

# Denouncing Denigration

#metoo and #balancetonporc

*by Abigail Saguy*

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**Recent press articles revealing numerous cases of sexual harassment and assault in the United States have encouraged women to step forward, especially on Twitter with the use of #metoo. Comparing existing legislation in France and in the United States, Abigail Sanguy examines two different approaches designed to tackle this issue.**

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In late 2017, over three-dozen women accused Hollywood producer Harvey Weinstein of sexual harassment, assault, or rape. Shortly after, following the lead of actress Alyssa Milano, millions of women posted “Me Too” on Twitter, Snapchat, Facebook, and other social media platforms. Milano explained that she, in turn, had taken inspiration from African American activist Tarana Burke—who, in 2007, started an offline “Me Too” campaign to let sex abuse survivors know that they were not alone. Milano hoped the social media campaign would shift the focus from Weinstein to victims and “give people a sense of the magnitude of the problem.”<sup>1</sup> In France, a similar social media campaign—begun the day *before* Milano launched #metoo—flourished, under the hashtag “balance ton porc,” loosely translated as “squeal on your pig.”<sup>2</sup> A wave of dismissals and resignations from powerful men in industries ranging from Hollywood to government has followed in the wake of these public accusations.

We have long known that sexual harassment, assault, and rape are persistent problems in both the United States and France. The existence of the very term “casting couch” speaks to the ubiquity of producers and directors using their power to coerce aspiring female actors into having sexual relations with them. A recent U.S. poll shows that 30 percent of women

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<sup>1</sup> Sandra E. Garcia, “The Woman Who Created #Metoo Long before Hashtags,” *The New York Times*, October 20 2017. Associated Press, “More Than 12m “Me Too” Facebook Posts, Comments, Reactions in 24 Hours,” news release, October 17, 2017, <http://cbsn.ws/2ypyCET>.

<sup>2</sup> Lauren Elkin, “How French Libertines Are Reckoning with #Metoo,” *the Paris Review*, January 24 2018.

surveyed report having been sexual harassed at work.<sup>3</sup> Likewise, it is estimated that one in five French women have been sexually harassed at some point in their careers.<sup>4</sup>

## How Did We Get Here?

Given how common sexual harassment is and how long it has been going on, few predicted that suddenly, in late 2017, there would be an outpouring of personal testimony or that these accounts would be taken seriously—with real repercussions for the men involved. With the benefit of hindsight, social movement scholar Nancy Whittier persuasively argues that the #metoo movement was made possible by a series of events that preceded it—including “slutwalks,” a theatrical form of protest against the idea that women provoke rape by their dress, and student protests against university responses (or lack thereof) to sexual assault on campus.<sup>5</sup> When Donald Trump was elected U.S. president despite the wide diffusion of a video recording in which he brags about sexually assaulting women, this university-based protest gained wider resonance. Following his inauguration, the first “women’s march” emphasized the issue of sexual assault, with “pussy hats” and slogans like “pussy grabs back”—a reference to Trump’s bragging that he grabs women by the “pussy,” a slang term for their genitalia.

These marches, Trump’s sexism, and pre-existing organization against sexual violence—along with more proximate factors related to the Weinstein company and tenacity of investigative journalists—that fueled the #metoo movement in the United States. In France, sexual assault charges filed against Socialist politician Dominique Strauss-Kahn in 2011—and the ensuing discussion in the mass media and around coffee machines—arguably provided a fertile ground for #balancetonporc.<sup>6</sup>

Yet, despite national similarities, there are also important differences than can help make sense of the specific ways in which these two nations are responding and can be expected to respond in the future to the issue of sexual violence. Let’s take a closer look.

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<sup>3</sup> Gary Langer, "Unwanted Sexual Advances Not Just a Hollywood, Weinstein Story, Poll Finds," *ABCNews*, October 17 2017.

<sup>4</sup> Assemblée nationale, "Report N° 4233," in *Rapport d'information sur l'évaluation de la loi n° 2012-954 du 6 août 2012 relative au harcèlement sexuel*, ed. La Commission des Lois Constitutionnelles de la Législation et de l'Administration Générale de la République (Paris, France: Presented by Pascale Crozon and Guy Geoffrey, Deputies, 2016).

<sup>5</sup> Nancy Whittier, "Activism against Sexual Violence Is Central to a New Women's Movement: Resistance to Trump, Campus Sexual Assault, and #Metoo," *Mobilizing Ideas*, January 22 2018.

<sup>6</sup> Abigail C. Saguy, "Europeanization or National Specificity? Legal Approaches to Sexual Harassment in France, 2002–2012," *Law & Social Review* (2018).

## U.S. Approaches

In many ways, the #metoo movement reveal both the strengths and weaknesses of the U.S. legal approach to sexual harassment, in which the job of regulating sexual harassment has largely been delegated to corporations. The accusations against Harvey Weinstein include criminal acts of rape and sexual assault, and several women have filed criminal charges against him. None have yet gone to trial, however, which is consistent with how difficult it is to convict someone of rape or assault.<sup>7</sup> In part, this is a feature of criminal trials in general, which include safeguards against sending innocent people to jail. The U.S. system holds that one is presumed “innocent until proven guilty” and that such proof must go “beyond a reasonable doubt.” But rates of prosecution, conviction, and incarceration are even lower for perpetrators of sexual violence than for other crimes. Thus, one study estimates that only six out of every 1000 rapist is incarcerated in the United States, compared to twenty out of one thousand robberies and 33 out of 1000 assault and battery crimes.<sup>8</sup> (Race matters too, with white men less likely to be convicted than men of color, and convictions less likely when the victim is a woman of color.)

Given the significant challenges of criminal law, American women often turn to civil law in cases where they experienced sexual violence at work. Since the 1970s, U.S. courts have ruled that companies with over 15 employees that fail to protect their employees from sexual harassment in the workplace are liable under Title VII of the Civil Rights Act of 1964, which outlaws discrimination on the basis of race, color, religion, national origin, or sex.

Unlike in France, where sexual harassment is defined as behavior that stops short of sexual assault—i.e., does not include touching the breasts, inner thighs or genital area—in the United States, sexual harassment may include behavior that would also qualify as sexual assault or rape. Indeed in the first Supreme Court case *Meritor Savings Bank v. Vinson* 477 U.S. 57 (1986), Mechelle Vinson testified that Sidney Taylor, the vice president of the bank, had touched her in public, exposed himself to her, and forcibly raped her multiple times. The court ruled that this qualified as sex discrimination since: 1) Vinson would not have been subjected to this behavior had she been a man; and 2) the behavior was sufficiently severe or pervasive as to itself negatively alter the terms of employment. That meant that Vinson did not have to also show that she was demoted, fired, or received other “tangible economic discrimination.” Taylor’s behavior itself was deemed to create a “hostile environment” that itself constituted sexual harassment.

Under Title VII, sexual harassment victims can receive both compensatory damages—money intended to compensate them for the harm suffered—and, since 1991, punitive

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<sup>7</sup> Richard Winton, "Manhattan D.A. Moving Closer to Criminal Charges against Harvey Weinstein," *Los Angeles Times*, November 7 2017.

<sup>8</sup> RAINN, "The Criminal Justice System: Statistics," <https://www.rainn.org/statistics/criminal-justice-system>; For comparable statistics on France, see Assemblée nationale.

damages as well. Because punitive damages are designed to punish the employer, they can be quite large, since only a large sum would effectively punish, say, a large multinational company. Unlike in criminal court where the prosecution must show that the defendant is guilty “beyond a reasonable doubt,” in civil law the standard of proof is “preponderance of evidence,” meaning that it is more likely than not that the violation took place.

To protect themselves from liability, U.S. corporations have developed training programs and have hired human resource personnel and diversity managers to handle sexual harassment complaints. The courts have subsequently ruled that corporations that take such proactive measures can mitigate their liability. In some cases, plaintiffs weaken their cases if they do not avail themselves of existing corporate policies.

Thus, U.S. corporations are increasingly “holding court” in cases of sexual harassment. There are some advantages to this. Bringing a lawsuit is time-consuming, emotionally draining, and costly. And, in some instances, a human resource manager is able to address an issue of sexual harassment effectively and efficiently. There are many limitations to this approach, however. First, Title VII only applies to companies with 15 or more employees—not domestic workers or employees of “mom and pop” companies, although some state laws may cover them. Undocumented workers are especially vulnerable,<sup>9</sup> as are political lobbyists, who are beholden to (overwhelmingly male) politicians, whose support they need to advance their cause.<sup>10</sup>

Even in large corporations with sexual harassment policies, sexual harassment prevention and remedies are subordinated to the bottom line. Title VII creates an incentive for companies to avoid sexual harassment lawsuits. The hope is that companies will try to prevent or quickly remedy sexual harassment when it happens. If, however, a particular employee is sufficiently valuable to the company’s financial success, it may make economic sense to settle and cover up accusations against him (and such employees are almost always male) rather than fire or discipline the offending employee. This is what we saw in the case of Harvey Weinstein, whose own company—the Weinstein Company—settled multiple cases for millions of dollars. This was also true for Roger Ailes and Bill O’Reilly, both for whom Fox News paid out millions of dollars in settlements for sexual harassment.

What the metoo# movement—coupled with traditional news media reporting—seems to be doing is change the calculus for these companies. By stoking public outrage, they have been able to shame some companies—including Fox and the Weinstein Company—into firing the accused harassers. Discussions about what more can be done have tended to focus on reforms within industries, companies, and—in the case of the Democratic party—political parties. There has been little to no talk about federal or state legal reform.

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<sup>9</sup> José R. Padilla and David Bacon, “Protect Female Farmworkers,” *The New York Times*, January 19 2016.

<sup>10</sup> Gabriel Trip and Julie Bosman, “For Female Lobbyists, Harassment Often Accompanies Access,” *ibid.*, December 8 2017.

## French Approaches

Things look different on the other side of the pond. Unlike in the United States, French corporations have little incentive to take preventive measures against sexual harassment. Compensatory damages tend to be small in France in general and especially in cases of sexual harassment, while punitive damages do not exist in the French system. As a result, French companies may be ordered—in Labor Court—to pay back pay and small compensatory damages in cases in which an employee was fired after being sexually harassed, but they do not risk having to pay hundreds of thousands of dollars to victims. Moreover, they also risk being sued for firing or otherwise penalizing an employee accused of sexual harassment.<sup>11</sup>

In this context, French employers have not taken ownership of the issue of sexual harassment, as their American counterparts have. They have not developed training programs or hired people trained to deal with this issue. Nor have they paid out millions of dollars to settle cases with women alleging sexual harassment against a powerful executive. They have not had to.<sup>12</sup>

These national legal differences shape attitudes about sexual harassment. When I interviewed French union representatives and personnel representatives at large French firms for my book *What is Sexual Harassment? From Capitol Hill to the Sorbonne*, they told me that it was not the role of corporations to intervene in cases of sexual harassment.<sup>13</sup> This was the responsibility of the state. In follow up research I conducted over the past five years, I found these attitudes persist. This explains why French lawmakers, feminist activists, and lawyers alike continue to say that it is important that France address sexual harassment in its Penal Code—and not just in the Labor Code. The challenges of criminal law notwithstanding, it is symbolically important, they say, that the state define sexual harassment as a misdemeanor—thereby expressing the nation’s condemnation of this behavior.<sup>14</sup>

Given this context, #balancetonporc is likely to work through different channels than metoo#. Rather than pressuring industries or companies to take action, French citizens are likely to demand that the state pass additional laws and better enforce and publicize existing ones. We have seen this already, with, for instance, laws proposed to address sexual harassment in public spaces and to lower the age of sexual consent. To the extent that new laws or educational campaigns spur discussions about sexual violence and consent, this is likely to lead to social change in France.

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<sup>11</sup> Saguy.

<sup>12</sup> Ibid.

<sup>13</sup> *What Is Sexual Harassment? From Capitol Hill to the Sorbonne* (Berkeley, CA: University of California Press., 2003).

<sup>14</sup> "Europeanization or National Specificity? Legal Approaches to Sexual Harassment in France, 2002–2012."

## Conclusion

It is commonly believed that the United States and France have very different approaches when it comes to sex. French actor Catherine Deneuve and 99 other French women played on this familiar theme in an open letter denouncing the #metoo movement as a “puritanical ... wave of purification” and defending men’s right “to bother” women.<sup>15</sup> But, as the backlash against this letter in France attested, neither French nor American cultures are static. Rather, both are constantly evolving in response to economic, legal, and social changes. The emergence of the #metoo movement and its French equivalent #balancetonporc around the same time points to a certain fluidity and openness to change in both countries around the topic of sexual violence. How things evolve will be shaped by national laws, traditions, and practices; but evolve they will.

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<sup>15</sup> Agnès Poirier, "After the #Metoo Backlash, an Insider’s Guide to French Feminism," *The Guardian*, January 13 2018.