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DIGNITY AND DISCRIMINATION IN SEXUAL HARASSMENT LAW: A FRENCH CASE STUDY

L. CAMILLE HÉBERT*

Abstract

In 2012, France adopted new prohibitions on sexual harassment into its Labor and Penal Codes. That enactment, which significantly broadened the definition of actionable harassment, was based on a model of harassment law that defines sexual harassment as a form of discrimination, while the French have traditionally conceived of sexual harassment as a form of sexual violence. Cases decided under the new prohibitions, as well as additional legislation adopted in France in 2016 and 2018, the latter prompted by France’s “#MeToo” movement, suggest that the French are beginning to perceive sexual harassment as implicating issues of both dignity and equality and that the underlying foundation for the prohibitions are affecting the ways in which the laws are being enforced. This Article explores those judicial and legislative developments and discusses the implications of a focus on dignity and discrimination as the basis for sexual harassment law in France and in other nations, including the United States.

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I. Introduction

In recent months, a good deal of attention has been focused on issues surrounding sexual harassment. In the United States, allegations of sexual harassment against a number of famous and powerful men have resulted not only in their dismissals or calls for

resignation,¹ but also the “#MeToo” social media campaign,² in which millions of women have shared their experiences of sexual harassment and sexual assault.³ In 2017, Time Magazine honored the “Silence Breakers,” the women who have come forward with their experiences of sexual harassment and sexual assault, as Time’s 2017 Person of the Year.⁴ The French version of the “#MeToo” campaign, “#BalanceTonPorc,” which roughly translates to “out your pig,” has been accompanied by a sharp increase in reports of rape, sexual assault, and sexual harassment.⁵ That

1. While the allegations against Harvey Weinstein and other celebrities have dominated the headlines, the majority of men—and almost all of the allegations have been against men—who have faced discharge or calls for resignation in the wake of the “#MeToo” movement have been corporate executives and other business leaders. See Jeff Green, *#MeToo Snares More than 400 High-Profile People*, BLOOMBERG BUS. (June 27, 2018, 6:46 PM), <https://www.bloomberg.com/news/articles/2018-06-25/-metoo-snares-more-than-400-high-profile-people-as-firings-rise> (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

2. The MeToo campaign began in 2007 by Tarana Burke, an African-American woman, as a way to reach survivors of sexual assault in under-privileged communities. See Alanna Vagianos, *The “Me Too” Campaign was Created by a Black Woman 10 Years Ago*, HUFFINGTON POST (Oct. 17, 2017, 1:44PM), https://www.huffingtonpost.com/entry/the-me-too-campaign-was-created-by-a-black-woman-10-years-ago_us_59e61a7fe4b02a215b336fee (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

3. The current iteration of the “#MeToo” campaign began as a response to the accusations of sexual harassment against Hollywood producer Harvey Weinstein, when actress Alyssa Milano tweeted: “If you’ve been sexually harassed or assaulted write ‘me too’ at a reply to this tweet.” See Margaret Renkl, “The Raw Power of #MeToo,” *Opinion*, N.Y. TIMES (Oct. 19, 2017) (discussing Ms. Milano’s Twitter request and the response to that request). Ms. Milano’s Twitter request was aimed at providing a sense of the magnitude of the problems of sexual harassment and sexual assault. The hashtag #MeToo was reportedly shared over 500,000 times on Twitter and 12 million times on Facebook in the first 24 hours. *Id.*

4. Stephanie Zacharek, Eliana Dockterman, & Haley Sweetland Edwards, *Time 2017 Person of the Year: The Silence Breakers, The Voices that Launched a Movement*, TIME (Dec. 18, 2017), <http://time.com/time-person-of-the-year-2017-silence-breakers/> (last visited Oct. 5, 2018) (announcing the 2017 Person of the Year as “silence breakers” Rose McGowan, Megyn Kelly, Terry Crews, Taylor Swift, Juana Melara, Ashley Judd, Alyssa Milano, Selma Blair, and Tarana Burke, among others) (on file with Washington & Lee Journal of Civil Rights & Social Justice).

5. See Kim Willsher, *Allegations of Sexual Violence Soar in France After Weinstein Scandal*, GUARDIAN (Nov. 14, 2017), <http://www.theguardian.com/world/2017/nov/14/france-sees-sharp-rise-in->

campaign has also prompted calls for legislation⁶ and has resulted in the adoption of legislation to criminalize street harassment and the sexual harassment of women in public places.⁷

Even before the most recent attention, sexual harassment has been recognized, both nationally and internationally, as a problem in the workplace that requires a response.⁸ A number of nations have moved to adopt prohibitions on sexual harassment in a number of settings, including in the workplace, with many of these prohibitions adopted in the last two decades or so.⁹ In many of those nations, legislative prohibitions of sexual harassment

reports-of-sexual-misconduct (stating that allegations of sexual violence increased by 30 percent in France following high-profile allegations) (on file with Washington & Lee Journal of Civil Rights & Social Justice).

6. See Dan Bilefsky & Elian Peltier, *France Considers Fines for Catcalls as Women Speak Out on Harassment*, N.Y. TIMES, Oct. 18, 2017, at A4 (discussing proposal by French government to impose fines for “aggressive catcalling and lecherous behavior toward women in public”); see also Angelique Chrisafis, *France Plans on-the-Spot Fines for Sexual Harassment in Public*, GUARDIAN (Mar. 21, 2018), <https://www.theguardian.com/world/2018/mar/21/france-plans-on-the-spot-fines-for-sexual-harassment-in-public> (discussing French government’s proposal to institute fines for “degrading and humiliating comments” and offensive “sexual or sexist” behavior toward another in public).

When the proposed legislation was introduced into the Senate, reference was made to improving legislation to fight all forms of harassment “in the post-Weinstein context.” SÉNAT [SENATE], SESSION EXTRAORDINAIRE DE 2017–2018, SÉANCE DU MERCREDI 4 JUILLET 2018 [EXTRAORDINARY SESSION OF 2017–2018, MEETING OF WEDNESDAY, JULY 4, 2018], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.][OFFICIAL GAZETTE OF FRANCE], July 5, 2018, p. 9085 (Mme Nicole Belloubet); see *id.* at 9093 (Mme Marie-Pierre de la Gontrie) (noting that the law against sexual and gender-based violence “was expected in light of the Weinstein affair and the #BalanceTonPorc and #MeToo movements”). In the original French: “Il était attendu, à la suite de l’affaire Weinstein et des mouvements #BalanceTonPorc et #MeToo.”

7. See Loi 2018-703 du 3 août 2018 renforçant la lutte contre les violences sexuelles et sexistes [Law 2018-703 of Aug. 3, 2018 reinforcing the fight against sexual and gender-based violence] JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.][OFFICIAL GAZETTE OF FRANCE], Aug. 5, 2018, No. 1079.

8. See DEIRDRE McCANN, INT’L LABOUR OFF., *Sexual Harassment at Work: National and International Responses, Conditions of Work and Employment Programme*, vii (2005) (discussing the approach of the International Labor Organization and other international and national bodies to deal with issues of workplace sexual harassment).

9. See *id.* at 17–18 n. 57–58 (listing the forty-nine nations with prohibitions on workplace sexual harassment as of 2005, with thirty-five of those nations adopting legislation for the first time since 1995).

resemble each other in important ways in part because regional bodies, such as the European Union, place constraints on the law of member nations,¹⁰ and in part because nations tend to model their legislation on examples provided by nations with earlier prohibitions.¹¹

In spite of similarities between legislative prohibitions of sexual harassment in different countries, the underlying foundations of those laws often differ, as well as the interests sought to be protected by those prohibitions. For example, many of the prohibitions on sexual harassment, such as those of the United States, are based on notions of the need for equality between the sexes and generally conceptualize sexual harassment as a form of sex discrimination.¹² In other jurisdictions, however, the interests

10. The Council Directives of the European Union, including those related to issues of harassment, are required to be transposed into national law. For example, Council Directive 2002/73/EC defining sexual harassment and harassment based on sex to be a form of discrimination was to be transposed into national law by October 5, 2005 and the Recast Directive, Council Directive 2006/54/CB, containing a similar definition of harassment on the basis of sex and sexual harassment, was required to be transposed into national law by August 15, 2008. Council Directive 2002/73, art. 8d, 2002 O.J. (L 269) 15, 19 (EC); Council Directive 2006/54, art. 33, 2006 O.J. (L 204) 23, 33 (EC); see ANN NUMHAUSER-HENNING, SYLVAIN LAULOM, HARASSMENT RELATED TO SEX AND SEXUAL HARASSMENT LAW IN 33 EUROPEAN COUNTRIES 3–4 (2012) (discussing requirement for transposition of EU directives on sexual harassment into national law).

11. For example, the definition of sexual harassment in the European Union's Council Directive 2002/73/EC of 23 September 2002 is "where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment." Council Directive 2002/73, art. 2, 2002 O.J. (L 269) 15, 17 (EC). While containing important differences, this definition resembles in some particulars the definition of sexual harassment contained in the United States' Equal Employment Opportunity Commission's Guidelines on Discrimination Because of Sex: "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." EEOC GUIDELINES ON DISCRIMINATION BECAUSE OF SEX: SEXUAL HARASSMENT RULE, 29 C.F.R. § 1604.11 (2018).

12. In the United States, sexual harassment is generally unlawful only if it can be characterized as a form of sex discrimination, made unlawful by § 703 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2. There is no general prohibition of sexual harassment in the United States, at least on the federal

sought to be protected by legislative prohibitions are those that protect the dignity of employees and prevent sexual violence, particularly against women. An example of a jurisdiction that has traditionally taken this approach is France.¹³

In recent years, however, France's prohibition against sexual harassment has been reshaped in a manner to more closely resemble that of nations and entities, including the European Union, which view sexual harassment as a form of discrimination.¹⁴ One question raised by this trend is whether, as the prohibition of sexual harassment in France starts to more closely resemble a framework expressly based on discrimination, the underlying foundation of the prohibition of sexual harassment will also shift from a focus on dignity to a focus on discrimination.¹⁵ Developments in France in the years since the enactment of the 2012 prohibition on sexual harassment, explored in the rest of this article, suggest that notions of both dignity and equality are playing a role in the enforcement and interpretation of the current French prohibition of sexual harassment. This shift in focus may have important implications for not only the way in which the harm of sexual harassment is perceived, but also the way in which the prohibitions on sexual harassment are being enforced.

level.

13. In France, the prohibition of sexual harassment is found in the section of the Penal Code dealing with sexual aggression and violence, including rape. See CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 222–33. This section is found in the Legislative Part of the Code, Book II: Crimes and offenses against persons, Title II: Attacks on the human person, Chapter II, Attacks on the physical or psychological integrity of the person, Section 3: Sexual assault, Paragraph 4: Sexual exhibition and sexual harassment. In the original French: “Partie législative, Livre II: Des crimes et délits contre les personnes, Titre II: Des atteintes à la personne humaine, Chapitre II: Des atteintes à l’intégrité physique ou psychique de la personne, Section 3: Des agressions sexuelles, Paragraphe 4: De l’exhibition sexuelle et du harcèlement sexuel.”

14. See *infra* text accompanying notes 25–26 for a fuller discussion.

15. This is a question raised in articles that I authored or co-authored shortly after adoption of a new sexual harassment law in France in August 2012. L. Camille Hébert, *Divorcing Sexual Harassment from Sex: Lessons from the French*, 21 DUKE J. GENDER L. & POL'Y 1, 22–23 (Fall 2013); Loïc Lerouge & L. Camille Hébert, *The Law of Workplace Harassment of the United States, France, and the European Union: Comparative Analysis After the Adoption of France's New Sexual Harassment Law*, 35 COMP. LAB. L. & POL'Y J. 93, 121–22 (2013). Enough time has now passed to provide some information about the answer to that question.

II. The Current State of French Sexual Harassment Law

In August 2012, France enacted two new statutes addressing sexual harassment,¹⁶ one in the Penal Code¹⁷ and one in the Labor Code.¹⁸ This legislative action was prompted by the Constitutional Court's decision in May 2012 to invalidate for vagueness the prior prohibition on sexual harassment contained in the Penal Code.¹⁹ The new statutes resulted in a substantial expansion of the prior definition of sexual harassment under French law, which had been focused on coerced sexual conduct.²⁰ The new definition includes

16. Loi 2012-954 du 6 août 2012 relative au harcèlement sexuel [Law 2012-954 of August 6, 2012 concerning sexual harassment], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.][OFFICIAL GAZETTE OF FRANCE], Aug. 7, 2012, p. 12021.

17. See CODE PENAL [C. PEN.] [PENAL CODE] art. 222-33.

18. See CODE DU TRAVAIL [C. TRAV.] [LABOR CODE] art. L 1153-1.

19. See Conseil Constitutionnel [CC] [Constitutional Court] decision No. 2012-240, priority issue of constitutionality, May 4, 2012. The criminal division of the Court of Cassation declined to refer a challenge to the constitutionality of the Penal Code prohibition on sexual harassment enacted in August 2012 to the Constitutional Court, indicating that there was not a serious question as to whether paragraph I of art. 222-33 was invalid, because the prohibition of repetition of sexually related words or conduct was "worded in sufficiently clear and precise" terms. Cour de Cassation [Cass.] [supreme court for judicial matters] crim., May 25, 2016, Bull. crim., No. 16-8237. In the original French:

Et attend que la question posée ne présente pas un caractère sérieux, dès lors que le I de l'article 222-33 du code pénal, qui exige la répétition des propos ou comportements à la connotation sexuelle, est rédigé en des termes suffisamment clairs et précis pour que l'interprétation de ce texte, qui entre dans l'office du juge pénal, puisse se faire sans risque d'arbitraire.

20. Although the Penal Code's prohibition had gone through a number of iterations over the years, at the time of the Constitutional Court's decision in 2012, the statute had read simply: "The act of harassing another person with the goal of obtaining favors of a sexual nature shall be punished by a term of one year's imprisonment and a fine of 15,000 euros." CODE PENAL [C. PEN.] [PENAL CODE] art. 222-33. In the original French: "Le fait de harceler autrui dans but d'obtenir des faveurs de nature sexuelle est puni d'un an d'emprisonnement et de 15 000 € d'amende." The corresponding provision of the Labor Code at that time read: "Acts of harassment of any person for the purpose of obtaining favors of a sexual nature for his or her benefit or for the benefit of a third party are prohibited." CODE DU TRAVAIL [C. TRAV.] [LABOR CODE] art. L 1153-1. In the original French: "Les agissements de harcèlement de tout personne dans le but d'obtenir des faveurs de nature sexuelle à son profit ou au profit d'un tiers sont interdits."

not only coerced sexual conduct, but also includes within the prohibition of the law sexual conduct harmful to the dignity of those harassed or that places them in a hostile or degrading situation. The 2012 and current version of the prohibition of sexual harassment in the Labor Code provides as follows:

No employee shall be required to submit to acts

1. of sexual harassment, consisting of repeated words or behavior with a sexual connotation, which undermine his or her dignity by reason of their degrading or humiliating nature or create against him or her an intimidating, hostile or offensive situation;
2. incorporated into sexual harassment, consisting of any form of serious pressure, even if not repeated, exerted with the real or apparent goal of obtaining an act of a sexual nature, if it is sought for the benefit of the actor or the benefit of a third party.²¹

Similarly, the 2012²² version of the prohibition of sexual harassment in the Penal Code²³ defined sexual harassment as follows:

21. CODE DU TRAVAIL [C. TRAV.] [LABOR CODE] art. L 1153-1. In the original French:

Aucun salarié ne doit subir des faits:

- 1° Soit de harcèlement sexuel, constitué par des propos ou comportements à connotation sexuelle répétés qui soit portent atteinte à sa dignité en raison de leur caractère dégradant ou humiliant, soit créent à son encontre une situation intimidante, hostile ou offensante.
- 2° Soit assimilés au harcèlement sexuel, consistant en toute forme de pression grave, même non répétée, exercée dans le but réel ou apparent d'obtenir un acte de nature sexuelle, que celui-ci soit recherché au profit de l'auteur des faits ou au profit d'un tiers.

22. As explained in more detail below, the Penal Code's prohibition on sexual harassment was amended in 2018. The current version of the Penal Code's prohibition on sexual harassment is discussed *infra* at text accompanying note 126.

23. The 2012 and current Penal Code provisions also contain a third paragraph, which provides for a penalty of two years imprisonment and a fine of 30,000 euros for violations of paragraphs I and II, as well as specified grounds for increasing the penalty to three years imprisonment and a fine of 45,000 euros. CODE PENAL [C. PEN.] [PENAL CODE] art. 222-33.

I. Sexual harassment is the act of imposing on a person, in a repeated manner, words or behavior with a sexual connotation, which undermine his or her dignity by reason of their degrading or humiliating nature or create against him or her an intimidating, hostile or offensive situation.

II. Incorporated into sexual harassment is the act, even if not repeated, of using any form of serious pressure with the real or apparent goal of obtaining an act of a sexual nature, if it is sought for the benefit of the actor or the benefits of a third person.²⁴

Accordingly, the effect of the enactment of these new statutory prohibitions was not only a substantial expansion of the definition of what constitutes sexual harassment, but also an explicit invocation of the concept of “dignity” as the nature of the harm caused by sexually harassing conduct. At the same time, the similarity of the new French definition of sexual harassment to the definition of sexual harassment in the European Union Directives is unmistakable. The European Union Directives define sexual harassment as conduct of a sexual nature that has the “the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment”;²⁵ the French definition defines sexual harassment to include conduct with a sexual connotation that “undermine his or her dignity by reason of their degrading or humiliating nature or create against him or her an intimidating, hostile or offensive situation.”²⁶ On the other hand, while the EU Directives explicitly define sexual harassment as a form of discrimination, there is no reference to discrimination in the

24. CODE PENAL [C. PEN.] [PENAL CODE] art. 222-33. In the original French:

I. Le harcèlement sexuel est le fait d'imposer à une personne, de façon répétée, des propos ou comportements à connotation sexuelle qui soit portent atteinte à sa dignité en raison de leur caractère dégradant ou humiliant, soit créent à son encontre une situation intimidante, hostile ou offensante.

II. Est assimilé au harcèlement sexuel le fait, même non répété, d'user de toute forme de pression grave dans le but réel ou apparent d'obtenir un acte de nature sexuelle, que celui-ci soit recherché au profit de l'auteur des faits ou au profit d'un tiers.

25. Council Directive 2004 O.J. (L 2004/113/EC).

26. CODE PENAL [C. PEN.] [PENAL CODE] art. 222-33, *supra* note 17.

definitions of sexual harassment found in either the French Labor Code or the Penal Code.

There is a separate provision of the French Labor Code that does define some types of harassment as a form of discrimination.²⁷ That prohibition, found in Article L. 1132-1, prohibits an individual from being subjected to “discriminatory measures” based on sex or other protected characteristics.²⁸ Those discriminatory measures based on sex are defined to include “any act with a sexual connotation, suffered by a person and having the purpose or the effect of violating his or her dignity or creating an intimidating, hostile, degrading, humiliating, or offensive environment.”²⁹ This provision was adopted for the purpose of complying with the EU Directive defining harassment as a form of discrimination, but the provision generally does not appear to have been used to bring claims of sexual harassment.³⁰

27. See CODE DU TRAVAIL [C. TRAV.] [LABOR CODE] art. L. 1132-1.

28. *Id.* Article 1132-1 incorporates the definition of discrimination contained in article 1 of Law 2008-496 of May 27, 2008, laying down various provisions for adapting to Community law in the field of combating discrimination. Loi 2008-496 du 27 mai 2008 portant diverses dispositions d’adaptation au droit communautaire dans le domaine de la lutte contre les discriminations (1) [Law 2008-496 of May 27, 2008 Laying Down Various Provisions for Adapting to Community Law in the Field of Combating Discrimination], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], May 28, 2008, p. 8801.

29. CODE DU TRAVAIL [C. TRAV.] [LABOR CODE] art. L. 1132-1. In the original French: “Tout agissement lié à l’un des motifs mentionnés au premier alinéa et tout agissement à connotation sexuelle, subis par une personne et ayant pour objet ou pour effet de porter atteinte à sa dignité ou de créer un environnement intimidant, hostile, dégradant, humiliant ou offensant.”

30. A search of the Legifrance.gouv.fr database on June 27, 2018 revealed that there are 10 cases in the Court of Cassation that contain a reference to article L 1132-1 of the Labor Code and the words *harcèlement sexuel* (“sexual harassment”); six of those cases were decided after the enactment of the sexual harassment provisions in August 2012. A review of those cases, however, reveals that article L 1132-1 was generally not being relied on to bring claims of sexual harassment. Rather, most of those cases involved claims under article L 1132-1 for some form of discrimination, as well as claims of either moral or sexual harassment under another provision. One of the cases, however, did involve a claim of violation of article L 1132-1 by a female truck driver who argued that she had been discriminated against by being treated differently from male employees, based on her refusal to submit to the sexual demands on her supervisor. Cour de Cassation [Cass.] [supreme court for judicial matters], soc., Jan. 6, 2011, No. 09-69438.

*III. Developments in the Law of Sexual Harassment in France**A. Increasing Use of the Labor Code's Sexual Harassment Provisions*

Although prohibitions of sexual harassment have long existed in both the Penal Code and the Labor Code in France, at least until 2012, the majority of cases dealing with sexual harassment, even in the context of the workplace, were decided by criminal courts under the Penal Code rather than by labor courts under the Labor Code.³¹ This focus on the criminalization of sexual harassment seems to have resulted in restrictive readings of the prohibitions on sexual harassment in both codes, because of the Court of Cassation's³² practice of conforming the law under both codes.³³ It seems likely that the focus on the Penal Code's prohibitions on sexual harassment is also responsible for the chronic under-enforcement of the law against sexual harassment.³⁴ And this under-enforcement, at least with respect to cases brought

31. A search of the Legifrance.gouv.fr database on July 3, 2018 revealed that between May 3, 1990 and July 25, 2012, there were 238 cases in the Court of Cassation in which the words *harcèlement sexuel* ("sexual harassment") appeared; of those 238 cases, 123, or 52 percent, were decided by the criminal division of the court. Most of those cases presumably involved the Penal Code's prohibition on sexual harassment, which was originally enacted in 1992.

32. The Court of Cassation is the highest court in the French judicial system, which reviews decisions from lower courts to determine the compliance of those decisions with the law, but which does not review issues of fact. The Court of Cassation has the power to annul the decisions of lower courts and send those decisions back to be redecided or to reject challenges to those decisions. The purpose of the Court of Cassation is to harmonize case law and to ensure that the statutory texts are applied in the same way throughout France. The Court of Cassation has six divisions, including the Social Division, which deals with labor issues, and the Criminal Division. See *The Role of the Court of Cassation*, www.courdecassation.fr/IMG/File/The%20role%20of%20the%20Court%20of%20Cassation%2025_10_2010%20Version%20definitive.pdf (last visited Oct. 20, 2018) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

33. See L. Camille Hébert, *Divorcing Sexual Harassment from Sex: Lessons from the French*, 21 DUKE J. GENDER L. & POL'Y 1, 21–22 & n. 83 (2013) (discussing practice of the Court of Cassation to conform the law of sexual harassment under the Penal Code and the Labor Code).

34. See *id.* at 22, n. 84 (discussing the scope of the problem of sexual harassment in France and the under-enforcement of the French law against sexual harassment).

under the Penal Code, has not improved since enactment of the new Penal Code provision in 2012.³⁵

Since 2012, however, a larger percentage of cases of sexual harassment have been brought in the labor courts under the Labor Code provisions.³⁶ There may be a number of reasons for this. The invalidation of the Penal Code prohibition of sexual harassment in 2012 meant that, if claims arising before 2012 were to be asserted, they had to be asserted under provisions other than the invalidated Penal Code provision.³⁷ The Labor Code's prohibition of sexual harassment, therefore, was an available alternative for asserting such claims.³⁸

35. See ASSEMBLÉE NATIONALE [NATIONAL ASSEMBLY], N° 4233, RAPPORT D'INFORMATION SUR L'ÉVALUATION DE LA LOI N° 2012-954 DU 6 AOÛT 2012 RELATIVE AU HARCÈLEMENT SEXUEL [NO. 4233, INFORMATION REPORT ON THE EVALUATION OF LAW NO. 2012-954 ON AUGUST 6, 2012 ON SEXUAL HARASSMENT], p. 32–33 (November 16, 2016) (noting the small number of criminal convictions for sexual harassment from 1994 to 2010 and noting that the number of convictions have not increased after adoption of the 2012 Penal Code provision).

36. A search of the Legifrance.gouv.fr database on July 3, 2018 revealed that between September 4, 2012 and June 20, 2018, there were 175 cases in the Court of Cassation referencing *harcèlement sexuel* (“sexual harassment”); of those 175 cases, 56 of those cases were decided by the criminal division of the Court, while the remaining 119 cases, or 68 percent, of those cases were decided by the civil division, mostly by the social chamber. Many of those cases involved the Labor Code's prohibition on sexual harassment, although given that the new statute was adopted on August 6, 2012 and was not retroactive, most of those cases were decided under prior versions of the prohibition. A number of those cases involved challenges by employees who had been disciplined or terminated for sexual harassment.

37. The criminal division of the Court of Cassation held that acts occurring before August 8, 2012, the effective date of the 2012 Penal Code prohibition on sexual harassment, could not be considered in a prosecution for sexual harassment brought after the effective date of the new statute. See Cour de cassation [Cass.] [supreme court for judicial matters] crim., Feb. 16, 2016, Bull. Crim., No. 16-82377.

38. The Labor Code's prohibition on sexual harassment was not the only alternative to bringing a claim for sexual harassment under the Penal Code. The criminal division of the Court of Cassation held that an employee's sexual conduct directed at a female employee, including questions about the status of her marriage and her intimate life, as well as the presence of picture of naked women on the doors of his cabinet, could constitute moral harassment, during a period in which the Penal Code's prohibition on sexual harassment had been invalidated. See Cour de cassation [Cass.] [supreme court for judicial matters], crim., April 25, 2017, No. 16-81180; see also Cour de cassation [Cass.] [supreme court for judicial

Another reason for the greater number of cases brought under the Labor Code may be the broadening of the definition of sexual harassment from only coerced sexual conduct, which may have seemed more appropriate for criminalization as a form of sexual violence related to sexual assault and rape, to include other forms of harassment, such as verbal harassment, which may seem less appropriate for criminal sanction, including imprisonment.

B. Broadening Definition of Sexually Harassing Conduct

Consistent with the broader definition of sexual harassment under the 2012 provisions of the Penal Code and the Labor Code, the courts do appear to be recognizing a broader range of workplace conduct to be unlawful sexual harassment.³⁹ As discussed below, a review of cases decided before and after the enactment of the 2012 prohibitions on sexual harassment suggests that courts may be giving a broader construction with respect to both branches of the definition of sexual harassment—the previous prohibition on coerced sex as well as the new prohibition on conduct creating harm to dignity or a hostile or offensive situation.

In a number of earlier, but still relatively recent, cases, courts seemed reluctant to find sexual conduct in the workplace, even when unwanted, to be actionable sexual harassment. In one memorable case, the criminal division of the Court of Cassation upheld the lower court's rejection of a sexual harassment claim against a manager who made repeated proposals of a sexual nature to a female subordinate.⁴⁰ That conduct included multiple

matters] crim., July 11, 2017, No. 16-85214 (unpublished)] (confirming conviction of a supervisor for moral harassment and holding that the sexual nature of the conduct did not preclude a conviction for moral harassment, in spite of the invalidation of the Penal Code provision on sexual harassment).

39. This connection between the broadening of the definition of sexual harassment in the statutory prohibitions and the broader recognition of sexually harassing conduct by the courts does not appear to be inevitable. After all, the enactment of the statutory provision on discriminatory harassment into the Labor code, discussed *supra* note 30 and accompanying text, appears to have been largely ignored by litigants and the courts.

40. See Cour de cassation [Cass.] [supreme court for judicial matters] crim., Jan. 19, 2005, No. 04-83443 (unpublished).

telephone calls to her private residence and an offer to share with her a single room with a single bed after “forgetting” to make a hotel reservation for a business trip to Paris.⁴¹ The court seems to have accepted the employer’s argument that the supervisor was only engaged in “seduction,” and that “an attitude of seduction, even if clumsy and insistent, by a hierarchical supervisor” was not sexual harassment.⁴² The court noted that the female subordinate had not suffered retaliation for her repeated refusals and seemed to find it irrelevant that she had suffered what was characterized as “unpleasantness,” which included stress and depression.⁴³

By contrast, in a case arising before the enactment of the 2012 sexual harassment provisions, but which was decided subsequent to the adoption of those provisions, the social division of the Court of Cassation held that acts by a co-worker toward a female employee—revealing details of his personal life, writing long handwritten letters, sending bouquets of flowers, and asking her to meet with him alone in his office, despite her refusals and protestations—constituted sexual harassment justifying his dismissal.⁴⁴ In reaching that conclusion, the court seems to have relied in part on the difference in their ages and their professional status in the company, as well as that fact that the employee subjected to the conduct was newly hired, while the co-worker was more senior.⁴⁵ The court seemed to have taken into account the vulnerability of the employee subjected to the sexual conduct, as well as the fact that the co-worker may have been using his status and seniority with the employer to impose sexual conduct upon

41. *Id.*

42. *Id.* In the original French: “[L]’attitude de séduction, fût-elle maladroit et insistante, d’un supérieur hiérarchique ne suffit pas à caractériser l’infraction.” See Cours d’appel [CA] [regional court of appeals] Montpellier, 22 Feb. 2000, RJS 9 -10 / 2000, No. 1042 (P. Adam, *Journal of Labor Law*, April 2007) (ruling that what it characterized as requests for kisses, external encounters, and insistent glances on the part of a co-worker to an employee did not constitute sexual harassment, but instead were “a simple indelicate attempt of seduction”).

43. See Cour de cassation [Cass.] [supreme court for judicial matters] crim., Jan. 19, 2005, No. 04-83443 (unpublished).

44. See Cour de cassation [Cass.] [supreme court for judicial matters] soc., Jan. 28, 2014, No. 12-20497 (unpublished).

45. See *id.*

her.⁴⁶ Rather than finding the co-worker's conduct to be "seduction," the court instead recognized it as harassment.⁴⁷

Similarly, in a case arising after the enactment of the new prohibition on sexual harassment, decided by the criminal division of the Court of Cassation, but arising in the employment context, the court held that a supervisor's conduct toward two female subordinates constituted sexual harassment.⁴⁸ The conduct included repeatedly asking them to have a drink after work, despite their refusals, telling one that she had beautiful eyes and offering to "warm her up" when she had been in a cold room, challenging the indications of the subordinates that they had boyfriends, and sending text messages to them.⁴⁹ The Court of Cassation indicated that the supervisor's conduct—making explicit and implicit proposals of a sexual nature to his professional subordinates, even if he underestimated the effect of his acts—placed those subordinates in an "intimidating, hostile and offensive situation" and, therefore, the court of appeals had made an "exact application" of the Penal Code prohibition of sexual harassment.⁵⁰

Workplace conduct consisting of explicit or implicit sexual proposals, as well as conduct consisting of sexual touching,⁵¹

46. *See id.*

47. *See id.* In another case arising before the 2012 enactment but decided after it, the social division of the Court of Cassation held that the court of appeals had erred in dismissing an employee's claim of sexual harassment based on her supervisor sending her text messages indicating his desire for, among other things, "a sweet day with lots of kisses on her velvet lips"; the employer had argued that the messages were romantic and not indicative of sexual harassment, and the court of appeals had held that the messages were unlikely to harm her dignity. Cour de cassation [Cass.] [supreme court for judicial matters] soc., Feb. 12, 2014, No. 12-26652 (unpublished). In the original French: "[U]ne douce journée avec plein de baisers sur tes lèvres de velours."

48. *See* Cour de cassation [Cass.] [supreme court for judicial matters] crim., Nov. 18, 2015, Bull. Crim., No. 14-85591.

49. *Id.*

50. *Id.*

51. *See* Cour de cassation [Cass.] [supreme court for judicial matters] soc., Mar. 14, 2018, No. 14-19635 (unpublished) (upholding award of damages of 5,000 euros for sexual harassment based on claim, under prior version of art. L. 1153-1, that supervisor touched the claimant in a sexual manner, including on her breasts, hips, and buttocks, and asked her questions about intimate aspects of her private life); *see also* Cour de cassation [Cass.] [supreme court for judicial matters]

however, could fit squarely within the prior statutory prohibition against coerced sexual conduct. Accordingly, those cases do not necessarily establish that the new, broader definition of sexual harassment is being internalized by the courts. Other cases, discussed below, however, do suggest that the courts are finding workplace conduct to constitute sexual harassment even when that conduct is not easily characterized as coerced sexual conduct but instead falls within the definition of harassment added by the 2012 enactment.

The social division of the Court of Appeals of Orléans found the existence of sexual harassment in the context of a working environment in which sexual jokes were told and suggestive photographs and videos of women were displayed on the workplace computers of a newspaper.⁵² The court noted that “vulgar and salacious” language was commonly used, including terms particularly offensive to women.⁵³ The court expressly found that sexual harassment could exist based on an environment to which an employee is exposed, even if she is not targeted by the harassing conduct.⁵⁴ The court rejected the employer’s argument that the claimant was intolerant and hard to live with; the court noted that “what some people find humorous and not to infringe upon dignity can be harmful and humiliating for others, especially with regard to sexual jokes directed at female colleagues.”⁵⁵ The court of

crim., Apr. 26, 2017, No. 16-83934 (unpublished) (upholding conviction and suspended sentence of supervisor for sexual harassment of female subordinate whose neck he grabbed in order to simulate forced fellatio).

52. Cour d’appel [CA] [regional courts of appeal] Orléans, soc., Feb. 7, 2017, No. 15/02566 (unpublished); *see* Conseil de Prud’hommes [labor tribunal] Tours, July 1, 2015, R.G.N° F 13/00966 (labor tribunal decision appealed to Court of Appeals of Orléans).

53. Cour d’appel [CA] [regional courts of appeal] Orléans, soc., Feb. 7, 2017, No. 15/02566 (unpublished).

54. *See id.* In the original French: “Le harcèlement sexuel peut consister en un harcèlement environnemental ou d’ambiance, où, sans être directement visée, la victime subit les provocations et blagues obscènes ou vulgaires qui lui deviennent insupportables.”

55. *Id.* In the original French: “Ce que certains individus trouvent humoristique et ne portant pas atteinte à la dignité peut être blessant et humiliant pour d’autres et notamment en ce qui concerne les plaisanteries à connotation sexuelles dirigées à l’encontre des collègues de sexe féminin.”

appeals upheld an award of 10,000 euros based on the harassment to which the claimant was subjected.⁵⁶

Similarly, in another case, the social division of the Court of Cassation rejected the conclusion of the court of appeals that a male employee, who had sent a detailed pornographic message to a female co-worker about performing and receiving oral sex, after she had rebuffed his prior advances, had not committed sexual harassment.⁵⁷ The Court of Cassation apparently accepted the employer's contention that the male employee's conduct met the standard of harming one's dignity and creating a hostile situation in that the "indecent and obscene remarks that he had addressed to the employee were likely to affect her modesty and her dignity in her professional life."⁵⁸ The court noted that the male employee's conduct was insulting and degrading and had a very detrimental effect on the female co-worker, to whom it was addressed.⁵⁹

In another case, the social division of the Court of Cassation rejected the lower court's conclusion that a female employee had not established the existence of sexual harassment.⁶⁰ The lower court had rejected the employee's complaints against her male supervisor.⁶¹ The conduct complained of included his harsh treatment of female employees, his use of sexist and coarse language when speaking with his male colleagues, and his act of urinating in front of the female employee.⁶² The court of appeals had concluded that the conduct did not constitute repeated sexual remarks or conduct creating a harm to dignity or a hostile or offensive situation.⁶³ However, the Court of Cassation concluded that the court of appeals had erred in viewing each incident

56. *See id.*

57. *See* Cour de cassation [Cass.] [supreme court for judicial matters] soc., July 13, 2017, 16-12493.

58. *Id.* In the original French: "[D]es propos indécents et obscènes qu'il avait adressés à la salariée lesquels étaient de nature à affecter sa pudeur et sa dignité dans la vie professionnelle."

59. *See id.*

60. *See* Cour de cassation [Cass.] [supreme court for judicial matters] soc., Sept. 28, 2016, No. 15-16805.

61. *Id.*

62. *Id.*

63. *See id.*

separately rather than as a whole, as it was required to do.⁶⁴ Accordingly, the Court of Cassation indicated that the case would have to be reconsidered.⁶⁵

In a recent case, the criminal division of the Court of Cassation upheld the fine and six months suspended sentence against a supervisor for sexual harassment of a female subordinate.⁶⁶ Among the acts complained of included the placement of articles of a sexual nature on her desk, as well as sexual remarks, gestures, propositions, and invitations.⁶⁷ The Court of Cassation held that these repeated sexually offensive behaviors were intended to coerce sexual conduct and harmed the victim's dignity because of its offensive and degrading nature.⁶⁸ As a result, the court ruled that the conduct constituted sexual harassment under both prongs of the Penal Code's definition.⁶⁹

The criminal division of the Court of Cassation found the Penal Code's prohibition on sexual harassment to have been violated in a case in which a supervisor made sexual comments and sexual proposals to four female subordinates;⁷⁰ one of the women submitted to his repeated demands because of her vulnerability caused by a personal situation, resulting in her claim for sexual

64. *See id.*

65. *See id.* At least some of the conduct in the case appears to have occurred before the effective date of the 2012 Labor Code's prohibition of sexual harassment, although the female employee's dismissal occurred after that date. However, it appears that both the court of appeals and the Court of Cassation were applying the 2012 provisions of the Labor Code.

In another case in which all of the conduct occurred before the effective date of the new statute, the social division of the Court of Cassation rejected the conclusion of the court of appeals that that an employee was not discharged for serious misconduct, when he asked four female trainees intimate questions about their personal life and commented that it would be good when "we sleep together"; without expressly invoking the 2012 version of the Labor Code provision, the Court of Cassation rejected the court of appeal's conclusion that the conduct was not a deliberate attack on the dignity of the women. Cour de cassation [Cass.] [supreme court for judicial matters], soc., Dec. 3, 2014, No. 13-22151.

66. *See* Cour de cassation [Cass.] [supreme court for judicial matters] crim., Dec. 13, 2017, No. 17-80563.

67. *See id.*

68. *See id.*

69. *See id.*

70. Cour de Cassation [Cass.] [supreme court for judicial matters], crim., March 7, 2018, No. 17-80449.

assault and rape.⁷¹ The conduct included the supervisor's crude comments about the women's bodies and dress, his request that one of them change her clothing and wear thongs, his pulling at the bodice of one of the woman revealing her bra, and his comments to the women about spanking.⁷² The Court apparently accepted the claimants' contention that the conduct harmed their dignity because of its degrading and humiliating nature and that the sexually suggestive words and conduct, directed at those over whom he exercised hierarchical authority, placed his subordinates in an objectively intimidating, hostile, or offensive situation.⁷³ The Court rejected the supervisor's attempts to trivialize his behavior or dismiss it as a joke or as a management technique.⁷⁴

Courts deciding cases under the new sexual harassment provisions also seem to be recognizing that the harm caused by sexually harassing conduct is not only emotional and dignitary harm, but also harm to the employment opportunities of those subjected to the conduct. In a case decided by the social division of the Court of Appeals of Basse-Terre, a female employee made a complaint of sexual harassment based on the actions of her supervisor in which he pulled her hair in order to forcibly kiss her and repeatedly sent text messages indicating his interest in meeting her socially and in establishing an intimate relationship with her.⁷⁵ She indicated that she was forced to submit to some of this behavior because of her probationary status.⁷⁶ She ultimately made a complaint to her employer, who did not take action on her complaint.⁷⁷ The court of appeals held that she had established the existence of sexual harassment and noted that she had been harmed not only psychologically, but that she had also suffered harm with respect to her professional environment, in part because she was isolated at work by close colleagues of her harasser and

71. *Id.*

72. *Id.*

73. *Id.*

74. *See id.*

75. Cour d'appel [CA] [regional court of appeal] Basse-Terre, soc., Sept. 25, 2017, 16/00727.

76. *Id.*

77. *Id.*

because work was taken away from her after her complaint.⁷⁸ The court of appeals awarded her damages not only based on lost wages and termination of her employment contract, but also 25,000 euros for the damages caused by the harassment that she suffered, which the court found particularly serious not only because of the duration of the harassment, but because of the lack of recognition of the professional skills that she contributed to the organization.⁷⁹

These cases suggest that both the courts of appeals and the Court of Cassation are altering their views of the type of conduct that constitutes actionable sexual harassment in direct reliance on the broader definition of sexual harassment contained in the current prohibitions of sexual harassment in the Labor and Penal Codes. The courts also seem to be recognizing both the psychological and professional harms caused by sexual harassment in the workplace.

C. Reliance on Concepts of Dignity and Discrimination

In addition to recognizing the broader definition of sexual harassment contained in the new definition of sexual harassment added by the 2012 enactment, there are also indications that the French courts are relying on concepts of both dignity and discrimination in discussing issues concerning sexual harassment. Members of the French political process, including members of the government and the legislature, have also relied on concepts of both dignity and discrimination in their consideration of legislation relevant to sexual harassment and similar types of conduct.⁸⁰

Some of the cases being decided by the French courts under the expanded prohibitions of sexual harassment enacted into the Penal and Labor Codes in 2012 involve an express invocation of the concept of dignity, by either the litigants, the lower courts, or the Court of Cassation. As discussed below, however, some of those cases seem to be relying not only on conceptions of dignity, but also

78. *See id.*

79. *Id.*

80. *See* discussion *infra* at text accompanying notes 90–97.

on conceptions of equality, in determining whether the challenged conduct constitutes prohibited sexual harassment.

In a recent decision by the Court of Appeals of Orléans,⁸¹ the court found that an offensive workplace environment was created by conduct consisting of sexual jokes, suggestive photographs and videos of women displayed in the workplace, and vulgar language, including terms particularly offensive to women.⁸² In reaching that conclusion, the court focused not only on the humiliating nature of the conduct, but also noted that the conduct consisted of suggestive photographs of women, as well as the fact that vulgar terms and jokes were directed at women.⁸³ Accordingly, the court's conclusion that sexual harassment had been established seemed to have been based at least in part on the fact that the workplace conduct, even if not directed at the claimant, had a more serious effect on her and other women.⁸⁴ This recognition would seem to rely on the underlying notion of the European Directives on sexual harassment that sexually harassing conduct is discriminatory based on its "purpose or effect"—that is, because the conduct either targets women or has a more significant effect on them.⁸⁵

A decision by the criminal division of the Court of Cassation also seemed to rely on notions of discrimination against women in upholding the conviction of a supervisor for sexual harassment against his female subordinate.⁸⁶ In two instances, the supervisor

81. See Cour d'appel [CA] [regional court of appeals] Orléans, soc., February 7, 2017, No. 15/02566; see also Conseil de Prud'hommes [labor tribunal], Tours, July 1, 2015, No. R.G. N° F 13/00966 (appealing the labor tribunal decision to the Court of Appeals of Orléans).

82. See Cour d'appel [CA] [regional court of appeals of Orléans, soc., Feb. 7, 2017, 15/02566.

83. See *id.*

84. See *id.*

85. Cf. Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the *Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation* (Recast), 2006 O.J. (L 204) 2. The Directive notes that "[h]arassment and sexual harassment are contrary to the principle of equal treatment between men and women and constitute discrimination on grounds of sex for the purposes of this Directive" and define prohibited harassment as conduct that the "purpose or effect" of harming dignity or creating a hostile environment. *Id.*

86. See Cour de cassation [Cass.] [supreme court for judicial matters] crim., Apr. 26, 2017, Bull. crim., No. 16-83934. The defendant was also convicted of

simulated forced fellatio by grabbing the back of her neck and immobilizing her.⁸⁷ There was also evidence that the supervisor generally engaged in sexist behavior toward the women with whom he worked.⁸⁸ In concluding that this conduct constituted sexual harassment, the court appears to have accepted the contention that:

[T]here was, moreover, no doubt that the acts thus described had undermined the dignity of the complainant because of their degrading and humiliating character, by reducing her, because she was a woman, to that still widespread archetype of the object of the sexual desire of men; that these acts had also created an intimidating and hostile situation, because she was also confronted with the insidious maneuvers of the defendant, seeking to gain power over her and to denigrate her in the eyes of their colleagues.⁸⁹

This language notes the harm to dignity caused by the humiliating and degrading act of simulated, coerced oral sex, but also that the fact that the harassing conduct seems to have been directed at her because she was a woman, reducing her to a sex object on the basis of her gender and denigrating her in her professional standing. This analysis suggests the discriminatory nature of the supervisor's conduct directed at his female subordinates.

Participants in the French legislative process have also invoked issues of equality as well as dignity in their discussions of issues of sexual harassment. The report of the National Assembly's Commission on Constitutional Laws, Legislation, and the General

sexual assault against another employee for groping her buttocks.

87. *Id.*

88. *See id.*

89. *Id.* In the original French:

[I]l ne faisait par ailleurs aucun doute que les gestes ainsi décrits avaient porté atteinte à la dignité de la plaignante en raison de leur caractère dégradant et humiliant, en la réduisant parce qu'elle était une femme à cet archétype encore trop répandu d'objet du désir sexuel des hommes; que ces actes avaient également créé à son détriment une situation intimidante et hostile, puisqu'elle était en outre confrontée aux manœuvres insidieuses du prévenu visant à prendre un ascendant sur elle et à la dénigrer aux yeux de leurs collègues.

Administration on the Project of Law Reinforcing the Fight Against Sexual and Gender-Based Violence⁹⁰ indicated that sexual and gender-based violence, including sexual harassment, violates fundamental rights, including both dignity and equality, with sexual harassment in particular harming the social and professional integration of its victims.⁹¹ In the discussions leading to that report, the Secretary of State in charge of equality between women and men, in introducing the bill to the Commission on Laws, noted that “real equality between women and men will not be possible as long as gender-based and sexual violence continues to be so widespread.”⁹² Other participants in that discussion also

90. A fuller discussion of this legislative process is discussed *infra* at text accompanying notes 110–41.

91. See ASSEMBLÉE Nationale [National Assembly], N° 938, Rapport fait au nom de la commission des lois constitutionnelles, de la législation et de l’administration générale de la République, sur le projet de loi renforçant la lutte contre les violences sexuelles et sexistes [No. 938, Information Report in the Name of the Commission of Constitutional Laws, Legislation, and General Administration of the Republic, on the Project of Law Reinforcing the Fight Against Sexual and Gender-Based Violence] 13–14 (May 10, 2018) (“Sexual and gender-based violence constitutes a violation of the fundamental rights of victims, including respect for physical integrity, dignity or equality, and affects, more generally, society as a whole by destabilizing the foundations of the family and the rules of common life.”); *id.* (“This is true of sexual harassment, the potential consequences of which are not only psychological. It also has an impact on the present and future social and professional integration of victims, by keeping them away from sectors of activity in which they are harassed or fear that they will be harassed.”). In the original French:

Les violences sexuelles et sexistes constituent une violation des droits fondamentaux des victimes, parmi lesquels le respect de l’intégrité physique, la dignité ou l’égalité, et affectant, plus généralement, la société dans son ensemble en déstabilisant les fondements de la famille et les règles de vie commune.

Il en va ainsi du harcèlement sexuel, dont les conséquences potentielles ne sont pas seulement psychologiques. Il a également un impact sur l’insertion socio-professionnelle présente et future des victimes, en les maintenant éloignées de secteurs d’activité dans lesquels elles ont subi des faits de harcèlement ou craignent de les subir.

92. *Id.* at 25 (Mme Marlène Schiappa). In the original French: “[L]’égalité réelle entre les femmes et les hommes ne sera possible tant que continueront de s’exercer aussi massivement des violences sexistes et sexuelles.”

indicated that sexual and gender-based violence implicated issues of equality between men and women.⁹³

Discussion of the bill in the legislative sessions also invoked notions of equality as well as dignity. In the National Assembly, one of the proponents of the bill indicated that the fight against all forms of sexual and gender-based violence was a “noble cause, that of equality and dignity.”⁹⁴ A speaker in the National Assembly who suggested that the bill as proposed did not go far enough also equated the fight against sexual and gender-based violence with the “global fight against inequality between men and women.”⁹⁵ In the Senate, one of the speakers in support of the bill indicated that “violence against women affects the fundamental rights of equality and dignity.”⁹⁶ In the final discussion of the bill in the National Assembly, notions of both equality and dignity were invoked in

93. *See id.* at 36 (statement of M. Erwan Balanant) (“[G]ender-based and sexual violence contributes to reinforcing inequalities between women and men.”). In the original French: “[L]es violences sexistes et sexuelles contribuent à renforcer les inégalités entre les femmes et les hommes.”

94. ASSEMBLEE NATIONALE [NATIONAL ASSEMBLY], SESSION ORDINAIRE DE 2017-2018, SEANCE DU LUNDI 14 MAI 2018 [ORDINARY SESSION OF 2017-2018, MEETING OF MONDAY, MAY 14, 2018], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], May 15, 2018, p. 3700-01 (Mme Alexandra Louis). In the original French: “[C]ette noble cause, celle de l’égalité et de la dignité.”

95. *Id.* at 3721 (Mme Elsa Faucillon). In the original French: “Je veux dire ici toute notre détermination à continuer le combat global contre les inégalités entre les hommes et les femmes, contre les violences sexistes et sexuelles.” Other speakers in the National Assembly made similar comments. *See* ASSEMBLEE NATIONALE [NATIONAL ASSEMBLY], SESSION ORDINAIRE DE 2017-2018, SEANCES DU MERCREDI 16 MAI 2018 [ORDINARY SESSION OF 2017-2018, MEETING OF WEDNESDAY, MAY 16, 2018] JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], May 17, 2018, p. 3892 (Mme Clémentin Austain) (“To ensure equality between men and women, to combat gender-based and sexual violence, we must be able to move from formal equality, proclaimed by law, to real equality.”). In the original French: “Pour assurer l’égalité entre les hommes et les femmes, pour lutter contre les violences sexistes et sexuelles, nous devons nous montrer capables de passer de l’égalité formelle, proclamée par la loi, à l’égalité réelle.”

96. SENAT [SENATE], SESSION EXTRAORDINAIRE DE 2017-2018, SEANCE DU MERCREDI 4 JUILLET 2018 [EXTRAORDINARY SESSION OF 2017-2018, MEETING OF WEDNESDAY, JULY 4, 2018], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [OFFICIAL GAZETTE OF FRANCE], July 5, 2018, p. 9112 (M. Guillaume Chevrollier). In the original French: “Les violences faites aux femmes touchent aux droits fondamentaux que sont l’égalité et la dignité.”

support of the bill and its prohibitions of sexual and gender-based violence, including its provisions expanding the definition of sexual harassment.⁹⁷

IV. Legislative Developments with Implications for French Sexual Harassment Law

Additional legislative developments since the 2012 enactment of the prohibitions on sexual harassment in the French Labor and Penal Codes seem to have implications for the way in which sexual harassment is thought about in France, including whether the underlying foundation of the prohibitions of sexual harassment are considered to be not only issues of dignity, but also issues of discrimination.

A. Implications for Sexual Harassment Law of the New Prohibition Against “Sexist Behavior”

In August 2015, France adopted a new statutory prohibition against sexist behavior into its Labor Code, which provides that: “No one will be required to submit to sexist behavior, defined as all behavior linked to the sex of a person, having the object or the effect of harming his or her dignity or creating an intimidating, hostile, degrading, humiliating, or offensive environment.”⁹⁸ The

97. See ASSEMBLÉE NATIONALE [NATIONAL ASSEMBLY], PREMIÈRE SESSION EXTRAORDINAIRE DE 2017-2018, SÉANCES DU MERCREDI 1 AOÛT 2018 [FIRST EXTRAORDINARY SESSION OF 2017-2018, MEETING OF WEDNESDAY, AUGUST 1, 2018], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [OFFICIAL GAZETTE OF FRANCE], Aug. 2, 2018, p. 8480 (Mme. Marlène Schiappa) (thanking the deputies of the Assembly for their “important votes in favor of equality between women and men”). In the original French: “[P]our leur vote important en faveur de l’égalité entre les femmes et les hommes.” See also *id.* at 8477 (M. Erwan Balanant) (calling for a lowering of tolerance for all forms of sexism and noting that “it’s a question of dignity”). In the original French: “[J]e viens vous demander qu’on abaisse enfin le seuil de tolérance au sexisme sous toutes ses formes. C’est une question de dignité.”

98. CODE DU TRAVAIL [C. TRAV.] [LABOR CODE] art. L. 1142-2-1; see Loi 2015-994 du 17 août 2015 relative au dialogue social et à l’emploi [Law 2015-994 of August 17, 2015 relating to social dialogue and employment], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug.

stated purpose of this provision was to provide a definition of discriminatory harassment, at least with respect to sex, which was incorporated into French law to comply with the European Union Directive with respect to sexual harassment.⁹⁹ The adoption of this provision had been one of the recommendations of the Report of the Superior Council of Professional Equality between Women and Men, titled “Sexism in the World of Work,” which was issued in March 2015.¹⁰⁰ That report stated that sexism was contrary to notions of equality and indicated that the term “behavior” should be used rather than the term “harassment” because the French word *harcèlement* requires repeated conduct, which might not capture all sexist behavior.¹⁰¹

When this provision was proposed as an amendment, the stated purpose of the amendment was to “codify the notion of sexist behavior, defined as any act based on the sex of a person, as part

18, 2005, p. 14346. In the original French: “Nul ne doit subir d’agissement sexiste, défini comme tout agissement lié au sexe d’une personne, ayant pour objet ou pour effet de porter atteinte à sa dignité ou de créer un environnement intimidant, hostile, dégradant, humiliant ou offensant.”

99. See SENAT [SENATE], PROJET DE LOI DIALOGUE SOCIAL ET EMPLOI [PROJECT OF LAW OF SOCIAL DIALOGUE AND EMPLOYMENT], SESSION ORDINAIRE DE 2014-2015, COMPTE RENDU INTEGRAL, SEANCE DU MERCREDI 24 JUIN 2015 [ORDINARY SESSION OF 2014-2015, FULL REPORT, MEETING OF WEDNESDAY, JUNE 24, 2015], p. 6779. One of proponents of the amendment described its purpose as follows:

In reality, it is proposed to codify the “acts by reason of sex” contained in article 1 of the law of May 27, 2008, which has never been codified, under the term “sexist behavior,” and integrate it into the Labor Code in the section devoted to professional equality between women and men, for reasons of legibility.

In the original French:

En réalité, il est proposé de codifier la disposition relative à “l’agissement à raison du sexe” contenue dans l’article 1er de la loi du 27 mai 2008, qui n’a jamais été codifié, sous la dénomination d’ “agissement sexiste,” et donc de l’intégrer au code du travail dans la partie dédiée à l’égalité professionnelle entre les femmes et les hommes, pour des raisons de lisibilité.

100. See LE SEXISME DANS LE MONDE DU TRAVAIL, ENTRE DENI ET REALITE, RAPPORT DU CONSEIL SUPERIEUR DE L’EGALITE ENTRE LES FEMMES ET LES HOMMES [SEXISM IN THE WORLD OF WORK, BETWEEN DENIAL AND REALITY, REPORT OF THE SUPERIOR COUNCIL FOR EQUALITY BETWEEN WOMEN AND MEN], 2015-01, pp. 82–84 (Mar. 6, 2015).

101. See *id.* at 82.

of the Labor Code devoted to professional equality.”¹⁰² The proponents of the amendment presented the issue of sexist behavior as a form of discrimination, but also noted that some sexist acts were already prohibited by the law, including in the existing provisions on sexual harassment.¹⁰³ The government opposed the amendment, indicating that while there was a need to combat sexism in all of its forms, the government felt that this amendment, addressing an issue of discrimination, did not sufficiently define the prohibited conduct.¹⁰⁴ The amendment was adopted over the objection of the government.¹⁰⁵ The next year, in a law adopted in August 2016, the employer’s obligation of prevention, which already applied to sexual harassment, was also extended to the prohibition on sexist behavior.¹⁰⁶

The enactment of this prohibition on sexist behavior in the context of employment, and the equation of sexist behavior with

102. SENAT [SENATE], PROJET DE LOI DIALOGUE SOCIAL ET EMPLOI [PROJECT OF LAW OF SOCIAL DIALOG AND EMPLOYMENT], AMENDEMENTS 101, 255, SESSION ORDINAIRE DE 2014-2015, COMPTE RENDU INTEGRAL, SEANCE DU MERCREDI 24 JUIN 2015 [AMENDMENTS 101, 255, ORDINARY SESSION OF 2014-2015, FULL REPORT, MEETING OF WEDNESDAY, JUNE 24, 2015], PP. 6779–80.

103. ASSEMBLEE NATIONALE [NATIONAL ASSEMBLY], N° 2774, RAPPORT D’INFORMATION FAIT AU NOM DE LA DELEGATION AUX DROITS DES FEMMES ET A L’EGALITE DES CHANCES ENTRE LES HOMMES ET LES FEMMES, SUR LE PROJET DE LOI RELATIF AU DIALOGUE SOCIAL ET A L’EMPLOI [NO. 2774, INFORMATION REPORT IN THE NAME OF THE DELEGATION FOR WOMEN’S RIGHTS AND EQUAL OPPORTUNITIES FOR MEN AND WOMEN, ON THE PROJECT OF LAW RELATIVE TO SOCIAL DIALOGUE AND EMPLOYMENT] 91–104 (May 19, 2015).

104. *See id.*

105. SENAT [SENATE], PROJET DE LOI DIALOGUE SOCIAL ET EMPLOI [PROJECT OF LAW OF SOCIAL DIALOG AND EMPLOYMENT], AMENDEMENTS 101, 255, SESSION ORDINAIRE DE 2014-2015, COMPTE RENDU INTEGRAL, SEANCE DU MERCREDI 24 JUIN 2015 [AMENDMENTS 101, 255, ORDINARY SESSION OF 2014-2015, FULL REPORT, MEETING OF WEDNESDAY, JUNE 24, 2015], PP. 6779–80.

106. Loi 2016-1088 du 8 août 2016, art. 5, relative au travail, á la modernisation du dialogue social et á la sécurisation des parcours professionnels [Law 2016-1088 of August 8, 2016, article 5, Relative to Labor, Modernization of Social Dialogue and the Securing of Career Paths], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 9, 2016, No. 0184. The employer’s duty of prevention is codified in CODE DU TRAVAIL [C. TRAV.] [LABOR CODE] art. L. 4121-2. The employer’s duty of prevention requires an employer to take steps to prevent sexual harassment and sexist behavior, and the employer can violate that duty by failing to take those steps or to prevent harassment or sexist behavior from occurring.

discrimination, has interesting implications for the conceptualization of sexual harassment in the context of the workplace.

At one level, the felt need for a prohibition on sexist behavior separate from the prohibition on sexual harassment seems to suggest that at least some, and perhaps much, sexist behavior might not be captured in the prohibition on sexual harassment. Otherwise, presumably, there would have been no need for the separate prohibition of sexist behavior.

To the extent that sexist behavior and sexual harassment are separate types of conduct, one might inquire as to the distinguishing features of those types of conduct. The differences between the two types of conduct do not appear to be the effects of that conduct, because both types of conduct are defined as those that cause harm to dignity and that create a hostile or offensive environment or situation for an employee.¹⁰⁷ Instead, the differences between the two types of conduct appear to be whether the conduct is “sexual” in nature, as opposed to “sexist.”¹⁰⁸ In practice, it might be very difficult to determine in which category particular conduct belongs. For example, is the assumption on the part of a supervisor that young women hired into a company should comply with his sexual demands “sexist” conduct, “sexual” conduct, or both?

The recognition of those involved in the legislative process of enacting the prohibition against sexist behavior that some forms of sexist behavior likely fall within the prohibition on sexual harassment and the recognition that sexist behavior is a form of discrimination would seem to suggest that some forms of sexual harassment might be viewed as a form of discrimination. That is, to the extent that sexist behavior is a continuum, from the most serious forms of rape and sexual assault, to what the proponents

107. *Compare* CODE DU TRAVAIL [C. TRAV.] [LABOR CODE] art. L. 4121-2 (describing sexist acts as those that create a hostile or offensive environment), *with* CODE DU TRAVAIL [C. TRAV.] [LABOR CODE] art. L. 1153-1 (describing sexual harassment as conduct that creates a hostile or offensive situation).

108. *Compare* CODE DU TRAVAIL [C. TRAV.] [LABOR CODE] art. L. 4121-2 (discussing acts related to the sex of a person), *with* CODE DU TRAVAIL [CODE TRAV.] [LABOR CODE] art. L. 1153-1 (describing sexual harassment as repeated offensive sexual remarks or behaviors).

of the prohibition on sexist behavior termed “ordinary sexism,”¹⁰⁹ the differences between what is prohibited by the law on sexual harassment and the law on sexist behavior would appear to be a difference of degree rather than a difference in kind. That is, just as sexist behavior is a type of discrimination, sexual harassment might also be viewed as a type of discrimination.

B. Implications of Adoption of Law Against Sexual and Gender-Based Violence

A new law recently enacted in France further complicates the question of whether sexual harassment is beginning to be viewed in France as a form of discrimination. In August 2018, the French parliament adopted a new law against sexual and gender-based violence.¹¹⁰ That law, which extended the statute of limitations for sexual offenses against children and enacted a prohibition against street harassment,¹¹¹ also made changes to the Penal Code’s

109. See ASSEMBLÉE NATIONALE [NATIONAL ASSEMBLY], N° 2774, RAPPORT D’INFORMATION FAIT AU NOM DE LA DÉLÉGATION AUX DROITS DES FEMMES ET À L’ÉGALITÉ DES CHANCES ENTRE LES HOMMES ET LES FEMMES, SUR LE PROJET DE LOI RELATIF AU DIALOGUE SOCIAL ET À L’EMPLOI [No. 2774, INFORMATION REPORT BY THE DELEGATION FOR WOMEN’S RIGHTS AND EQUAL OPPORTUNITIES FOR MEN AND WOMEN, ON THE PROJECT OF LAW RELATIVE TO THE SOCIAL DIALOGUE AND EMPLOYMENT] 93–94 (May 19, 2015) (“Certain sexist acts are already referred to in our law, acts of sexual aggression, moral harassment, sexual harassment, and discrimination of all types. However, the notion of sexism, a fortiori ordinary sexism, has not found a place in legal norms. Sexism as such is not a legal category and the labor law or the legal provisions applicable in the context of work do not say anything about it.”). In the original French:

Certains actes sexistes sont d’ores et déjà visés dans notre droit, qu’il s’agisse de l’agression sexuelle, du harcèlement moral, du harcèlement sexuel, et des discriminations en tous genres. Toutefois, la notion de sexisme, a fortiori de sexisme ordinaire, n’a pas trouvé sa place dans les normes juridiques. Le sexisme en tant que tel n’est pas une catégorie juridique et le droit du travail ou les dispositions légales s’appliquant au contexte du travail n’en disent rien.

110. See Loi 2018-703 du 3 août 2018 renforçant la lutte contre les violences sexuelles et sexistes [Law 2018-703 of August 3, 2018 Reinforcing the Fight Against Sexual and Gender-Based Violence], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAIS [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 5, 2018, No. 0179.

111. See *id.* at art. 15. The prohibition against street harassment, called “sexual contempt,” prohibits “the fact of imposing on a person all words or

prohibition on sexual harassment. Added to Article 222–33 of the Penal Code was a provision to the effect that sexual harassment also occurs when words or behaviors are imposed on the same person by several persons, in a concerted manner, at the instigation of one person, or successively with the knowledge that the words or behaviors are being repeated.¹¹² The impact study by the government on the proposed legislation indicated that the purpose of this provision was to reach cyber harassment.¹¹³

behavior with a sexual or sexist connotation that is harmful to his or her dignity because of its degrading or humiliating character or that creates against him or her an intimidating, hostile, or offensive situation,” when that action does not otherwise violate specified existing provisions of the Penal Code relating to sexual violence. *Id.* In the original French:

Constitue un outrage sexiste le fait, hors les cas prévus aux articles 222-13, 222-32, 222-33 et 222-33-2-2, d'imposer à une personne tout propos ou comportement à connotation sexuelle ou sexiste qui soit porte atteinte à sa dignité en raison de son caractère dégradant ou humiliant, soit crée à son encontre une situation intimidante, hostile ou offensante.

This new offense was modeled after the Penal Code's prohibition on sexual harassment. *See* SÉNAT [SENATE], N° 574, RAPPORT D'INFORMATION FAI AU NOM DE LA DELEGATION AUX DROITS DES FEMMES ET À L'ÉGALITÉ DES CHANCES ENTRE LES HOMMES ET LES FEMMES SUR LE PROJET DE LOI RENFORÇANT LA LUTTE CONTRE LES VIOLENCES SEXUELLES ET SEXISTES [No. 574, INFORMATION REPORT MADE IN THE NAME OF THE DELEGATION OF WOMEN'S RIGHTS AND EQUAL OPPORTUNITY BETWEEN MEN AND WOMEN, ON THE PROJECT OF LAW REINFORCING THE FIGHT AGAINST SEXUAL AND GENDER-BASED VIOLENCE] 25 (June 14, 2018) (“The definition of sexual contempt was inspired by that of sexual harassment, with the difference that it does not require the repetition of facts implied by ambient harassment.”). In the original French: “[L]a définition de l'outrage sexiste s'inspire de celle du harcèlement sexuel, à la différence près qu'elle n'exige pas la répétition des faits que suppose le harcèlement dit d'ambiance.”

112. *See* Loi 2018-703 du 3 août 2018 renforçant la lutte contre les violences sexuelles et sexistes [Law 2018-703 of August 3, 2018 Reinforcing the Fight Against Sexual and Gender-Based Violence], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAIS [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 5, 2018, No. 0179, at art. 11. In the original French:

1° Lorsque ces propos ou comportements sont imposés à une même victime par plusieurs personnes, de manière concertée ou à l'instigation de l'une d'elles, alors même que chacune de ces personnes n'a pas agi de façon répétée; 2° Lorsque ces propos ou comportements sont imposés à une même victime, successivement, par plusieurs personnes qui, même en l'absence de concertation, savent que ces propos ou comportements caractérisent une répétition.

113. *See* ETUDE D'IMPACT [IMPACT STUDY], PROJET DE LOI RENFORÇANT LA LUTTE CONTRE LES VIOLENCES SEXUELLES ET SEXISTE [PROJECT OF LAW REINFORCING THE

Another change to Article 222-33 of the Penal Code was to add as an additional ground for increases to the penalties for violation of the statute when the conduct is committed using a public online communication service or an electronic or digital medium.¹¹⁴

Another change to the Penal Code's sexual harassment provision followed a circuitous route before being ultimately adopted. In the version of the bill initially adopted by the National Assembly, the words *ou sexiste* would have been added after the word *sexuelle* to Article 222-33, paragraph I of the Penal Code,¹¹⁵ so that the prohibition of sexual harassment in the Penal Code would prohibit not only words or behavior with a sexual connotation, but also words or behavior with a sexist or gender-based connotation, when that conduct had the purpose of undermining an individual's dignity or creating an intimidating, hostile, or offensive situation.¹¹⁶

FIGHT AGAINST SEXUAL AND GENDER-BASED VIOLENCE] 39-42 (March 19, 2018).

114. See Loi 2018-703 du 3 août 2018 renforçant la lutte contre les violences sexuelles et sexistes [Law 2018-703 of August 3, 2018 Reinforcing the Fight Against Sexual and Gender-Based Violence], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAIS [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 5, 2018, No. 0179, at art. 11. In the original French: "Par l'utilisation d'un service de communication au public en ligne ou par le biais d'un support numérique or électronique."

115. This language was added to the version of the bill approved by the National Assembly by Amendment 208, which was accepted by the government and adopted without discussion. ASSEMBLÉE NATIONALE [NATIONAL ASSEMBLY], SESSION ORDINAIRE DE 2017-2018, SÉANCES DU MERCREDI 16 MAI 2018 [ORDINARY SESSION OF 2017-2018, MEETING OF WEDNESDAY, MAY 16, 2018], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [OFFICIAL GAZETTE OF FRANCE], May 17, 2018. The amendment indicated that its purpose was to align the definition of sexual harassment in the Penal Code with the definition of the new crime of sexist contempt by adding the sexist character of the words and behavior likely to constitute sexual harassment. *Id.* In the original French: "Amendement de cohérence, visant à aligner, hors la répétition, la définition du harcèlement sexuel telle qu'elle figure à l'article 222-33 du code pénal et la définition de l'outrage sexiste créé par l'article 4, en ajoutant le caractère sexiste des propos et comportements susceptibles de constituer le harcèlement sexuel."

116. See ASSEMBLÉE NATIONALE [NATIONAL ASSEMBLY], PROJET DE LOI RENFORÇANT LA LUTTE CONTRE LES VIOLENCES SEXUELLES ET SEXISTES [PROJECT OF LAW REINFORCING THE FIGHT AGAINST SEXUAL AND GENDER-BASED VIOLENCE] (May 11, 2018), Text No. 115.

That language was in the version of the bill introduced in the Senate,¹¹⁷ but was removed by the Senate's Commission on Constitutional Laws, Legislation, Universal Suffrage, Rules and General Administration,¹¹⁸ for the stated purpose of avoiding confusion between the crime of sexual harassment and the newly created offense of sexist contempt; the contention was that the addition of the prohibition of sexist behavior in the sexual harassment provision resulted in a lack of clarity between the definitions of the two offenses.¹¹⁹ Amendments to reinstate that language were initially rejected by the Senate.¹²⁰ The version of the bill originally approved by the Senate did not contain that language.¹²¹ However, the Joint Mixed Commission, charged with resolving inconsistencies in bills between the National Assembly and the Senate, reinstated the language.¹²² The text of the Joint

117. See SENAT [SENATE], N° 487, PROJET DE LOI RENFORÇANT LA LUTTE CONTRE LES VIOLENCES SEXUELLES ET SEXISTES [NO. 487, PROJECT OF LAW REINFORCING THE FIGHT AGAINST SEXUAL AND GENDER-BASED VIOLENCE] (May 17, 2018).

118. See SENAT [SENATE], N° 590, PROJET DE LOI RENFORÇANT LA LUTTE CONTRE LES VIOLENCES SEXUELLES ET SEXISTES [NO. 590, PROJECT OF LAW REINFORCING THE FIGHT AGAINST SEXUAL AND GENDER-BASED VIOLENCE] TEXTE DE LA COMMISSION DES LOIS CONSTITUTIONNELLES, DE LEGISLATION, DU SUFFRAGE UNIVERSEL, DU REGLEMENT ET D'ADMINISTRATION GENERALE [TEXT OF THE COMMISSION OF CONSTITUTIONAL LAWS, LEGISLATION, UNIVERSAL SUFFRAGE, RULES AND GENERAL ADMINISTRATION] (June 20, 2018).

119. See AMENDEMENT COM-66 [AMENDMENT COM-66], PROJET DE LOI LA LUTTE CONTRE LES VIOLENCES SEXUELLES ET SEXISTE, [PROJECT OF LAW OF THE FIGHT AGAINST SEXUAL AND GENDER-BASED VIOLENCE] (June 18, 2018); see also ASSEMBLEE NATIONALE [NATIONAL ASSEMBLY], N° 589, RAPPORT FAIT AU NOM DE LA COMMISSION DES LOIS CONSTITUTIONNELLES, DE LEGISLATION, DU SUFFRAGE UNIVERSEL, DU REGLEMENT ET D'ADMINISTRATION GENERALE [NO. 589, REPORT MADE IN THE NAME OF THE COMMISSION ON CONSTITUTIONAL LAWS, LEGISLATION, UNIVERSAL SUFFRAGE, RULES, AND GENERAL ADMINISTRATION] 54–55, 97–98 (June 20, 2018).

120. See SENAT [SENATE], PROJET DE LOI LUTTE CONTRE LES VIOLENCES SEXUELLES ET SEXISTES [PROJECT OF LAW OF THE FIGHT AGAINST SEXUAL AND GENDER-BASED VIOLENCE] AMENDEMENTS 41, 114, 132 [AMENDMENTS 41, 114, 132], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 6, 2018, p. 9212.

121. See SENAT [SENATE], N° 134, PROJET DE LOI D'ORIENTATION ET DE PROGRAMMATION RENFORÇANT LA LUTTE CONTRE LES VIOLENCES SEXUELLES ET SEXISTES, [NO. 134, PROJECT OF LAW OF ORIENTATION AND PROGRAMMING REINFORCING THE FIGHT AGAINST SEXUAL AND GENDER-BASED VIOLENCE] (July 5, 2018).

122. ASSEMBLEE NATIONALE [NATIONAL ASSEMBLY], N° 1186 [No. 1186], SENAT

Mixed Commission was then adopted by the Senate¹²³ and the National Assembly¹²⁴ and promulgated into law.¹²⁵ The text of the prohibition on sexual harassment in the Penal Code now reads in relevant part:

I. Sexual harassment is the act of imposing on a person, in a repeated manner, words or behavior with a sexual or gender-based connotation, which undermine his or her dignity by reason of their degrading or humiliating nature or create against him or her an intimidating, hostile or offensive situation.¹²⁶

The legislative history of consideration of this provision reveals disagreements not only about the wisdom of including this

[SENATE], N° 686 [No. 686], RAPPORT FAIT AU NOM DE LA COMMISSION MIXTE PARITAIRE (1) CHARGÉE DE PROPOSER UN TEXTE SUR LES DISPOSITIONS RESTANT EN DISCUSSION DU PROJET DE LOI D'ORIENTATION ET DE PROGRAMMATION RENFORÇANT LA LUTTE CONTRE LES VIOLENCES SEXUELLES ET SEXISTES [REPORT MADE IN THE NAME OF THE JOINT MIXED COMMISSION (1) CHARGED WITH PROPOSING TEXT ON THE REMAINING PROVISIONS OF THE PROJECT OF LAW ON ORIENTATION AND PROGRAMMING REINFORCING THE FIGHT AGAINST SEXUAL AND GENDER-BASED VIOLENCE] (July 23, 2018); *see* ASSEMBLÉE NATIONALE [NATIONAL ASSEMBLY], N° 1186 [No. 1186], SENAT [SENATE], N° 687 [No. 687], PROJET DE LOI D'ORIENTATION ET DE PROGRAMMING RENFORÇANT LA LUTTE CONTRE LES VIOLENCES SEXUELLES ET SEXISTES [PROJECT OF LAW OF ORIENTATION AND PROGRAMMING REINFORCING THE FIGHT AGAINST SEXUAL AND GENDER-BASED VIOLENCE] (July 23, 2018) (adding the words *ou sexiste* in paragraph I of article 222-33 of the Penal Code).

123. SENAT [SENATE], N° 156, PROJET DE LOI RENFORÇANT LA LUTTE CONTRE LES VIOLENCES SEXUELLES ET SEXISTES [No. 156, PROJECT OF LAW REINFORCING THE FIGHT AGAINST SEXUAL AND GENDER-BASED VIOLENCE], (July 31, 2018). The project of law was adopted by the Senate by a vote of 252 to 0, with 90 abstentions.

124. ASSEMBLÉE NATIONALE [NATIONAL ASSEMBLY], N° 169, PROJET DE LOI RENFORÇANT LA LUTTE CONTRE LES VIOLENCES SEXUELLES ET SEXISTES [No. 169, PROJECT OF LAW REINFORCING THE FIGHT AGAINST SEXUAL AND GENDER-BASED VIOLENCE, NATIONAL ASSEMBLY] (August 1, 2018). The project of law was adopted by the National Assembly by a vote of 92 to 0, with 8 members abstaining.

125. *See* Loi 2018-703 du 3 août 2018 renforçant la lutte contre les violences sexuelles et sexistes [Law 2018-703 of August 3, 2018 Reinforcing the Fight Against Sexual and Gender-Based Violence], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAIS [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 5, 2018, No. 0179, at art. 11.

126. CODE PÉNAL [C. PÉN] [PENAL CODE] art. 222-33. In the original French: “Le harcèlement sexuel est le fait d'imposer à une personne, de façon répétée, des propos ou comportements à connotation sexuelle ou sexiste qui soit portent atteinte à sa dignité en raison de leur caractère dégradant ou humiliant, soit créent à son encontre une situation intimidante, hostile ou offensante.”

language in the bill, but also of its effects. In addition, there seems to have been disagreement generally about the equivalence, or lack of equivalence, between the categories of sexual and sexist behavior by participants in the legislative process.

Legislative discussions of the bill indicate that at least some legislators were equating sexual conduct and sexism. Erwan Balanant, the reporter on behalf of the delegation for women's rights and equal opportunities for men and women, noted: "Sexist and sexual violence is a massive phenomenon in our society, always marked by sexism. Gender stereotypes continue to assign women and men to predefined roles that legitimize now acceptable dominance relations."¹²⁷

Other participants in the legislative process, however, seemed to draw a distinction between sexual conduct and gender-based or sexist conduct. In response to a proposed amendment in the National Assembly to delete the word *sexistes* from the title of the bill,¹²⁸ both the reporter on the bill and the Secretary of State responsible for issues of equality between men and women opposed the amendment, indicating that some sexist behavior was not sexual and therefore sexual behavior and sexist behavior was not

127. ASSEMBLEE NATIONALE [NATIONAL ASSEMBLY], SESSION ORDINAIRE DE 2017-2018, SEANCES DU LUNDI 14 MAI 2018 [ORDINARY SESSION OF 2017-2018, MEETING OF MONDAY, MAY 14, 2018], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], May, 15, 2018, p. 3702 (M. Erwan Balanant). In the original French: "Les violences sexistes et sexuelles constituent un phénomène massif dans notre société, toujours empreinte de sexisme. Les stéréotypes sexués continuent d'assigner les femmes et les hommes à des rôles prédéfinis qui viennent légitimer des rapports de domination désormais acceptables."

128. ASSEMBLEE NATIONALE [NATIONAL ASSEMBLY], AMENDEMENT N° 187 [AMENDMENT NO. 187], PROJET DE LOI CONTRE LES VIOLENCES SEXUELLES ET SEXISTES [PROJECT OF LAW AGAINST SEXUAL AND GENDER-BASED VIOLENCE], SESSION ORDINAIRE DE 2017-2018, SEANCE DU MERCREDI 16 MAI 2018 [ORDINARY SESSION OF 2017-2018, MEETING OF WEDNESDAY, MAY 16, 2018], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], May 17, 2018, p. 3940. The stated purpose of the amendment was to avoid inequality between men and women, on the grounds that the fight against sexist violence concerns women more than men and therefore engenders ostracization of men. *See id.* In the original French: "Actuellement, la lutte contre les violences sexistes concerne davantage les femmes que les hommes. Cette dynamique engendre une certaine ostracisation de l'homme et rompt avec la volonté affichée par le gouvernement de promouvoir l'égalité entre les hommes et les femmes."

the same thing.¹²⁹ Similar comments were made when amendments were proposed, one by the government, in the Senate to restore the words *ou sexistes* to the proposed change to the Penal Code provision on sexual harassment, after that language had been removed by the Senate's Commission on Laws. The Secretary of the State, in presenting the amendment on behalf of the government, seemed to draw a distinction between sexual and sexist conduct, by noting that "harassment can be sexist without being sexual" as an important reason for adding the term *ou sexistes* back into the bill.¹³⁰ Later in the Senate discussion, the Secretary of State responsible for equality between men and women gave her definition of the term *le sexisme* as "the different and negative treatment of women as compared to men."¹³¹ These points can be understood to suggest not that there is no overlap between sexual and sexist behavior, but that there is not complete overlap, in that sexist behavior might consist of both sexual and non-sexual behavior.

Curiously, one of the opponents of the amendment in the Senate to restore the term *sexistes* to the bill also drew a distinction between sexual and sexist conduct as justification for that position. She indicated that it was necessary not to assimilate sexist and sexual behavior, which "bring together different realities," noting

129. ASSEMBLEE NATIONALE [NATIONAL ASSEMBLY], SESSION ORDINAIRE DE 2017-2018, SEANCE DU MERCREDI 16 MAI 2018 [ORDINARY SESSION OF 2017-2018, MEETING OF WEDNESDAY, MAY 16, 2018], JOURNAL OFFICIEL DE LA REPUBLIC FRANCAIS [J.O.] [OFFICIAL GAZETTE OF FRANCE], May 17, 2018, p. 3940 (Mme. Alexandra Louis) (quoting the reporter) ("Through this text, we want to attack sexual as well as sexist violence."). In the original French: "À travers le présent texte, nous souhaitons nous attaquer aux violences sexuelles aussi bien que sexistes." See also *id.* (Mme. Marlène Schiappa) (quoting the secretary of state responsible for issues of equity between men and women) ("In this case, there is gender-based violence that is not sexual; sexism is not the same thing."). In the original French: "En l'occurrence, il existe des violences sexistes qui ne sont pas sexuelles le sexisme, ce n'est pas la même chose."

130. SENAT [SENATE], SESSION EXTRAORDINAIRE DE 2017-2018, SEANCE DU JEUDI 5 JUILLET 2018 [EXTRAORDINARY SESSION OF 2017-2018, MEETING OF THURSDAY, JULY 5, 2018], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 6, 2018, p. 9211 (Mme. Marlène Schiappa). In the original French: "un harcèlement peut être sexiste sans être sexuel."

131. *Id.* at 9220 (Mme. Marlène Schiappa). In the original French: "Qu'est-ce que le sexisme? C'est traiter différemment et négativement une femme par rapport à un homme."

that there was a real difference between “the facts of sexual harassment and the facts of sexist harassment.”¹³² She also noted, however, the similarity between sexual harassment as currently defined in the law and the new offense of sexual contempt, which she said “meets the same definition as sexual harassment, but without the requirement of repetition, and which concerns sexist remarks.”¹³³

Other participants in the legislative process seem to have taken a more nuanced view of the distinction between sexual and sexist conduct. A proponent of one of the amendments to restore the words *ou sexistes* to the bill explained that the purpose of the amendment was to codify the reasoning of the decision of the Court of Appeals of Orléans,¹³⁴ which had indicated that the prohibition on sexual harassment could be violated by an environment in which obscene and vulgar comments and jokes were made, which she indicated was “not sexual harassment, but the creation of a sexist environment.”¹³⁵ The explanatory text of that amendment indicates that the jurisprudence under the existing sexual harassment prohibition in the Labor Code already included gender-based or sexist harassment and that the amendment was

132. *Id.* (Mme. Marie Mercier). In the original French: “En effet, il ne faut pas assimiler les propos sexuels et les propos sexistes, qui regroupent des réalités différentes et nous faisons une réelle différence entre les faits de harcèlement sexuel et les faits de harcèlement sexiste.”

133. *Id.* (Mme. Marie Mercier). In the original French: “Ces derniers doivent être réprimés par le délit d’outrage sexiste, qui répond à la même définition que le harcèlement sexuel, mais sans l’exigence de répétition, et qui concerne les propos à caractère sexiste.”

134. See discussion of this case *supra* notes 52–56 and accompanying text.

135. SENAT [SENATE], SESSION EXTRAORDINAIRE DE 2017-2018, SEANCE DU JEUDI 5 JUILLET 2018 [EXTRAORDINARY SESSION OF 2017-2018, MEETING OF THURSDAY, JULY 5, 2018], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 6, 2018, p. 9210 (Mme. Laurence Rossignol). In the original French:

Cet amendement vise, d’une part, à tirer les conséquences de la jurisprudence de la cour d’appel d’Orléans, qui a considéré que le harcèlement sexuel peut consister en un harcèlement environnemental ou d’ambiance. Sans être directement visée, la victime subit les provocations et blagues obscènes et vulgaires qui lui deviennent insupportables. Ce n’est pas du harcèlement sexuel, mais du harcèlement d’ambiance sexiste.

necessary to codify that decision and confirm that sexual harassment was a broad concept.¹³⁶

Another proponent of restoring the words *ou sexistes* into the provision of the bill on sexual harassment indicated that the purpose of this portion of the bill was to “reinforce” the definition of harassment and to expressly mention the sexist character of harassment.¹³⁷ To do that, she indicated that it was necessary to recognize that harassment of women consists of both sexual and sexist behavior.¹³⁸ In making that distinction, she seemed to suggest that the distinction between the two types of behavior was that sexual conduct was physical, while sexist behavior consisted of “hurtful and humiliating remarks that aim to belittle women

136. See SENAT [SENATE], PROJET DE LOI LA LUTTE CONTRE LES VIOLENCES SEXUELLES ET SEXISTE, AMENDEMENT N° 41, REJETE [PROJECT OF LAW ON THE FIGHT AGAINST SEXUAL AND GENDER-BASED VIOLENCE, AMENDMENT NO. 41, REJECTED], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 6, 2018, p. 9211 (“The case law confirms the existence of a gender-based environmental harassment. The modification contained in this amendment asserts that harassment is a broad concept, not limited to blackmail aimed at obtaining sexual favors, and is in the interests of the victims themselves.”). In the original French: “Cette jurisprudence confirme l’existence d’un harcèlement environnemental à caractère sexiste. La modification de rédaction portée par cet amendement affirme que le harcèlement est une notion large, ne devant pas être limitée au chantage visant à l’obtention de faveurs sexuelle, et ce dans l’intérêt même des victimes.”

The proponent of the amendment indicated that the amendment was necessary because the National Assembly had already codified the case law, but the Law Commission had removed the reference to sexist harassment. SENAT [SENATE], SESSION EXTRAORDINAIRE DE 2017-2018, SEANCE DU JEUDI 5 JUILLET 2018 [EXTRAORDINARY SESSION OF 2017-2018, MEETING OF THURSDAY, JULY 5, 2018], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 6, 2018, p. 9210 (Mme. Laurence Rossignol). In the original French: “L’Assemblée nationale avait déjà codifié cette jurisprudence, mais la commission des lois a supprimé la référence au harcèlement sexiste.”

137. See SENAT [SENATE], SESSION EXTRAORDINAIRE DE 2017-2018, SEANCE DU JEUDI 5 JUILLET 2018 [EXTRAORDINARY SESSION OF 2017-2018, MEETING OF THURSDAY, JULY 5, 2018], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 6, 2018, p. 9211 (Mme. Esther Benbassa). In the original French: “L’article 3 du présent projet de loi visait à renforcer la définition du harcèlement . . . Le présent amendement vise donc à rétablir dans son état initial le présent article 3, en mentionnant expressément le caractère sexiste que peut revêtir le harcèlement.”

138. *Id.* (Mme. Esther Benbassa).

because they are women.”¹³⁹ Her characterization, however, of the differences between the types of conduct seemed to draw disagreement, because when she indicated that a comment such as “you have beautiful buttocks” would be sexist, not sexual, her comment drew vocal disagreement from other participants in the debate.¹⁴⁰ Regardless of the accuracy of her assessment of the distinction between sexual and sexist harassment, her comments about “reinforcing” the definition of sexual harassment seemed to suggest the possibility that degrading and sexist words and conduct directed at women because of their gender might already be included within the prohibition on sexual harassment and that the statutory language should recognize that reality.

One objection voiced to including the words *ou sexistes* in the Penal Code’s prohibition against sexual harassment was a fear that the addition of sexist behaviors to the definition of sexual harassment would result in “downgrading” sexual harassment.¹⁴¹ The concern seemed to be not that sexist behavior was necessarily less serious than sexual behavior; instead, the concern was that the new offense of sexual contempt would be relied on for cases that might formerly have been prosecuted as sexual harassment, resulting in a lower penalty for such actions.

The legislative process concerning the Project of Law Reinforcing the Fight Against Sexual and Gender-Based Violence suggests some uncertainty about the understanding of the equivalence or divergence between sexual harassing conduct and sexist conduct. Some of the discussion during that process might be understood as suggesting that the two types of conduct are

139. *Id.* (Mme. Esther Benbassa). In the original French: “Les violences faites aux femmes ne sont pas seulement physiques, elles passent aussi par ces comportements machistes banalisés, ces remarques blessantes et humiliantes qui visent à rabaisser les femmes, car elles sont femmes.”

140. *Id.* (statement of Mme. Esther Benbassa). In the original French: “Quand on vous dit tous les jours devant la photocopieuse: ‘Tu as de belles fesses!’ ce n’est pas du harcèlement sexuel, mais du harcèlement sexiste. (Mme le rapporteur et M. le président de la commission le contestent).”

141. SENAT [SENATE], SESSION EXTRAORDINAIRE DE 2017-2018, SEANCE DU MERCREDI 4 JUILLET 2018 [EXTRAORDINARY SESSION OF 2017-2018, MEETING OF WEDNESDAY, JULY 4, 2018], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 5, 2018, p. 9095 (Mme. Maryse Carrère). In the original French: “[Q]ue l’on vienne ‘contraventionnaliser’ le harcèlement sexuel par l’ajout des comportements à connotation sexistes à la définition du harcèlement.”

different from each other, with only sexist behavior invoking issues of discriminatory treatment. However, that discussion might be better understood to suggest that there is a lack of exact overlap between sexual conduct and sexist conduct: Not all sexist conduct is sexual in nature, and presumably not all sexually harassing conduct is sexist. This understanding leaves room for considerable overlap between the two types of conduct, such that many forms of conduct that will be found to constitute sexual harassment will be considered sexist and, therefore, discriminatory in nature.

In any event, the current prohibition of sexual harassment in the Penal Code, although not in the Labor Code, expressly incorporates the prohibition on both sexual and sexist or gender-based conduct, when that conduct results in harm to dignity or creates an intimidating or hostile environment.¹⁴² This change to the Penal Code provision accordingly defines sexual harassment as including behavior that has been equated with discrimination, that is, sexist or gender-based conduct. Accordingly, it appears that at least the Penal Code prohibition on sexual harassment now expressly incorporates both concepts of dignity and discrimination within its statutory provisions.

V. The Effects of a Focus on Dignity Versus Discrimination

An important question raised by the conceptualization of sexual harassment as a violation of dignity or as a form of discrimination, or perhaps as both, are the effects of that underlying conceptualization. That conceptualization does seem to matter, both with respect to the recognition of the harm of that behavior and the remedies provided for violation of the prohibitions against sexual harassment.

The conceptualization of sexual harassment as a form of discrimination recognizes the collective nature of the harm imposed by harassment, in addition to the individual harms suffered by the women and the men subjected to it. In fact, in the early cases in the United States in which courts refused to

142. Compare CODE DU TRAVAIL [C. TRAV.] [LABOR CODE] art. L 1153-1 (referring to conduct with a sexual connotation) *with* CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 222-33 (referring with conduct with a sexual or gender-based connotation).

recognize sexual harassment as a violation of Title VII of the Civil Rights Act of 1964, it was because courts viewed the harassment—often in the form of sexual advances or coerced sexual conduct—to have been directed at an individual woman because she was sexually attractive to her male harasser, not because of her gender.¹⁴³ It was the recognition by other courts that individual women were subjected to harassment because they were women that allowed those courts to view the harassment as discrimination and therefore an act that imposed collective as well as individual harm.¹⁴⁴ A conceptualization of sexual harassment as a form of discrimination allows for a consideration of the extent to which sexual harassment is caused by and serves to perpetuate structural gender hierarchies.¹⁴⁵

In contrast, a conception of sexual harassment as a form of sexual violence seems to conceive of sexual harassment as an individual, rather than a collective, harm. Viewing sexual harassment through the lens of sexual violence suggests that the harm is an interpersonal one, a harm largely unconnected to the working life of women, even when the harassment occurs in the context of the workplace. This conception of sexual harassment seems to have been reflected in the fact that, at least until 2012, most cases of sexual harassment in France were pursued through the Penal Code, with criminal and civil penalties imposed on the harasser,¹⁴⁶ rather than through the Labor Code, under which the

143. For example, the district court in *Tompkins v. Pub. Serv. Elec. & Gas Co.*, 422 F. Supp. 553, 556 (D.N.J. 1976), *rev'd*, 568 F.2d 1004 (3d Cir. 1977), dismissed the claim of the female plaintiff alleging that she had been fired for resisting the sexual advances of her supervisor, holding that Title VII was intended to promote equal employment opportunity, not “to provide a federal tort remedy for what amounts to physical attack motivated by sexual desire on the part of the supervisor and which happened to occur in a corporate corridor rather than a back alley.”

144. See generally *Williams v. Saxbe*, 413 F. Supp. 654, 660–61 (D.D.C. 1978) (ruling of the district court that the female plaintiff who had alleged that she was discharged for refusing the sexual advances of her supervisor had stated a claim under Title VII because she alleged that the action of the supervisor was a condition of employment imposed on one sex but not the other), *rev'd on other grounds sub nom.*, *Williams v. Bell*, 587 F.2d 1240, 1241 (D.C. Cir. 1978).

145. See generally NUMHAUSER-HENNING, *supra* note 10, at 2 (discussing effects of conceptualization of sexual harassment as a form of discrimination).

146. In France, unlike in the United States, courts in criminal cases can

remedy would be more likely to address the workplace harms suffered by the women who had been harassed.¹⁴⁷

It is somewhat more difficult to determine how the conceptualization of sexual harassment as a violation of dignity might affect the view of sexual harassment as either a collective or an individual harm. At one level, a focus on dignity—asking whether sexual conduct violates or undermines one’s dignity because it is degrading or humiliating—seems to speak of a personal, individualized harm, focusing on the effects of the sexual conduct on the particular person who suffers from it.¹⁴⁸ On the other hand, the concept of dignity—particularly in the context of human rights—seems to also speak of a collective injury, such as that suffered by a group of people exposed to degradations.¹⁴⁹

The use of the French word *dignité* in the prohibitions on sexual harassment in the Penal and Labor Codes may suggest that the interests in protecting dignity may also extend to protecting interests in equality. Another portion of the Penal Code, titled “Attacks on the dignity of a person,” prohibits a number of actions, including discrimination, which would seem to invoke notions of

award civil damages to the victims of sexual harassment. See Abigail C. Saguy, *French and American Lawyers Define Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 604 (Catharine A. MacKinnon and Reva S. Siegel, eds. Yale University Press 2004).

147. In sexual harassment actions brought under the French Labor Code, if an employee can establish that she was sexually harassed and lost her employment as a result, her dismissal can be reversed and she can receive compensation in connection with that loss of employment. See, e.g., Cour d’appel [CA] [regional court of appeals] Basse-Terre, soc., September 25, 2017, N° de RG: 16/00727 (nullifying employee’s dismissal, ordering her reinstated, and ordering damages for lost wages, as well as damages for the harassment after concluding that she had established the existence of sexual harassment and violation of the employer’s duty of prevention).

148. See NUMHAUSER-HENNING, *supra* note 10, at 7 (characterizing a “dignity harm” approach to sexual harassment as focusing on individuals, as contrasted with the systemic approach of discrimination).

149. The term “dignity” came into use on an international scale after World War II, including in the U.N. Universal Declaration of Human Rights, in an apparent reaction to the atrocities of the Holocaust, which inflicted not only individual but collective harm. See L. Camille Hébert, *Divorcing Sexual Harassment from Sex: Lessons from the French*, 21 DUKE J. GENDER L. & POL’Y 1, 36 (Fall 2013).

equality.¹⁵⁰ Protection of equality interests through protection of dignity may also suggest that the harms sought to be protected against include collective harms, as well as individual harms.

The understanding of sexual harassment as involving the collective harm of discrimination as well as the individual, and perhaps also collective, harm of violation of dignity is important for the ways in which sexual harassment is understood and therefore the way in which the prohibitions against sexual harassment are enforced. A focus on dignity seems to suggest that the real harm of sexual harassment is the embarrassment and shame inflicted on the women who are subjected to it. If that is the real harm of sexual harassment, then the way to remedy that harm is presumably to stop the conduct, presumably by the censure of the harasser, and to attempt to compensate the victim for the emotional costs imposed by the harassment.

If sexual harassment is viewed as a discriminatory act, instead of or in addition to as a dignitary harm, the real harm of sexual harassment, particularly in the context of the workplace, may be seen as continuing the status of women as unequal participants in professional life, with the career and economic limitations that result. When women are treated as sexual objects in the workplace, subject to the sexual and sexist words and conduct by their superiors, co-workers, and perhaps even their subordinates, they are not just being embarrassed, but are being deprived of workplace opportunities. The remedy for this discriminatory conduct is not just to stop the harassment—although that is important—but to compensate women for the loss of workplace opportunities that they have suffered because of the harassment. In addition, the focus on harassment as an issue of discrimination may suggest that the remedy for the harassment is not just to adjust the situation between the parties, but to adjust the workplace itself, which allowed the harassment to occur. If harassment is viewed as a form of discrimination, the way to prevent and remedy the harm of sexual harassment in the

150. CODE PENAL [C. PEN.] [PENAL CODE] arts. 225-1 to 225-4. In the original French: “Des atteintes á la dignité de la personne.” Included in this chapter are provisions making it unlawful to discriminate on a number of grounds, including on the basis of sex, as well as to discriminate against a person who has refused to submit to sexual harassment.

workplace is to provide and promote equality between men and women in the workplace.

There are, however, other potential implications of a focus on discrimination rather than dignity as the underlying foundation of a claim of sexual harassment. To the extent that the focus is on intentional discrimination, then thinking about sexual harassment as a form of discrimination may cause courts to delve into the motivation of harassers, finding harassment to be unlawful only if motivated by unlawful considerations.¹⁵¹ On the other hand, a focus on dignity seems to implicate not the motivation behind the harassment, but the effect of the harassment on those subject to it.

But a focus on discrimination does not make inevitable an inquiry into the motivation of a harasser in order to determine if the sexually harassing conduct is unlawful. While intentional discrimination—called “disparate treatment” in the United States¹⁵² and “direct discrimination” in France¹⁵³ and the

151. This result has occurred in the United States, in which there are many cases finding sexually hostile and degrading conduct not to be unlawful because it was motivated not by sex or gender, but by other unprotected (or less clearly protected) characteristics of the person harassed, such as his or her personality, sexual orientation, or gender identity. See generally L. Camille Hébert, *Sexual Harassment as Discrimination “Because of . . . Sex: Have We Come Full Circle?, The Twenty-Fourth Annual Law Review Symposium, Sexual Harassment in the Workplace: Fifteen Years after Meritor Savings Bank*, 27 OHIO NORTHERN L. REV. 439 (2001).

152. The United States Supreme Court has defined “disparate treatment” as a situation in which “[t]he employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin” and for which “[p]roof of discriminatory motive is critical.” *Teamsters v. United States*, 431 U.S. 324, 335 n. 15 (1977).

153. In French law, “direct discrimination” is defined as situations in which a person “is treated less favorably than another” in a comparable situation based on protected characteristics. See Loi 2008-496 du 27 mai 2008 portant diverses dispositions d’adaptation du droit communautaire dans le domaine de la lutte contre les discriminations [Law 2008-496 of May 27, 2008 Laying Down Various Provisions for Adapting to Community Law in the Field of Combating Discrimination], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], May 28, 2008, p. 8801. In the original French:

Constitue une discrimination directe la situation dans laquelle, sur le fondement de son appartenance ou de sa non-appartenance, vraie ou supposée, à une ethnie ou une race, sa religion, ses convictions, son âge, son handicap, son orientation sexuelle ou son sexe, une personne

European Union¹⁵⁴—requires an inquiry into motivation, discrimination that is made unlawful because of its effects—called “disparate impact” in the United States¹⁵⁵ and “indirect discrimination” in France¹⁵⁶ and the European Union¹⁵⁷—requires no inquiry into motivation.

There is no reason that sexual harassment, even if conceptualized as a form of discrimination, necessarily will be considered a form of intentional discrimination requiring inquiry

est traitée de manière moins favorable qu'une autre ne l'est, ne l'a été ou ne l'aura été dans une situation comparable.

154. The European Union has defined “direct discrimination” as “where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation.” Council Directive 2006/54, 2006 O.J. (L 106) 1 (EC).

155. The Supreme Court in *Teamsters* defined “disparate impact” as claims involving “employment practices that are facially neutral in their treatment of different groups, but that in fact fall more harshly on one group than another and cannot be justified by business necessity,” and for which proof of discriminatory motive is not required.” *Teamsters*, 431 U.S. at 335 n. 15.

156. In French law, “indirect discrimination” is defined as

a seemingly neutral provision, criterion or practice which, for one of the reasons mentioned in the first subparagraph, may be of particular disadvantage to persons in relation to other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and that the means to achieve that purpose are not necessary and appropriate.

Loi n° 2008-496 du 27 mai 2008 portant diverses dispositions d'adaptation du droit communautaire dans le domaine de la lutte contre les discriminations [Law No. 2008-496 of May 27, 2008 Laying Down Various Provisions for Adapting to Community Law in the Field of Combating Discrimination], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE] (May 28, 2008), p. 8801. In the original French:

Constitue une discrimination directe la situation dans laquelle, sur le fondement de son appartenance ou de sa non-appartenance, vraie ou supposée, à une ethnie ou une race, sa religion, ses convictions, son âge, son handicap, son orientation sexuelle ou son sexe, une personne est traitée de manière moins favorable qu'une autre ne l'est, ne l'a été ou ne l'aura été dans une situation comparable.

157. The European Union defines “indirect discrimination” as “where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.” Council Directive 2006/54, 2006 O.J. (L 106) 1 (EC).

into motive.¹⁵⁸ It is true that the French prohibition on sexual harassment in the Penal Code will likely be interpreted to require intent on the part of the harasser. A similar prohibition on “moral harassment” found in the Penal Code,¹⁵⁹ which does not expressly contain a requirement of intent,¹⁶⁰ has been interpreted to impose such a requirement.¹⁶¹ Similarly, the provision on sexual harassment that prohibits coerced sex, in both the Penal Code and the Labor Code, may well be interpreted to impose a requirement of intent, both because of the language used in that prohibition—prohibiting conduct with the “real or apparent goal” of obtaining sexual acts—but also because cases under the former prohibition of sexual harassment had seemed to impose an intent requirement in interpreting essentially the same language.¹⁶²

158. I have explained elsewhere how sexual harassment in the United States can be considered discrimination under the disparate impact theory, as well as discrimination under the disparate treatment theory. *See generally* L. Camille Hébert, *The Disparate Impact of Sexual Harassment: Does Motive Matter?*, 53 U. KAN. L. REV. 341 (2005). At least one circuit court has agreed that disparate impact claims can be predicated on a hostile work environment. *See* *Madonado v. City of Altus*, 433 F.3d 1294, 1304 (10th Cir. 2006) (citing the article) (overruling on other grounds recognized in *Bristow v. Endeavor Healthcare, LLC*, 691 Fed. App’x 515, 521 (10th Cir. 2017)).

159. The prohibition on “moral harassment” contained in the French Penal Code provides that:

Harassing others through repeated speech or behavior that has as its purpose or effect a deterioration of working conditions that may affect their rights and dignity, impair their physical or mental health, or jeopardize their professional future, is punished by two years of imprisonment and a fine of € 30,000.

CODE PENAL [C. PEN] [PENAL CODE] art. 222-33-2. In the original French:

Le fait de harceler autrui par des propos ou comportements répétés ayant pour objet ou pour effet une dégradation des conditions de travail susceptible de porter atteinte à ses droits et à sa dignité, d’altérer sa santé physique ou mentale ou de compromettre son avenir professionnel, est puni de deux ans d’emprisonnement et de 30 000 € d’amende.

160. While the reference to *pour objet* (“for purpose”) clearly seems to reference intent, the use of the terms *ou pour effet* (“or for effect”) would seem to indicate that intent is not required.

161. *See generally* Cour de cassation [Cass.] [supreme court for judicial matters] crim., June 8, 2010, No. 10-80570 (interpreting the Penal Code provision on moral harassment to require intent on the part of the perpetrator).

162. *See generally* Cour de cassation [Cass.] [supreme court for judicial matters] crim., November 10, 2004, No. 03-87,986 (interpreting prior version of

However, there is no reason that the French provision on sexual harassment in the Labor Code that prohibits sexual conduct that imposes a harm to dignity or creates an offensive or hostile environment should be interpreted to impose an intent requirement. Not only does no express requirement of intent appear in that provision, but the European Union directive on which the French prohibition is based imposes no such requirement, because that provision expressly prohibits conduct that has “the purpose or effect” of violating dignity or creating an offensive or hostile environment.

Similarly, when the European Union directive was incorporated into French law by the adoption of the provision on discriminatory harassment, the French legislature expressly defined “discrimination” to include “any act with a sexual connotation, undergone by a person and whose object or effect is to undermine his or her dignity or to create an intimidating, hostile, degrading, humiliating, or offensive environment.”¹⁶³ If the express provision on discriminatory harassment in French law imposes no intent requirement, it seems unlikely that courts would impose such a requirement under a prohibition on sexual harassment that does not explicitly refer to discrimination.

Accordingly, as long as sexually harassing conduct can be shown to have an adverse effect on the women who are its principal targets, which, as discussed above,¹⁶⁴ some French courts seem to have recognized, a conceptualization of sexual harassment as a form of discrimination should not result in courts failing to recognize as actionable sexually harassing conduct simply because the discriminatory intent of the harasser cannot be established.

Penal Code provision on sexual harassment to impose a requirement of intent).

163. Loi 2008-496 du 27 mai 2008 portant diverses dispositions d'adaptation du droit communautaire dans le domaine de la lutte contre les discriminations (1) [Law No. 2008-496 of May 27, 2008, Laying Down Various Provisions for the Adapting Community Law in the Field of the Fight Against Discrimination (1)], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE] (May 28, 2008), p. 8801. In the original French: “La discrimination inclut . . . tout agissement à connotation sexuelle, subis par une personne et ayant pour objet ou pour effet de porter atteinte à sa dignité ou de créer un environnement hostile, dégradant, humiliant ou offensant.”

164. See *supra* notes 52–79 and accompanying text.

VI. Conclusion

A more extensive study of cases decided under the new prohibitions on sexual harassment contained in the French Penal Code and Labor Code will be necessary in order to determine the effect of the decision of the French legislators to model those prohibitions on European law, which conceptualizes sexual harassment as discrimination, but which also expressly references harms to dignity. Because of the lag between the occurrence of harassing conduct and decisions about that conduct by the courts, it is only now—over half a decade after enactment of the new prohibitions on sexual harassment—that the courts are deciding cases under those prohibitions. My study of those preliminary cases, however, suggests that the courts applying the new prohibitions have accepted a broader definition of sexual harassment, one that focuses not just on the individual harms associated with sexual harassment, those that implicate dignity, but also on the collective harms created by lack of equality between men and women in the workplace, which may be contributed to by the existence of sexual harassment and other forms of sexist behavior.

Recent legislation enacted and considered in the French legislature also suggests that at least some of the participants in that process may be viewing sexual harassment as a form of discrimination and therefore a problem of inequality between men and women. Their conceptualization of sexual harassment in that way, rather than as just a harm to the dignity of its victims, may suggest that the way to prevent sexual harassment is to address issues of equality between men and women more generally, because attainment of more equity and equality between the genders may not only address concerns about sexual harassment but other important workplace issues as well.

This French case study has implications for the law of other nations that prohibit sexual harassment, including the United States. In order to be truly effective at preventing sexual harassment in the context of the workplace, legal prohibitions against sexual harassment should recognize that that conduct implicates issues of both dignity and equality. An express reference to dignity and equality in those prohibitions could help those who are enforcing those prohibitions understand both the individual

harms to dignity and the collective harms of inequality that are caused by sexual harassment and that need to be remedied in compensating the victims of sexual harassment. A recognition that sexual harassment implicates both dignity and equality might also help employers and other entities prevent sexual harassment from occurring, by recognizing both the interpersonal issues and the structural issues of inequality that lead to sexual harassment in the workplace.