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Restorative Justice as a Response to Campus Misconduct

—
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Presenters



Paige Duggins-Clay
Husch Blackwell



David Karp
University of San Diego Center for Restorative Justice



Scott Schneider
Husch Blackwell

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Perspective

- ✓ Deep, almost universal dissatisfaction with the investigation/adjudication model for dealing with student misconduct
- ✓ No appetite for return to mishmash of informal practices which reigned pre-2011 DCL
- ✓ Is there an alternative to the investigation/adjudication model which is rigorous and more in line with educational role of colleges and universities?
- ✓ Much discussion about restorative justice but little understanding of how to implement a thoughtful program

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What is Restorative Justice?

“Restorative justice is an approach to achieving justice that involves, to the extent possible, those who have a stake in a specific offense or harm to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.”

-Howard Zehr



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How Does RJ Differ from Traditional Investigative/Adjudicative Processes?

Traditional Conduct Process:

What rule was violated?

How will we investigate/adjudicate?

Is there enough evidence to support a finding of responsibility?

How should we punish the offender?



Restorative Justice Process:

What is the harm?

Who is responsible?

How can they accept responsibility?

What can they do to repair the harm?

How can we rebuild trust?

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Why do Harmed Parties Participate?

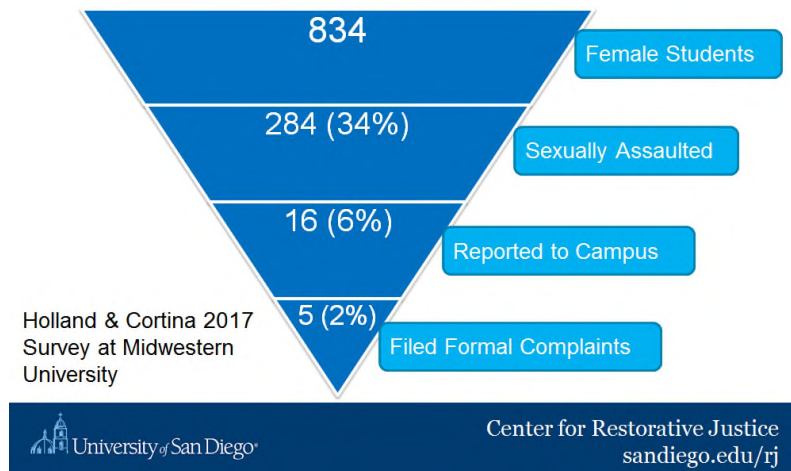
Traditional investigative/adjudicative processes can often be incompatible with needs of harmed parties:

- Long and intrusive investigation and decision process
- Potential for re-traumatization in a variety of different forms
- Confrontation and Cross-examination*
- Reluctance to expose offender to severe disciplinary sanctions
- Concerns about confidentiality, maintaining personal and social relationships, etc.

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The Need for More Options



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Why do Individuals Who Cause Harm Participate?

- Non-adversarial
- Creates space for acceptance of responsibility
- Opportunity for education/growth
- Desire to regain social status/reputation

"[A]ccountability involves facing up to what one has done. It means encouraging offenders to understand the impact of their behavior—the harms they have done—and urging them to take steps to put things right as much as possible."

-Howard Zehr

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Why do Institutions Participate?

- RJ serves institutional goals of promoting safety and furthering educational objectives
- **Provide more opportunities for students to come forward**
- More effective use of resources, diverting away from costly investigations and adjudications
- Increase satisfaction with process and outcome . . . less OCR and litigation risk?

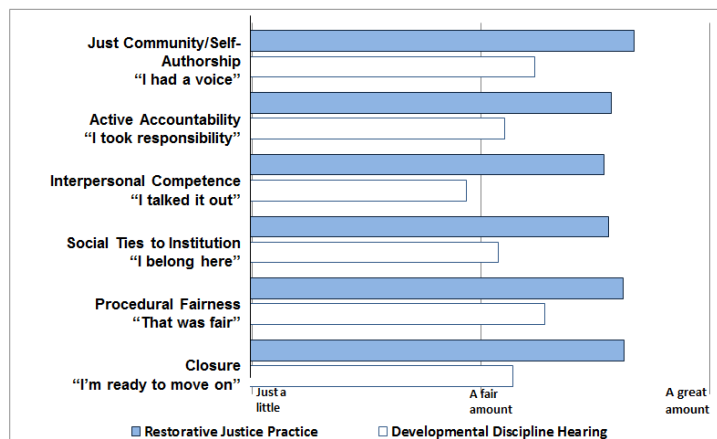
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Student Accountability and Restorative Research Project Offender Survey (STARR)

- Harmed Party Survey
- Offender Surveys
- Conduct Administrator Surveys

Type of Process	Cases
Developmental Discipline Administrative/Board Hearing	403
Restorative Justice Circle/Conference/Board	165



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TCNJ “Alternative Resolution for Cases involving Student Respondent”

TCNJ Staff Labor:

(Average Hours/Case Formal Hearing vs RJ (Indirect))



Process	Hearing	RJ
Meetings with Reporter	7	6
Meetings with Respondent	7	7
Meetings with Witnesses	7	0
Documentation/Report	14	2
Hearing/Appeal	6	0
Email Communications	34	10
TOTAL	75	25



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Understanding the RJ Process

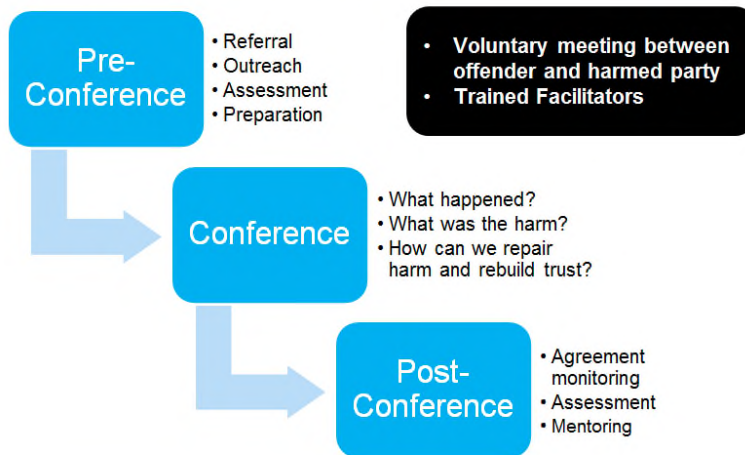
The RJ process offers a rigorous, effective alternative to “traditional” informal resolution & investigative/adjudicative models.

- Institution provides notice of rights and options in compliance with ED regulations
- Voluntary process that all parties must agree to
- Participants (offender(s), harmed parties, support persons) are prepared prior to meeting
- Outcomes and solutions memorialized in final resolution agreement, which is monitored and enforced by institution

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Fundamental RJ Process



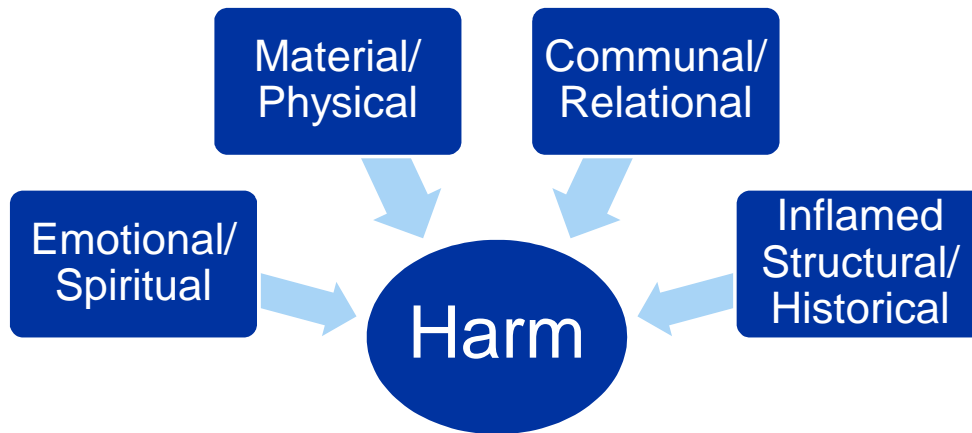
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Harms, Needs, & Obligations



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Anwen and Sameer

"I started talking with him, I think about what I wanted and that I **didn't want a formal proceeding**. I didn't want a verdict handed down. I wanted something to come out of it. I wanted it to be discussion and I wanted to decide with Sameer what the results were going to be . . . It was a **powerful feeling** to feel that I was not just crazy. And that he also knew that it had been wrong."

"I was **terrified** that I assaulted her. I was terrified that I'd hurt her in this way. I was terrified of myself. Because if this was true and I did assault her then what did that make me?"

I was terrified of being found out. I was terrified of being sent to jail. I was terrified of all the consequences that come with sexual assault and rape and I didn't have anybody that I was like who I could tell because like . . . how do I say, 'Hi. I think I think I assaulted and raped somebody, but I'm not entirely sure.'"

21 || A SURVIVOR AND HER PERPETRATOR FIND JUSTICE

12/3/2018



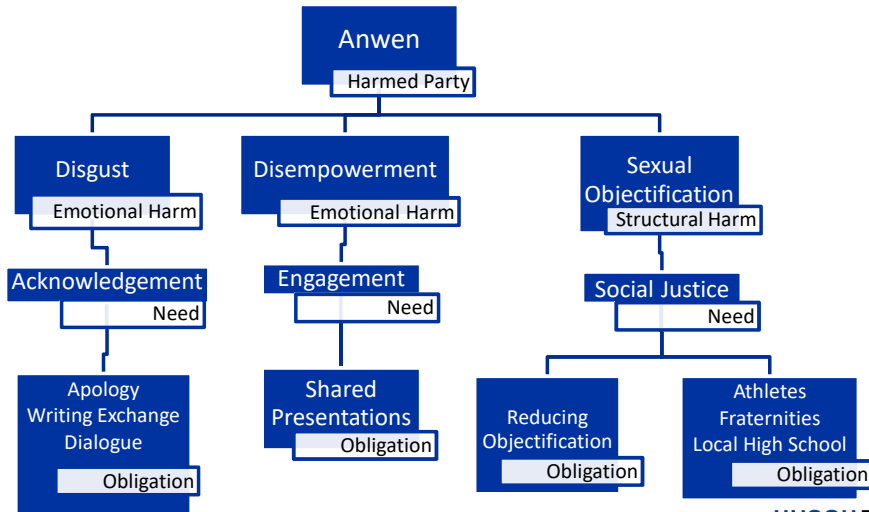
Sameer met Anwen freshman year. He was into her, and they started seeing each other. Then one night, after a fraternity party, Sameer convinced Anwen to come home with him – which is when he coerced her into sexual activity. Their senior year, Anwen invited Sameer into a process of restorative justice.

<http://www.reckonings.show/episodes/21>

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Harms, Needs, and Obligations: Anwen and Sameer



Accepting Responsibility: Anwen and Sameer

Agreement

- Read/respond to Anwen’s writings
- Write article for student publication
- Present story together at bystander intervention workshop
- Collaborate on gender violence programming for student athletes and Greek system
- Outreach to peer advocates for mutual learning
- Develop sexual violence prevention education curriculum for local high school

RECKONINGS
#21 || A survivor and her perpetrator find justice

30% 00:00:00 / 00:56:17

Mediation v. Restorative Justice



RJ for Re-entry and Reintegration

- Providing support so the returning student can be academically successful
- Providing accountability so the community can be reassured about safety



McMahon, Karp, and Mulhern. 2018. "Addressing Individual and Community Needs in the Aftermath of Campus Sexual Misconduct: Restorative Justice as a Way Forward in the Re-Entry Process." *Journal of Sexual Aggression*

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Legal Concerns



Perspective

- Very few reported cases.
- Federal courts have been resistant to allowing deliberate indifference claims based on an institution's use of an informal resolution process in general.
- Key issue is **voluntariness**.
- If the institution follows (or makes a good-faith attempt to follow) its policies and procedures, courts appear to be reluctant to second-guess the decision or outcome.

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Takla v. Regents of the University of California (C.D. Cal. 2015)

1. “UCLA handled Takla’s report through what appears to be a **truncated process** called ‘Early Resolution,’ rather than a formal hearing . . . even though [the administrator] learned through her investigation that [Respondent] had previously harassed another graduate student and two junior professors. **This was in violation of UCLA’s own Title IX policy, which prohibits the use of Early Resolution in cases that involve multiple complaints of sexual misconduct.**”
2. Administrator “**discouraged** Takla from filing a written request for a formal investigation, stating that [Respondent’s] peers may well side with him and that Early Resolution would be faster and more efficient.”

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Takla – cont’d

3. “Takla requested a formal investigative report after the conclusion of Early Resolution, but was told that **no formal documentation or report existed** because the matter was handled through Early Resolution. This too was **in violation of UCLA’s own policy**, which states that Early Resolution efforts should be documented.”
4. “UCLA took **nine months** to investigate Takla’s report but did not make any findings at the conclusion of its investigation, **again in violation of UCLA’s policy.**”
5. “UCLA **did not inform Takla of the outcome** of Early Resolution or whether Piterberg was sanctioned for his conduct.”

Court denied UCLA’s MTD

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Shank v. Carleton College (D. Minn. 2019)

- RJ conference utilized for reintegration of disciplined respondent
- Court found that RJ conference did not violate ED's guidance prohibiting victims to "work out the problem directly with the alleged perpetrator"
- Rejected deliberate indifference claim
 - Plaintiff voluntarily participated
 - Institution appropriately facilitated the conference
- **Caution:** "It is possible to hypothesize a different case where, for example, a meeting is not voluntary or a school knows or should know that a victim's ability to make rational decisions is compromised."

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Informal Resolution is Not for All Cases.

Factors to consider:

- The nature of the alleged offense
- Whether there is an ongoing threat of harm or safety to the campus community (e.g., use of a weapon)
- Whether alleged respondent is a repeat offender
- Whether the person alleged to have caused the harm is participating in good faith

Remember: Traditional investigative/adjudicative processes should be used when an accused student *denies* responsibility.

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How Do We Ensure Participation is Voluntary?

- Educate the parties and the community about RJ
- Provide Notice of Rights & Options, such as:
 - Whether and when the process can be terminated
 - Whether information shared can be used in subsequent conduct matters
 - How RJ differs from formal investigation and adjudication
 - Whether the process involves face-to-face interaction
- Participation contingent on successful completion of preparatory meetings
- Require parties to sign a RJ Participation Agreement
- Frequent check-ins and monitoring

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Compliance Considerations for Title IX Cases

*ED guidance permits the use of RJ in student sexual misconduct cases in at least four ways: as a resolution process, as a victim impact process, as a sanctioning process, and as a reintegration process.

- Integration with ED notice and process requirements
 - How will we maintain records of process?
- Rights and options memorialized in conduct codes/policies
 - When can RJ process be terminated and investigative/adjudicative process re-engaged?
 - What conduct and stage of process? (e.g., alternative resolution, sanctioning, reentry/reintegration?)
 - How will we enforce final resolution agreements?
- Appropriate personnel, training, and resources for facilitators
- Monitor compliance with resolution agreement

*Mary P. Koss, Jay K. Wilgus, and Kaaren M. Williamsen, "Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance With Title IX Guidance" (2014)

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Implications for Potential Legal Proceedings?

Many students charged with sexual or other misconduct that implicates criminal justice issues may be reluctant to participate without assurances that their admissions of causing harm won't be used against them.

- MOU with local prosecutor?
- Civil litigation waiver?
- Mutual confidentiality agreement?
- State privilege or confidentiality law?
- FRE 408?

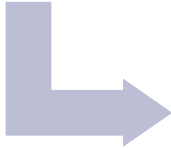
Federal Rule of Evidence 408
 Evidence of the following is not admissible—on behalf of any party—either disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:
 . . .
(2) conduct or a statement made during compromise negotiations about the claim"

NEB. REV. STAT. § 25-2914.01
 "No admission, confession, or incriminating information obtained from a juvenile in the course of any restorative justice program . . . shall be admitted into evidence against such juvenile, except as rebuttal or impeachment evidence, in any future adjudication hearing under the Nebraska Juvenile Code or in any criminal proceeding."

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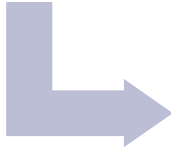
Preparation/
Adoption

- Decision regarding commitment to adopting and supporting RJ program/practices
- Review current policies, practices, personnel, and resources to determine capacity for integrating RJ
- Develop plan for implementation



Initial
Implementation

- Issue revised conduct and other policies
- Provide training for involved personnel and offices, such as Student Affairs, OIE, campus safety, general counsel/compliance
- Implement protocol for screening and referring cases for RJ process for targeted location, conduct, population, etc.
- Assess outcomes, areas for improvement, etc.



Broader
Implementation/
Continuous
Improvement

- Expand program/practices to address other populations or conduct
- Assess for opportunities to make process more efficient and accessible

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Questions?

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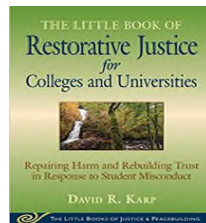
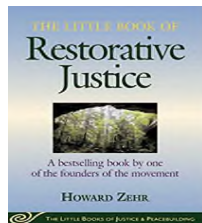
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The Center for Restorative Justice

Restorative justice focuses on the harm caused by misconduct or crime, enabling those affected to identify responses that best meet their needs.

The Center for RJ provides...

- Facilitator trainings on restorative practices
- Educational resources, presentations, and coursework on best practices in restorative justice
- Consultation and facilitation to institutions seeking a restorative response to harmful incidents
- Networking groups/learning communities
- Research on innovative practice and evaluation of restorative programs



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Training in Campus RJ for Bias Response and Historical Harm

February 17-19, 2020

University of New Orleans

Introductory Training in Campus RJ for Sexual Harm

April 2-4, 2020

University of San Diego

Campus Restorative Justice Across Student Affairs for Catholic Campuses

June 22-24, 2020

University of San Diego

Campus Restorative Justice Across Student Affairs

July 15-17, 2020

ACPA, Washington DC. **HUSCH BLACKWELL**

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