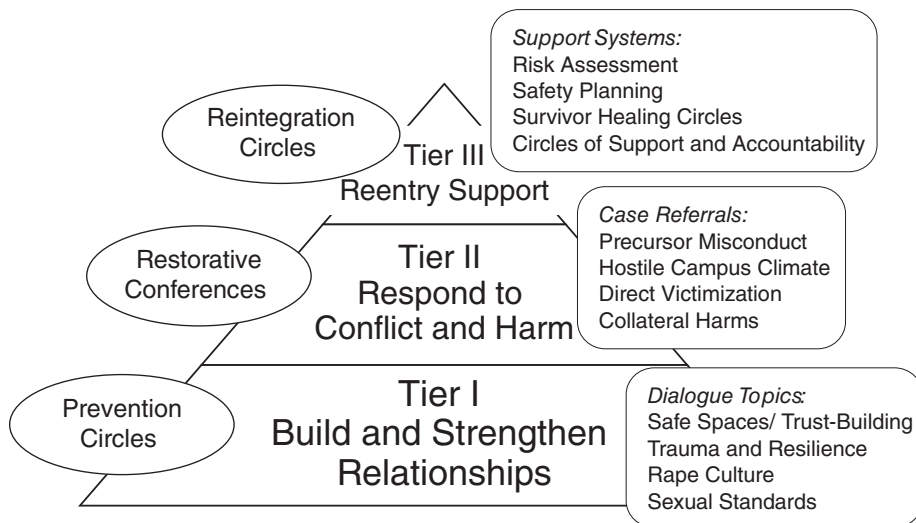


FIGURE 10.3 Whole Campus Restorative Justice Approach to Campus Sexual Assault

RESTORATIVE JUSTICE CIRCLE ADDRESSING SEXUAL VIOLENCE ON CAMPUS

In an effort to have an open dialogue and foster healing surrounding incidents of sexual violence and sexual harassment, Vicki Assegued, Restorative Justice Program Developer, Trainer and Facilitator at the University of California, Santa Cruz, organized a restorative community-building circle in 2017. Previously, Assegued had facilitated a restorative circle with students, faculty, and staff in an academic department that was reeling after a faculty member had been accused of sexually assaulting a graduate student. This healing circle provided so much social support, ideas for healing, and hope for the participants that Assegued was then asked to plan a circle to address sexual violence on campus, in general, and extend an open invitation to all members of the campus community.

Assegued collaborated with faculty from a working group, called Beyond Compliance, which seeks to reduce sexual violence and improve the campus sexual climate. Knowing the importance of the issue, but seeing that opportunities to openly discuss it were rare, the group wanted to invite the community to actively engage in a conversation within a structured, safe, and supportive format. They wanted to offer the chance for participants to express themselves openly and safely, to hear, acknowledge, and validate each other, to work collaboratively on solutions and to build a stronger sense of belonging to their wider community.

The circle agenda incorporated common elements of a restorative community-building process: creating a sense of connection, allowing people to discuss the harm associated with the topic, and brainstorming ways to address the harm and strengthen the community. Their circle began with a welcome to the 25 students, staff, and faculty in the circle, thanking them for coming, sharing the reasons for gathering, describing restorative justice and its benefits, and outlining how they would apply the principles together. They acknowledged the sensitive nature of the topic, introduced the support people who were there in case someone wanted to step out and talk one-on-one, and explained the use of the talking piece.

The three co-facilitators (Assegued and two faculty members she had trained) passed the talking piece around the circle for the first time, inviting participants to introduce themselves and express their hopes for addressing sexual violence on campus. Then, they divided into groups of four, being mindful to include mixes of students, staff, and faculty. The members of each small group discussed what inspired them to attend this gathering and what was most important for them to address about the topic of sexual violence on campus. After reassembling into the larger circle, a spokesperson from each group summarized their priorities.

Following this summary, the facilitators led an open, whole group discussion to brainstorm ideas about how to manifest their shared goals. They focused particularly on the importance of maintaining a strong community with transparency, trust, and openness for addressing issues of sexual violence. Ideas were captured on a large white pad for ongoing discussion and planning. Participants also shared upcoming events addressing sexual violence, giving everyone the opportunity to get more involved in the community.

In the closing round, they passed the talking piece again, with each person sharing how they felt about this restorative justice process and what it meant for them. Participants expressed their sincere appreciation for the opportunity. The facilitators closed the circle by summarizing and acknowledging what had taken place and thanking everyone for engaging in the process.

When an incident of harm occurs, Tier II restorative conferences can address the harm as an alternative or supplement to formal/adversarial hearings. Circle processes in response to harms can also be implemented. As of this writing, the Department of Education's Office for Civil Rights (OCR) has not provided guidance about the use of RJ for sexual and gender-based misconduct. In 2011, OCR briefly discusses informal resolution options and identifies mediation as permissible "for resolving some types of sexual harassment complaints," but inappropriate for sexual assault cases (U.S. Department of Education Office for Civil Rights, 2011). Because mediation and RJ are often confused, this stipulation has had a chilling effect on the application of RJ for sexual and gender-based misconduct. In 2017, OCR reversed the 2011 guidance and in a recently published document stated, "if a school determines that the particular Title IX complaint is appropriate for such a process, the school may facilitate an informal resolution, including mediation, to assist the parties in reaching a voluntary resolution" (U.S. Department of Education Office for Civil Rights, 2017, p. 4). This reversal will likely lead to increased use of restorative conferencing.

More commonly today, campuses are using conferencing for related harms. Collateral harms are those associated with an instance of direct victimization, but not the most immediate harms to the victim. For example, students may publicly criticize a harmed party in defense of the accused student or, alternatively, attack the accused student or that student's larger friend group. These ripple effects often play out over social media. Conferencing can also be used for harms to the campus climate, such as when a student group leads a "rape chant" (Foderaro, 2011) or a fraternity hangs a sexist banner during first-year orientation (Samuels, 2015). Campuses can readily use conferencing for precursor misconduct, such as binge drinking, hazing, or other behaviors that create the conditions in which sexual assault is most likely to occur. The following case study is a rare example of a restorative conference in response to an individual incident of sexual misconduct (Cirioni, 2016; Karp & Schachter, 2018; Lepp, 2018; Smith, 2017).

RESTORATIVE JUSTICE CONFERENCE IN RESPONSE TO A CAMPUS SEXUAL ASSAULT

Anwen and Sameer (pseudonyms) met in their first semester at a small, liberal arts college. They went on a date or two and then decided to remain friends. Fast forward to their second semester and they ran into each other at a party. Anwen noticed that Sameer was very intoxicated, but danced with him anyway. He became more sexually aggressive, isolating her in a private room. She tried to leave, but all of her friends had already gone, and she didn't have her dorm key or phone with her. Rather than assist her to get back to her room, Sameer persuaded her to go to his room instead. Once there, Anwen felt trapped and pressured into sexual activity she did not consent to and did not want. Afterwards, she said she walked "around for several days feeling disgust with myself, feeling a ghost hurt between my legs where he rubbed me, feeling dirty, blocking the thoughts."

Anwen stayed silent about her harm for the next three years. Throughout that time, she came into contact with Sameer on numerous occasions, especially through their roles as student orientation leaders. This incident and their following interactions affected her both socially and academically. In the spring of her senior year, Anwen reported the incident to the campus conduct

administrator. She specifically requested that it be handled through an informal resolution process that would let her meet with Sameer so she could share how much she had been hurt by him. Otherwise, she did not want him to be suspended or expelled, nor did she want to involve the local police. Afterwards, Anwen explained, "What's important to me about the restorative justice process is that both people are given a space where they are empowered to make things better. I didn't want to take away his agency because that would just be reversing the roles." Sameer said, "Every time that I've wanted to punish myself beyond all belief she always said no, I want you to do better. Don't just take the easy route and lock yourself up or get yourself kicked off campus because that's not going to help anybody. She never wanted to punish me. She wanted me to learn. She wanted me to grow. She wanted me to prevent this from ever happening to others."

The conduct administrator met with Sameer, told him of Anwen's complaint, and Sameer immediately admitted to a sexual misconduct violation and expressed his deep remorse. He agreed that he did want to do whatever he could to meet Anwen's request and make up for what he had done. The administrator met individually with Anwen 12 times and Sameer seven times before bringing the two together. His conversations with Anwen were focused on regaining the power that she felt she had lost. The conversations with Sameer explored how he could take ownership and responsibility for his actions; what he could do to repair the harm he caused.

The facilitated RJ dialogue lasted for two hours. It allowed Anwen to share the pain she felt. Initially, she had felt isolated and intimidated. Later, she started to blame herself for not calling security. She felt guilty thinking that she led him on. These feelings of self-blame were triggered each time she saw him. Her role as an orientation leader was compromised due to his presence. Anwen's relationship with her new partner never felt whole because she prevented herself from feeling vulnerable with him. As a creative writing major, much of her work had been about the violation. She wanted Sameer to read her papers and write a response.

Sameer committed to fully hear about the harm he caused and to take responsibility. "For my end, this was just a fun hook up, but then from her end, this guy is pushing himself on me. It didn't sound like me; it sounded like a monster. That was the hardest part. This guy who forced himself on to this girl is me." He agreed to be found formally in violation of the campus sexual misconduct policy and have a formal "conduct reprimand" in his file. Since Sameer had no other conduct charges in the three years since this incident and as it was just weeks before their graduation, the administrator decided that Sameer was not a threat to others and would not need to be suspended or expelled.

Collaboratively, they developed a list of remedies that best met Anwen's needs and the concerns of the institution:

- Reading and responding to Anwen's extensive writing about the incident.
- Writing an article discussing the misconduct for a student magazine that focuses on issues of gender and sexuality.
- Teaching others about the incident. Both Anwen and Sameer agreed to present their story together at a campus bystander intervention workshop, focusing on how power, privilege, emotional manipulation, and coercion help facilitate and perpetuate campus sexual misconduct.

- Collaborating with gender violence programming on campus to advocate for mandatory bystander intervention and other prevention training for all student athletes and Greek Letter organizations as well as developing strategies to encourage sincere and engaged participation by these students.
- Reaching out to students who provide peer support for sexual assault survivors to identify ways in which student offenders could speak with them and learn from them.
- Developing sexual violence prevention education programming for local middle and high school students.

After the RJ dialogue, Anwen and Sameer met regularly to plan their presentation and worked together to create a video where they recounted the night of the incident, each sharing what happened from their perspective. Sameer, after he graduated, continued to work with the conduct administrator for six months in order to finalize the community service project focused on prevention education in the local schools. Two years later, Anwen observed, "One of the things I realized during and after the restorative justice process is that Sameer's honestly one of the people that knows me best and I him. We know each other's deepest horrible moment. There's not a lot that can't be said. I don't think I'll ever lose contact entirely with Sameer."

Tier III restorative interventions assist with the reintegration of students who have been suspended. Not only are these students anxious about how they will be received upon their return to campus, but the wider community needs reassurance that they will be responsible and committed to causing no further harm. Following the highly successful restorative justice model for sex offenders returning to the community after incarceration, Circles of Support and Accountability (CoSA) can be developed to support returning students (Karp et al., 2016). CoSAs meet frequently with the student to provide social support, but also monitor the student's behavior and intervene early if concerns arise. Concurrently, support circles for survivors can help reduce their anxiety during this transition period. They may be organized to specifically support the survivor of a returning student or be a reciprocally supportive circle of survivors.

REENTRY CIRCLE FOR A STUDENT SUSPENDED FOR SEXUAL MISCONDUCT

A reentry circle was convened for an undergraduate student's return to a U.S. university campus after a period of separation due to an incident of sexual misconduct (McMahon et al., 2018). The staff who participated in the circle included three representatives from the Dean of Students Office, one person from Academic Affairs, one person from the international study office, and a representative from the campus counseling center. In addition, there were three support people for the returning student who were members of the campus community: a male student leader and two faculty members.

The student of concern, “Ivan” (a pseudonym), was a junior when he was suspended for coercion for sexual activity. The reentry circle was included in the sanctioning process as a prerequisite to Ivan’s request to study abroad for his academic return to campus. As a student of color at a predominantly White institution, Ivan was involved in significant social justice leadership roles on campus. At the time of the incident of sexual misconduct, Ivan was struggling with significant mental health issues and these were central to understanding the context in which he committed the harm, was separated from the institution, and his return to campus.

During the preparation process, the facilitators interviewed the circle participants, asking: 1) How could they serve as a resource to Ivan? 2) What concerns did they have about Ivan and his reentry process? and 3) What was their connection to this incident and to Ivan? When the facilitators spoke with Ivan, he expressed anger and a sense of isolation after interacting with the staff during the formal Title IX process. The facilitators listened and reflected back what they heard Ivan say, reiterating that the focus of the reentry circle was to provide support to Ivan *and* to address the needs of the community members with whom he would be studying abroad. Staff members expressed concerns about institutional racism, tokenism, and fears about possible racial re-victimization of Ivan in the circle as a result of these dynamics on campus. There were also concerns about the timing of the circle, as Ivan would not be returning directly to the campus, but re-enrolling as a student and studying abroad first.

The reentry circle is structured by elements common to restorative circle practices (Boyes-Watson & Pranis, 2015). These include the use of a “talking piece” (a symbolic object that is passed from speaker to speaker); circular turn-taking as the talking piece is passed sequentially around the circle; and phases of the circle that begin with questions or activities that help to establish trust, progress to questions of concern, and then collective brainstorming to develop a plan for action—in this case a plan for reintegration support. The questions posed in this reentry circle included: 1) Can you describe a time in which you faced a difficult reintegration or community transition? 2) How are you connected to the issue at hand? 3) What happened from your perspective? 4) What concerns do we need to address? 5) What needs do we have to meet? 6) What plan will address those concerns and needs?

In their reflections on this circle, the facilitators observed that there was a great deal of sadness about this incident of sexual misconduct, as Ivan was a well-respected student leader on campus. The concerns expressed by participants included a variety of themes including mental health; lost student leadership opportunities; frustration with the formal adjudication process; social support while studying abroad; concerns about race and racism on campus; and how the campus climate could affect Ivan’s overall well-being and his reintegration to the campus community.

To meet the needs of this student and the campus community, the group committed to regular check-ins with Ivan throughout his time abroad and upon his return to campus. For his part, Ivan agreed to participate in a facilitated conversation with the student leader who attended the circle in order to address peers’ concerns about him upon his return to campus. Counseling center staff agreed to reinvigorate efforts to address the mental health needs of students of color. Administrators committed to reviewing the campus Title IX process for best practices, as well as ways to increase communication, transparency, and support for all parties involved in the process.

Conclusion

This chapter has drawn a distinction between the current regulatory framework for campus sexual assault and a restorative justice approach. Table 10.2 summarizes key distinctions. The current approach is challenged by a focus on determining violations when evidence in sexual assault cases is often weak. The RJ approach focuses less on the violation in favor of identifying and addressing harm. The current approach promotes denials of responsibility, while an RJ approach seeks to increase responsibility-taking. The current approach polarizes participants and campus communities, often leading to litigation, whereas RJ seeks collaborative solutions that avoid adversarialism. RJ is intended to be inclusive, particularly for people with little access to lawyers and other dimensions of social privilege. RJ is intended to offer resolution options that better meet the needs of the key stakeholders, increasing their likelihood of reporting misconduct and pursuing a resolution process. RJ seeks strategies, where possible, to reduce fear, offer social support, and make it possible for students to coexist safely on campus. RJ seeks to provide voice and empowerment to participants, treating them with respect and a belief that their active participation will yield better, more durable outcomes for all.

Despite the promise of RJ for campus sexual misconduct, several challenges and questions remain to be addressed.

The Opportunity and Pressure to Participate

One of the primary values of restorative justice is voluntary participation. It is easy for a university to write policy that states participation is voluntary and no institution is likely to require participation in an RJ process for an incident of sexual harm. But it is more difficult to protect against coercive pressure, which is much more subjective. An assault survivor may experience pressure to respond in various ways, and the anticipation of such external pressure may be one reason so many survivors choose not to report their victimization. They may experience pressure to report or not to report; to go forward with a restorative justice process or a formal hearing process; to go to the police; to speak publicly about their victimization; to join solidarity groups, and so on. Victim advocates, as representatives of the institution, may be torn between encouraging the survivor to avoid an adversarial process that may be retraumatizing and encouraging them to go forward because they want the institution to hold the offender accountable. Friends may want the survivor to proceed as a political act in support of the student movement against sexual assault. Or they may discourage the survivor from responding because they also share a friendship with the offender. Any institutional representative of an RJ process must present the option in a way that is informative without adding to the inevitable pressures that already exist.

TABLE 10.2 Distinguishing Regulatory Formalism and Responsive Regulation for Campus Sexual Assault

<i>Regulatory Formalism under Title IX</i>	<i>Responsive Regulation/RJ</i>
Focus on policy violation under uncertainty	Focus on harm
Denial of responsibility	Conditions for taking responsibility
Adversarial/backlash	Collaborative
Economic/racial disparities	Accessible
Low reporting/filing	Responsive to reporting needs
Separation (no contact, suspension)	Peaceful coexistence or reconciliation
Undermines agency	Empowerment/voice

For an accused student, the opportunity to participate may provide a path to meaningful accountability. But it may also put the student at risk for harsher consequences should the RJ process fail. Although survivors can always pursue a formal hearing or criminal case, using the RJ process to obtain evidence for them is problematic. It is essential to develop policy mechanisms to protect the confidentiality of the RJ process in order to prevent it from becoming a retributive mechanism for obtaining confessions (Coker, 2016). RJ conferences must be both voluntary and confidential.

Public Accountability

Restorative justice conferences are a private process and participants are often concerned with confidentiality. They are designed to be emotionally transformative for the participants as they gain a deeper understanding of each other's perspectives. Agreements are created that reflect this and are customized to meet the unique needs of those involved. Onlookers to the process, however, do not experience this transformation and can have a hard time understanding the outcome, especially when it deviates from standard retributive punishments. The wider community also needs "justice" and is looking for predictable, substantive outcomes. A private process with a limited number of participants cannot easily provide this broader, public accountability. The most likely candidates to be effective spokespersons on behalf of the RJ process are harmed parties, but again it is important not to impose further burdens. In a well-known application of RJ in response to campus sexual harassment at Dalhousie University (Llewellyn, Chapter 9 this volume), the harmed students were among the persuasive voices in favor of the RJ process (Llewellyn, Demsey, & Smith, 2015). In one conferencing script, participants are specifically asked if and how they would like to communicate the outcomes of their agreement with the larger community (Karp, 2015). Ideally, individual RJ cases not only explore private harms, but the broader factors that lead to and perpetuate sexual assault. They should inspire responsive actions that meet individual needs and address systemic issues that affect campus climate.

Informal vs. Formal Process

Often, RJ is categorized as an alternative dispute resolution process, like arbitration or mediation. It may be a diversion from formal adjudication. This can be a procedural advantage to avoid the effects of formal labeling, but unfortunately positions RJ as the informal, experimental, non-serious approach and, therefore, more easily dismissed. Braithwaite's sanctioning pyramid helps codify its location within a larger regulatory framework, adding to its legitimacy. A central question for campus policy is whether it is necessary for a student to agree to be formally found in violation of the sexual misconduct policy as an indication of their willingness to take responsibility. Or, can a purely informal, diversionary process be perceived as meeting the standards of institutional accountability that many are demanding?

Safety

Restorative justice emphasizes mutual understanding, which requires communication, often face to face. The standard campus response in the face of safety concerns is social distance, either through a no-contact order or a progressive separation (removal from co-enrolled classes, housing, suspension, expulsion). Restorative justice encourages the development of informal social control systems that enlist those who are closest to the key stakeholders, much like bystander intervention programs are designed

for those most likely to be in proximity to a dangerous situation. Restorative justice calls for a paradigmatic shift away from the common belief that separation is the only means to achieve safety. Overcoming entrenched beliefs that separation is the only and best option for safety is a significant challenge.

Campus sexual assault has been a regulatory nightmare, but it does not have to remain that way. Restorative justice can provide a new approach that provides accountability for a deeply hurtful form of misconduct, but does so in a way that leverages social support and leads to healing for individuals and a safer campus climate for living and learning. RJ is a promising approach, though it will not be suitable for or chosen by everyone. Implementation will need to be slow and considered, but it is one of the few hopeful innovations available for this vexing social problem.

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