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Jennifer Robbennolt

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2018 SYMPOSIUM LECTURE: THE RANGE OF REMEDIES AND RESPONSES IN THE #METOO MOVEMENT

*Jennifer K. Robbennolt**

* Professor Jennifer Robbennolt is a professor of law and psychology at the University of Illinois, focusing on the areas of psychology and law, torts, and dispute resolution. Her research integrates psychology into the study of law and legal institutions focusing primarily on legal decision-making and the use of empirical research methodology in law. Professor Robbennolt is co-author of several books, including “The Psychology of Tort Law, Psychology for Lawyers – Understanding the Human Factors in Negotiation, Litigation, and Decision-Making,” a textbook on empirical methods in law, and the casebook “Dispute Resolution and Lawyers.” She has served as a secretary of the American Psychology-Law Society and chair of the AALS section on law and the social sciences, and is on the editorial boards of Psychology, Public Policy and Law, Law and Human Behavior, and Law and Social Inquiry. A graduate with highest honors at the University of Nebraska College of Law, she also earned master’s and doctoral degrees in social psychology from the University of Nebraska. Before joining the law faculty at the University of Illinois, Professor Robbennolt was associate dean for faculty research and development, associate professor, and Senior Fellow at the Center for the Study of Dispute Resolution at the University of Missouri Columbia School of Law. Professor Robbennolt is also the co-author of an upcoming paper: Lesley Wexler, Jennifer K. Robbennolt & Colleen Murphy, #MeToo, Time’s Up, and Theories of Justice, 2019 U. Ill. L. Rev. 45 (2019).

LECTURE

I want to thank all the *Public Interest Law Review* students for inviting me. I want to talk today about the range of concerns that survivors of sexual misconduct may have, and that their attorneys ought to have in mind as they represent them or represent the perpetrators of sexual misconduct. I want to do that in part to take seriously the role of survivors and the notion that survivors have the right to control their cases and deserve to be afforded the agency to decide what their particular remedial goals are. Some survivors may have different goals than other survivors, so we want to think about the range of what those possibilities might be. My background is in law and psychology, and I will draw on the social science research about how people respond when they've been injured. I'll draw in part on the social science that looks at how tort claimants respond to their injuries and what motivates them to claim, but also the social science that looks at how people respond to sexual violence, what their motives for making claims might be, and what they say about what justice means to them.

One thing that many victims of sexual violence and other kinds of injuries value is a chance to tell their stories. We've heard a lot about that already this morning. They would like to be able to describe what happened to them, and how it has affected them. They value having an opportunity to speak – to speak out, to voice their experience. That's going to manifest itself differently for different kinds of survivors, and in some ways, this is at the heart of the #MeToo Movement. #MeToo provided many survivors with the space to tell their stories, with an opportunity to tell their stories, with the support from other people that allowed them to come forward.

Some survivors may want to voice their experience on social media, others may not. Some survivors may want to tell you, their lawyer, their story. For some of them – for those who are not going to be able to have legal claims for the kinds of reasons we have been talking about – it may be very important for them to have some representative of the justice system listening to their story. Some survivors may welcome the opportunity to tell their story directly to their perpetrator, and some survivors may emphatically not want that. So however it might manifest, simply being able to tell their story can be very empowering for survivors and it's one of the things that many survivors want.

Those who are injured by other people, including those injured by sexual harassment and other forms of sexual violence, also often desire some form of acknowledgment. Acknowledgment of their experience, acknowledgment of the specifics of the behavior and the specifics of what happened to them, acknowledgement about how that affected them. That acknowledg-

ment can serve a whole host of different kinds of purposes for victims, a whole host of different kinds of goals. It can confirm their experience. It can convey to them a message that they weren't overreacting, or that it wasn't their fault, because a lot of victims worry that they did something or that other people are blaming them. To acknowledge what happened to them helps them understand that it was not their oversensitivity or their fault that that something happened. It can also signal community support for the victim, which a lot of victims find useful.

There's a whole literature of research and studies looking at apologies, who offers them, how they're offered, and their effects on injured parties. This research has found that apologies can be more effective when an offender has taken the time to hear the experience of the injured party and then to express an understanding – even if not an agreement with – simply an understanding of their experience of what was done and how it has affected the victim. So the same words of apology can be understood differently if they have followed a period of reflection and conveyed a message of understanding of the victim's experience.

Let me give you some examples of responses or apologies that have been given in some high-profile cases to exemplify and counter-exemplify some of the things I'm talking about. So as a counter-example to the kind of acknowledgment a victim might want, consider the response from snowboarder Shaun White when there were allegations of his own sexual misconduct. This response did not acknowledge the harm, it did not acknowledge the victim's experience, it did not acknowledge the victim at all. And so not surprisingly, therefore, White was promptly criticized for further insulting the victim of the harassment.

Offender responses, even when they are ostensibly apologetic, do not always provide the sort of acknowledgment typically sought by survivors. So consider, for example, apologies that are conditional, where the person says, "If I did anything..." or responses that are vague or general, referring only to "behavior" or "actions." These kinds of apologies do not articulate an understanding, do not acknowledge the harmful behavior, do not demonstrate an understanding of the wrongfulness of the behavior or the effects of the behavior. Responses that cast doubt on the consequences of the behavior, for example, responses that say, "if anyone was offended..." can appear to lay the blame at the feet of the target of the harassment for misinterpreting or being overly sensitive.

In contrast, consider an interaction between Megan Ganz and her former boss Dan Harmon that took place on Twitter and on Harmon's podcast. Harmon offered a lengthy apology that included fairly specific acknowl-

edgment of the variety of ways in which he had created a toxic environment for Ganz, including the initial behavior that was problematic, but also the retaliatory behavior that had happened, and he acknowledged the ways that it had affected Ganz. She describes him as having given a full account of what happened. She also describes the relief that she felt at hearing him say that these things actually happened so that it wasn't something that she had dreamed, she wasn't crazy for having understood these things in these ways. We'll talk later about accepting apologies, but she felt like it was appropriate to accept that apology. In many ways, especially when we're thinking about public apologies, this sort of apology tends to be the exception rather than the rule. You'll more often get very carefully crafted, conditional, and vague statements.

Another way in which a response may fail to provide the kind of acknowledgment that survivors might be seeking is when the response is made in general or to the wrong person. Consider as one example Charlie Rose's apology, which was to "these women," and it didn't name any particular women, even though there were particular women who had made the claims. In contrast, for all its other faults, Louis C.K.'s apology effectively acknowledges specific women who he had wronged and respected the agency of the other woman who was not prepared to be named. We can talk about the other faults in his apology, but in that respect, he got acknowledgment correct. Conditional, or blame-shifting, or vague apologies tend not to provide the kind of acknowledgment that many victims seek, nor do they provide any evidence of understanding of the wrongfulness of the behavior or of its effects. These sorts of failures are not only dissatisfying to many of the survivors, but in themselves can also sometimes constitute an additional offense.

Simple acknowledgement is something that many survivors would welcome. But survivors may also desire that offenders do more than simply acknowledge their experience. They hope that their offenders will accept responsibility for their behavior and for the harm that their behavior has caused. This responsibility-taking can be very difficult. A book that I like is called "Mistakes Were Made, But Not by Me." You've got the passive voice and also the blame-shifting. It's a book by a couple of social psychologists who work through the social science about why it's really hard for any of us to take responsibility for our own wrongful behavior. There are many psychological reasons and many legal reasons why offenders may not be able to recognize that they have acted inappropriately or to accept responsibility for their behavior. Denial, embarrassment, difficulty in accepting that you've done something wrong and inconsistent with your self-image as a good person, concern for reputation, the belief that a denial will

be a more effective response than accepting responsibility, one's own vulnerability, the fear that taking responsibility is to cede control of a situation – and in many of these cases potential legal consequences will emerge.

So concern for liability – whether that's civil liability or criminal responsibility – is often but not always in the background of these kinds of cases. And there are all sorts of reasons why it can be difficult to take responsibility. On the other hand, there's lots of social science research that suggests that responsibility taking can be really, really powerful. Acceptance of responsibility for having caused harm is the central feature of an apology. It is the key element of an apology that distinguishes an apology from other responses that one might make to wrongdoing. It distinguishes an apology from denial. It distinguishes an apology from excuse making. It distinguishes an apology from justification.

A lot of empirical research, including my own research on apologies and tort victims has found that accepting responsibility for having caused harm tends to contribute significantly to positive reactions to apologies. People tend to think that the behavior was less intentional when someone apologizes for it. They're less likely to blame the person for the behavior if they apologize for it. People can be more willing to have settlement talks or settle cases when someone has apologized to them. Now that's not to say that listening, acknowledging, expressing sympathy – things that don't take responsibility but are also appropriate responses – can't have positive effects as well. The research finds that those kinds of things can also have positive effects. But the positive effects of taking responsibility for having caused harm tends to be greater and much more consistently seen.

Let me mention a couple of additional things about responsibility-taking. The first is that many victims also would like to have acceptance of responsibility from other people who enable wrongful conduct. They would like people who enabled the conditions for wrongful conduct to happen to take responsibility for their part in supporting those conditions, or failing to prevent wrongdoing, or failing to stop the harmful behavior.

Second, responsibility taking could, but often does not, extend beyond the original harassing behavior to admitting responsibility for subsequent denial, deception, or retaliation. Those things tend not to be included in responses. But those secondary bad acts can result in significant additional harm and additional barriers to people feeling comfortable reporting. These acts are part of what victims wish to hold offenders accountable for. That's one of the things that Megan Ganz found notable about Dan Harmon's apology, that he not only articulated what he had done in the first instance

but also the ways that he had responded to her after she had objected to his behavior.

Third, many survivors would ideally like to hear responsibility-taking from their perpetrator. But accountability and responsibility can be also accomplished through other avenues such as the courts. So when they can't get responsibility-taking from a perpetrator, having a court or a jury define where accountability lies is also something that they welcome.

In addition to having a voice, being acknowledged and having someone take responsibility, victims also care about what is done to repair the harm. Sexual misconduct does harm. There are physical and mental health consequences. There are lost professional opportunities, lost professional assignments, career advancement problems, career interruption problems. Repairing those sorts of harms is important. Now, some of the things I've already talked about can contribute to harm repair. So having a voice, being acknowledged, having there be responsibility-taking can help repair some of the harms of sexual harassment. But an additional way to repair harm, of course, is through financial compensation. Survivors deserve to be made whole under the law and some of the discussions that we've had this morning are about some of the problems with the law that get in the way of that kind of redress. There's also a deterrence function to compensation. Making sexual misconduct expensive for alleged abusers may be a deterrent. Damages are one way to repair, in particular, concrete financial harms. Lost professional opportunities, lost income, expenses related to physical and mental health care, and so on. But money damages are also symbolic. They can serve to accomplish some of victims' other goals. They serve symbolic purposes. Damages can serve to provide a form of acknowledgement. They can serve as evidence of accountability. They may help to reaffirm a victim's self-worth. Money damages are not the only form of repair that is appropriate. Things like community service or efforts to effect reform might also be a way of repairing harm that has been done, and I'm going to circle back to that in a minute.

One thing to note is that there may be survivors who are hesitant to seek individual compensation. For some survivors compensation will be very important to them and they will want to seek that and are clear about that. Other survivors may be hesitant. Some of them may feel like money damages are not commiserate with the kinds of harms they have experienced. Those preferences ought to be respected. The autonomy of victims to control how their claims are handled and what their goals are is important. At the same time, attorneys and the community need to be aware of the kinds of social pressures there can be on survivors that can make them hesitant to seek financial damages. Concerns about how they will be viewed by others,

and critiqued by others as ambulance-chasers or gold diggers. We've seen that in the public cases in which people have made claims in the context of sexual harassment. Some victims have found that their credibility may turn on whether or not they seek financial compensation, finding that they're more credible if they are not seeking financial damages. That's a potential problem, and one that we need to grapple with.

Survivors of sexual misconduct are often motivated to speak up and say "Me Too" or take some other kind of action against offenders in the hope that they can prevent additional harm from occurring. The #MeToo Movement has relied, at least in its early phases, on naming and shaming as a tool aimed at preventing reoccurrences. But many of the statements we have seen from perpetrators tend not to offer specifics about how their behavior will change in the future and institutions don't always have good specifics about the changes that they will make in order to prevent these kinds of harms.

The discussion we had earlier this morning about social responsibility reflects the early steps in thinking about how we as individuals and as institutions prevent reoccurrences of harmful behavior. Many survivors are concerned that offenders will be "quick to apologize but slow to change." And that is something that we need to take seriously. With respect to prevention, survivors may be concerned about prevention of the behavior of specific individuals, but they also are interested in influencing institutional behavior and affecting systemic change. This desire for reform means that it's important to think about the institutions, about the structures, about the norms, about the practices that contribute to the problem of sexual misconduct as part of an appropriate response to individual claims and to the movement as whole. And it's important to think about institutional responses, that in terms of harm repair. Simply restoring an inequitable status quo is not really repairing the harm. It's important to think about how and what we are going to do to transform cultures and institutions that underlie the bad behavior that happens.

Also coming up in some conversations about #MeToo – particularly in conversations about institutional change and what should happen in the aftermath of particular claims – are questions about how we reintegrate both survivors and perpetrators back into a meaningful community and what that might look like. For survivors that means things like listening to their stories, addressing the employment setbacks that they have experienced, and the other aspects of repair that we've been talking about. For many survivors, reintegration of the offender is secondary, but also important. We are only beginning to discuss what we need to do to reintegrate survivors and how to appropriately reintegrate perpetrators. For offenders, what is re-

quired as a precursor to reintegration and what that reintegration looks like depends, and should depend, in part, on the nature of the offense: its severity, its intentionality, its pervasiveness. We ought not have a “one-size-fits-all” set of requirements for perpetrators because there are lots of different kinds of behavior involved. But however we define that work, it is work that needs to be done. The notion of “earned redemption” from the restorative justice literature anticipates that offenders will both be held accountable for their behavior and enabled to earn their way back into the trust of the community. Those two things need to happen together, not just one, not just the other. As actress Ashley Judd said about redemption and #MeToo, “there’s an appropriate sequence. Accountability, introspection, restitution, [and] then redemption. You don’t get to skip to stages that lead to redemption.” Now offenders may not have to become moral saints, but they should make restitution to their victims, engage in service to the relevant community, confront the harm caused by their behavior, and learn from their experience and help others to do so as well.

When we are thinking about reintegration and what should happen in the aftermath of some of these claims, the question of forgiveness often comes up. If reintegration is possible, what does that mean for forgiveness? There’s a huge psychological literature about forgiveness that demonstrates that forgiveness can benefit both victims and perpetrators, psychologically, physiologically, emotionally. But it’s important to think about what forgiveness is and what forgiveness is not. We need to have a nuanced understanding. Forgiveness, as a psychological construct, is about the forgiver. It is not about the offender. And it involves an intrapersonal process. It’s about the letting go of resentment, it is not about an interaction with the offender. So importantly, neither forgiveness nor reintegration should mean that offenders are not to be held accountable or that they’re exempt from punishment or reparations. Forgiveness and accountability can coexist, and maybe amends should be a precursor to reintegration or forgiveness but neither dictates that there must be forgiveness.

Similarly, forgiveness does not mean that the survivor must reconcile with the perpetrator. That is up to the individual survivor. And despite the common refrain that says, “forgive and forget,” forgiveness does not necessarily imply forgetting. It’s important to remember what has happened so that offenders can learn, society can learn, and others can protect themselves as necessary.

The other thing that’s important to think about in the context of forgiveness is that we need to be aware of the pressures that are put on survi-

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vors to forgive perpetrators. Research has found evidence for a sort of script that prescribes how apologetic interactions go. The script starts with an injury, then there's an apology, and then there's forgiveness. And that is the pattern that is expected. What that can mean is a victim who chooses not to forgive, or is not able to forgive, or doesn't want to forgive at this time, can feel the pressure of the expectation that the appropriate response is to forgive. That expectation can turn the victim into the wrongdoer because now the victim is holding a grudge. Individual victims should be able to choose whether forgiveness is one of their goals, not that there should be an expectation that they must forgive, or reconcile, or interact with, the perpetrator.

So, in thinking about this whole range of goals and responses and remedies, it's important to realize that community responses to wrongdoing and what the community requires from an offender – whether that's legal system, whether that's an employer, whether that's the community as observers – communicate something about the collective's view of the violation. They communicate something about the underlying social norms, they communicate something about the value of the survivor. So, it's important for us to think broadly and collectively about what messages we want to send. Meaningful consequences and meaningful repair for victims can serve to condemn the treatment of the victim, confirm the value of the victim in the community, and reaffirm – or in this case, it's probably more appropriate to say, recreate – a shared set of social norms, and values, and expectations for behavior.

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