Employment Discrimination or Sexual Violence? Defining Sexual Harassment in American and French Law

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In this article I examine how and why the term "sexual harassment" has been defined very differently in American and French law. Drawing on political and legal history, I argue that feminists mobilized in both countries to create sexual harassment law, but encountered dissimilar political, legal, and cultural constraints and resources. Having adapted to these distinct opportunities and constraints, feminists and other social actors produced sexual harassment laws that varied by body of law, definition of harm, scope, and remedy. I conclude by discussing the implications of these findings for studies of culture, gender and the state, globalization, and public policy.

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Introduction

The term "sexual harassment," or "harcèlement sexuel" in French, has been defined very differently in American and French law. Considering the newness of this term and the fact that it was translated from English into French, one would expect very little cross-national difference in its meaning.[1] More generally, there seems to be a trend toward increasing transnational homogeneity, as documented by work that points to a growing "world culture," built upon such central values as universalism, individualism, voluntaristic authority, rational progress, and world citizenship (Boli & Thomas 1997; see also Meyer 1994; Meyer et al. 1991; Strang & Meyer 1994). According to this work, this new value system and the need to placate transnational and domestic women's groups committed to equality now compels states to take action to improve the status and role of women (Berkovitch 1999; Boli & Thomas 1997:186). This literature, which stresses cultural and political convergence, suggests that national differences are waning in importance. Surely, some national differences linger, but the trend, it seems, is toward uniformity. But is it?

In the American workplace, explicit pornography coupled with sexist and sexual taunts from co-workers is legally recognized as sexual harassment (*Robinson v. Jacksonville Shipyards* 1991). According to French law, however, "sexual harassment" can only occur if a person uses his or her position of authority to try to coerce a subordinate into having sexual relations (du nouveau Code Pénal, art. 222–33, 1991). In France a sexual harasser could theoretically be sent to jail for his or her behavior, but sexual harassment is not a penal offense in the United States.[2] Instead in the United States the harassed employee may sue her or his *employer* for *monetary* damages. In other words, American and French sexual harassment laws are extremely different, both in how they define sexual harassment and in what they do about such behavior. At least as far as this one issue is concerned in these two nations, we seem to be witnessing the making of national difference, rather than convergence, in social policy and cultural meaning. This raises questions not only about the extent to which globalization is producing transnational uniformity but also, more generally, about the mechanisms of the

[1] This term was only coined in the mid 1970s in the United States and then translated in the 1980s (via French Canada) into French (Dhavernas 1987:78).

[2] In actuality, to date, no one has been sentenced to jail for sexual harassment alone. See note 8.

law-making process. In this article, I shed light on these questions by exploring in some detail the making of sexual harassment law in the United States and France.

A two-country comparison is the most appropriate research design at this exploratory stage. Though the limited sample size dictates caution in drawing generalizations, such in-depth analysis has the potential to reveal a greater level of detail about political and legal processes than do large *N* studies. The United States and France are good countries to compare since they both have high rates of female employment and independent women's movements, two of the main structural factors thought to foster strong sexual harassment laws (Aeberhard-Hodges 1996:505; Husbands 1992; MacKinnon 1979), yet they have divergent political and legal institutions, which, I predict, will result in distinct approaches to sexual harassment policy.[3]

In the United States, socialist traditions are extremely weak, but there is a strong political tradition of analyzing inequality in terms of racial (and, later, gender) discrimination. This political tradition is institutionalized in many ways, including in antidiscrimination jurisprudence, under Title VII of the Civil Rights Act of 1964. Moreover, in the United States, where much of law is made through case law, the courts offer an important avenue for social change. In contrast, France has historically focused on class conflict and has an entrenched political tradition of denouncing abuse of hierarchical authority, but it has focused less on racial and gender discrimination. Critiques of class inequality and abuse of authority are institutionalized in the Communist and socialist political parties, in unions, and in labor law. Discrimination law in France, however, is narrowly defined and the jurisprudence limited (see Bleich 2000; Banton 1994). In France, where the courts are expected to interpret statutes more closely and literally, the lawmaking process takes place predominantly in Parliament.

In my consideration of how such political, legal, and cultural traditions opened certain avenues for social actors as they blocked off others, I regard law and legal traditions as cultural resources that are both enabling and constraining (see Giddens 1984; Pedriana & Stryker 1997; Sewell 1992; Stryker 1994). Rather than arguing that the differences in sexual harassment law in each country stem from the inherent specificity of each nation's women's movements, I contend that very different social contexts elicited dissimilar behavior by these groups. The particularities of these opportunities and constraints influenced not only the action of these activists but also how other key social actors (e.g., judges and lawmakers) responded to them. The

[3] In 1994 the female share of employment was 45.6% in the United States, and in 1997 it was 44.9% in France (OECD 1996 for the U.S. figures; Insee-Enquête emploi, March 1997 for the French figures).

combined effect led to distinct bodies of sexual harassment law. In other words, I argue that when they constructed competing definitions of sexual harassment, social actors in each country drew on the cultural repertoire that was available to them, based on their group, institutional, and national context. In this article, I focus on the production of legal definitions, rather than on the subsequent effects these legal definitions have on the larger society, a topic that I deal with elsewhere (Saguy 2000, 2001).

In the next section, I briefly describe the empirical data that inform this article. I then provide an overview of the principal differences in U.S. and French sexual harassment law, specifically in regard to the way sexual harassment is framed, the scope of behavior covered, and the remedy prescribed.[4] (These differences are also summarized in Table 1.) I then provide a more detailed account of why and how sexual harassment law was addressed in employment law, under Title VII, in the United States. I argue that the courts offered activist groups a point of entry into the law-making process and that American feminists built sexual harassment jurisprudence onto Title VII for both strategic and ideological reasons. In doing so, feminists found racial discrimination case law particularly useful. The reliance on Title VII, in turn, had important consequences for how sexual harassment was defined (as sex discrimination in employment) and the remedy provided (monetary damages paid to the victim by her or his employer).

After I discuss the American case, I turn to France and argue that Penal Code reform in 1991 offered French feminists a point of entry into the law-making process. France's housing the sexual harassment statute in the Penal Code implied a remedy involving some combination of prison and state fines. The penal statute opened the door to proposals for a labor statute that offered added remedies for employment retaliation following an incident of sexual harassment. In response to anti-American rhetoric and beliefs about the importance of hierarchical boundaries, which emerged in France's Parliamentary debates, the state-feminist sponsors of the bill and their fellow lawmakers framed sexual harassment as sexual violence and limited the scope to abuse of authority.

Finally, in the conclusion, after summarizing the preceding argument, I discuss the implications of this study in relation to how we think about culture, gender and the state, globalization, and public policy.

[4] I borrow the concept of frame from social movement research (Gamson 1992; Snow & Benford 1988; Tarrow 1992). According to Snow and Benford (1988:198), "[social movements] frame, or assign meaning to and interpret, relevant events and conditions in ways that are intended to mobilize potential adherents and constituents, to garner bystander support, and demobilize antagonists." The way social movement theorists use the term is quite different from Goffman's (1974) original concept of "frame" (see Heinich 1991).

Table 1. American and French Law as It Relates to Sexual Harassment

	United States	France
Body of law	employment law, i.e., Title VII of the Civil Rights Act of 1964	penal law, labor law
Social sphere covered	workplace	any relationship of official authority
Where law was chiefly created	courts	legislature
Groups most responsible for creating the laws	feminist associations, lawyers/ (feminist) legal scholars, judges	feminist associations, elected officials, Secretary of Women's Rights
Definition of wrong	(1) quid pro quo: exchange of employment benefits for sexual relations; (2) hostile environment: sexual or sexist behavior, on the part of a boss or colleague, that is sufficiently severe or pervasive to create a "hostile environment"	abuse of authority to demand "sexual favors" from another (quid pro quo only)
Larger values evoked	equal employment opportunity	physical safety and personal integrity
Main remedy	monetary compensation paid to the harassed party by the employer (back pay, compensatory damages, punitive damages)	penal: prison, fines, small compensatory damages labor: reinstatement, back pay

Data

The following discussion is grounded in analyses of sexual harassment laws, legislative debates, and jurisprudence in the United States and France. I further draw on law review articles and over 60 interviews I conducted with French and American lawyers, activists (in associations combating sexual harassment), public figures, human resource managers, and union representatives. In the United States, I focus on jurisprudence, the Civil Rights Acts of 1964 and 1991, and federal guidelines issued by the Equal Employment Opportunity Commission (EEOC). In France, I focus on the 1991–1992 National Assembly debates, including early bills and European Union recommendations, and the ensuing penal and labor sexual harassment laws. I have also examined French jurisprudence to see how courts have interpreted the statutes and the 1998 amendment to the penal sexual harassment statute.

Different Bodies of Law, Frame, Scope, and Remedy

Sexual harassment is covered under employment law in the United States but under penal and labor law in France. This arrangement is more than a legal technicality. As I illustrate briefly later, each body of law has had important implications for how sexual harassment has been legally defined and for the remedy provided.

The United States

Sexual Harassment as Sex-Based Discrimination in Employment

In the United States, sexual harassment law has been created mostly as case law, under Title VII of the 1964 Civil Rights Act, which states that in businesses with 15 or more employees an employer may not "fail or refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[5] In order to address sexual harassment under Title VII, legal scholars, lawyers, and judges have had to argue that sexual harassment is a case of sex discrimination in employment. In so doing, they have stressed two dimensions of this problem: (1) the adverse effect it has on the target's employment, and (2) that the behavior was motivated by or has the effect of sex discrimination. Why sexual harassment constitutes sex discrimination is ambiguous, but the dominant view is that sexual harassment violates formal equality principles, because members of one sex (usually women) are targeted for abusive behavior *because of their sex (my emphasis)* (Franke 1997). By courts stressing employment repercussions and sex discrimination, they have, in effect, underplayed other dimensions, such as the target's psychological and physical well-being and the fact that sexual harassment is not always about sex discrimination but is sometimes a product of simple cruelty or poor impulse control.

American Law Covers a Wide Range of Sexual Behavior at Work

Over the years, the scope of what is legally considered sexual harassment in the United States has expanded to include not only instances in which a boss demands sexual relations with an employee in exchange for continued employment or employ-

[5] Title VII exempts corporations owned by the U.S. government, Native American tribes, private membership clubs and religious groups. Plaintiffs bringing claims of racial or national origin but not sex discrimination can get around the 15-or-more employees limitation by bringing their case under 42 U.S.C. sec. 1981 (1994) instead of Title VII. However, some sexual harassment plaintiffs can appeal to state statutes that extend protection from sexual harassment to smaller businesses.

ment benefits, known as "quid pro quo" harassment, but also more subtle behavior known as "hostile environment" sexual harassment. In the latter, sexual or sexist comments and gestures by a boss or co-worker must be sufficiently "severe or pervasive" to negatively affect an employee's conditions of employment.

Title VII applies strictly to the workplace, however, offering no protection from, say, a predatory doctor or landlord (see Schulhofer 1998).[6] Also, although courts have recognized a greater range of *sexual* behavior as being in violation of Title VII, they have ruled that egregious forms of non-sexual gender harassment (e.g., men telling female co-workers that women belong in the kitchen or bedroom, or sabotaging their equipment in manual jobs) are not covered under Title VII (see Schultz 1998).

American Law Allows Plaintiffs to Sue Employers

In the United States, use of Title VII dictated the remedy that would be used to address sexual harassment. Title VII holds employers responsible for ensuring that they have fair employment practices in place. The U.S. courts, in ruling that sexual harassment is a form of sex discrimination under Title VII, have held employers responsible for sexual harassment among their employees. Concretely, this means that employees who have been sexually harassed can sue their employers for monetary compensation. The Equal Employment Opportunity Commission (EEOC) exists to enforce Title VII.[7]

[6] American students can also seek redress for sexual harassment in education, under Title IX of the Education Amendments Act of 1972, which outlaws sexual harassment in schools (receiving federal funds) as illegal sex discrimination. In a lower court ruling in Ohio, a landlord was convicted of sexual harassment under Title VIII of the Fair Housing Act of Ohio (*New York Times,* 11 Dec. 1983, p. 44) (*Shellhammer v. Lewallen* 1983). However, the most developed sexual harassment jurisprudence is under Title VII.

[7] In order to bring a Title VII claim for sexual harassment, the plaintiff must file a complaint with the EEOC, which is supposed to conduct an investigation. Because of the budget constraints, however, the EEOC is not able to investigate most of the complaints it receives. After the case has served 180 days in the agency, the plaintiff can request a "right to sue letter," which is required to bring a private lawsuit and is issued automatically after the time requirements have been met. The plaintiff may not wish to bring a private lawsuit, say for financial reasons, or may have difficulty finding a lawyer to take the case, at which point the plaintiff can pressure the EEOC to do an investigation. After the EEOC concludes an investigation, which can take several years, it issues a "determination letter," ruling in favor of either the employer or the employee. The EEOC can also become a plaintiff in a civil suit. A ruling in favor of the employee is rare, according to a 9to5: National Association of Working Women activist who received such a letter in her own case in 1998, and strengthens the plaintiff's case considerably. After she received such a ruling, for example, this 9to5 activist found that several of the top law firms were interested in representing her. Despite the help that this activist received from the EEOC, she agrees with all of the six 9to5 activists and ten American lawyers that I interviewed, that the EEOC is an ineffective organization that is more a hindrance than an aid to victims of sex discrimination.

France

Sexual Harassment as Sexual Violence

In France, sexual harassment is covered under the Penal Code, and employment retaliation linked to sexual harassment is addressed in the Labor Code. The Penal Code, which went into effect in 1994 and qualifies sexual harassment as sexual violence, states (art. 222–33): "The act of harassing another by using orders, threats, constraint, or serious pressure in the goal of obtaining sexual favors, by someone abusing the authority conferred by his position, is punished by [a maximum of] one year of imprisonment and [a maximum] fine of Fr 100,000 [U.S. $16,000]."[8] Categorization is an important source of meaning. If one situates sexual harassment among other forms of sexual violence, one is, in effect, defining it as a form of sexual violence itself. In France, what is and what is not sexual harassment is also given meaning relationally. Among the four kinds of sexual violence mentioned in this section—rape, sexual assault, exhibitionism, and sexual harassment—rape is considered the only *crime* (crime) among the four; the other three are *délits* (misdemeanors). Moreover, the maximum penalty for sexual harassment in France is, along with exhibitionism, the smallest of the group, implying that sexual harassment is among the least serious form of sexual violence. According to French penal law, sexual harassment is also different from rape and sexual assault in that it does not involve physical contact: only when a perpetrator uses his or her official authority or the target's economic dependence to pressure a person into consenting to sexual relations does the law interpret the action as sexual harassment. One might "consent" to sexual relations, for example, out of fear of losing one's job, without the sexual contact being "welcome," at which point one is seen to have been sexually harassed, but not raped or sexually assaulted. If, however, a male boss, say, not only tells his employee that she will have to sleep with him if she wants to keep her job but also grabs her breast, he would be guilty not only of sexual harassment but also of sexual assault. If he goes further and physically forces his employee into having sexual intercourse, he would be guilty of rape, in addition to assault and sexual harassment. Note that this is different from the U.S. case, where, if Title VII is invoked, all forms of sexual violence at work

[8] "Serious pressure" was added when the law was amended in 1997 (Jolibois 1998). To date, no one has been sentenced under this law to jail for sexual harassment alone. Several convicted harassers have received suspended sentences. When harassers have been sentenced to jail, they have been convicted not only of sexual harassment but also of *agression sexuelle*, which involves physical sexual attacks. In many of these cases, the judge was aware that the victim had been raped but could not prove that charge, according to AVFT (Association Européenne Contre les Violences Faites aux Femmes au Travail) activists who were involved in such cases.

are lumped together under the category "sexual harassment" (*Meritor v. Vinson* 1986).[9]

French Law Is Restricted to Abuse of Power, but Not Only in the Workplace

France's sexual harassment law is thus narrower in scope than the U.S. law in that it recognizes only those instances in which there is both abuse of hierarchical power and explicit demands for sexual activity. However, unlike American jurisprudence under Title VII, France's penal statute extends beyond the workplace to other kinds of relations of power, such as that between a doctor and patient, a teacher and student, a state bureaucrat and a welfare recipient, or a landlord and tenant.

French Penal Law Allows for Jail, Fines, and Modest Civil Reparations

Rather than monetary damages from the employer, the French state can impose (suspended) prison sentences and/or state fines on the harasser. The wronged party can also seek civil damages from the harasser during the penal trial, called "*porter partie civile.*"[10]

French Labor Law Allows Victims of Employment Retaliation to Claim Back Pay

Retaliation linked to sexual harassment is also covered in a statute in France's Labor Code (art. L. 122–46), which went into effect in 1992, and states:

> No employee can be penalized nor dismissed for having submitted or refusing to submit to acts of harassment of an employer, his agent, or any person who, abusing the authority conferred by their position, gave orders, made threats, imposed constraints, or exercised pressure of any nature on this employee, in the goal of obtaining sexual favors for his own benefit or for the benefit of a third party.

Employees who suffer employment retaliation linked to sexual harassment can claim reinstatement or (more likely) back pay under this labor statute, which also protects whistle-blowers from retaliation. The labor law further allows, but does not require, employers to discipline sexual harassers in the workplace (art. L. 122–47). Employers are required to include sexual harassment in

[9] The plaintiff in this first Supreme Court ruling on the issue of sexual harassment (*Meritor* 1986), Mechelle Vinson, alleged that her boss not only made offensive sexual comments to her but also that he raped her on several occasions in the workplace. In the United States, rape victims and victims of sexual assault can, of course, press criminal charges instead of or in addition to civil ones. My argument is that sexual harassment under Title VII includes anything from (severe and pervasive) sexist comments to rape, as long as such behavior occurs at work and has a detrimental effect on the victim's employment.

[10] As a general rule, it is possible to sue for civil damages during a French penal trial, unlike in the United States, where a separate civil trial is necessary.

the company's internal regulations and to post the internal regulations in the firm and in places of recruitment (art. L. 122–34, L. 123–7, and L. 122–12). Provisions of employer liability for sexual harassment, however, are extremely weak (*art. L. 122–48*; Benneytout, Cromer & Louis 1992; Felgentrager 1996). Because French labor law requires employers to provide justification for any dismissal, employers who are overzealous in penalizing employees for sexual harassment can be sued for wrongful discharge (Aeberhard-Hodges 1996).

American Law: A Product of Activism and Opportunity

We have seen that the body of law in which sexual harassment is inscribed has important consequences for how this problem is conceptualized. This begs the question: Why did the United States end up addressing sexual harassment in employment law while France addressed this same problem through penal and labor law? Was this a result of distinct strategies on the part of social actors? Alternatively, was this a product of political or legal institutions? I argue that it was a combination of the two. In each country, social actors took advantage of the legal and political resources available to them and responded to the social constraints they faced. These resources and constraints led them to different bodies of law, which in turn shaped both the frame and the remedy of sexual harassment in important and far-reaching ways.

In the United States, where much of law is created through jurisprudence, the courts offered American feminists access to the law-making process. After a few false starts, American feminists were able to successfully argue that sexual harassment was covered under Title VII of the Civil Rights Act (1964), which prohibits employers from discriminating on the basis of race, color, religion, sex, or national origin. Feminists and others found that racial discrimination jurisprudence was particularly useful for expanding the scope of sexually harassing behavior prohibited under Title VII. However, certain characteristics of Title VII have limited the scope and effectiveness of U.S. sexual harassment law. For instance, since Title VII applies only to the workplace, it is of little help in addressing sexual harassment outside of work. Because it only addresses discrimination, it is also poorly equipped to deal with sadistic abuses of authority that are not discriminatory on the basis of sex, as the courts have defined it. Moreover, although courts have recognized a larger range of sexual forms of sex discrimination, they have increasingly overlooked non-sexual forms of gender discrimination (Schultz 1998).

American Feminists Raise Consciousness about "Sexual Harassment"

The earliest theorizing on sexual harassment in the United States emerged from women's own experiences. In a consciousness-raising group in 1974, Lin Farley (1978:xi) discovered that each member had "already quit or been fired from a job at least once because we had been made too uncomfortable by the behavior of men." Such discussions convinced Farley (and others) that this behavior needed a name; they decided that the term "sexual harassment" came "as close to symbolizing the problem as the language would permit" (1978:xi). Moving from personal experience to political action, members of this group joined with the NYC Human Rights Commission and the National Organization for Women (NOW) to help establish Working Women United (WWU), a resource center and activist organization for women who work outside the home, focusing primarily on sexual harassment (Elman 1996:98). Other early women's movement organizations that dealt specifically with issues of sexual harassment included the Women Office Workers (WOW) in New York City, The Alliance Against Sexual Coercion in the Boston area, and 9 to 5: The National Association of Working Women (Farley 1978; MacKinnon 1987; Langelan 1993; Zippel 2000).

In May 1975, the WWU held the first "Speak Out Against Sexual Harassment" in Ithaca, New York, and as an anti–sexual harassment network grew within the existing women's movement, others followed (Elman 1996:98; Farley 1978:70). Several surveys were conducted from both within the women's movement and outside of it (Craib 1977; Working Women United Institute 1975; *Redbook* 1976; U.S. Merit Systems Protection Board 1981), which pointed to the widespread nature of the problem.[11]

In early discussions, sexual harassment was conceptualized as sexual violence. Women referred to incidents of sexual harassment as "little rapes" (Tong 1984:65) and the first group to develop confrontational strategies to end street harassment was the Community Action Strategies to Stop Rape (CASSR) project in Columbus, Ohio (Elman 1996:97, n.10). In an effort to make the experience of sexual harassment fit into the categories of the law, however, feminist activists increasingly defined it as a form of sex-based employment discrimination.

At first, feminist activists used a variety of legal strategies to combat sexual harassment. They pressured unemployment agencies to recognize sexual harassment as a reasonable cause of constructive discharge. When they met with resistance, the WWU

[11] Results from these early surveys vary widely. For instance, according to Craib (1977), 20% of women have been sexually harassed, while *Redbook* (1976) estimated 88%. The differences depend on sample bias and on question wording, particularly how sexual harassment is defined. The U.S. Merit Systems Protection Board (1981), the most comprehensive and systematic study, found that 40% of female federal employees surveyed had been sexually harassed.

helped develop legislation that explicitly stated that sexual harassment is a reasonable cause for quitting one's job; therefore, the women who did so would qualify for unemployment benefits. Activists across the country also had local Human Rights Commissions and Commissions on the Status of Women intervene on behalf of sexually harassed women who were denied unemployment benefits (Elman 1996; Farley 1978; MacKinnon 1979).

This legal remedy, as well as those available under criminal and tort law, proved inadequate, however. Earning the right to unemployment benefits individualizes the issue and does nothing either to punish the harasser or the employer or to prevent further incidents of sexual harassment. Criminal law applies only to instances involving serious physical harm (Tong 1984:71) and must be proven "beyond a reasonable doubt." Moreover, prosecution relies on police and district attorneys who are often insensitive to complaints of sexual violence toward women.[12] Tort law, which is designed to address "offenses" (behavior that embarrasses, shames, disgusts, or annoys someone), tends to both individualize and trivialize the complaint (MacKinnon 1979:172; Tong 1984:73). In light of these shortcomings, U.S. feminist activists began looking toward Title VII for an alternative solution.

Title VII Offers American Feminists a Political Opportunity

The initial proposal of Title VII of the Civil Rights Act of 1964, which was designed to combat race discrimination, made no reference to sex discrimination. Through congressional debate, however, it was amended to address not only "race" and "color" but also sex, religion, and national origin.

The reason sex was added to Title VII is contested. Conventional wisdom maintains that Congressional Representative Howard Smith proposed to add "sex" as a protected class to Title VII as a ploy to sink the entire bill with a controversial measure, a big "congressional joke" that backfired (*Rabidue v. Osceola Refining Co.* 1984). Others, however, have argued that feminists played an important role in lobbying for the amendment (Bird 1997; Brauer 1983; Evans 1989; Gold 1981; Rupp & Taylor 1987). Their accounts suggest that Howard Smith, who was a staunch opponent of the Civil Rights Bill but a firm *supporter* of the Equal Rights Amendment (ERA), probably made the following calculation: With luck, his amendment would sink the entire bill, he thought. However, if that were to fail, he reasoned that it would be preferable to offer protection not only to blacks but also to white women. Though some liberal and feminist groups objected to the amendment, either because they preferred separate treat-

[12] In France, where sexual harassment is addressed under penal law, insensitivity by police and state prosecutors is also an important problem, according to the lawyers, activists, and the one prosecutor I interviewed.

ment of sex discrimination or because they feared the addition would sink the bill, others strongly supported it (Bird 1997:155). With their support, the sex amendment survived debate in the House and Senate, despite attempts to remove it (Bird 1997:158). In 1964, the incipient women's movement thus gained in Title VII a powerful legal tool against sex discrimination.

The first sex discrimination cases focused on equal access to jobs, seniority, and pay; it would be ten years before feminist lawyers would think of using Title VII to combat sexual harassment. Beginning in the mid-1970s, however, feminists trained in the law began to formulate a case that sexual harassment constituted a form of sex discrimination (Farley 1978; Ginsburg & Koreski 1977; MacKinnon 1979; McGee 1976; Michigan Law Review 1978; Minnesota Law Review 1979; New York University Law Review 1976; Seymour 1979; Taub 1980). In 1975, Catharine MacKinnon circulated a draft of her book *Sexual Harassment of Working Women*, in which she argued that sexual harassment should be considered a group-defined injury, suffered by individuals (usually women) because of their sex. This point, she maintained, was obscured when tort remedies, which stress moralism and women's "delicacy," were applied (MacKinnon 1979:xi, 172). Only antidiscrimination law, which was designed to *change the society* to prevent the reoccurrence of discriminatory behavior, clearly conveyed the group-injury aspect of sexual harassment, she contended (1979:172). When American feminists argued that sexual harassment was a form of sex discrimination they, like their 1960s predecessors, thus "bridged" (Snow et al. 1986; Snow & Benford 1988) this new issue to that of racial discrimination, an issue whose social legitimacy was built by the Civil Rights Movement. In so doing, they stressed the group-based discrimination component of sexual harassment.

In order to show that sexual harassment should be addressed under Title VII, American feminists also framed sexual harassment as concerning employment opportunity. They thus built on ingrained American beliefs that the job market should be fair. In a nation like the United States, where a low degree of "decommodification" and socialism is combined with a high degree of liberalism (Esping-Andersen 1990), there are particularly high expectations that markets should be "fair," since they are supposed to be a legitimate and efficient means of distributing wealth. MacKinnon (1979:7) recognized this when she said, "Legally, women are not arguably entitled, for example, to a marriage free of sexual harassment any more than to one free of rape, nor are women legally guaranteed the freedom to walk down the street or into a court of law without sexual innuendo. In employment, the government promises more." The belief that the market should be fair is stronger in the United States than it

is in social democracies, such as France. Those in the latter are more likely to question the legitimacy of market-determined inequalities, regardless of the equality of opportunity, and seek to render human welfare at least partially independent of market mechanisms (see Wright et al. 1995).

Finally, Title VII was strategically appealing to feminists because it allowed victims of sexual harassment to sue their employers, who usually have deeper pockets than individual harassers. This combination of civil and market remedies has strong precedent in the American political tradition; in France, there is greater suspicion of the market, and the state is seen as a more legitimate arbitrator (see Lamont & Thévenot 2000).

Courts Build Sexual Harassment Jurisprudence on Racial Discrimination Case Law

American sexual harassment law has been made primarily in the courts. It is here that feminists and feminist sympathizers have gained access into the law-making process and where they have also encountered legal opposition. In the early years, opponents argued that sexual harassment was not a form of sex discrimination because it was personal rather than group-based behavior and/or because it had no serious implications for the victim's employment opportunities (*Barnes v. Train* 1974; *Corne v. Bausch & Lomb* 1975; *Miller v. Bank of America* 1976; and *Tomkins v. Public Service* 1977). Since then, the precedent for treating sexual harassment as sex discrimination under Title VII has become well established in case law, despite challenges from legal scholarship.[13] Nonetheless, the limits of sexual harassment and employer liability continue to be debated in the courts and remain in flux. In what follows, I sketch some of the major moments in the making of current sexual harassment law in the United States.

The first feminist victory in the courts dates to 1977, when the three-judge panel in *Barnes v. Costle* (1977) reversed the District Court's decision in *Barnes v. Train* (1974) and held that sexual harassment is sex discrimination in employment.[14] The decision in this case was informed by an early draft of MacKinnon's (1979) *Sexual Harassment of Working Women*, which the author herself had given to a law clerk on the case (Toobin 1998:50).

[13] For instance, some legal critics argue that employers should not be held liable for sexual harassment, in general, or for sexual harassment among co-workers, specifically. Instead, they contend that all or some forms of sexual harassment should be conceptualized as personal torts in state court (Bernstein 1994; Hager 1998; Vhay 1988). These authors have argued that because sexual harassment reduces workers' productivity, holding employers liable constitutes a double punishment and makes employers "overzealous" in their efforts to curb sexual harassment (Browne 1998; Cohen 1991; Hager 1998).

[14] The late George MacKinnon, Catharine MacKinnon's father and a conservative Republican, was one of the judges on the panel.

The court reasoned that the plaintiff, whose job had been abolished because she refused to have sexual relations with the director of the Environmental Protection Agency's Equal Opportunity Division, where she worked, was the victim of discrimination because "but for her womanhood . . . [the plaintiff's] participation in sexual activity would never have been solicited. . . . She was invited only because she was a woman subordinate to the inviter in the hierarchy of agency personnel" (*Barnes v. Costle* 1977, at 990). In a footnote, the court further specified that this principle would also apply to a heterosexual woman who sexually harassed a man or a homosexual boss who harassed someone of the same sex: "In each instance, the legal problem would be identical to that confronting us now—the exaction of a condition which, but for her sex, the employee would not have faced" (*Barnes,* at 990, n.5).[15] This was also the year that two other federal Courts of Appeal held for the first time that sexual harassment constitutes sex discrimination under Title VII (*Garber v. Saxon Business Products* 1977; *Tomkins v. Public Service* 1977).

Arguing that Title VII should not only apply to the quid pro quo type of sexual harassment but also to hostile environment sexual harassment, advocates appealed to existing race discrimination jurisprudence that recognized that an extremely hostile and discriminatory working environment could itself be found to be in violation of Title VII. One of the most important of these cases was *Rogers v. EEOC* (1971), in which a Hispanic woman complained that her employer, an optometrist, segregated his Hispanic and white patients. The Fifth Circuit held that

> [t]he phrase "terms, conditions or privileges of employment" in [Title VII] is an expansive concept [that includes] the practice of creating a working environment heavily charged with ethnic or racial discrimination. . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers. (*Rogers* 1971, at 238)

In 1981, following the recommendations of feminists, the D.C. Circuit Court of Appeals extended the *Rogers* ruling to cases of hostile environment sexual harassment, ruling that

> [r]acial slurs, though intentional and directed at individuals, may still be just verbal insults, yet they too may create Title VII liability. How then can sexual harassment, which injects the most demeaning sexual stereotypes into the general work environment and which always represents an intentional assault on an individual's innermost privacy, not be illegal? (*Bundy v. Jackson* 1981)

[15] In the years following *Barnes v. Costle,* there was some uncertainty among the courts about whether same-sex harassment was indeed covered by Title VII. In 1998, however, the High Court clarified that same-sex harassment is covered under Title VII, as long as the plaintiff can show that there was discrimination on the basis of sex (*Oncale v. Sundowner Offshore Services, Inc.* [1998]).

The court reasoned that unless the hostile work environment was actionable, "an employer could sexually harass a female employee with impunity by carefully stopping short of firing the employee or taking other tangible actions against her in response to her resistance" (*Bundy* 1981, at 945).

The Court of Appeals for the Eleventh Circuit supported this ruling in 1982, in *Henson v. City of Dundee*, ruling that the numerous and demeaning sexual "inquiries and vulgarities" suffered by the plaintiff from the Chief of the Dundee Police Department, where she worked, themselves created a "hostile working environment" that constituted discrimination. In his opinion the circuit judge quoted from MacKinnon's 1979 book to distinguish between "condition of work" (hostile environment) and "quid pro quo" sexual harassment (*Henson* 1982, at 33, n.18). Like MacKinnon, the court also made the connection between sexual harassment and racial harassment.

> Sexual harassment, which creates a hostile or offensive environment for members of one sex, is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or women run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets. (*Henson* 1982, at 902)

Under pressure from feminist organizations, the High Court confirmed *Henson* in 1986, in *Meritor*. Catharine MacKinnon joined plaintiff/respondent Mechelle Vinson's lawyer on her brief; and several feminist organizations, including the Women's Bar Association of Massachusetts, the Women's Bar Association of New York, the Women's Legal Defense Fund, and the Working Women's Institute, filed briefs of *amici curiae* supporting Vinson.

Although most of sexual harassment law was made in the courts, the legislature did intervene with the passage of the Civil Rights Act of 1991. This legislation was passed in the wake of the nationally televised Senate hearings, where Anita Hill alleged that Supreme Court nominee Clarence Thomas had sexually harassed her years before. The 1991 Act allowed courts to award plaintiffs punitive and compensatory damages for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses" in sexual harassment cases. The 1991 amendment also gave plaintiffs the right to a jury trial and, in general, strengthened sexual harassment law under Title VII.

The Supreme Court's ruling in *Harris v. Forklift Systems* (1993) expanded the category of hostile environment sexual harassment by clarifying that behavior need not have tangible economic consequences to fall under this category of wrong. Supported by briefs from the American Civil Liberties Union, the Feminists for

Free Expression, the NAACP Legal Defense and Educational Fund, the National Conference of Women's Bar Associations, the National Employment Lawyers Association, the NOW Legal Defense and Education Fund, and the Women's Legal Defense Fund, the High Court ruled "Title VII comes into play before the harassing leads to a nervous breakdown" (*Harris* 1993, at 22). In Justice O'Connor's opinion in the unanimous ruling, she emphasized the debilitating effect that sexual harassment has on employment opportunities. She argued that even a discriminatorily abusive work environment that does not seriously affect an employee's psychological well-being often detracts from an employees' job performance, prevents career advancement, or leads the employee to quit entirely. Though the Court concluded that there is no precise test to measure a hostile environment, it did offer guidelines. It said that the plaintiff must establish two facts. First, she or he should demonstrate that the conduct objectively creates a hostile or offensive environment, so that a "reasonable person" (a legal term referring to a theoretical person of average sensibilities) would find it hostile. Second, the plaintiff should show that she or he personally found the behavior abusive.

In 1998 the Supreme Court delivered two decisions clarifying somewhat the conditions of employer liability for sexual harassment under Title VII. In *Burlington Industries v. Ellerth* (1998) and *Faragher v. City of Boca Raton* (1998), the Supreme Court held that when harassment results in "a tangible employment action, such as discharge, demotion or undesirable reassignment" (Burlington 1998 at 2270 and Faragher 1998 at 2276) the employer's liability is absolute. When there has been no tangible action, employers can defend themselves if they can prove two things: first, that they have taken "reasonable care to prevent and correct promptly any sexually harassing behavior" (Faragher 1998 at 2280 and Burlington 1998 at 2258) such as by adopting an effective policy with a complaint procedure; and second, that the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided" (Burlington 1998 at 2261 and Faragher 1998 at 807). This puts the burden of proof on the employer, who must prove each of these points.

These decisions represented a gain for plaintiffs, who, according to some earlier decisions, had to demonstrate negligence by the employer, or that the employer knew or should have known of the harassment but did not act (see Oppenheimer 1995). In the case of sexual harassment among hierarchical peers, however, the plaintiff still has to demonstrate employer negligence. The Court argued that these rulings would help corporations limit liability by creating effective complaint procedures and training. For critics, these rulings put too much of a burden on employers to control workplace behavior, a burden already inconsistent with their interests. This was the position ex-

pressed by Justice Thomas, who, joined by Justice Scalia, argued that employers should only be liable for sexual harassment committed by hierarchical superiors in cases of quid pro quo: "Sexual harassment is simply not something that employers can wholly prevent without taking extraordinary measures—constant video and audio surveillance, for example—that would revolutionize the workplace in a manner incompatible with a free society" (*Burlington* 1998, at 770).

Limitations of Title VII Shapes Sexual Harassment Jurisprudence

A basic insight of the sociology of culture is that human beings need categories, definitions, frames, or accounts (I am using these terms loosely, almost interchangeably) to make sense of the world (see, e.g., Berger & Luckman 1967; Boltanski & Thévenot 1991; Douglas 1986; Durkheim [1960] 1990; Fiske & Linville 1980; Friedland & Alford 1991; Giddens 1984; Lamont & Wuthnow 1990; Mannheim 1956; Moscovici 1984; Swidler 1988; Wuthnow 1987). Any given account, however, presents experience from a particular angle, making certain aspects of the phenomenon extremely clear, but obscuring others. In the case of sexual harassment, definitions that rely on a sex-discrimination frame focus on how sexual harassment can be motivated by and can contribute to gender inequality in employment, but they are less useful for making sense of a generally sadistic boss who thrives on making life miserable for his subordinates, men and women alike (see Chancer 1992). A discrimination frame, which stresses employment repercussions, is also of little help in conceptualizing the denigration or fear many women feel in the streets when ogled or threatened by men. Nor is an employment discrimination frame very useful in understanding the sense of violation and betrayal a woman may feel when her psychiatrist abuses her trust and sense of vulnerability by initiating sexual relations.

Those who are unsympathetic of sexual harassment jurisprudence under Title VII appeal to the shortcomings of this frame to argue that sexual harassment should be addressed elsewhere; say, in state tort law. Those who support sexual harassment jurisprudence under Title VII prefer to work within an employment discrimination frame since, by definition, Title VII only applies to employment discrimination. For instance, Katherine Franke, a prominent feminist legal scholar and champion of Title VII sexual harassment jurisprudence argues in an influential law review article that the courts need to conceptualize sex discrimination differently (1997). Franke contends that the Supreme Court has not sufficiently theorized why sexual harassment is sex discrimination and that feminist scholars and the lower courts have advanced three main theories for why sexual harassment falls under

Title VII. The dominant view is that sexual harassment violates formal equality principles, because members of one sex (usually women) are targeted for abusive behavior *because of their sex* (see, e.g., *Barnes v. Costle* 1977; MacKinnon 1979). Others have claimed that the sexism of sexual harassment lies in the fact that the conduct is sexual (see, e.g., Abrams 1989:1209; Estrich 1991:830; MacKinnon 1982:533). Finally, some have argued that sexual harassment is an example of the subordination of women by men (see, e.g., MacKinnon 1979:116).

After showing how each of these theories fails to account for certain cases of sexual harassment, in particular those behaviors involving same-sex harassment, Franke (1997) offers an alternative analysis of why sexual harassment is a form of gender discrimination. She argues that sexual harassment is a technology of sexism, in that it penalizes gender non-conformity by humiliating and/or terrorizing "overly assertive" women or "effeminate" men.

Franke's model does more easily account for certain kinds of male-on-male sexual harassment, particularly those behaviors that do not seem to be based on sexual desire but involve instead macho men humiliating or terrorizing their seemingly effeminate or weak (male) co-worker(s) (*e.g. Oncale* 1998). However, her model of gender discrimination does nothing to compensate for the limitations of Title VII in dealing with the sadistic boss described previously, abuse of authority outside of the workplace, or hostile environments beyond the office.

Moreover, in recognizing that sex discrimination can take the form of sexual behavior, the courts have overlooked the fact that not all forms of sex discrimination are sexual in nature. Legal scholar Vicki Schultz (1998) has shown that women are more likely to lose their cases when the harassment they suffered was not sexual in nature, even when the behavior, such as having their equipment sabotaged by male co-workers trying to prove that women cannot do manual labor, put their lives at risk. Schultz's critique seems to suggest that American sexual harassment jurisprudence equates sex with discrimination and discrimination with sex. In so doing, we are left little room for conceptualizing either non-discriminatory sex or non-sexual discrimination.[16]

French Law: A Product of Activism and Opportunity

Sexual harassment law in France was also a product of feminist activism and legal, political, and cultural opportunity and constraint. The first important difference between France and

[16] Indeed, this seems to be the trend in American workplaces, where managers express more concern over consensual office romance than sexist behavior.

the United States is that, in the former, laws are made strictly in Parliament through statutes rather than largely in the courts through case law, as in the United States. Penal Code reform in 1991 opened an opportunity for feminists to propose a penal sexual harassment statute. On one hand, French feminists were thus not forced to make sexual harassment fit under a pre-existing discrimination statute; on the other hand, they did have to garner political support for their proposal. During parliamentary debates, they encountered resistance from some lawmakers who seemed intent on discrediting the bill by appealing to anti-American rhetoric, arguing that passing a sexual harassment law in France would have the undesirable effect of importing "American excesses" of litigiousness, Puritanism, and a Battle of the Sexes. This is a common strategy in France for discrediting the initiatives of French feminists (see Ezekiel 1995; Louis 1999; Scott 1995). To salvage the bill from these critiques, the state-feminist sponsors of the piece of legislation argued before their socialist colleagues that, in fact, the bill defended traditional socialist values by denouncing abuse of hierarchical authority. To prove their point, they revised the legislation so that it only targeted quid pro quo sexual harassment, in which abuse of authority is involved. Once the penal statute was passed, an opportunity opened for the Secretary of Women's Rights to propose a Labor Code statute to provide additional recourse for people who suffer employment retaliation linked to sexual harassment. The Penal and Labor Codes then dictated the kinds of remedies that could be deployed.

Feminist Associations Plant Seeds for French Law

Independent French feminist groups initiated the French sexual harassment laws that state feminists eventually pushed through Parliament. The most important association was the Association Européenne Contre les Violences Faites aux Femmes au Travail (AVFT, European Association Against Violence towards Women at Work), which was founded in 1985 to fight against all forms of workplace sexual violence, including sexual harassment. The AVFT drew attention to this problem through the publication of its journal, *Cette violence dont nous ne voulons plus* (This violence that we want to end), and through scholarly work published by its members (e.g., Benneytout, Cromer & Louis 1992; Cromer 1990, 1992, 1995; Cromer & Louis 1992; Louis 1994). The situations the association grouped under the term "violence" included "sexual blackmail in hiring, battery, rapes, psychological abuse, sexually vulgar environments, use of pornography, discrimination, [and] sexual harassment" (Cromer 1990:224). In 1989, the AVFT organized an international conference around the theme "violence, sexual harassment, and abuse

of power at work." American (i.e., Catharine MacKinnon and Sarah Burns), Canadian, and European scholars presented work on the phenomenon of sexual harassment in their respective countries, and the AVFT published the collection of papers the following year (AVFT 1990a).

The Ligue du Droit des Femmes (LDF, League of Women's Rights), an association founded in the mid 1970s, also helped politicize this issue in the early years. The rest of the women's movement vehemently criticized the LDF as "reformist," when the latter officially formed as an association (see also Picq 1993:203).[17] Yet when the LDF embraced rather than shunned the political process it made a mark in France in the 1970s, and, unlike most French feminist groups of the 1970s, it survived into the 21st century. Having fought against rape and domestic violence, as well as having fought (in vain) for a law that would ban sexist images of women in the media, the LDF, led by Anne Zelensky, organized a conference on sexual harassment in 1985. Simone de Beauvoir presided, and the Minister of Women's Rights, Yvette Roudy, and the European Union (EU) sponsored the event. The colloquium speakers included representatives of the newly formed AVFT, who had quickly established themselves as the leaders on the issue of sexual harassment in France. The LDF also co-sponsored, with *BIBA* (a women's magazine for young professionals), a survey on sexual harassment.

Penal Code Reform Offers Feminists a Legal Opportunity

Penal reform in France in 1991 provided an opportunity for French feminists to propose a law on sexual harassment to the Penal Code, which feminists recognized would send a strong message about the unacceptability of this act. The AVFT (1990b) proposal defined sexual harassment as

> [a]ny act or behavior that is sexual, based on sex or on sexual orientation, towards a person, that has the aim or affect of compromising that person's right to dignity, equality in employment, and to working conditions that are respectful of that person's dignity, their moral or physical integrity, their right to receive ordinary services offered to the public in full equality.
>
> This act or behavior can notably take the form of: pressure [*pressions*], insults, remarks, jokes based on sex, touching, all battery [*coups*], assault, all sexual exhibitionism, all pornography, all unwelcome implicit or explicit sexual solicitations, all threats or all sexual blackmail.

The AVFT proposal suggested that this crime be punished by a maximum of two years in prison and a Fr 200,000 (U.S. $32,000) fine (twice the maximum jail term and fine of the bill that eventually passed). It also specified that the employer would be legally

[17] Interview with Anne Zelensky, 23 June 1995.

responsible for sexual harassment committed by his or her employees, clients, or suppliers, a provision that was not retained in the final version of the law. The AVFT made hierarchical authority an aggravating factor rather than a necessary element of sexual harassment, as in the statute that eventually passed. Marie-Victoire Louis, one of the AVFT leaders and founders, presented the proposal to lawmaker Jean Michel Belorgey, who was a personal friend of hers. He agreed to defend and present the proposal to about 20 deputies, including Yvette Roudy.

In June 1991, l'Union des Femmes Françaises (UFF, Union of French Women), a feminist group within the Communist Party, published a report on sexual harassment and drafted a sexual harassment bill, which was reproduced in *Clara* magazine (UFF 1991). Similar to the AVFT recommendation, the UFF proposal defined sexual harassment broadly as any "pressure, constraint, of sexual nature carried out through words, gestures, threats, promises, writing, drawings, sending of objects, all blackmail, all explicit or implicit sexual allusions, all sexually discriminatory remarks, targeting a person during a hire, or while conducting their professional activity . . ." Note, however, that although the AVFT proposal targeted not only sexual behavior but also conduct that was "based on sex or on sexual orientation," the UFF bill, like the ultimate law, focused exclusively on sexual conduct. Like the proposed AVFT bill, the UFF bill called for longer prison sentences and higher fines when the sexual harasser was in a position of authority over the plaintiff. It further called for publication of the conviction, and required employers to post the law in workplaces.

Because the AVFT and UFF were not working within the constraints of an anti-discrimination jurisprudence, such as that under the Civil Rights Act (1964) in the United States, they were not confined to an antidiscrimination analysis. Instead, they invoked a range of criteria for denouncing sexual harassment, including not only equal opportunity in employment but also human dignity, moral and physical integrity, and rights as consumers.

The European Union Proves an Important Ally

In 1976, the EU issued a directive on sex equality at work (76/207/EEC). In 1987, it commissioned a report documenting the existence of sexual harassment in member states (Rubenstein 1987). In 1991, the EU issued a recommendation encouraging member states to take action against sexual harassment, stating that behavior

> is unacceptable if: a) such conduct is unwanted, unreasonable and offensive to the recipient; (b) a person's rejection of, or submission to, such conduct on the part of employers or work-

> ers (including superiors or colleagues) is used explicitly or implicitly as a basis for a decision which affects that person's access to vocational training, access to employment, continued employment, promotion, salary or any other employment decisions; and/or (c) such conduct creates an intimidating, hostile or humiliating work environment for the recipient; and that such conduct may, in certain circumstances, be contrary to the principle of equal treatment within the meaning of Articles 3, 4 and 5 of Directive 76/207/EEC.([92/131/EEC] *Official J.* L049, 24/02/1992 p.1–8)

The content of the recommendation is strikingly similar to the EEOC guidelines. Both describe the behavior as unwelcome or unwanted from the victim's point of view. The two texts also recognize not only behavior that has tangible employment repercussions but also that which simply creates a hostile or intimidating environment. Both texts acknowledge that colleagues as well as hierarchical superiors can harass employees. As in the United States, social actors in the European Union justified the recommendation on sexual harassment by stressing the link to sex discrimination. As in the American case, there were strategic reasons for this emphasis; the EU had the right only to make suggestions to nation-states concerning the economic domain, under the equality clause in the Treaty of Rome. However, the EU also justified the intervention as a protection of "dignity," a theme not present in the U.S. legal debates. Moreover, while the EEOC guidelines defined sexual harassment as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of *sexual nature*" (29 C.F.R. § 1604.11, *my emphasis*), the EU recommendation targeted not only "all behavior of sexual connotation" but also "all other behavior based on sex that affects the dignity of men and women at work" ([92/131/EEC] Official Journal L049, 24/02/1992 p. 1–8). The recommendation was not binding, but the AVFT, which was also subsidized in the early years by the European Union, found that the EU's proposal, along with its 1976 directive and the Rubinstein report, gave the AVFT greater legitimacy in arguing before French lawmakers that sexual harassment was an important problem that necessitated legislative action.

State Feminists Compromise to Pass the Bill

State feminists in France, especially representative Yvette Roudy and the former Secretary of Women's Rights, Véronique Neiertz, played a crucial role in passing sexual harassment legislation. Not only did they sponsor penal and labor sexual harassment bills, respectively, but they also did some of their own consciousness-raising. Specifically, in 1991 Neiertz contracted a Louis Harris poll on sexual harassment (Harris 1991). This was the first systematic survey on sexual harassment conducted in

France and was an important tool in getting mainstream political support for legislation. One of the survey's major findings was that 19% of men and women interviewed had been sexually harassed in the workplace or had witnessed such harassment. As politicians, the state feminists also knew how to compromise, which, as in most legislative debates, would become necessary.

Anti-American Rhetoric Threatens to Discredit Sexual Harassment Legislation

Globalization proved to be a mixed blessing during France's parliamentary debates. On one hand, as we saw, French feminists found useful theoretical, empirical, and legal examples by looking to Europe and North America. On the other hand, opponents of the bill appealed to anti-American rhetoric in order to discredit the bill as a U.S. import that would replicate "American excesses" of litigiousness, Puritanism, and the Battle of the Sexes in France. Regarding the labor law, which was debated later in the year, these fears were fed by French reporting of the Thomas-Hill Senate hearings, which portrayed Hill as a vengeful feminist and Thomas as a besieged male, caught in a "witch hunt" (Badinter 1991).

State Feminists Compromise to Pass Sexual Harassment Legislation

During penal reform in France's National Assembly, Yvette Roudy proposed two amendments on sexual harassment. In both, abuse of authority was a necessary component. Why did Roudy thus restrict the scope of the law? According to her, this compromise was necessary to win over the male socialist lawmakers she needed to vote for the bill. In her own words: "My amendment would never have passed without the support of certain men within the socialist group. I told them that sexual harassment, which is an abuse of power, is a form of exploitation. That's the language they understand" (*Le Point,* 25 Jan. 1992). In the newspaper *Libération* (30 Apr. 1992), Roudy was even more explicit about what the socialists were ready to accept in the amendment:

> When I proposed it to the socialist group, the first reaction was: "You aren't going to prohibit flirting. We aren't in the United States." I explained to them [that it was about] sexual harassment in the corporation, abuse of power, exploitation. If there wasn't a hierarchical dimension, the group would not have accepted it, fearing that it would be penalizing flirtation.

In other words, Roudy realized that arguments about sexism and discrimination did not resonate among the members of Parliament. She shaped the amendment's definition of sexual harassment to fit their conception of rights and injustice. Because she had been exposed to the AVFT and to the larger women's movement, her cultural "toolkit" (Swidler 1988) included concepts of

sexism and discrimination. She put them aside when addressing her male colleagues, however, who did not think in terms of these categories.[18]

During the Legislative Process, Statute Is Moved to the Section on Sexual Violence

Once France's National Assembly had approved Roudy's sexual harassment bill, it passed the bill on to the Senate for review, where it was modified. Then, in keeping with parliamentary rules, the Senate sent the modified bill to be examined by the Commission of Laws in the National Assembly and to be put before a second vote in the National Assembly (Cromer 1992).

Several changes were made to the statute during this process, which are enumerated in detail elsewhere (see Cromer 1992). One change, however, is particularly noteworthy. First, although the National Assembly had initially placed the sexual harassment statute in chapter V, "Harm to Human Dignity," section I, "Discriminations," the Commission of Laws moved the statute to the section "Sexual Aggression," under the logic that "the *délit* (misdemeanor) of sexual harassment does not appear to be discriminatory because it exists regardless of the sex of the victim or of the author of the *délit*. In reality, it is much closer in nature to sexual violence" (Cromer 1992:114). Indeed, as French legal scholar Françoise Dekeuwer-Defossez (1993) has demonstrated, the discrimination component of sexual harassment was essentially abandoned during the legislative process. In France's Penal Code there is neither any reference to sex discrimination in article 222–33, which defines sexual harassment, nor any mention of sexual harassment in article 225–1, which condemns sex *discrimination*.[19]

[18] To say that French men rejected arguments about sexism because it was in their interest to do so is to miss the point. First of all, as members of the ruling elite, it was no more in their interest to embrace analyses of class inequality or abuse of power than those of gender inequality. Second, even though men, as employers and bosses, may wish to sustain male privilege, men, as fathers, may want to protect their daughters from sexual abuse and employment discrimination. Moreover, American male lawyers, legal scholars, and judges did connect sexism to racism, although they share the same stakes in patriarchy as French men. Instead, it seems that one's interests are themselves largely a product of one's cultural categories and narratives.

The Communist group also proposed two amendments, inspired by the UFF proposal. The bills presented sexual harassment as an affront to "dignity." Unlike Roudy's proposals, which made abuse of authority a necessary component of sexual harassment, the Communist bills, consistent with the UFF proposal, considered abuses of authority to be aggravating circumstances that raise the maximum penalties (J.O. Assemblée Nationale 1991:3567). Roudy's more modest bill, rather than the Communist version, passed, suggesting that Roudy's calculations about how far her colleagues were likely to go were accurate.

[19] The only surviving link in French law between sexual harassment and discrimination is found in article L. 123–1 of the Labor Code. This statute, which is included in the chapter on professional equality, states that employment decisions should not account for whether the employee submitted to or refused to submit to demands for sexual relations from someone with "official authority" over her or him. The inclusion of sexual harass-

Passage of 1991 Penal Law Statute Paves Way for Labor Law Statute

Once sexual harassment was addressed in penal law, the Secretary of Women's Rights, Véronique Neiertz, proposed a statute in the Labor Code, which would compliment the penal statute by allowing sexual harassment victims and whistleblowers to dispute employment retaliation linked to an incident of sexual harassment. Initially, Neiertz criticized the limits of the penal law and said she did not want to limit the definition of sexual harassment to abuse of authority (*Le Monde,* 28 June 1991). Yet, the proposal she presented to the Counsel of Ministers ended up being similarly limited.

Like Roudy, Neiertz modified her position to appeal to the men she needed to convince. Faced with anti-American rhetoric that accused her of importing American excesses of Puritanism and gender warfare, Neiertz disarmed her adversaries by contrasting the "reasonable" character of the French initiative with American "excesses" and by limiting the content of the project (Jenson & Sineau 1995:287). Before France's Senate, Neiertz described the project as pragmatic and modest, demonstrating her concern to "avoid falling into the excesses of a situation *à l'*American, that [would] lead . . . to repressing all forms of seduction between men and women" (*Le Monde,* 23 May 1992). The presenter of the bill before the National Assembly described it as "moderate" and corresponding to "French culture" (*Le Monde,* 2 June 1992b).

France's 1998 Penal Reform

French legal traditions put a high premium on consistency among the different legal codes. Yet the penal and labor statutes that were passed in the early 1990s varied slightly in how they defined sexual harassment. Whereas the penal law defined the harasser as one who uses "orders, threats, constraint, or serious pressure," the labor law referred to "orders," "threats," "constraints," and "pressure of any nature." In 1997, an amendment was proposed to the penal statute that replaced "serious pressure" with "pressure of any nature" (Assemblée Nationale 1997:27). The more-conservative Senate rejected the amendment twice, arguing that the phrase "pressure of any nature" was too vague (Jolibois 1998:33; Journal Officiel de la République Française 1998, 1369–70). Finally, in a joint meeting between the Senate and the National Assembly, Parliament approved the inclu-

ment under sex discrimination in this statute has been analyzed as an "opportunistic text" because, in conjunction with another labor statute (article L. 152–1–1), it gives the Inspector of Work the right to investigate infractions and impose penalties (Roy-Loustaunau 1995:3). Because the Inspector usually forgoes the penalties for employers who demonstrate goodwill by trying to rectify the problem this law serves primarily as an arm of dissuasion (Roy-Loustaunau 1995:3).

sion of "serious pressure" as a compromise (Jolibois 1998). Although the AVFT welcomed this amendment, they were not involved in its passage.

Political Traditions of Denouncing Abuse of Authority: A Cultural Resource

In the preceding narrative of the French legislative process, I have argued that (male) French lawmakers were more likely to condemn sexual harassment if it was presented as an abuse of hierarchical authority, rather than as a form of sex-based employment discrimination. Realizing this, state feminists restricted the content of the sexual harassment statutes they presented and stressed themes of domination and abuse of authority, rather than gender inequality. During legislative debates, the lingering analyses of sexual harassment as a form of sex discrimination were minimized further. In other words, during legal debates about sexual harassment, lawmakers appealed to and reinforced French political culture, in which social inequality is understood in terms of class struggle and abuse of power rather than in terms of ethnic group or gender conflict.

There are some historical reasons for this political tradition. To begin with, France did not have a Civil Rights Movement, such as the one that proved so important in the United States. I would argue that this lack, in turn, stems partly from the fact that, historically, France has not categorized people according to racial, ethnic, or religious affiliation. The Third Republic, by separating church and state, hoped to confine customs and beliefs to the "private sphere," meaning both that the state should not segregate citizens according to these criteria and that citizens should not "politicize" these differences (Noiriel 1992:109).[20] Consequently, and in accordance with republican principles, France's census does not gather information about race, ethnicity, or religion, which subsequently makes it difficult for the country to measure racial discrimination; thus, without an objective measure of racial inequality, it is hard to make this a political rallying point. The lack of statistics in France regarding racial disparity can obscure discrimination and racism.[21] Although certain social actors have tried to politicize ethnic identity in France, others have resisted by appealing to long political traditions of an assimilating model of nationhood (Brubaker 1992; Fassin 1998; Scott 1997).

[20] Scott (1996) argues that this political model presents a paradox for feminists, who simultaneously argue that women should be permitted to participate in government because they are like men and who, by demanding rights for women, paradoxically affirm the specificity of women as a group.

[21] The opposite side of the coin is that racial categorization, as in the United States, can serve to reify "races" and reinforce racism. In other words, as Minow (1990) has argued, inequality is reproduced whether it is noticed or ignored.

Nevertheless, France has a long history of politicizing work-based group identities in its social policies, social theory, Labor Code, unions, and occupational-group representations, such as "socioprofessionnels," within the Commissariat au Plan committees (Boltanski 1987; Desrosières and Thévenot 1988). The employee-boss (*employé-patron*) dichotomy is particularly well institutionalized in France's political parties, unions (which form to defend *either* workers or bosses), and labor courts (which include an equal representation of employees and management). This employee-boss dichotomy is, in turn, linked to a long French tradition of critiquing the arbitrary use of power.

More than 35 years ago, sociologist Michel Crozier (1964:220) argued that many French workers conceive authority to be universal, absolute, and unrestrained. Lamont (1992:49) finds that this general attitude persists; French workers are more likely than their American counterparts to believe that managers exercise power for their own benefit, while American workers are more likely to say that managers use such power for the collective good or for the good of the company. Moreover, the particularly insidious combination of abuse of power and sexual violence has been both practiced and condemned in France for some time. According to the (contested) rules of feudal tradition, feudal lords had the right to have sexual relations with their serfs' brides on their serfs' wedding nights. This right, which was later waived in exchange for a tax, was referred to as *le droit de seigneur, le droit de cuissage,* or the First Night.[22] In the 19th century, the phrase "*droit de cuissage*" referred to overseers who, because of the enormous power they had over female factory workers, engaged in (often consensual and frequently coerced) sexual relations with them, a practice that was condemned in several strikes and demonstrations (Louis 1994). "Droit de cuissage" was "reinvented" in the late 1980s to raise consciousness about contemporary forms of sexual violence at work. Framing sexual harassment as a form of abuse of authority in France, where there exists deep-seated beliefs about the absolute and unrestrained nature of authority, thus proved particularly effective.

A Question of Time?

I have argued that the important differences in American and French sexual harassment laws are a consequence of how feminists (and other social actors) in each country responded to the dissimilar cultural, political, and legal resources and constraints they encountered. According to an alternative explanation, the differences we observe are the effect of a time lag, in that France is simply 10 to 20 years behind the United States

[22] Whether *le droit de cuissage* actually existed or was a "myth" is contested (Boureau 1995; Louis 1994). However, records of the *droit de cuissage* tax do exist.

when it comes to sexual harassment law. This explanation makes intuitive sense, in varying degrees, to many of the French lawyers, activists, and human resource managers I interviewed. It is therefore worth discussing briefly.

It is true that sexual harassment law in France is more recent and that its scope may broaden over time; after all, it only dates back to the early 1990s. In the United States, however, the first court cases of this nature date to the late 1970s. During the early years of U.S. sexual harassment jurisprudence, the courts began by recognizing only the quid pro quo version of sexual harassment and then expanded the scope over time. In France, change would have to come through legislative amendment but, with time, France could "catch up" to the United States by condemning a wider range of sexual harassment. Indeed, as we have seen, in 1997 France's Parliament extended the scope of the penal statute. One may expect to see further progress on gender issues now that France's gender parity law requires the country's political parties to fill 50% of the candidacies in virtually any race with women or lose a corresponding share of their campaign funding (Loi N° 2000-493 du 6 juin 2000:8560; see also Kramer 2000: 112).

Although I do expect that progress is likely, I still contend that the time lag hypothesis is flawed in that it assumes that France is following behind the United States when, in fact, the two countries are on very different paths. The latter is developing civil remedies that place the burden of prevention on private employers, who are held liable for infractions. The former relies on state intervention and individual accountability. Although the U.S. courts pursue sexual harassment as an instance of group-based discrimination in employment, the French state condemns this same behavior because it threatens the physical safety and personal integrity of women and men. In each country, reformers will have to take these legal foundations, and the political traditions that support them, into account.

Conclusion

We have seen how, in mobilizing for sexual harassment laws, feminist groups in both the United States and France were successful to the extent that they were able to respond to the cultural, political, and legal resources and constraints before them. National variation in these resources and constraints necessitated distinct action on the part of feminists and others, which, in turn, resulted in dissimilar bodies of sexual harassment law.

In the United States, the courts offered feminists and others access to the law-making process. Having drawn on political and legal traditions of antidiscrimination, U.S. groups successfully built a jurisprudence that condemned a wide range of unwanted

sexual attention in the workplace as a form of sex discrimination under Title VII of the Civil Rights Act of 1964. Since Title VII addresses employment discrimination by employers, using the former to condemn sexual harassment imposes a discrimination frame on the situation. This frame makes discriminatory intent or effect and employment consequences most salient. Violent or abusive behavior at work that does not appear discriminatory falls between the cracks of Title VII jurisprudence, as does behavior that does not occur in the workplace. Finally, in expanding the scope of *sexual* behavior that constitutes sexual harassment, the U.S. courts have overlooked other forms of non-sexual gender harassment (Schultz 1998).

In France, penal law reform in 1991 provided feminists with a window of opportunity in the legislature, which they used to propose a sexual harassment statute in the Penal Code. They then argued that a Labor Code statute was necessary to compliment the penal statute. Working within a political and legal context that recognizes class inequalities and abuse of authority more readily than race or gender discrimination, the state-feminist sponsors of the bill decided that they would be more persuasive if they could pitch their proposal in the vocabulary of their socialist colleagues, as abuse of power and exploitation. In so doing, they limited the scope of the proposed statute to target only sexual harassment involving abuse of authority, rather than the wider range of behavior addressed in earlier feminist proposals. Informed by their own political and legal traditions, in which critiques of violence were more developed than analyses of discrimination, French lawmakers, during Parliament's revisions to the statute, re-categorized the offense as sexual violence rather than sex discrimination. The penal law allowed for penal remedies (prison sentences and fines) and small civil remedies targeted at the *harasser*. Parliament's adoption of a sexual harassment labor statute allowed victims of employment retaliation that was linked to workplace harassment to demand back pay and/or reinstatement from their employers.

There are several lessons to be drawn from this study. First, although national cultural differences exist, they are mediated by institutional structures (see Friedland & Alford 1991; Pedriana & Stryker 1997; Stryker 1994). We therefore need to study how institutional context, which varies cross-nationally, shapes social meaning. Second, we learn that though states are gendered, they are gendered in different ways, thus providing particular openings for influence by women's movements. The lesson here for students of the state is that what is often called "structure" cannot determine everything. There appear to be cultural differences—in this case concerning how inequality is conceptualized—that have real implications for policy debates, independent of institu-

tional effects (see also Dobbin 1993; Lamont 2000; Lamont & Thévenot 2000).

Finally, we learn that there are limits to globalization. In culture, globalization means that ideas will circulate broadly, but it does not mean that they will simply diffuse everywhere they circulate. Instead, ideas will be selected and changed in interaction with political regimes (e.g., France's resistance to the United States), institutional factors (e.g., the French legal system), and cultural repertoires (e.g., ideas about inequality). National and foreign policy can be a resource for activists, as a positive model, if a convincing argument can be made for emulation. For example, copying Western policy is often a useful way for young democracies to gain legitimacy among their more-established peers (Meyer 1994; Meyer et al. 1991; Strang & Meyer 1994). However, opponents can also use international, foreign, or specifically American rhetoric as an anti-model. This study suggests that this can be a powerful strategy where there is significant anti-American and/or nationalist sentiment.

Borrowing Policy from Other Countries: Pitfalls and Promises

In this article I have used a cross-national research design to describe and explain how and why the United States and France adopted very different sexual harassment laws. A different question that could have been asked concerns what policy lessons each country can learn from the example of the other.

Each of the 50 states could look to France for ideas, but basic differences in legal structure would make replication of French law in the United States difficult. For instance, it is hard to imagine an effective sexual harassment labor law in the United States, given the general weakness of labor law here. Passing criminal sexual harassment laws could prove useful, as a complement to the sexual harassment jurisprudence under employment law. However, even existing rape and sexual assault laws are notoriously difficult for victims to use, particularly because of the high burden of proof that exists in U.S. criminal courts and the narrow way in which these crimes are generally defined (Schulhofer 1998). The fact that victims cannot receive any kind of compensation in American criminal courts, unlike victims in France, is another drawback of criminal court for many victims (and their lawyers) in the United States.

In France, where the United States remains largely a countermodel when it comes to sexual harassment policy, it is important to point out that, even if some aspects of American law were replicated in France, French sexual harassment law would remain very different. For instance, if Parliament were to revise the sexual harassment penal statute to hold employers liable for sexual harassment in the workplace, this would still not result in

the infamous million-dollar judgments seen in the United States. Even though the U.S. media may be exaggerating the occurrence of these lucrative verdicts in the United States (see Sunstein 1998 for a review of actual awards), French judgments would be even smaller, in keeping with the rules of French penal law. These rules allow for jail sentences and state fines, but only small compensatory damages and no punitive damages. Moreover, even if employers were to be held liable for incidents of harassment among hierarchical peers and for hostile environment forms of sexual harassment, they would have to take into account labor protections before hastily dismissing an employee for sexual harassment, as sometimes occurs in American workplaces, where labor protections are much weaker.

I thus suggest that it is extremely difficult to export public policy across national boundaries. Since national public policy is built into local legal and political institutions, it is transformed into something quite different when divorced from those institutions. In order to learn lessons from the policy of other nations, it is therefore important to understand the larger legal, political, and cultural context of such policy.

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