COMMENTARY

The Notion of Truth and Our Evolving Understanding of Sexual Harassment

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The notion of truth and its determination in legal proceedings is contingent on the cultural setting in which a claim is argued or disputed. Recent years have demonstrated a dramatic shift in the public dialogue concerning sexual harassment. This shift reflects changing cultural mores and standards in the workplace and society as a whole, particularly with respect to the validity of women's voices. The subjective reality experienced by victims of sexual harassment is inherently tied to the legal system's treatment of women throughout history. In determinations of truth, our understanding of which information and perspectives are relevant, and our expectations regarding the credibility of complainants and the accused, are undergoing a period of rapid change. The discourse surrounding the #MeToo movement suggests that the "reasonable-person" standard so often applied by courts is poorly suited to sexual-harassment litigation. As our understanding of what constitutes "severe," "pervasive," and "unwelcome" conduct continues to evolve, forensic psychiatrists must strive to uphold the values of respect for persons in the search for the truth.

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In his presidential address,[1] Michael Norko touches on Ezra Griffith's work on cultural formulation and concern for nondominant groups in the context of truth-finding in forensic psychiatry.[2] These concerns are especially relevant today, in light of the recent #MeToo movement and our changing understanding of sexual harassment. Norko particularly emphasizes Griffith's interest in the role of "truth-telling" in the courtroom and its potential impact on disadvantaged groups. How does society decide what information is relevant to determining truth in legal proceedings?[3] When a party in a case is a member of a minority group (e.g., ethnic and racial minorities and women), "truth" can be used in harmful ways or be completely disregarded in the adversarial process by attorneys who are ethically bound to protect only their own client's best interests. In this commentary, I address the impact of recent cultural changes, as reflected by the #MeToo movement on the acceptance of women's truth in sexual harassment litigation. I do not discuss the perspectives of male complainants, whose truth may face even more daunting barriers than the traditional women's truth, as current events have not been focused on these cases, but they also may experience a new appreciation of truth's being a complex problem with multiple dimensions that have heretofore been ignored or minimized.

As Norko noted,[1] truth-finding missions in the legal process are typically framed around the requirement for binary judgments: misconduct did, or did not, occur; an offense did, or did not, take place. The answers to these questions, however, may change over time in response to evolving cultural norms. Sexual harassment law in the United States has been built primarily upon the legal concept of the "reasonable person."[4] In this commentary, I argue that this standard ignores the historically disadvantaged status of women and its relevance to the subjective truth experienced by victims of harassment. In light of the growing public recognition of women's voices in recent years through phenomena like the #MeToo movement, the criteria by which we evaluate individual elements of a sexual harassment claim may be changing. Historically, these claims were often received by courts and forensic psychiatrists with doubt and suspicion, and a general belief that sexual harassment was an uncommon occurrence. Recent developments, however, have potentially dramatic impact on our assumptions and presumptions about truth in sexual-harassment litigation.

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The Historical Context of Women and the Law

The notion of truth is central to the dialogue surrounding society's evolving understanding of sexual harassment, and questioning the veracity of a woman's experience (or dismissing it outright) has roots reaching far back into ancient history. For many years, the legal system has been characterized by the treatment of women as objects, not subjects; a woman's subjective experience and agency were considered irrelevant. For example, the legal prohibition of sexual assault arose to protect men's interests: a woman who was raped was viewed as damaged goods, and rape entered the law as analogous to a property crime committed by one man against another man.[5] This bias persisted through the marital rape exemption until the very recent past. Until the 1970s, U.S. law in most jurisdictions did not allow a woman to file charges of rape against her husband.[6] The marital rape exemption continues to affect perceptions of women's experiences today.[7]

Throughout much of recorded history, women have not been considered competent to give courtroom testimony, to own property, to enter into contracts, or to vote. They have been systematically prevented from participating in the life of commerce and political discourse. In the case of *Bradwell v. Illinois*,[8] the U.S. Supreme Court upheld the State of Illinois's exclusion of women from the practice of law in 1872, arguing that:

> [t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . A married woman is incapable, without her husband's consent, of making contracts which shall be binding on her or him. This very incapacity was one circumstance which the Supreme Court of Illinois deemed important in rendering a married woman incompetent fully to perform the duties and trusts that belong to the office of an attorney and counselor (Ref. 8, p 141).

The decision was based on a prevalent cultural belief at the time: women and men were destined "to occupy different spheres of action" (Ref. 8, p 132), later known as the "separate spheres" doctrine.[9] The case formalized and institutionalized the concept that women lacked the capacity to participate meaningfully in legal proceedings and should remain silent, in the domestic sphere of the home. In a society in which women could not enter into a contract, the testimony of women about concerns in the workplace could easily be disregarded or minimized as an irrelevant truth. The separate spheres doctrine persisted well into the mid-20th century in U.S. courts.[9,10]

Even today, these ideas continue to have currency. Our current Vice President, Mike Pence, recently made headlines when he announced that he would not have a meal alone with a woman other than his wife.[11] Although some, particularly in conservative religious groups, have lauded this policy as honorable, it reinforces the prevailing cultural belief that a woman's place is in the home, not in settings where important business or political decisions are being made. Such a policy tends to enforce "old boys' club" attitudes that have served to exclude women's voices from full participation in civil society.[12]

Society's tendency to dismiss a woman's subjective truth as irrelevant and unworthy of consideration pervades public discourse, with victims of sexual harassment often derided as lacking credibility:

> Not uncommonly, when a woman says something that impugns a man, particularly a powerful one . . . especially if it has to do with sex, the response will question not just the facts of her assertion but her capacity to speak and her right to do so. Generations of women have been told they are delusional, confused, manipulative, malicious, conspiratorial, congenitally dishonest, often all at once.

This bias, too, has deep roots in history, and all too often physicians have played a complicit role. In the Nineteenth Century, a woman whose truth was unacceptable was often diagnosed with "hysteria," a condition inherently linked to her status as a woman [Ref. 13, p 4].

Legal Definition of Reasonable Person

The concept of sexual harassment was nonexistent in U.S. law until the past few decades. During the drafting of the bill that would become the Civil Rights Act of 1964,[14] lawmaker Howard Smith (an opponent of the bill) proposed a last-minute amendment to include sex as a protected class to the Title VII provisions that would prohibit discrimination in the workplace, an action that some have argued was intended to defeat the bill. Treating the concept of sex discrimination as so laughable that it could sink an entire civil-rights statute is an illustration of the low status of women's truth and experience in political discourse, even in modern times. Nonetheless, the bill passed, making discrimination on the basis of sex unlawful in the United States.

Sexual harassment law in the United States developed in the context of sex-discrimination claims

based on the doctrines of disparate impact and disparate treatment, first applied in race-based discrimination cases in the late 1960s and early 1970s.[15] Feminist scholarship regarding sexual harassment developed in the 1970s,[16] and in 1980, the Equal Employment Opportunity Commission (EEOC) published guidelines[17] declaring sexual harassment in the workplace an unlawful form of sex discrimination. Catharine MacKinnon has noted the critical importance of women's voices in shaping modern views of sexual harassment: ". . . [s]exual harassment doctrine did not historically arise because or when legislatures passed sex discrimination laws. It was judicial engagement with the experiences of sexually harassed women presented to courts on an equality theory, in phenomenological depth and one case at a time, that made it happen" (Ref. 18, p 815). The first U.S. Supreme Court case to recognize hostile environment-based sexual harassment a violation of Title VII, was *Meritor Savings Bank v. Vinson*,[19] decided in 1986. The *Meritor* opinion set forth standards by which courts in the future could determine whether an alleged harasser's conduct was so unwelcome, severe, and pervasive that it rendered the work environment hostile.

Most courts in sexual harassment litigation apply a test based on the reasonable-person standard: to be actionable, the harasser's conduct must be unwelcome, severe, and pervasive in the eyes of the average reasonable person (male or female). The EEOC also endorsed the reasonable-person standard for sexual harassment cases in a policy guideline released in 1990.[20] The reasonable person standard was not unique to sexual harassment jurisprudence, however; the concept dates back at least as far as 1837 in English law,[21] a time when a woman's subjective experience was usually treated as irrelevant by courts. In the late 19th Century, the U.S. Supreme Court held that "person" was to be interpreted to mean "male person" in a Virginia statute.[22]

In 1991, some important developments emerged in our understanding of sexual harassment. The passage of the Civil Rights Act of 1991[23] expanded remedies to victims, and 1991 was also the year in which Anita Hill testified regarding her sexual harassment by Clarence Thomas. In the same year, the Ninth Circuit decided *Ellison v. Brady*,[24] applying a reasonable-woman standard, explaining: "We adopt the perspective of a reasonable woman, primarily because we believe that a sex-blind reasonable person standard tends to be male-based and tends to systemically ignore the experiences of women" (Ref. 24, p 879).

The *Ellison* court was not the first to propose the adoption of a reasonable woman standard. In fact, the reasonable woman standard was suggested for sexual harassment cases as early as 1986.[25] Nonetheless, today many courts still apply the reasonable person standard when deciding sexual-harassment cases, although some, such as the Third Circuit, have applied the reasonable-woman approach.[4]

In 1993, the Supreme Court held in *Harris v. Forklift Systems*[26] that a plaintiff in a Title VII sexual harassment case need not prove that she has suffered psychological harm when the work environment would be perceived by a reasonable person as hostile. The *Harris* case is significant in part because it took the subjective experience of a harassed woman seriously: why require exposure and interrogation of her mental state when it was not *her* conduct that was objectionable? However, the Court rejected the complainant's argument that it should apply the "reasonable woman" or "reasonable person in the position of the plaintiff" in cases of sexual harassment (Ref. 26, p 18).

A more comprehensive approach to identifying truth was applied by the Supreme Court in a sexual harassment case when it was brought by a male plaintiff who allegedly experienced harassment from his male coworkers. In *Oncale v. Sundowner Offshore Services*,[27] The Court applied a "reasonable person in the plaintiff's position" standard. The Court in *Oncale* also noted the importance of "careful consideration of the social context in which particular behavior occurs and is experienced by its target" (Ref. 27, p 81). The principle of considering the social context and a target's subjective experience may have been more readily understood by the Court in this case because the perspective was that of a male complainant. In *Meritor*, for example, the plaintiff was not permitted to introduce evidence about the general work environment and its sexual content.[19] Nonetheless, *Oncale* demonstrates an evolving recognition of the nuances of truth in the subjective experience of sexual harassment.

Credibility and the Complainant

Many sexual harassment allegations are characterized by courts as "he-said, she-said" disputes:

> The phrase [he-said, she-said] now dominates the accounts of what lawyers used to call formally material fact disputes, and more colloquially swearing matches. . . . Now the phrase most often means "testimony in direct conflict," with an implication that truth is therefore undiscoverable.[28]

To prevail in a he-said, she-said type of dispute, one must be perceived as competent and credible. Impeaching the credibility of a complainant or witness has long been a favored tactic among attorneys seeking to undermine or exclude the testimony presented by opposing counsel.

Arguments and tactics are commonly employed by the accused or his associates to diminish and undermine the credibility of a woman who has leveled accusations of sexual harassment against him. These tactics (*ad hominem* attacks) exploit extrinsic factors and irrelevant material to obfuscate the truth the complainant seeks to present. Common allegations and attacks designed to suppress women's truth fall into several recognizable categories:

Attention or publicity: the complainant was lying to attract attention (e.g., Kristen Anderson and Monica Lewinsky).

Greed and money: the complainant was lying to get a payoff (e.g., Bill Cosby's accusers and Bill O'Reilly's accusers).

Politically motivated: the complainant was lying for political reasons or to disparage the accused (e.g., Ms. Hill, Mariah Billado, Tasha Dixon, Jessica Drake, Mr. O'Reilly's accusers, Roy Moore's accusers, and Donald Trump's accusers).

Vindictive and scorned woman: the complainant resented the accused's power, or charges were motivated by a desire for revenge for rejection (e.g., Ms. Hill).

Crazy, confused, or exaggerating: The complainant was crazy, confused, overreacted, misunderstood the situation, or was hypersensitive. She does not remember events accurately, or she is distorting the truth (e.g., Ms. Hill).

Implausibility: The complainant's allegations are so absurd as to be implausible (e.g., Jill Harth, Cathy Heller, Temple Taggart, and several of Harvey Weinstein's accusers).

A variant of the implausibility tactic is for the accused to claim that because he was not attracted to the woman (or because she was not perceived as objectively attractive), it could not have happened.

Another variant is for the alleged perpetrator to be portrayed as "such a nice guy" that he could not have engaged in the reported acts (e.g., the reaction to allegations against Bill Clinton, Mr. Cosby, and Matt Lauer).

It was consensual: the accused admits to sexual contact but states that "she wanted it" or "it was consensual" (e.g., Ivana Trump, Nate Parker's accuser, and Mr. Weinstein's accusers).

Never interacted: the accused admits no involvement with the complainant (e.g., Lisa Boyne, Ms. Drake, victims of Mr. Moore, and victims of James Toback).

Simple denial: the alleged incident or behavior did not happen, there is no proof that it happened, or both (e.g., Rachel Crooks, Jessica Leeds, Bridget Sullivan, and Ms. Lewinsky).

No comment: the accused will not deign to dignify the complaint by taking it seriously; the allegations do not deserve a response (e.g., Samantha Holvey, Ninni Laaksonen, Melinda McGillivray, and Cassandra Searles).

Why didn't she complain when it happened?: reference made to the length of time elapsed since an incident and the airing of an allegation ("If this happened, and if it bothered her, why didn't she report it at the time?" "It must not have happened, or she remembers it inaccurately.") (e.g., Ms. Harth, Natasha Stoynoff, and Ms. Hill).

These tactics share a tendency to minimize the credibility of the complainant herself (not merely the allegations) and to imply that her truth is unworthy of consideration, owing to her status as a woman. It has recently been disclosed that women who accuse members of Congress of sexual harassment are required to undergo 30 days of counseling before they can press their claims and that their settlements include nondisclosure clauses. This system is discriminatory and designed to prevent the truth from being told. First, the requirement of counseling is an added burden, and, if the claimant is able to navigate the other obstacles, she is contractually silenced.

Disputes about the truth of the matter have dominated public discourse surrounding recent allega-

tions of sexual harassment by public figures in recent years. In October 2016, the *Washington Post* released a video recording from an *Access Hollywood* taping in 2005 in which Donald Trump is heard bragging about his sexually inappropriate behavior toward women.[29] Following the release of the recording, Mr. Trump initially acknowledged having made the comments. ("I said it, I was wrong, and I apologize.") Outrage over the language in the tape and Mr. Trump's continued rise to power despite reports of his inappropriate conduct toward women helped to spur the Women's March on Washington in January 2017. In recent months, Mr. Trump and his staff have disputed the legitimacy of the *Access Hollywood* recording and have claimed that he did not make the comments heard on the tape.[30] So far, at least 19 women have come forward publicly with allegations of his sexual misconduct toward them.[31] Their accounts share striking similarities, and several of the incidents were witnessed by others who corroborated the victims' accounts.[31] Mr. Trump has denied all of these allegations, characterizing the accounts as "fake news."[32] The existence of multiple accusers and corroborating witnesses has made undermining an individual complainant's credibility more challenging.

Barriers to Truth-Finding and Recent Developments

In October 2017, several news outlets (including *The New Yorker*[33] and the *New York Times*[34]) published accounts of women who reported having been victimized by entertainment industry executive Harvey Weinstein. After these reports, there has been a seemingly endless stream of accounts of similar sexual misconduct by other prominent executives and public figures, fueled in part by a social media campaign (#MeToo). *Time Magazine* recently named "the Silence Breakers" (i.e., women who went public with allegations of sexual harassment and abuse) the 2017 Person of the Year.[35] Being the first person to level sexual harassment allegations against someone in a position of power is often an extremely risky decision for a complainant. Frequently, the accused denied the allegation, and his supporters deride the complainant as crazy or manipulative. Many complainants are subjected to retaliatory harassment. There is safety in numbers, however,[36] and, as more persons come forward, the objectionable character of the accused's behavior becomes progressively more difficult to ignore.

The case of Mr. Weinstein illustrates many examples of silencing tactics that are used prejudicially to prevent potential complainants from telling their truths.[37] To keep victims quiet, perpetrators of harassment may conduct surveillance on the victim, as when Mr. Weinstein had a private investigator follow a male associate with whom he was involved in litigation, even as the associate and his wife dropped their children off at school. Potential claimants may also be subjected to increased harassment, not just by the original perpetrator but by his supporters as well. Perpetrators in positions of power may also mention "friends in high places;" Mr. Weinstein, for example, frequently made reference to his high-ranking political associates, such as Bill and Hillary Clinton.

Hush money, whether paid via legal settlements outside of court or "off the books," is another common tactic, as seen in the cases of Mr. O'Reilly, Mr. Weinstein, and Roger Ailes:

> Steve Hutensky, a Miramax lawyer nicknamed the Cleaner-Upper by some colleagues, helped write an agreement with Ms. Perkins in 1998 that barred her from disclosing Mr. Weinstein's name, even to a therapist, and required her to provide "reasonable assistance" to Miramax if the company chose to contest any criminal investigation that might arise.[37]

Mr. Weinstein also used a tactic known as "catch and kill,"[37] wherein a publisher connected to the perpetrator acquires exclusive rights to damaging information, then never publishes it. Requiring new employees to sign nondisclosure agreements and mandatory arbitration contracts as a condition of employment (which appears to be growing more common) may prevent future victims of workplace sexual harassment from making the public accusations that are often necessary to put other potential victims on notice. With legal "gag clauses" in place, sexual harassment can be, and has been, hidden or covered up for decades, often facilitating its continued presence and escalation. The threat of retaliatory counterlawsuits in tort (e.g., defamation) and strategic lawsuits against public participation (SLAPP) is another favored tactic to keep victims from voicing their truth.

Some victims experience hints or outright threats of other forms of retaliation. These may include threats of violence and bodily harm to the victim or her family, the prospect of damage to the victim's career and reputation, or the possibility of public humiliation from exposure of private information about the victim if the victim takes her complaint

public.[35,37] The most vulnerable groups (e.g., persons of color, persons with disabilities, and sexual orientation and gender identity minorities) are frequent targets of harassment and abuse related to the power differential. Often, they have the most to lose: income, social support, or even their physical safety.[35] Undocumented immigrants or their family members are frequently singled out and targeted for sexual harassment because the threat of possible deportation often dissuades victims from complaining. Perpetrators may also threaten to use their power to harm those close to the victim if allegations come to light. One of Mr. Weinstein's victims reported that he "somehow knew personal information about [her], mentioning her student loans and where her younger sister attended school and saying he could have her kicked out."[37]

Even when victims of harassment are successful in obtaining monetary compensation for damages through a legal settlement, many of the silencing tactics deployed by perpetrators are designed to eliminate the possibility that the truth will ever be brought to light in a public forum.[37] Unfortunately, as Scheppele noted:

> . . . [T]ruth-finding is a socially situated practice. . . . Most of the time, we are successful enough or blind enough to the consequences of our inaccuracies not to reevaluate our practices. Whenever our failures call attention to our inadequacies in this regard, we engage in a patch-up effort to work out what went wrong in the case, but we rarely rethink our entire scheme for evaluating the evidence that daily life presents us [Ref. 36, p 151].

The guidance of Griffith and Norko regarding the importance of individual, subjective truths can help us avoid these pitfalls.

Factitious Allegations

Determining or verifying truth in he-said, she-said disputes can be an extremely challenging and sometimes impossible task.[38] Although they likely comprise a minority of sexual harassment complaints, false allegations do sometimes occur.[39] How is truth verified in cases involving only one complainant and no confirmatory evidence? In such instances, forensic psychiatrists are sometimes called upon for assistance. Typically, "ultimate issue" questions, such as whether discriminatory and unlawful harassment occurred, are left to the fact finder in a case (i.e., the judge or the jury), and the expert witness's role is to provide additional information that may be helpful to the trier of fact in weighing different evidence in a case.[40] We may be asked, for example, whether a complainant's behavior is consistent with that of confirmed victims of sexual harassment, or whether the complainant exhibits symptoms of factitious disorder or other relevant psychiatric diagnosis.[41]

As Gutheil and Sutherland explained,[40] the credibility of a complainant may be the ultimate question in a case of alleged sexual harassment. The admissibility of expert-witness testimony concerning witness credibility remains a contested area of the law.[42] At a minimum, the forensic psychiatrist must remain cognizant of existing biases, which can play a significant role in one's interpretation of sexual harassment allegations.[43] Binder and McNiel[38] provided helpful recommendations for forensic experts engaged in such cases, where there is no confirmatory or corroborating evidence.

Implications for Forensic Psychiatrists

As yet, it is too early to know what effect the #MeToo movement will have on the future of sexual harassment law in the United States. One potential unforeseen complication may be the overvaluation of the importance of having multiple accusers: when there is only one complainant, will he or she be believed? The truth-finding process in sexual harassment litigation, while it may show a growing acceptance of women's claims, may cause not only the backlash that many fear, but also the diminution of the individual victim's experience. Psychiatrists consulting or testifying in sexual-harassment cases must strive to remain objective and open to information from multiple sources, especially as our understanding of welcome and unwelcome conduct in the workplace continues to evolve.

Forensic psychiatrists should be on guard against attorneys' efforts to exploit mental health evidence for credibility attacks, particularly when the complainant is a member of a disadvantaged, nondominant group. The existence of mental illness in a complainant does not negate the possibility of her having been subjected to sexual harassment, nor does it prove that harassment occurred (e.g., in the case of posttraumatic stress disorder). Such nuances may be lost on the triers of fact, however; and even true facts regarding a complainant's or defendant's mental health may be presented in ways that unfairly prejudice one party's side in a dispute.[44] As in the 19th century, someone whose experience is depicted as hysterical often will not be heard or taken seriously.

It seems that we are in a time and social climate when the understanding of what is unwelcome, severe, and pervasive has begun to grant women more credibility. Public opinion appears to be shifting toward an approach similar to that employed by the Court in *Oncale*: the complainant's point of view should be considered in light of all the circumstances, including the unique perspective of a woman as a member of a nondominant group. I am not suggesting that the legal standard has changed, but rather that the lived experience of women is being given greater credence. In the judicial process, the fact-finding process may be influenced by the #MeToo environment; women's allegations of sexual harassment may face a lower barrier in the assessment of credibility. If so, and if we are indeed moving toward adoption of the reasonable-woman standard, such a development has implications for both the complainant and the accused.

Concluding Thoughts

We are at an inflection point where women's stories and the social contexts of women's lives may produce a truth that has heretofore been unexplored. "I believe the women" has become a cultural and political mantra. As Zacharek and colleagues wrote, "in early October [2017], the dam finally broke,"[35] and the number of allegations of sexual harassment by both men and women is flowing at an unprecedented rate. This flood of cases represents decades of fears about one's truth not being believed, fear of being the first one to speak when others have been silent, and a growing consensus that victims' truths have gone unheard for far too long. The impact of the evolving understanding of truth in cases of sexual harassment in the workplace is still in transition. One of the lessons from the #MeToo movement is the almost universal presence of harassment in women's work experience. Perhaps we should be wondering as a society why we have not heard the truth for so long.

We cannot reflexively adopt the I-believe-the-women position in performing our evaluations. Particularly in post-traumatic stress disorder evaluations, we need to evaluate our criteria for assessing the existence of an event that may be the precipitant, given the new knowledge of the ubiquity of women's experiences of sexually harassing experiences in the workplace. The truth of the event and its sequelae cannot be a truth defined by a male perspective. Rather, we need to recognize that the truth in these contexts is complex, and the impact of some events on women shapes a truth that has not heretofore been heard in American jurisprudence. It is up to the forensic psychiatrist to remain committed to gathering that truth in all of its complexity, and we must be prepared to adapt our approaches to truth identification in the context of these ongoing developments throughout the process of change.

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