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SEXUAL HARASSMENT IN A UNIVERSITY SETTING: SEARCHING FOR JUSTICE AND COMPASSION IN AN UNJUST AND INDIFFERENT WORLD

Abstract

The article deals with the question concerning legal responses to sexual harassment – whether those responses should be relentless in punishing and stigmatizing perpetrators and banishing them from positions where they can offend further, or whether there should be room for rehabilitating or even forgiving at least those offenders whose abusive behavior is not violent or serial. On the one hand, the importance of achieving justice and equality for women is critical. On the other hand, one may recognize the possibility of repentance and restoration of both victim and offender to society. The modern restorative justice movement, informed by Christian theology, suggests that alternative dispute resolution mechanisms should not only ensure that victims receive appropriate restoration for the harm they have suffered, but also try to restore perpetrators who accept responsibility for their offenses back into the community. It seems that practiced in the right cases, restorative justice may turn the disempowerment and fearful, sometimes guilty in-turning that victims may experience in adjudicative processes, into a freedom of giving beyond justice, and they may move the self-justificatory shame of a perpetrator into true repentance and reparatory action. At least, restorative justice may push them toward a relational dynamic that is healthier for both whether they must necessarily encounter each other in the future or free themselves from the hurt of the past.

KEYWORDS

sexual harassment, #Me Too movement, restorative justice, feminism, Christian feminism

SŁOWA KLUCZOWE

molestowanie seksualne, ruch #Ja też, sprawiedliwość naprawcza, feminizm, chrześcijański feminizm

The United States is undergoing a widespread national conversation about sexual harassment and assault against women by employers, professors, and peers in work and school. Frequently publicized incidents of sexual harassment or assault perpetrated by presidential candidate Donald Trump, media mogul Harvey Weinstein, and prominent men in almost every field from television news to cooking have resulted in national prominence for the “#MeToo” and “Time’s Up” movements in the United States. The #Me Too movement, founded by feminist activist Tarana Burke¹, sheds light on the pervasiveness of sexual harassment and assault in the U.S. by encouraging victim-survivors to speak out against their abusers so they are not silenced or disempowered. It has also resulted in a string of resignations and firings, from the United States Senate to national television news to Hollywood, and stigmatization of those who are accused.

Public stories of sexual harassment can be haunting. A young college student, Natalie Brady, recounts how her university vocal program director “groomed” her by offering her private lessons, giving her work at his family’s church, describing how sexy and beautiful she was, and confiding in her, while criticizing new boyfriends. The first lingering hugs and forehead kisses became “accidental” grazes of his arm over her breast. Ultimately, when she asked him for a favor, he responded: “For that to happen, you’re going to have to give me a lot more than you do now”. She later discovered that four other women had complained about the director with similar stories².

¹ See E. Nicolaou, C.E. Smith, *A #MeToo timeline to show how far we’ve come – & how far we need to go*, “Refinery 29” 21 October 2019, at 2, <https://www.refinery29.com/en-us/2018/10/212801/me-too-movement-history-timeline-year-weinstein> (accessed 28.10.2019) (including a timeline of celebrities accused of sexual harassment or assault from 2017–2019).

² See J. Pilcher, *How sexual harassment starts on campus: One student’s story*, Cincinnati.com/The Enquirer 2 April 2018, available at <https://www.cincinnati.com/story/news/your-watch-dog/2018/04/02/how-sexual-harassment-starts-campus-one-students-story/452882002/> (accessed 31.10.2019).

However, there has also been a backlash against efforts to call perpetrators to account for their behavior, particularly around how American universities should handle complaints of sexual assault or sexual harassment under Title IX, the federal law that prohibits discrimination on the basis of gender in federally funded programs. Organizations such as Families Advocating for Campus Equality (FACE) have been formed to tell stories of male students falsely or unfairly accused of sexual assault and to demand change in the federal regulations governing Title IX³.

Under President Barack Obama, in 2011 and 2014, the federal government issued guidance that universities should use a preponderance standard of proof for finding sexual harassment and institute more victim-friendly procedures to ensure that women were believed when they came forward claiming harassment or abuse⁴. In response, the alleged perpetrators' defense attorneys and others have argued that there should be more due process protections for men faced with accusations to ensure that only the truly guilty are stigmatized and punished by university expulsion or other sanctions.

They were successful in persuading President Donald Trump's Secretary of Education Betsy DeVos to rescind the Obama-era guidance in September 2017⁵.

During the Trump administration, the U.S. Department of Education was embroiled in controversy because of its plans to re-write Title IX regulations to make the university disciplinary sexual harassment process better resemble criminal trials. For example, the 2019 DeVos federal regulations required schools to presume alleged perpetrators were innocent, describe allegations to both parties specifically, and give both parties access to all evidence⁶. They also pushed universities in the direction of choosing a higher "clear and convincing" standard for proving misconduct instead of a "preponderance" standard of proof by requiring them to use the higher standard unless they use the preponderance standard for all cases of misconduct university-wide. Perhaps most troubling to victim advocates, the standards require universities to hold a live hearing at which the victim and other witnesses can be cross-examined⁷. On the other hand, the regulations clarify for the first time that mediation or other informal dispute resolution processes

³ See Families advocating for campus equality, <https://www.facecampusequality.org/> (accessed 1.11.2019).

⁴ C. Jackson, Acting assistant secretary for civil rights, Dear Colleague Letter, 22 September 2017, <https://www.cmu.edu/title-ix/colleague-title-ix-201709.pdf> (accessed 5.12.2019).

⁵ *Ibidem*.

⁶ S. Brown, K. Mangan, *What you need to know about the proposed Title IX regulations*, "The Chronicle of Higher Education" 16 November 2018, <https://www.chronicle.com/article/What-You-Need-to-Know-About/245118> (accessed 27.11.2019).

⁷ *Ibidem*.

are permissible⁸. Some of these regulations were invalidated by a federal judge, and the Biden administration held a week-long series of hearings in summer 2021 with the objective of overturning the Trump-era rules⁹.

Some institutions of higher education have gone in a different direction than the federal government's push toward more criminal-like procedures. In October 2019 the University of Minnesota, the flagship university in the state of Minnesota, created a local firestorm of controversy by agreeing to allow two male professors who were disciplined for sexual harassment to return to the classroom after they went through a period of "rehabilitation". Both had been found to have crossed the line into inappropriate behavior with students: after he had already received a "talking-to" by university administrators about crossing the professional/personal line with a graduate research assistant, Professor James Ron was found to have violated the university's sexual harassment policy by telling that assistant that if she were single, he would ask her out. Professor Jason Cao was sanctioned for sexual humor and inviting a student to meet him at his home in the evening¹⁰.

The question that the University of Minnesota case raises for feminists who are also religious, particularly Christians, is whether legal responses to sexual harassment should be relentless in punishing and stigmatizing perpetrators and banishing them from positions where they can offend further, or whether there should be room for rehabilitating or even forgiving at least those offenders whose abusive behavior is not violent or serial.

On the one hand, the importance of achieving justice and equality for women is critical in these cases. It has taken literally centuries of reform for legal institutions to acknowledge and act on the complaints of victims that they have endured some form of sexual harassment or violence. For example, it took tremendous efforts by feminists and others to get states in the U.S. to reform the law of rape, which traditionally put the burden on victims to prove that they were innocent and not consenting by requiring them to put up physical resistance¹¹. Moreover, most states employed procedural rules that effectively assumed that women were

⁸ *Ibidem*. Proposed Regulation 106.45(b) would permit the university to "facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication" before any determination is made on the charge, if the university provides appropriate notice and explanations to the parties.

⁹ L. Camera, *Education Department begins sweeping rewrite of Title IX sexual misconduct rules*, "U.S. News" 7 June 2021, <https://www.usnews.com/news/education-news/articles/2021-06-07/education-department-begins-sweeping-rewrite-of-title-ix-sexual-misconduct-rules> (accessed 21.05.2022).

¹⁰ M. Koumpilova, *School officials walk fine line as they let disciplined professors return to classroom*, "Star Tribune" 20 October 2019, A1, A10, <http://www.startribune.com/minnesota-campuses-look-to-rehabilitation-for-sanctioned-faculty/563461072/> (accessed 4.12.2019).

¹¹ S. Estrich, *Rape*, "Yale Law Journal 1986, Vol. 95, pp. 1087, 1094–955, 1107–08.

lying about being raped¹². If educational institutions and employers can institute practices that restore harassers to their positions of power where they can continue perpetrating, or require victims to be retraumatized by putting them alone in a room with their offenders to settle their disputes, there is a significant danger that society will backslide into the past, when women were not believed and their injuries were not taken seriously.

On the other hand, Christian theology recognizes the possibility of repentance and restoration of both victim and offender to society. The modern restorative justice movement, informed by this theology, suggests that alternative dispute resolution mechanisms should not only ensure that victims receive appropriate restoration for the harm they have suffered, but also try to restore perpetrators who accept responsibility for their offenses back into the community.

Given these conflicting values, how should a Christian feminist evaluate an institutional system that permits a sexual harasser, in some circumstances, to be “rehabilitated” and returned to the position from which he harassed women?

Resolving this dilemma requires that Christian feminists define the values that should govern legal attempts to arrive at a just solution to cases of sexual harassment. From (mostly secular) legal feminism, they would borrow the values of inclusivity and embrace of difference, the importance of contextual “on the ground” inquiry in the making and enforcement of law, and the critical importance of relationality in defining and enforcing ethical and jurisprudential decisions affecting both victims and perpetrators of civil wrongs¹³. Much feminist theory starts with the understanding that human beings, by their nature, are connected to others¹⁴, although those connections can be fruitful and life-affirming, or destructive of human personality, such as when women are subordinated because of their gender. Feminists focus on the importance of moving society toward relationships of equality between men and women.

Christian feminist lawyers (and perhaps those of other religious traditions) would probably add some other values to this list of basic values that the law must fulfill: one is the importance of radical honesty and humility, the recognition that individuals do deceive themselves and others about their behavior and its consequences, and that it is often difficult for fallible human beings to determine what

¹² *Ibidem*, p. 1094 (noting that rules such as the corroboration requirement, the fresh complaint rule, jury instructions that were “cautionary” and evidentiary rules about the victim’s prior sexual conduct “placed the victim as much on trial as the defendant”).

¹³ See C. Preston, *Deconstructing equality in religion*, (in: M.A. Failinger, E.R. Schiltz, S.J. Stabile (eds.), *Feminism, law, and religion*, New York 2014, p. 27 (describing feminist values as inclusion, self-definition, perspective and empowerment); N. Levit, R.R.M. Verchick, *Feminist legal theory: A primer*, New York 2006, p. 45 (noting feminist legal theory values including consciousness raising, unmasking patriarchy, and contextual reasoning).

¹⁴ See M. Chamallas, *Introduction to feminist legal theory*, Aspen Publishers 2003, pp. 58–59 (describing Professor’s Robin West’s argument that feminist theory has an emphasis on attachment, responsibility to others, empathy and relationships).

“the truth” is, given this complex brew of action, conscious intention and unconscious self-justification. Moreover, Christian feminists would stress the importance not only of justice, but also of compassion and generosity toward others.

In keeping with these Christian values, the foundation for resolving the problem of sexual harassment and abuse is radical honesty about the fact that gender inequality is deeply embedded in the social construction of reality. Even in social and legal cultures emphasizing gender equality, those who care for male children see them imprinted from very young ages with the notion that males are socially more valued and that they are entitled to whatever they choose to take for themselves. By contrast, both men and women receive messages that women need not be seen or heard, and their role in life is to serve others’ needs and desires and stoically accept the burden of unfairness or misfortunes that come their way. One sees, as just one example of this, the way in which females often are blamed, and blame themselves, when things go wrong in their relationships, while males often blame their partners or others. While it must be acknowledged that this social construction is not true of many relationships and is starting to break down in cultures where men and women share child care, housework, and breadwinner duties, these social patterns are hard to remediate. These dynamics are only some of the ways in which people of different genders are both treated in, and respond to, crises and conflicts that come before the law.

Given this circumstance, any legal sexual harassment or sexual abuse regime will not be effective unless it recognizes and attempts to compensate for the ways in which many, if not most, men and women respond differently to such conflictual encounters. The common law of rape, reflecting the view that sexual assault was often women’s fault and that women had reasons for lying about consent, reflects this male perspective that others are to blame for any wrong that occurs and women’s passive acceptance of the idea that they are to blame if they have not done everything they could to prevent their violation.

Relevant to the due process demands of men accused of sexual harassment on campus, the United States Supreme Court has consistently held in recent decades, while process is always warranted when government takes adverse action against a citizen, it is only process which is “due” – i.e. “due process” is a flexible measure that balances the nature of the possible deprivation with the social interests the state is pursuing, plus the likelihood that extra procedural safeguards will get closer to the truth¹⁵.

¹⁵ See, e.g. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (requiring balancing of “the private interest that will be affected by the official action; (...) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (...) the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail”).

Secretary DeVos's attempt to install a criminal law-like regime into the disciplinary process balances these interests in gendered ways. First, the process assumes that the harm to male college students from possible sanctions like stigmatization and expulsion is worse and more important than the harm to victims of being repeatedly sexually harassed and assaulted, or being retraumatized by having to live or work in close proximity with the man who harmed them in the past. Second, it is not clear that adding extra pro-accused process to disciplinary adjudications adds much to the truth-seeking function. In criminal cases, many nations impose a very high standard of proof before a defendant can be convicted because the consequences of being wrong are drastic: citizens lose their lives and their freedom, in some cases for the rest of their lives, and they are forever marked with the stigma of a criminal conviction. Moreover, requiring the state to meet tough procedural standards before it can imprison an individual ensures that the state will not use the criminal process to imprison dissenters or punish the most vulnerable or most despised in society without very clear and strong social reasons.

In non-criminal settings which adjudicate the rights of some individuals against others, these considerations are not present, and thus may not justify additional pro-accused safeguards that are less likely to ensure more accurate fact-finding. States' experience with rape law has demonstrated that victims may be less likely to come forward or more easily discouraged from pursuing charges even for egregious harms. Moreover, because the procedural thumb is placed on the scale of the accused rather than the accuser, criminal process may simply reinforce the power differential in a typical sexual harassment case.

In addition, numerous critiques of adversarial approaches for sexual offenses document the re-harming that these processes can cause the victim. By focusing on the offender's wrongdoing rather than the victim's harm, these systems can rob victims of a role in the adjudicative process, including the opportunity to tell their story and respond to what has happened to them¹⁶. Administrators of campus disciplinary systems reinforce the fact that adjudicative processes do not further victim healing from the trauma they have experienced, and even leave perpetrators with the sense that they have not been fully heard. According to these administrators, the investigative process "depersonalizes the information to such an extent that neither party sees their story in it, and most of the time neither party feels heard or vindicated", no matter who has won¹⁷. Indeed, one noted that because of the need for respondents to defend themselves in an adversarial setting, "complainants have to prove their side over and over again and get

¹⁶ K.M. Williamsen, "*The exact opposite of what they need*": Administrator reflections on sexual misconduct, the limitations of the student conduct response, and the possibilities of restorative justice, University of Minnesota Dissertation, 2017, pp. 46–47, https://conservancy.umn.edu/bitstream/handle/11299/190564/Williamsen_umn_0130E_18323.pdf?sequence=1 (accessed 27.11.2019).

¹⁷ *Ibidem*, p. 131.

angrier and angrier as the process moves along. Although a complainant may start the process just wanting the respondent to understand the harm caused, they end the process wanting harsher punishment¹⁸.

The value of radical honesty embraced by Christian feminists is even important at the interpersonal level in these cases. As suggested, what is distinctive about modern feminist thought is its focus upon the fundamentally interpersonal nature of human existence, the fact that human beings are inseparably tied to each other and that reality is characterized not by individual isolation but by interpersonal encounter. At the same time, especially the Protestant Christian tradition recognizes that every person is both good and evil, and in Luther's description, every person will try to justify his or her own behavior as right and deceive him/herself about the situation in order to do so. In the case of sexual behavior, this means that virtually all interpersonal interactions, though both inevitable and part of what makes living rich and meaningful, will also be infected with some degree of sin, whether minimal or extreme. That sin may take the form of blindness to the other person's needs, indifference to his or her suffering, selfishness in preferring one's own desires or needs over the other, or attempts to create or preserve unhealthy or abusive power dynamics.

This reality should drive two criteria for any legal procedures to respond to sexual harassment and abuse. One criterion is that investigators and decision-makers must avoid the temptation to paint these situations as black and white unless indeed they virtually are, as in the case of rape or other violent sexual assault. Carleton College Professor Kaaren Williamson has documented the effects of contemporary casual sex, the so-called "hook-up culture" on American campuses which, in tandem with substance abuse patterns and the lack of explicit communication about sexual expectations, creates conditions ripe for misunderstanding and sexual assault¹⁹. Recognizing this complexity means that sexual harassment cases are likely to be more justly and successfully resolved if investigators and adjudicators explore the nuances that have caused the behavior to occur, and describe as honestly as possible (and get the parties to describe as honestly as possible) what has occurred and why. That does not mean a relativist approach to the problem of sexual harassment – both legal guidelines and those who administer them should be as clear and precise as possible about behaviors that are unacceptable and will trigger investigations and sanctions.

The other requirement, given the reality of the human condition, is that every person in law-related interpersonal conflicts such as this one (including the investigators and the adjudicators) needs to examine him- or herself about his or her own behavior, motivations, and ask whether he or she is minimizing the effect of his or her actions on the others involved. The way in which investigations

¹⁸ *Ibidem*, p. 132.

¹⁹ *Ibidem*, pp. 11–17.

and adjudications are conducted may unwittingly reinforce the harmful power dynamics that led to the charges, or they may invert those dynamics so that the accused wields unfair power over the accuser. Or, ideally, they may encourage honest introspection and an attempt to state the facts that is both candid and appropriately complex.

Both incident examination and self-examination processes must take account of the social dynamics of gender, such as the fact that women may be more likely to blame themselves even when they are predominantly or completely innocent in these encounters, and men may be more likely to blame others even when they are quite guilty. While this generalization cannot and should not be blindly applied to every man and every woman in these cases, those who are investigating and adjudicating need to be aware of this social reality so they can identify and correct for it when they see it. Because “blame the victim” has been so much a part of this dynamic in the past, those who engage the parties must be especially careful that their attempt to call both parties to examine the complexity of the situation giving rise to harm is not taken as victim-blaming. However, without forcing this kind of reflection, victims may be led to focus on the desire for vindication or revenge that, ironically, does not advance their own healing and empowerment, or they may not reflect on how they can prevent revictimization in the future. And a process singularly focused on whether certain guidelines were or were not met may give perpetrators an excuse to paint themselves as victims of the adjudicatory system and to repeat the behavior when they have the opportunity.

A process that respects this need for interrogation of the situation and engagement with the parties to get at an objectively honest, and subjectively candid, assessment of the relationship and occurrence of the past, is important. Criminal-style due process is generally not helpful in the search for sometimes quite complicated truth that results from self-examination and sensitive investigation, because its goal is to shield the alleged perpetrator until it is clear beyond question that he committed specified acts which the criminal law punishes, and then “give him what he deserves”, a retributive response.

Mediation, which the DeVos’s standards permit for the first time, may or may not be equally ineffective in engaging the parties in honest reflection about the harmful event, depending on the nature of the mediation process used. The proposed regulations do not specify what kind of informal processes may be utilized. Some interest-based mediation processes are simply focused on identifying short-term material interests and finding a compromise or acceptable alternative to solve the immediate problem without pushing the mediating parties to engage in serious consideration of what went wrong that brought them to this conflict. These kinds of processes are not likely to satisfy the victim that her harm has been acknowledged and her voice heard.

By contrast to interest-based mediation, transformative mediation, introduced by Robert Baruch Bush and Joseph Folger in 2004, proposes a mediation

practice that transforms the relationship with an adversary as well as with others in the participants' lives. Such a mediation process portends the possibility that Christian feminist recognition of the fundamental reality of relationality, and values such as inclusivity, the embrace of difference, compassion and generosity may be practiced. Beyond empowering people to seek their own solutions, transformative mediation aims for "mutual recognition – being willing and able to understand on another's position (...). Individuals are able to listen to and respond to each other, increasing the potential for harmony and wholeness and renewed relationships"²⁰. Transformative mediation recognizes the possibility that at least some sexual harassment incidents result not from intentionally malicious and evil efforts to create "power over" relationships between harasser and victim but from breakdowns in verbal and non-verbal communication or socially reinforced expectations about what women owe men sexually²¹. Transformative mediation may help each party to understand why the other person acted as he or she did, and "what went wrong". Though understanding of the other's point of view does not by itself constitute justice, it may pave the way for a more nuanced consideration of options for achieving a just and healing result than formal adjudication, which depends on and often reinforces misperceptions by both parties of the others' motives and experiences.

Just as transformative mediation recognizes the nature of reality as fundamentally interpersonal and tries to instantiate the feminist values of inclusion and diversity by accepting the otherness of the adversary, though not uncritically, so too does the restorative justice movement. As described by its lead theorist, theologian Howard Zehr, restorative justice recognizes that harms like those from crime result from a "violation of human relationships (...) that affects our sense of trust, resulting in feelings of suspicion, of estrangement, sometimes of racism. [Such harm] is a violation of a person by another person (...) [and] a violation of the just relationship that should exist between individuals (...) [that] ripple[s] out, touching many others"²². Indeed, like feminist theory, restorative justice recognizes that criminal or other harmful action may create a relationship, albeit a ruptured and damaged one, between complete strangers²³. Recognizing that both victim and perpetrator may be "wounded", restorative justice aims at practices that engage perpetrators (in the case of criminal violations) or contending parties (in the case of civil disputes) to reflect on their own behaviors with the help of members of the community. Restorative justice embraces a dual dynamic that

²⁰ B.J. Redfern, *Hope and reconciliation with grief*, (in:) J.P.J. Dussich, J. Schellenberg (eds.), *The promise of restorative justice: New approaches for criminal justice and beyond*, London 2010, pp. 232–234.

²¹ See K.M. Williamsen, *op. cit.*, pp. 9–17.

²² H. Zehr, *Changing lenses; A new focus for crime and justice*, Herald Press 1990, pp. 181–182.

²³ *Ibidem*.

respects the dual nature of human beings as good and sinful, as dishonest about their own behavior as well as capable of repenting for what they have done.

On the one hand, restorative justice puts the victim's harm and the need to remedy it at the center of the process, unlike adjudicatory processes which put the offender's wrongdoing in the front and center. Restorative justice aims to find healing for the victim that "does not imply that one can or should forget or minimize the violation (...) [but rather] implies a sense of recovery, a degree of closure, [the ability to] feel like life makes some sense and that they are safe and in control"²⁴. In this context, the restorative justice process does not cast the victim aside as just a witness to the wrongful act, but focuses on her restoration and tries to identify those things that the perpetrator can do to alleviate her suffering or make it as right as possible, given the harm already done. Restorative justice may also involve creatively identifying actions that the community can take to allow a sexual harassment victim to move on, such as changing her classes or her living arrangements, providing her with counseling or social support, teaching her how to respond in empowering ways to harassing behavior, and even changing the campus environment around her to prevent future traumatization.

Restorative justice also recognizes the brokenness of the offender. It aims to encourage a wrongdoer to accept in a deep way the consequences of his behavior through engagement with members of the community, not only (in some but not all cases) in the presence of the victim he has harmed but in the confrontation with others in the community whose lives have been affected by his actions, including members of the law enforcement and judicial communities.

Restorative processes that offer the possibility of healing and closure to the victim may at the same time engender compassion and generosity from and to the perpetrator as well as to and from the victim. Compassion means to choose to participate, intellectually and emotionally, in the experience of others, particularly the suffering of others²⁵. It is to "refuse to regard any suffering as a matter of indifference or any living being as a thing (...), [it is] the opposite of cruelty, which rejoices in the suffering of others, and of egoism, which is indifferent to that suffering"²⁶.

Compassion is necessarily concrete and specific, directing its care for the other to the specific humanity of one. It "realizes this equality between the suffering person and the person next to him, who becomes his equal by sharing his suffering"²⁷, thus accomplishing a key feminist goal in gender conflicts. Instead of giving the perpetrator an excuse to treat himself as the victim of an unjust and life-upending investigation, a restorative circle offers at least the possibility of get-

²⁴ *Ibidem*, p. 186.

²⁵ A. Comte-Sponville, *A small treatise on the great virtues: The uses of philosophy in everyday life*, C. Temerson (transl.), Metropolitan Books 2001, p. 105.

²⁶ *Ibidem*, p. 106.

²⁷ *Ibidem*, p. 115.

ting the offender to see the deep hurt that his behavior, whether witting or not, has caused his victim, and to move toward compassion for the suffering he sees. In a circle that includes other women, perhaps other victims, as well as actors in the system who have seen numerous such cases, the perpetrator who is willing to learn may come to understand in a deeper way why behavior he thought was welcome or justified was instead presumptuous, demeaning, terrifying, or painful to his victim. Not all perpetrators will be willing to lay down their self-justifying arguments or their insistent denials of what happened, but some will.

At the same time, restorative justice is prepared, if a perpetrator's eyes are opened, and he is honest and remorseful and willing to address the consequences of his action, to return that compassion, to surround him not as a social outcast or beyond redemption. To be compassionate in the Christian tradition is not only to see and at least superficially experience things from the point of view of the other, but to acknowledge the common humanity of all in these controversies, to marry accountability with respect.

Moreover, with a radically honest and compassionate dialogue within a community committed to having it in these circumstances, it is possible for the Christian virtue of generosity to be practiced. As Spinoza described it, justice is to give every person his or her due; generosity is giving the other what is not his due, but what is yours, not owed to him, but given freely of yourself²⁸. It is a choice to free oneself from one's own self-preoccupation. "[G]enerosity invites us to give in the absence of love to the very people we do not love and to give them more the more they need it or the better equipped we are to help them".

In the United States, there has been a national expression of astonishment at recent incidents in which victim-survivors expressed generosity toward the perpetrators of very serious crimes. A daughter of one of the nine African American worshippers killed by white supremacist Dylann Roof at the Emanuel African Methodist Episcopal Church in 2015 exemplified this generosity, this giving beyond what justice would demand, when she said to Roof: "You took something very precious from me. I will never talk to her again. I will never, ever hold her again. But I forgive you. And have mercy on your soul"²⁹. More recently, trial watchers were surprised when white police officer Amber Guyger was embraced and forgiven by the brother of an African American man whom she killed in his apartment, mistaking him for an intruder when she went into his apartment rather

²⁸ *Ibidem*, p. 86. Comte-Sponville argues that "generosity is more subjective, more individual, more affective and more spontaneous, while justice (...) is always somewhat more objective, more universal, more intellectual and more considered". *Ibidem*, p. 157.

²⁹ M. Berman, 'I forgive you.' *Relatives of Charleston church shooting victims address Dylann Roof*, "Washington Post" 19 June 2015, <https://www.washingtonpost.com/news/post-nation/wp/2015/06/19/i-forgive-you-relatives-of-charleston-church-victims-address-dylann-roof/> (accessed 1.11.2019).

than her own apartment upstairs³⁰. While these are certainly uncommon outlier exhibits of generosity, they illustrate the ways in which generosity paradoxically frees the giver from the self as much as it speaks to the need of the recipient.

Research on campus sexual harassment processes by Williamsen and her colleagues suggests that restorative approaches offer precisely what victims, in particular, need from university sexual harassment processes. Drawing on the restorative justice work of her collaborator Mary Koss, Williamsen notes that victims express the need for input into key decisions during the process, which requires them to be continually informed about what is happening and receive quick responses to their queries; to be able to tell their story without being interrupted and cross-examined; to be validated by those in the system, to feel safe during the process, and to help shape a remedy that meets their emotional, as well as their material, needs³¹.

As Williamsen's research indicates, administrators who have been involved in or contemplated even informal restorative practices involving peer harassment and assault at their campuses are optimistic about the opportunity of restorative practices to achieve some of these goals. They cite the opportunity to give the victim agency and choices about how to proceed in the case based on her own needs, as well as the opportunity for the victim to see the perpetrator expressing remorse and acting in a way that shows that remorse is genuine. They also suggest that restorative processes provide space for the perpetrators to be honest about what happened, to learn what is wrong with their behavior and perhaps develop empathy for the victim, and to accept responsibility for the immediate event but also for their future behavior³².

Because restorative processes often involve others besides the adjudicators, the parties and their lawyers, they also offer the possibilities for the community. In a restorative circle, for example, some members of the community will serve supporters for the harmed party, which lessens the possibility of re-victimizing her or reinforcing her marginalization, especially in cases where the victim is already a member of a minority group³³. Unlike educational processes alone, restorative circles involving members of the community push offenders to understand the ripple effects of their behavior on others. The public acknowledgement of remorse not only makes it more real and effective than a private apology, but also enables

³⁰ Botham Jean's brother hugs Amer Guyger after murder sentence, ABC Eyewitness News 3 October 2019, <https://abc13.com/former-cop-embraced-by-victims-brother-after-murder-sentence/5586186/> (accessed 1.11.2019)

³¹ K.M. Williamson, *op. cit.*, p. 50, citing M. Koss, *Restorative justice for acquaintance rape and misdemeanor sex crimes*, (in:) J. Ptacek (ed.), *Restorative justice and violence against women*, New York 2010, pp. 218–238.

³² See *ibidem*, pp. 173–186.

³³ *Ibidem*, p. 188 (also noting that members of marginalized communities may be reluctant to report victimization so they don't get others from those communities in trouble with predominantly white and straight members of that campus community).

the offender to experience the compassionate response of the community to his attempts to take responsibility and action to remedy what he did. In the case of campus sexual harassment, involving the community may engender efforts to create a safer campus culture for those who have not yet been victims or perpetrators.

Of course, restorative justice is not suitable for all sexual harassment cases. Where restorative processes are used, perpetrators are carefully screened to ensure that they are potentially willing to take responsibility for their actions and will not take the opportunity to revictimize. Even so, sexual perpetrators are often cunning manipulators who believe they will be able to beat the system or see restorative processes as a way to avoid punishment. Victims may be too cowed or exhausted to undergo any face-to-face encounters, or too angry and vengeful to want to give any quarter to their abusers. Blurry storylines will sometimes conjoin with a sense of threat and damage by both parties, preventing acknowledgement of the humanity of the other. Innocents, both accusers and accused, may understandably seek justice or vindication rather than be willing to acknowledge wrongdoing or extend compassion and generosity to their adversaries.

In the case of perpetrators who are university faculty or administrators and victims who are students, different dynamics may make restorative processes more difficult. It is less likely that faculty members are harassing women because of ignorance of what society expects in male-female relationships, which may be the case with young college-age perpetrators. The power dynamics between faculty and students are also exacerbated, which may make faculty members less willing to engage in such processes. Moreover, faculty perpetrators may be less willing to acknowledge either the fact of the harassment or the harm it caused because the consequences are so dire for them. Unlike student harassers who may be dismissed from the university only to return or to find another school to finish their degrees, faculty members adjudicated as harassers face detenuing and permanent banishment from academic posts. In this era of #MeToo, the nervousness of college administrators about legal liability and the possibility that “rehabilitation” may put perpetrators back into a sea of vulnerable undergraduates once again may result in the end of a promising academic career. The professional community’s reaction may have both economic and socially stigmatizing consequences not only for the perpetrator but his spouse, children, and other family members and friends who stand by him. (Of course, these prospects may also incentivize faculty members to acknowledge harm and participate in a restorative practice because the consequences of not doing so are so dire). Students may also be less likely to report and more likely to minimize incidents because of the community ramifications of reporting a popular teacher. They may be less likely to want to participate in any processes, wondering what later professional consequences the faculty member might visit on them in retaliation for their complaints.

But practiced in the right cases, restorative justice may turn the disempowerment and fearful, sometimes guilty in-turning that victims may experience in

adjudicative processes into a freedom of giving beyond justice, and they may move the self-justificatory shame of a perpetrator into true repentance and reparatory action. At least, restorative justice may push them toward a relational dynamic that is healthier for both whether they must necessarily encounter each other in the future or free themselves from the hurt of the past.

REFERENCES

Books and articles

- Chamallas M., *Introduction to feminist legal theory*, Aspen Publishers 2003
- Comte-Sponville A., *A small treatise on the great virtues: The uses of philosophy in everyday life*, C. Temerson (transl.), Metropolitan Books 2001
- Estrich S., *Rape*, "Yale Law Journal" 1986, Vol. 95, p. 1087
- Koss M., *Restorative justice for acquaintance rape and misdemeanor sex crimes*, (in:) J. Ptacek (ed.), *Restorative justice and violence against women*, New York 2010, p. 218
- Levit N., Verchick R.R.M., *Feminist legal theory: A primer*, New York 2006
- Preston C., *Deconstructing equality in religion*, (in:) M.A. Failinger, E.R. Schiltz, S.J. Stabile (eds.), *Feminism, law, and religion*, New York 2014, p. 25
- Redfern B.J., *Hope and reconciliation with grief*, (in:) J.P.J. Dussich, J. Schellenberg (eds.), *The promise of restorative justice: New approaches for criminal justice and beyond*, London 2010, p. 232
- Zehr H., *Changing lenses: A new focus for crime and justice*, Herald Press 1990

Case-law

- Mathews v. Eldridge, 424 U.S. 319, 335 (1976)

Websites

- Berman M., "I forgive you". *Relatives of Charleston church shooting victims address Dylann Roof*, "Washington Post" 19 June 2015, <https://www.washingtonpost.com/news/post-nation/wp/2015/06/19/i-forgive-you-relatives-of-charleston-church-victims-address-dylann-roof/> (accessed 1.11.2019)
- Botham Jean's brother hugs Amer Guyger after murder sentence, ABC Eyewitness News 3 October 2019, <https://abc13.com/former-cop-embraced-by-victims-brother-after-murder-sentence/5586186/> (accessed 1.11.2019)
- Brown S., Mangan K., *What you need to know about the proposed Title IX Regulations*, "The Chronicle of Higher Education" 16 November 2018, <https://www.chronicle.com/article/What-You-Need-to-Know-About/245118> (accessed 27.11.2019)
- Camera L., *Education Department begins sweeping rewrite of Title IX sexual misconduct rules*, "U.S. News" 7 June 2021, <https://www.usnews.com/news/education-news/articles/2021-06-07/education-department-begins-sweeping-rewrite-of-title-ix-sexual-misconduct-rules> (accessed 21.05.2022)
- Families advocating for campus equality*, <https://www.facecampusequality.org/> (accessed 1.11.2019)

- Jackson C., Acting assistant secretary for civil rights, Dear Colleague Letter, 22 September 2017, <https://www.cmu.edu/title-ix/colleague-title-ix-201709.pdf> (accessed 5.12.2019)
- Koumpilova M., *School officials walk fine line as they let disciplined professors return to classroom*, “Star Tribune” 20 October 2019, A1, A10, <http://www.startribune.com/minnesota-campus-look-to-rehabilitation-for-sanctioned-faculty/563461072/> (accessed 4.12.2019)
- Nicolaou E., Smith C.E., *A #MeToo timeline to show how far we’ve come – & how far we need to go*, “Refinery 29”, 21 October 2019, at 2, <https://www.refinery29.com/en-us/2018/10/212801/me-too-movement-history-timeline-year-weinstein> (accessed 28.10.2019) (including a timeline of celebrities accused of sexual harassment or assault from 2017–2019)
- Pilcher J., *How sexual harassment starts on campus: One student’s story*, Cincinnati.com/The Enquirer, 2 April 2018, <https://www.cincinnati.com/story/news/your-watchdog/2018/04/02/how-sexual-harassment-starts-campus-one-students-story/452882002/> (accessed 31.10.2019)
- Williamsen K.M., *“The exact opposite of what they need”: Administrator reflections on sexual misconduct, the limitations of the student conduct response, and the possibilities of restorative justice*, University of Minnesota Dissertation, 2017, https://conservancy.umn.edu/bitstream/handle/11299/190564/Williamsen_umn_0130E_18323.pdf?sequence=1 (accessed 27.11.2019)