

Martha Nussbaum Responds

First, I would like to thank the four participants for their thoughtful and incisive responses. I admire them, and I think that this type of conversation among feminist philosophers -- deliberative, civil, and unafraid to be productively critical -- is a model for what ought to happen more often, on this urgent issue as well as on others. I've learned a lot, and am grateful. I would also like to thank the Yeoh Tiong Lay Centre for Politics, Philosophy and Law for organizing this high-profile event on a subject of such great importance, especially as its inaugural annual lecture.

Instead of answering the contributors one by one I will answer thematically.

A good time for us

The floodgates are opening. The Harvey Weinstein scandal seems to mark a turning point: women are coming forward, in large numbers, and women in power are supporting other women. Numerous powerful men are being held accountable: Weinstein, Roger Ailes, Bill O'Reilly. This is fantastic, largely (I believe) not for reasons of retribution, since I have criticized retributive views of punishment, though punishment of some type is surely warranted here, but more on account of deterrence and the expression of our new values (since I support deterrence and expressive theories of punishment). We are affirming a commitment to create a different future.

As one might expect, the outpouring of justified denunciation has led to some blurring of different cases. I believe, for example, that Leon Wieseltier is quite different from Harvey Weinstein: embarrassing, ridiculously theatrical, a little gross, but not threatening or malign, at least in my own experience, which may well be different from that of vulnerable employees. I always thought that Leon behaved rather like those gay men in the theater who embrace, kiss, and say "love" and "darling," but are not really asking for sex; he isn't gay, but his behavior had the over-the-top self-dramatizing character that I often see in gay theatrical subcultures. And given the public importance of the magazine he was creating, I can't help regretting his downfall, although I acknowledge that others may have experienced him as threatening and as creating a "hostile work environment." Still, that the whole magazine idea, urgently needed and of great cultural significance, will end, and that Leon himself may never work again, all seems rather sad to me, and I'm trying to see whether there may be other ways to revive the magazine.

What I definitely regret is that now, since the floodgates have opened and women are believed as they were previously not believed, false accusers, too, are coming forward, and I am aware of at least one case in which a major scholar has suddenly been falsely charged in ways that are terribly damaging to him and to his family, although I have confidence that he will eventually be vindicated. It's like what I said (conjecturally) about Derrick Rose in my article: celebrity gives men a shield for wrongdoing, but it also invites extortion, and that is one of the difficult issues that we need to acknowledge and thrash out in each case.

I would like to see much more discussion of the nuances of both legal and ethical issues. First, what conduct is ethically objectionable? It's a fact of life that a sexual overture from someone you don't find attractive seems creepy, but we must try to articulate clearer criteria of when that conduct becomes ethically objectionable. When the approached is a minor, as with Kate Manne's piano teacher, clearly; when the approached is a subordinate in the workplace, also clearly. Beyond that, however, when both are adults, I'd say persistent and unwelcome overtures are objectionable when the person has made their unwelcomeness clear, but one or two attempts are not, icky though one might find them.

There are hard cases. Like Kate Manne, I had a creepy music teacher. I was thirteen, and taking singing lessons. My teacher did not touch me at all, he just looked at me in what I felt to be an unpleasantly leering manner. He also assigned songs with a sexual content, in particular Ado Annie's song "I'm just a girl who can't say no." I felt terribly uncomfortable singing that song. (If you don't

know Oklahoma, it is a pretty innocent song, all about kissing and not sexually explicit in any way.) However, I have to acknowledge that it might have been a good thing to assign that song in the persona of a lower-class woman to aristocratic me, and its joyful sexual content was not a bad thing for me either. As for the leering, who knows. Maybe I was right, maybe it was more that I found him physically rather disgusting anyway. (He had very greasy hair and some body odor.) So I am not sure that he did anything ethically wrong. Surely if I had been older it would have been just fine, and if I didn't like it I could have gone elsewhere. In this case I did, and soon found a good female teacher at my school.

Then again, when do such approaches become legally problematic, and are our laws well equipped to handle the range of situations that life presents? Kate Manne's teacher was pretty clearly over a legal line, given the amount of touching and her age. Even for adult women she is wrong to say that a woman who freezes has no legal recourse. Steve Schulhofer's Unwanted Sex deals extensively with such cases, some of which my paper discusses; and though states differ, at least some states have dealt with the challenges such cases present in a satisfactory manner, agreeing with his analogy to financial crime. (If I freeze and don't say no when you take my wallet you are still committing a crime – unless I affirmatively give it to you in non-extortionate circumstances.)

Where sexual harassment is concerned, we've evolved legal concepts ("quid pro quo," "hostile environment") that are very useful, together with a valuable incremental tradition of precedent; and most workplaces in addition have their own rules. I think the rule our university has, focusing on the supervisory role, is a good rule, though as I said in the article the more stringent rule that is in force in our law school (no faculty-student sex of any kind) is also fine. What we have not dealt with, however, is the situation where the entire profession is a diffuse workplace, as is the case with theater. The women Weinstein harassed were for the most part not his employees, and in at least many cases there was no explicit quid pro quo related to hiring. But his power in the industry was such that all women in it were in a more diffuse sense his employees or potential employees. I think the best way to deal with such an open-ended workplace, in addition to sexual harassment law, is through professional associations and their disciplinary procedures, though of course actual assault - and some of his reported behavior constituted assault == is a criminal matter that should be dealt with by the criminal justice system.

Talking and not talking

I have great admiration for all the women who have been coming forward, in the cases of Ailes and O'Reilly and, most recently, in the Weinstein case. There is safety for other women in these women's daring. I am hopeful that theater will become professional and dignified, as it surely wasn't in my brief period as a professional actress (which ended before the incident I recorded), just as classical music has become more dignified and respectful by the policy of the musicians' union of conducting auditions behind a screen. That can't happen in theater and film, and the oversupply of talent is also a problem, far more than in classical music. So the only way to solve the sexual violence problem is through vigilance and presence. Let's hope that continues and grows.

Why didn't I name the man who abused me? I shall now do so: Ralph Waite (1928-2014), who starred in The Waltons as the pioneer father. (At the time of the incident he was starring as Claudius in the Joe Papp production of Hamlet at the Public Theater. He was very very good, and who knows whether his own contorted life lent authenticity to his portrayal of the tormented and guilty king.) In my Huffington Post piece I mentioned not speaking out at the time and in 1998 when he ran unsuccessfully for Congress, and indeed, as I said there, those two decisions were largely explained by the feeling that I would do no good for others and get myself embroiled in harmful litigation. After his death in 2014, I said in the Huffington Post, I might still have been sued, but in truth that was not my primary reason for not naming him. I had noticed that in the discussion of Bill Cosby's offenses the discussion somehow became all about Cosby, not about the problem, which was and still is

ubiquitous. So, as one of the replies sagely sees, by making it simply “my own Bill Cosby tale” I meant to signal that it is generic, and not about this or that famous individual. I did not want the conversation to be deflected to Waite or the image of pioneer masculinity he embodied. There was a subsidiary reason. Waite’s difficulties clearly were connected to alcoholism, and I had reason to believe that for some time before his death he had been a sober recovering alcoholic and a born-again Christian. Since I think one should give people a chance to reform, and since I thought it was at least possible that he had, I saw no point in publicly shaming him at that time. The issue was the thing.

When I said that my decision was the right one in my particular situation, I did not mean that it was a “good” decision, as one respondent plausibly, but wrongly, infers. Let me explain. I have written a lot about tragic dilemmas, and it is my position that one may make the decision that is best all things considered, “the right decision” in that sense, and still not be free of serious wrongdoing. Agamemnon made the right decision when he chose to sacrifice his daughter at Aulis, because the only alternative was that the gods would kill the entire army and the daughter as well. Still, it was a horrible wrongful act, and his outcry, “Which of these is without evils?” is appropriate. Bernard Williams discussed this case long ago in “Ethical Consistency,” and I have since built on his analysis, studying different types of conflict. One thing that I observe, as Williams does not, is that some such conflicts are caused by defective political and social arrangements. Thus, when women have to choose between attending appropriately to their children and doing a good job at work, these constant everyday dilemmas are often caused by bad workplace arrangements, which for example schedule department meetings after the pick-up time of child-care centers. Similarly, when Arjuna in the Mahabharata finds that in order to do his duty in the army he has to try to kill his kinsmen, the problem is caused by the horrible circumstances that led to civil war, and such dilemmas are ubiquitous there, as tragic authors in many traditions have seen. Similarly again, when a poor parent in a developing country finds that she has to keep her child out of school in order to put that child into the work force earning money essential if the family is to survive, the problem lies not with the parent, but with defective political and economic arrangements that force the terrible choice. Still, the parent is definitely wronging the child, even while making a decision that is best all things considered.

Many philosophers, including Aquinas, Kant, Henry Sidgwick, and R. M. Hare, but not including Aristotle (as Michael Stocker has shown in his excellent Plural and Conflicting Values), have denied that there were such conflicts: in such a situation, at most one option can be a genuine duty. I have spent a lot of time disputing this, following Williams. I think Christians have a hard time with tragedy, since it seems mean-spirited for a just God to land people in such situations. But that does not excuse philosophical error. And of course another source of error is blindness about how one’s own privileged social order oppresses others, landing them in morally difficult situations not of their own making. Many if not most men in the past have been Creons in this regard.

What’s the point of recognizing a class of tragic dilemmas? It is that the people themselves are not irrational: they have a pair of commitments (family and work, family and political duty, schooling and survival) that are in principle fully compatible, and that should always be compatible. Recognizing that the dilemma displaces people from fulfilling commitments that ought to be co-possible gives the entire society incentives for designing things differently, as Hegel noted in his eloquent writings on tragedy.

So my dilemma was in that sense tragic. I had a better choice but no “good” choice. (Tragedy doesn’t need to be big and spectacular; it can often be small and unnoticed by many.) People should not have to choose between continued productivity and reporting a terrible crime. And I did understand this, and have been working in whatever way I can to push society in the direction of supporting women in their demand for accountability. I do believe that the person who is caught in a tragic dilemma and makes an all-things-considered decision that pursues one side but does wrong on the other side, owes it to her own ongoing commitments and to society to do two things: first, to make reparations for the wrong done, insofar as that is possible, and, second, to try to bring about a

state of affairs where that wrong does not happen. (Michael Walzer talks well about the first in “Political Action and the Problem of Dirty Hands.”) So, having not done something I should in principle have done, I have also tried, going forward, to devote a large part of my career and such influence as I possess to speak out and write on justice for women generally and on sexual violence issues in particular. I shall continue to do so. And I hope that my voice along with many others may help to move society to a place where no woman need face such a dilemma. So my Huffington Post piece did not air these philosophical issues particularly well, and I am glad to have the chance to do so now.

Speaking out is valuable, and I agree with the responses that shunning can also be valuable. Ever since around 2000 I have refused to participate in any project with Thomas Pogge and I have refused to invite him to any conference of mine. Here I had solid evidence: Charles Larmore, then my colleague at the University of Chicago, told me at that time that he had been chair at Columbia when Pogge was convicted of sexual harassment in an internal university proceeding there, and he believed on the basis of the evidence he heard that this was a pattern of conduct likely to recur. (He said this because Iris Young and I were informally discussing whether one ought to try to get a position to hire Pogge in our Political Science Department.) I was hampered in this instance by the fact that Larmore was bound by a non-disclosure agreement, so he really should not have been telling me and Iris, and I worried that if I told further people it could get him in trouble. In another instance, Brian Leiter and I advised a prospective law student not to go to a law school where there was a notorious harasser in their very area. Brian and I agreed that the man’s conduct was sufficiently well known, indeed notorious, that it was appropriate to say this. (Shortly after that the man resigned, in a way that appeared to reflect duress.) Basically, then, I agree with Peggy DesAutels that shunning is valuable, but best in the presence of solid evidence.

I do agree strongly that an active citizenry is crucial, and that women’s solidarity is also very important as one part of active citizenship. However, I think that consumer movements are often more important than protest marches, and that they are one tool that concerned women and men can use and have used in the US to good effect. The baneful anti-transgender law in North Carolina was derailed largely through industrial boycotts spurred on by consumers, and there are many other similar examples. We need to be active on many fronts, not disdaining the market!

Colleges and Universities

The first thing to be said here is that college students are not just a small elite. 89 percent of US adults are high school graduates, and 87 percent of African-American adults. 53 percent have at least some college education, and that number is considerably higher among younger adults. As for college graduation from four-year colleges, the figure now stands at 57 percent in Canada, and 43 percent in the US, but again, much higher in younger decades. Racial disparities remain troubling within these graduation figures. But at any rate, it seems to me that these figures tell us that focusing on college students does not mean focusing on an elite. We need to do a lot more to make college education available to all Americans, especially given the labor market. But while we should study sexual violence in many contexts, college campuses provide one helpful source of understanding of these problems, one that is particularly tractable for those who study it, and it does not mean that those who focus thus are focusing on a narrow elite.

Another reason for the focus on colleges and universities in the context of accountability is that in the US college sports are much more corrupt than professional sports at this point, and are highly destructive to the academic endeavor. One does not hear of NFL or NBA teams pimping women to star athletes to recruit them. Indeed, the shoe is usually on the other foot, with many more people seeking these jobs than there are jobs to be had. With colleges and universities, by contrast, if there are, say, twenty big talents in a given entering year, every school in the top 500 will be after that person, with all sorts of incentives, some legal and some illegal. When a very talented sports star in football or basketball gets to a university, his presence quickly generates further corruption. Schools with top teams depend on TV revenue and strive to stay in the elite category in those two sports,

which has meant creating bogus classes, writing papers for athletes, and covering up for their sexual predation if it occurs. The entire system is a huge problem for learning. It is unfair to instructors (see the story in the NYTimes of the Florida state instructor who was fired because she refused to pass an athlete in a class for which he had done no work, <https://www.nytimes.com/2017/09/01/sports/ncaafotball/florida-state-football.html>); it is unfair to the other students; and it is also unfair to the athletes, who, should they be injured, or for some other reason fail to get pro contract, have nothing to fall back on and often can barely read and write. The Jameis Winston story shows how corruption extends to the DA's office and the courts, through networks of alumni (the "Seminole Boosters"). By contrast, the professional leagues are all the time in the public eye and do not have devoted alumni networks to cover up wrongdoing. They have their zones of corruption, for example the heinous coverup of evidence linking football to CTE. But I believe that when it comes to policing the criminal behavior of individual athletes they are at least a little better, and they can be pressured further by all of us as spectators and consumers.

All in all the system of training athletes through college and university teams is a horrible system, and I am terribly happy that my own institution decided early on not to engage in athletic recruitment (which has been shown to harm campus life in the Ivy League as well as the Big Ten). The rare big-time sports schools who do manage to uphold standards (Northwestern and Stanford are often named) should be commended; but they cannot be emulated because their overall standards of admission are so highly selective that they are unlike most of their peers.

What should be done? The case of baseball, where the teams themselves fund minor leagues that are totally independent of universities, shows that this can happen. That is the way things happen in Europe generally. But of course by now the NFL and NBA teams are used to having their training costs subsidized by universities greedy for TV revenues (though it has been shown that all but the very top schools lose money on their athletic programs). They are not likely to change. So the only remedy is to keep working to regulate college sports effectively, a difficult battle, because of the collective action problems it presents: schools who cut corners get ahead. The philosopher Myles Brand, having observed the corruption and its damages as President of Indiana University, decided to try to fix it, becoming President of the NCAA in 2002. He tried very hard and was making at least some progress. Alas, he died of pancreatic cancer in 2009, and my impression is that progress has stalled since then.

Let me now turn to Title IX. My remarks about the Title IX complaint process for sexual assault were not intended as criticisms. By and large, I am convinced that the process that was instituted during the Obama administration is a good one, and I think it is alarming that the Obama administration's interpretation of Title IX has now been abruptly withdrawn by the Trump administration. It is as yet unclear what will take the place of the old process. Indeed, many universities are likely to continue the old process on a voluntary basis, and there is some reason to think that ours will do so. My remarks about mandatory reporting and the burden of proof were intended simply to record ongoing debates among feminists and to show my respect for those who take a position different from my own (still tentative) position.

I do not think, however, that the presumption of innocence, were that to be adopted as the new standard for campuses (as a group of left-wing Harvard Law School faculty have recommended) ever entails that the accuser is a liar. This is simply not the way our criminal justice system operates, and everyone knows that. We have a system that is deliberately skewed in favor of the accused, because of a widely shared belief that it is better for a guilty person to go free than for an innocent person to be condemned. We know that many guilty people will be acquitted, and that means that we also know that many true accusations will not prevail. This is the price our society has agreed to pay for avoiding the conviction of the innocent. Given that DNA evidence now shows us that an alarmingly high number of innocent people have been convicted anyway, I think it's a good system to keep, and it does not stigmatize the accuser. Moreover, even when an accuser is incorrect, we should not and do not conclude that the accuser is lying. People are notoriously unreliable at eyewitness identification of assailants, and that is rarely because they are lying. It's just something people are

bad at, particularly when racial difference is involved. And that is one more reason why in the world at large we should keep the presumption of innocence. In campus cases, identification is less often the crucial issue, since most accusations are against acquaintances. Even here, however, there may be good-faith mistakes, and everyone knows such cases, particularly when alcohol is involved.

Optimism?

Am I optimistic? Yes. What feminist, studying world history, would not be? And indeed what person concerned with sexual orientation equality, a topic on which I've written for a long time. Hard-won progress can be followed by backsliding, but I believe that what Kant said about feudalism is true also of women's situation: the minute that we can name a problem and get society to see it as a problem, that is already "a form of improvement in itself," whether or not the problem is solved as yet:

We are here concerned only with the attitude of the onlookers as it reveals itself in public while the drama of great political changes is taking place: for they openly express universal yet disinterested sympathy for one set of protagonists against their adversaries, even at the risk that their partiality could be of great disadvantage to themselves....And this does not merely allow us to hope for human improvement; it is already a form of improvement in itself....The revolution which we have seen taking place in our own times in a nation of gifted people may succeed, or it may fail. It may be so filled with misery and atrocities that no right-thinking man would ever decide to make the same experiment again at such a price, even if he could hope to carry it out successfully at the second attempt. But I maintain that this revolution has aroused in the hearts and desires of all spectators who are not themselves caught up in it a sympathy which borders almost on enthusiasm, although the very utterance of this sympathy was fraught with danger.

Kant, we should bear in mind, was not a supporter of the French Revolution, believing, as he did, that there was no right of revolution, even against an utterly unjust authority. His point is, rather, that widespread enthusiasm for the revolution is already a repudiation of feudal ideas of the naturalness of hierarchy, whether the Revolution succeeds or fails. Henceforth, human inequality is named as unjust, not understood as founded in some natural fittingness of things.

Feudalism and gender hierarchy are similar phenomena: in both cases, a hierarchy was established by force and long custom, but people came to believe it innate, unalterable, and founded in the way things must be and ought to be. Even though the physical differences between lords and serfs were caused by nutrition and health, people believed that there were basically two races of people, different innately; and in the case of gender, they believed this all the more firmly. As Mill points out in The Subjection of Women, people who loved to think of themselves as liberal democrats and who, in (male) political life insisted on the strictest equality, would just assume without even thinking about it that there is a nature-based inequality of ability, power, and competence between male and female that sufficiently grounds the permanent "subjection" of females to males. His title, of course, is deliberate: it is a reminder that Britain, while apparently repudiating feudalism, nourished a form of feudal hierarchy right in the bosom of the family, where all young people grow up and learn their norms.

The modern movement for gender justice changes the picture, just by existing and commanding public assent, even if lots of it is insincere. Now when bad behavior occurs, it will not be coded as unremarkable and natural. The baseline of public expression has changed. This widespread acceptance of a new baseline is, as Kant said, already a form of improvement in itself. And this is so even should behavior not change at all in any nation of the world. Indeed, it is so even should most men harbor in their hearts great doubt and even resentment concerning the equality to which they pay lip service. Lip service, in short, is not nothing. What people support with their lips (including the treaties, such as CEDAW, that they endorse) is not necessarily what they intend to live by, but it is what they think it prudent to own to publicly, and that, in turn, is a sign that women's concerns have won wide recognition. That's progress, despite the fact that there is much more work to do.

