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Mary P. Koss
University of Arizona

Elise C. Lopez
University of Arizona

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VAWA AFTER THE PARTY: IMPLEMENTING PROPOSED GUIDELINES ON CAMPUS SEXUAL ASSAULT RESOLUTION

Mary P. Koss and Elise C. Lopez
University of Arizona

The 20th anniversary of the passage of the Violence Against Women Act (“VAWA”) and its reauthorization in 2013¹ merits celebration and marks a time to contemplate the future legislative and policy agenda. This commentary considers the effect of existing and proposed VAWA guidelines on the process for sexual assault adjudication at institutions of higher education. The focus is several documents including the US Department of Education Office of Civil Rights “Dear Colleague Letter”[DCL],² DCL clarification,³ and the Proposed Guidelines for the Violence Against Women Act Reauthorization as disseminated for comment in the Federal Register of June 20, 2014.⁴ We aim to establish that taken together, these documents: (1) blur the distinctions between campus misconduct resolution and criminal justice process;⁵ (2) lack scholarly

¹ The White House Council on Women and Girls, *Sexual Assault: A Renewed Call to Action* (Jan. 2014), available at http://www.whitehouse.gov/sites/default/files/docs/sexual_assault_report_1-21-14.pdf; Violence Against Women Reauthorization Act of 2013, S.47, 113th Cong. (2013).

² Russlynn Ali, *Dear Colleague Letter from Assistant Secretary for Civil Rights*, U.S. DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS (Apr. 4, 2011), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

³ Anurima Bhargava & Gary Jackson, *Re: DOJ Case No. DJ169-44-9, OCR Case No. 10126001* (May 9, 2013), available at <http://www.justice.gov/sites/default/files/opa/legacy/2013/05/09/um-ltr-findings.pdf>.

⁴ Violence Against Women Act, 79 Fed. Reg. 119 (proposed Jun. 20, 2014) (to be codified at 34 C.F.R. pt. 668).

⁵ Nancy Chi Cantalupo, “Decriminalizing” *Campus Institutional Responses to Peer*

analysis of sexual assault justice on campus;⁶ and (3) clash with contemporary values and practice standards of student affairs professionals.⁷ This commentary identifies enhancements derived from restorative justice principles [RJ] and situates them within misconduct resolution framework while maintaining consistency with DCL and VAWA required elements. RJ offers a range of formats that are relevant to the student body at large as well as to individuals involved in sexual misconduct of varying severity and can be implemented at multiple time points in case processing. We draw upon many sources that collectively express desire for policy guidance that supports evidence-based innovations intended to increase congruence with victims' perceptions of what constitutes justice, raise the likelihood that offenders will be held responsible by sanctions proportional to the harm done, and augment the extent to which institutional responses deter future sexual misconduct.⁸

POLICY EMPHASIS ON ADVERSARIAL RESOLUTION

Because the required and recommended elements in the DCL and

Sexual Violence, 38 J.C. & U.L. 481 (2012); Clare McGlynn, *Feminism, Rape and the Search for Justice*, 31 OXFORD J. OF LEG. STUD. 825–42 (2011).

⁶ David R. Karp, *Reading the Scripts: Balancing Authority and Social Support in the Restorative Justice Conference and the Student Conduct Hearing Board*, available at <http://www.skidmore.edu/~dkarp/Karp%20Vitaefiles/Reading%20the%20Scripts.pdf> (last visited Oct. 29, 2014); David R. Karp & Casey Sacks, *Student Conduct, Restorative Justice, and Student Learning: Findings from the STARR Project*, available at http://www.skidmore.edu/campuslife/karp/Misc/STARR_for_LPR.pdf (last visited Oct. 29, 2014).

⁷ David R. Karp & Thom Allena, *Restorative Justice on the College Campus: Promoting Student Growth and Responsibility and Reawakening the Spirit of Campus Community* (2004), available at <https://www.skidmore.edu/campuslife/karp/book-chapters/Introducing-Restorative-Justice-to-the-Campus-Community.pdf>; Edward N. Stoner II & John Wesley Lowery, *Navigating Past the "Spirit of Insubordination": A Twenty-First Century Model Student Conduct Code with A Model Hearing Script*, 31 J.C. & U.L. 1 (2004).

⁸ Nancy G. Giacomini, *Incorporating Principles of Conflict Resolution and Social Justice into Formal Student Conduct Code Pathways*, in REFRAMING CAMPUS CONFLICT: STUDENT CONDUCT PRACTICE THROUGH A SOCIAL JUSTICE LENS 182-93 (Jennifer M. Schrage & Nancy G. Giacomini ed., 2009); Mary P. Koss et al., *Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidelines* 15 TRAUMA VIOLENCE ABUSE 242-57 (Jul. 2014); Clare McGlynn et al., "I Just Wanted Him to Hear Me": *Sexual Violence and the Possibilities of Restorative Justice*, 39 J. OF LAW AND SOCIETY 213-40 (2012); L.M. Monroe, et al., *The experience of sexual assault: Findings from a statewide victim needs assessment*, 20 J. OF INTERPERS. VIOLENCE 767-76 (2005); Bronwyn Naylor, *Effective justice for victims of sexual assault: Taking up the debate on alternative pathways*, 33 UNIV. OF NEW SOUTH WALES L.J. 662-83 (2010).

VAWA guidelines shape a quasi-criminal justice model for achieving results in sexual misconduct cases, they are subject to many of the same criticisms that have been leveled against adversarial process in general. Criminal justice response to sexual assault yields low numbers of convictions or findings of responsibility and have been found to include policies and practices that discourage reporting,⁹ re-traumatize victims,¹⁰ and lead to high rates of closed cases.¹¹ The result is that many victims feel defeated, disbelieved, and perceive that justice was not realized. Many of them have a desire for a process that is centered on the behavior of the perpetrator as opposed to their own, provides a forum for their story to be heard and believed, and accords them input into sanctions. A large body of commentary examines the application of RJ to sexual offenses.¹² McGlynn and colleagues frame the issues succinctly, “Some argue that it may trivialize violence against women, re-victimize the vulnerable, and endanger the safety of victim-survivors”.¹³ On the other hand, RJ “may enable us to hear their stories more holistically, offering greater control and validation, and reduce victim-blaming...[and] may also provide an additional opportunity to secure some form of justice”.¹⁴ In this brief quotation, they encapsulate the reasons that RJ cannot be evaluated in a vacuum, but instead must be viewed against the backdrop of current adversarial practices.

The language of the DCL-required elements and proposed VAWA guidelines for adjudication resembles adversarial justice. The proposed VAWA guidelines revise the definitions of rape, sex offenses, fondling, incest, and statutory rape to those used by the FBI. These definitions of criminal acts do not cover the spectrum of sexual misconduct that occurs on campuses such as gender harassment, sexting, hidden videotaping, uploading private explicit photos to the internet, and various coerced sexual acts that involve threat, but do not rise to legal standards of bodily harm. All of these acts contribute to a negative educational climate for women. Misconduct response is referred to as a grievance procedure, a word choice that is derived from mediation. Parties include the complainant (alleged victim) and respondent (alleged perpetrator). Each must be allowed to present witnesses and evidence. Lawyers are permitted to question and cross-examine the parties, but the parties may not directly speak to each

⁹ Koss, *supra* note 8.

¹⁰ *Supra* note 2.

¹¹ Kathleen Daly & Brigitte Bouhours, *Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries*, 39 CRIME & JUST. 565 (2010).

¹² Koss, *supra* note 8.

¹³ McGlynn, *supra* note 8 at 213.

¹⁴ *Id.*

other. The standard of evidence is stipulated as preponderance of the evidence. Language regarding sanctioning emphasizes retribution including words such as probation, fines, and exclusion from the institutional community.

Holding an institution accountable for their investigation and hearing processes and the resulting findings and sanctions imposed is a priority. The impetus for the guidelines is clearly the large number of cases across the country that has been accorded inadequate and damaging institutional responses. It is beyond contention that there are cases on college campuses that by their nature require criminal justice involvement and victims should always be informed of how to report to police. However, it must also be recognized that the institutional process is distinct from criminal justice. Higher education imposes and enforces a conduct code, not a criminal code. Some but not all sexual misconduct is a violation of both law and conduct. Institutional and criminal processes may share information and involve the same parties, but they are distinct and can be pursued simultaneously or sequentially. Maintaining the independence of these avenues of redress is central to providing victim choice.

DIFFERENTIATING MEDIATION FROM RESTORATIVE JUSTICE

The DCL allows alternative resolution with the exception of mediation, which is explicitly forbidden for sexual assault. Mediation can be generally defined as "...conciliatory interventions by an acceptable third party who works with individuals or groups in conflict to facilitate the development of a shared and mutually acceptable solution to their problem(s)."¹⁵ Although terminology varies between campuses and programs, parties in mediation processes often are referred to as disputants. The typical issues addressed by these programs include cases such as roommate conflict, fights between students, landlord/tenant disputes, and conflicts arising within student groups. Mediation does not fit situations where someone has been harmed by another person because it provides neutrality and treats parties as equal partners. Justice responses to sexual misconduct must acknowledge and obviate the negative effects of societal and individual norms that operate to silence victims and create opportunities for re-abuse. We agree that mediation is inappropriate for sexual assault and question why the DCL has allowed it for sexual harassment.

The conceptual foundation of restorative justice [RJ] is that harm has

¹⁵ William C. Warters, *Models of Mediation*, in REFRAMING CAMPUS CONFLICT: STUDENT CONDUCT PRACTICE THROUGH A SOCIAL JUSTICE LENS 126-39 (Jennifer M. Schrage & Nancy G. Giacomini ed., 2009).

been done and someone is responsible for repairing it.¹⁶ Responsible persons hurt direct victims and that harm has ripple effects on: (a) family and friends of victims who suffer distress over the injury sustained by the direct victim and also have emotions of their own over issues such as inability to protect the victim from harm; (b) family and friends of responsible persons who may experience shame, anger and other emotions stemming from being part of an interpersonal context that includes a person responsible for sexual misconduct; and (c) community members who experience less safety and social connection when they perceive high levels of offence and low deterrence. RJ aims to address the needs of each group of participants.

The fundamental difference between mediation and RJ is the requirement that the responsible person accept responsibility as a precondition of participation as opposed to neutrality towards the parties.¹⁷ All models of RJ are premised on a responsible person or persons who either voluntarily accept responsibility for the wrongdoing or who have been found responsible through an appropriate fact-finding process. It is apparent that the focus of RJ is present and future oriented. Looking back to weigh evidence and deliberate fault is viewed as the function of adversarial justice, which institutions must establish or maintain for compliance with the DCL and proposed VAWA guidelines. The guidelines also specifically allow innovation to introduce additional processes.

DIFFERENTIATING THERAPEUTIC JUSTICE AND RESTORATIVE JUSTICE

Given the focus of RJ on the emotional impacts of harm, some might classify RJ as being under the umbrella of therapeutic justice (“TJ”). Therapeutic justice may refer to either of two models. First, it may refer to court models such as drug courts or wellness courts that aim to teach offenders to take accountability for their actions and weave therapeutic interventions into the adjudication process. This is particularly true when defendants in civil or criminal cases are experiencing mental illness. Second, it may refer to therapeutic interventions provided to offenders who have been sentenced to prison. These post-sentencing programs focus on prisoner rehabilitation and community re-integration skills.

Restorative justice is not analogous to therapeutic justice. TJ is a perpetrator-centered model designed to improve the offender’s experience

¹⁶ Mark S. Umbreit et al., CTR. FOR RESTORATIVE JUSTICE AND PEACEMAKING, *Executive summary: Victim-offender dialogue in crimes of severe violence: A multi-site study of programs in Texas and Ohio* (2002).

¹⁷ McGlynn, *supra* note 8.

and shape more appropriate consequences for him/her.¹⁸ TJ shares the low priority placed on victim welfare with all approaches that are court-based. Conversely, RJ by its very structure is centered on victims who are given a safe forum to express the impact of the harm done to them and have a say in the development of a meaningful reparation plan, which may include therapeutic interventions for the perpetrator. Indeed, inclusion of therapy as part of a restorative justice resolution plan is associated with the likelihood of successful outcomes. Daly, Bouhours, Broadhurst, and Loh found that that participation in juvenile sex offender treatment was central to the impact of RJ conferencing resolution.¹⁹ Other RJ resolution programs that have required therapeutic involvement benefited offenders as expected, and also contributed to victims' perceptions that the resolution process made them feel safer in their community and fulfilled their intention to reduce the likelihood that the responsible person will hurt them or someone else in the future.²⁰ A caveat for campus sexual misconduct sanctioning is that while there is an extensive body of research on treatment for adolescent and adult sex offenders, there are no existing treatment interventions tailored to the unique characteristics of and types of sexual offending committed by the college-aged emerging adult population. The U.S. Department of Justice recently awarded three-year funding to Farleigh Dickinson University and The University of Arizona to conduct a nationally-representative, cross-site project to develop and pilot a sex offender treatment program for students found responsible of sexual misconduct.

RESTORATIVE ENHANCEMENTS OF CAMPUS SEXUAL MISCONDUCT RESOLUTION

Although historically rooted in due process and determining responsibility for reported violations of institutional policy, the objectives of student conduct management have evolved to include student development and community justice goals while maintaining compliance with Title IX, the DCL and VAWA guidelines. Student conduct professionals view their role as contributing to the educational objectives of higher education and point out that students spend more time outside the classroom than inside it. Among the goals of conduct management are advancing students' inter- and intra-personal competence, moral

¹⁸ David B. Wexler, *Therapeutic Justice*, 57 MINN. L. REV. 289 (1972).

¹⁹ Kathleen Daly et al., *Youth Sex-Offending, Recidivism, and Restorative Justice: Comparing Court and Conference Cases.*, 46 AUSTL. AND N.Z. J. OF CRIMINOLOGY 241 (2013).

²⁰ Mary P. Koss, *The RESTORE Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcomes*, 29(9) J. INTERPERSONAL VIOLENCE 1623 (2014).

complexity, and social responsibility.²¹ Student conduct professionals recognize the need to expand options and have described a spectrum of resolution options including both quasi-judicial hearings and alternative resolution. They have worked for years to decriminalize the language of student conduct policies.²² Their intent in managing misconduct is, of course, to reduce it and maintain campus safety. To do so, they embrace a process that facilitates student-engaged learning and personal development including ethical behavior and responsible citizenship. They visualize not only a range of options.²³ Hewing to a single investigative process, although it meets the intent of the DCL to impose accountability on responsible persons, is less likely to accomplish the equally important goals the DCL guidance articulates including remedying the effects of sexual misconduct on victims, and preventing its occurrence. In our view the intent of the DCL guidance and the outcomes pursued by conduct professionals are complimentary and could be constructively achieved through a menu of responses rather than a single process.

Alongside the judicial hearing model, the following RJ merit consideration:

RJ as a Victim Impact Process

Typically victim-offender dialogue occurs post-sentencing, during incarceration, or pre-release.²⁴ We envision victim-offender dialogue in the campus setting with cases that fail to result in findings of responsibility. If dialogue is desired by the person who reported the conduct and there is willingness of the other party to meet under ground rules to protect safety and preclude non-productive discussion, dialogue may be arranged and facilitated by a student conduct professional trained in RJ methodology. This approach recognizes that individuals accused of sexual misconduct that did not amount to a policy violation may still regret aspects of their behavior and may be willing to discuss it in a manner that would be useful to the victim.

²¹ COUNCIL FOR THE ADVANCEMENT OF STANDARDS IN HIGHER EDUCATION, *Self-Assessment Guide for Student Conduct Programs* (2006).

²² Stoner, *supra* note 11. Also, Jennifer Meyer Schrage & Monita Thompson, *Providing a Spectrum of Resolution Options*, in *REFRAMING CAMPUS CONFLICT: STUDENT CONDUCT PRACTICE THROUGH A SOCIAL JUSTICE LENS* 65-84 (Jennifer M. Schrage & Nancy G. Giacomini ed., 2009); Cantalupo, *supra* note 5.

²³ Schrage & Thompson, *supra* note 22.

²⁴ Susan L. Miller, *AFTER THE CRIME: THE POWER OF RESTORATIVE JUSTICE DIALOGUES BETWEEN VICTIMS AND VIOLENT OFFENDERS* (New York: New York University Press 2011).

RJ as Sanctioning

Among cases where responsibility has been assigned by admission or campus-based judicial hearing boards, a sanctioning process resembling a sentencing circle could be appropriate if the victim chooses, and the student ruled to be responsible agrees to accept the findings of wrongdoing. This process facilitates the involvement of a larger group of people than student conduct professionals to express impact and contribute to shaping a proportional, individualized sanction plan. When the victim does not desire restorative sanctioning, or when responsibility is denied despite the results of fact-finding, standard sanctioning occurs following established guidelines. At their most severe, institutionally imposed sanctions may include involuntary separation from the institution on a temporary (i.e. suspension) or permanent (i.e. expulsion) basis. Higher education institutions must strive to avoid the outcome that occurred with Catholic priests where responsible persons were separated from one parish and resurfaced at another one without any notification or risk reduction intervention.

RJ as Reintegration

RJ practices may also be applicable after a responsible person completes a period of separation from the institution. Suppose, for example, that a student is found responsible for sexual misconduct and is involuntarily suspended from the institution for two years. If the student fulfills the conditions of his/her suspension, including any meetings necessary to assess readiness for re-enrollment and ensure community safety, he/she may be permitted to re-enroll. However, to maximize the likelihood of successful reintegration into the student body and to further decrease the risk of reoffending, student conduct professionals can facilitate a process modeled after the circles of support and accountability. This approach recognizes that responsible persons often benefit from a community that buffers the social stigma of being an offender and provides emotional and tangible support to avoid risky situations associated with previous sexual misconduct such as excessive alcohol use or socialization with negative peer groups.

RJ as Resolution

RJ as resolution becomes an option when victims and responsible persons mutually select this pathway following an invitation from the

student conduct professional²⁵. RJ resolution is offered to the victim during the investigative process when the preponderance of evidence suggests that a sexual misconduct occurred. RJ resolution is chosen by victims to whom this approach is appealing. Imposing it would violate RJ's core principles, the DCL, and the foundational values that guide student conduct professionals. RESTORE, a demonstration model of RJ resolution has been described by Koss²⁶ and qualitative²⁷ and quantitative program evaluations²⁸ have been published. In an academic setting the student conduct professional would assume roles of the case manager in the program design. Briefly, these responsibilities involve full explanation of the process to ensure that both victim and responsible person are participating voluntarily, connecting them with needed support services, helping them identify who will attend the face-to-face conference, preparing for the conference through development of what each person will say in their statement of impact (victims, family and friends) or responsibility (responsible persons), training facilitators to conduct the conferences safely and without re-abuse, and monitoring completion of the redress plan. Beyond the opportunity to voice impact, RJ conferences result in a redress plan that formalizes a number of activities through which the responsible person will be held accountable. These may include reparations, counseling of various types, and campus community service. Mandatory supervision should be part of any sexual misconduct redress plan to monitor compliance and risks of re-offending. The appropriate response to changes in risk or non-compliance is to re-route the case to the traditional adjudication process.

Truthfulness in RJ approaches is best encouraged by using a confidentiality agreement. This is permissible under DCL guidelines as long as sexual violence victims are not required to sign ("...postsecondary institutions may not *require* a complainant to abide by a nondisclosure agreement").²⁹ The offer of RJ resolution should be made in the context of other available options including those that do not involve confidentiality.

CONCLUSION

The VAWA and DCL required elements shape a quasi-judicial

²⁵ Koss, *supra*, note 8 at 11.

²⁶ Mary P. Koss, *Restorative Justice for Acquaintance Rape and Misdemeanor Sex Crimes*, in *Feminism, in RESTORATIVE JUSTICE, AND VIOLENCE AGAINST WOMEN* 218-239 (James Ptacek 2011).

²⁷ K. Bletzer & Mary P. Koss, *From Parallel to Intersecting Narratives in Cases of Sexual Assault*, 23 *QUALITATIVE HEALTH RESEARCH*, 291-303 (2012).

²⁸ *Supra*, note 20.

²⁹ *Supra*, note 2 at 14.

adversarial approach that may be too prescriptive.³⁰ Institutions are scrambling to align their practices with DCL and VAWA guidelines. Existing guidance falls short of facilitating the development of victim-centered justice. Our recommendation is that future VAWA amendments should propose guidelines that will ensure that perpetrators are held accountable in ways that encourage desistance, acknowledge and prioritize victim voice, and avoid locking in a one-size-fits all solution. Innovation within guidelines better accommodates the heterogeneity of sexual misconduct offenses, those who perpetrated them, those harmed by them, and institutional culture and resources.

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³⁰ Naylor *supra*, note 16.