

## **What would have been justice?**

Remarks prepared for the Plenary on Sexual Harassment in the Thomas Hearings,  
Law & Society Annual Meeting, 27-31 May 1992

Kathleen Daly, Department of Sociology, Yale University

What more can be said about the confirmation hearings of Clarence Thomas? I want to imagine what might have happened in the hearings. What would have been justice? If you or I could write the script, what would it say?

When we move from critique of law and legal process to more imaginary or visionary realms, our work gets tougher. It gets even tougher when we think about how to respond to an individual who harms another. What should be done? What is right?

Tonight I want to consider a dimension of sexual harassment that's often not discussed - - which is, the types of responses or methods of redress that we find appropriate for someone who harasses. I'm going to introduce ideas proposed by feminist-abolitionists on criminalized sexual assault as a way to think about the response to sexual harassment.

As you know, law dealing with sexual harassment in the U.S. has developed within the anti-discrimination legal framework of Title 7 of the Civil Rights Act of 1964. If a sexual harassment case should reach federal court, it would have survived many hurdles, including a workplace organization's policies and procedures, and a state's administrative procedure before reaching the federal level. [Note in passing that we know little about complainants' experiences with these organizational and administrative processes; and we need to know more.] But if a case gets to federal court in the Title 7 framework, the workplace organization is normally the defendant. Criminal law in the U.S. differs from the Title 7 anti-discrimination framework in many ways; but one striking difference is that defendants in criminal courts are people (not organizations). In contrast to Title 7, criminal law is far more individualizing and committed to the notion of individual culpability for harms. [Note in passing that I wish

criminal law could have more of an organizational or structural understanding of how harms are spawned, but that is another paper.]

There are, then, different legal contexts and relationships in a sexual harassment suit and in the criminal prosecution of an assault between workplace associates. But there are points of overlap. Certainly, for the person harmed, what happened to her (or him, from time to time) -- the difference between sexual harassment and criminal assault may only be a legal line, a legal naming.

I will be working with the ambiguity and arbitrariness of this legal line in drawing from work produced by Dutch and Scandinavian scholars on abolitionism. Abolitionism is a set of ideas about reducing the role of the criminal law and justice system in the response to harms. Its initial inspiration was a critique of prisons and imprisonment as punishment, but it has moved to a wider set of questions about penalty. As one Dutch scholar (Marijke Meima) suggests, “abolitionism ... is a different way of looking at and thinking about reality” (Meima, 1990: 243). This author continues by asking rhetorically, “what makes crime so much different from other types of ill, destruction, annoying or anti-social behavior that we should need a complete and elaborated repressive system to respond to it?”

Abolitionists’ ideas offer a challenging corrective to corrections. Some of the more thought-provoking articles apply feminist-abolitionist analyses to men accused (or convicted) of rape. This is “work-in-progress” -- it’s imaginative and visionary in trying to formulate alternative ways of responding to harms. It’s practical and important because, as a Norwegian feminist (Liv Finstad) says:

“Today’s system abandons both the victim and the perpetrator. But many women are ... clinging to a system that gives us so little and that is so damaging for us, [and we’re] doing it because there is no alternative. Since the court system and the prisons are the only thing we have to deal with, we cling to what we have, although it is hideous also for us.” (Finstad, 1990: 209) (emphasis in the original)

Let me describe what feminists, who work within an abolitionist framework, would propose in responding to criminalized sexual violence. One proponent (Meima) suggests these three steps:

First, to find a common version of what happened and to try to reach agreement on what should be done to restore or pay for what has been damaged.

Next, to redefine “the conflict” as being between the parties involved, and to focus on *conflict solving*. The implication here is a reduced role for the state in pursuing the complaint criminally -- thus moving it out of the penal domain.

The third step is to reach agreement between the parties on the sanctions. Here is a list of possible sanctions for a man found to be sexually violent:

- pay compensation for harm
- take a course on gender relations and power
- agree to stay away from a certain parts of town [not sure about this -- presumably women do not feel safe in certain areas because rapes occurred there) -- meet with a group of women who have had terrible experiences with sexual violence and want to talk to him about it
- move to another part of town (or away from the area) What is missing from this list of sanctions? I suspect what’s missing for you is *retaliation* (or *revenge*) for the harm. Specifically, many of us assume that “justice” is done -- or a harm is “balanced” -- when an offending individual is harmed (punished) in a state legitimated way.

My attention tonight is on this third step (the “sanction” or “redress”), so I’ll be passing over an important discussion of the processes by which the parties discuss “what happened” in an incident. Let’s turn then from criminalized sexual violence to sexual harassment, using the Thomas confirmation hearings as an example.

For me, there were two grave injustices at the hearings: one everyone mentions, and the other, few have mentioned.

The first injustice: the treatment of Anita Hill and the fact that she was not believed. In their questioning of her, the hostile Senators had to destroy, humiliate, and demean her. This is the price that victims of sexual harassment pay for coming forward with complaints. It is similar to the price paid by victims of criminalized sexual violence.

The second injustice: [In stating this, I am going to assume that Anita Hill's memory is right -- that Clarence Thomas did the things she said.] The second injustice was that Thomas could not admit that he harassed Hill -- because if he did, his professional life was utterly lost, destroyed.

The injustice for Hill: tell the truth, get destroyed.

The injustice for Thomas: avoid the truth; otherwise, you will be destroyed.

I want to raise some questions about this second injustice. If, in the hearings, Thomas admitted he harassed Hill, and if he admitted this in ways you found sincere; and further, if he apologized for what he did and said he would make amends, what would have been your response? Would his admissions, apology, and efforts to make amends have been sufficient recompense? Or would you want more of a sanction? What would you say, for example, about his future employment (as a judge, as a lawyer)? What, in short, would have been "justice" to you? or for Anita Hill?

In raising these questions about justice in the response to sexual harassment, I am pushing you (and myself) to consider the role of retaliation and stigmatization in our conceptions of a "just" response. I am also pushing you (and myself) to consider, what is the "pound of flesh" you (or I) may be seeking, and why? I am asking that we stop using the words "harasser" and "rapist" as if these were fixed identities for men. I am hopeful that some men can and will change -- that harmful acts, of domination, of violence, can be attenuated.

This spring Anita Hill gave a talk at the Yale Law School, and she used the familiar terms SILENCE and DENIAL to describe women's experiences of sexual harassment and how others respond. She encouraged women to make sexual harassment "an issue" and to speak out about their experiences -- thus to break the silence and to challenge the denial of injury.

As I listened to her, I wondered, what ultimately is our goal? Speaking out raises the consciousness of those victimized and, one hopes, shifts “the problem” of sexual harassment from the victimized individual (usually a woman) to the one harassing (usually a man) and to the broader cultural and social supports for harassment. These are important political moves -- both the raised consciousness and shifting the target of “the problem.” But what then? What is the justice women are seeking?

For several decades feminists have been calling for **BREAKING THE SILENCE** in bringing many forms of violence against women and children to light. For sexual harassment, it takes tremendous courage and perseverance to challenge a workplace organization and to describe one’s experience of sexual harassment to administrative and legal officials. **BUT** I want to propose that we move beyond these brave acts of breaking the silence, beyond the speak-outs and bathroom write-ins. We need to consider the processes by which these harms should be discussed and adjudicated. And we need to consider what sanctions are appropriate for men who harass. In short, we need to discuss and imagine formalized responses, which we see as creating “justice.”

Here we can learn from abolitionist scholars in this way. It will take extraordinary generosity, creativity, and optimism to *not respond in the familiar ways*. The familiar ways are by retaliation, destruction, and labeling as “pathologically deviant” -- the litany of stigmatizing and degrading moves the criminal justice system has historically offered. The “familiar ways” are those of exclusion (using Stan Cohen’s terms, 1985: 266-268): the ways of *exclusion* include “banishment and expulsion, segregation and isolation, classification and stigmatization.” Less familiar ways (certainly today, less so in the 1960s) are those of *inclusion*, of “integration and accommodation, toleration and incorporation.” Cohen argues for a “cautious affirmation” of the impulses of inclusion (and I agree with him on taking this tack) -- though recognizing that such impulses are not without flaws and problems -- and that the exclusion/inclusion dualism cannot be applied in a clear or certain way across varied populations and harms.

Let me end the way I began: What would have been justice the Thomas hearings? If you or I could write the script, what would it say? In workplace organizations (and elsewhere) women are struggling to bully down men who bully -- dominating men, violent men, and men who see women only as sex, as playthings and helpers, as

mothers and wives. The ways we respond and the ways we conceptualize a “just” response will be the cornerstone of our ideal workplaces and social relations in the future.

## References and bibliographic notes

Cohen, Stanley (1985) *Visions of Social Control*. Cambridge: Polity Press.

Meima, Marijke (1990) "Sexual violence, criminal law, and abolitionism." Pp. 238-252 in *Gender, Sexuality, and Social Control* (Bill Rolston and Mike Tomlinson, eds.). University of Bristol: The European Group for the Study of Deviance and Social Control.

Finstad, Liv (1990) "Sexual offenders out of prison: principles for a realistic utopia." Pp. 188-210 in *Gender, Sexuality, and Social Control* (Bill Rolston and Mike Tomlinson, eds.). University of Bristol: The European Group for the Study of Deviance and Social Control. [Note that this paper was also published in the *International Journal of the Sociology of Law*, 1990, Vol. 18, pp. 157-177.3

On abolitionism: There are other relevant papers in *Gender, Sexuality, and Social Control* by feminist-abolitionists, including those by Rene van Swaaningen, Ase Berge, Jolande uit Jeijerse, Renee Kool, and others. The major exponents of abolitionism and writers of key texts are Louk Hulsman (*A Farewell to Criminal Justice: A Plea for Self-Regulation*, 1986), Herman Bianchi and Rene van Swaaningen (eds.); *Abolitionism: Towards a Non-Repressive Approach to Crime*, 1986); Nils Christie (*Limits to Pain*, 1982); Thomas Mathiesen (*Can Prisons be Defended?*, 1987); and Willem de Haan (*The Politics of Redress*, 1990).

See also, special issue on abolitionism in *Contemporary Crises*, No. 10(1), 1986; articles by Hulsman, DeFolter, and others, reviewed in S. Cohen (1988) *Against Criminology*, esp. chapters 12 & 13.