Headshrinkers Manmunchers Moneygrubbers Nuts & Sluts: Reexamining Compelled Mental Examinations in Sexual Harassment Actions Under the Civil Rights Act of 1991

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HEADSHRINKERS, MANMUNCHERS, MONEYGRUBBERS, NUTS & SLUTS: REEXAMINING COMPELLED MENTAL EXAMINATIONS IN SEXUAL HARASSMENT ACTIONS UNDER THE CIVIL RIGHTS ACT OF 1991

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INTRODUCTION

Paula's a moneygrubber.¹ Anita's a manmuncher,² driven by her

¹ Paula Corbin Jones seeks $700,000 in compensatory and punitive damages from President Clinton and Arkansas state trooper Danny Ferguson. Complaint, Jones v. Ferguson, No. LR-C-94-290, 1994 U.S. Dist. LEXIS 5739 (E.D. Ark. May 6, 1994) [hereinafter Jones Complaint]. Jones, a former Arkansas state employee, alleges that Ferguson arranged for her to meet then-Governor Clinton in a hotel suite, where Clinton made unwelcome sexual advances that Jones rebuffed. Id. at para. 6-27. Even members of her family assert that Jones is motivated by greed. Howard Schneider, Paula Jones and a House Divided: They Believe Sis. It's Her Motives They Don't Buy, WASH. POSR, June 9, 1994, at C1, C8.

The public similarly speculated that greed prompted Anita Hill to air her charges against Clarence Thomas. Responding to a newspaper poll, one man noted that "[e]very woman who's brought down a major man in the last five years has made millions of dollars.... I look at what Anita Hill is saying, and I don't believe it." Joyce Price, Thomas Will Not "Cry Uncle," Eager Callers Sure Where Truth Rests, WASH. TIMES, Oct. 13, 1991, at A1.

² The term "manmuncher" comes from a recent bestselling novel. MICHAEL CRICHTON, DISCLOSURE (1993). The novel's villainess, nicknamed "Meredith Manmuncher," compulsively uses her workplace power to seduce and bully her male subordinates. When the protagonist refuses to submit to her advances, she accuses him of sexual harassment.
hyperfeminist politics to smear men. They’re both at best a touch too sensitive; at worst, outright liars. Or maybe even a little nuts. Kinda slutty, folks say.

3 See David Brock, The Real Anita Hill: The Untold Story 340-48 (1993) (alleging that Hill has long been a “full-fledged campus radical” driven by extreme ideology on gender and race issues). Brock also claims that Hill used charges of harassment and discrimination to cover for her professional and personal shortcomings. Id. at 338-39.

4 In his testimony before the Senate Judiciary Committee, John Doggett III claimed that Hill has “a problem with being rejected by men she was attracted to.” Hearings Before the Senate Comm. on the Judiciary on the Nomination of Clarence Thomas to be Associate Justice of the Supreme Court of the United States, 102d Cong., 1st Sess., pt. 4, at 554 (1991) [hereinafter Hearings]. Mr. Doggett testified at length that he felt Hill was set on attracting to him and that she fantasized that he was interested in her. Id. at 554-59. He speculated that she may have been similarly attracted to Clarence Thomas and entertained similar fantasies about Thomas. Id. at 573. Virginia Lamp Thomas, Justice Thomas’s wife, echoed this sentiment: “In my heart, I always believed she was probably someone in love with my husband and never got what she wanted.” Virginia Lamp Thomas & Jane Sims Podesta, Breaking Silence: Forced to Endure Her Husband’s Trial by Fire, a Wife Speaks Out at Last, PEOPLE, Nov. 11, 1991, at 108, 111.

5 Michael Kinsley speculates that Jones may be a liar, and that even if her story is true, it hardly amounts to sexual harassment, let alone intentional infliction of emotional distress. Michael Kinsley, Pants on Fire, NEW REPUBLIC, May 30, 1994, at 6. In her lawsuit, Jones seeks damages for defamation, citing in part veiled accusations from the Clinton administration that she is lying. Jones Complaint, supra note 1, at para. 48-52, 75-77.


6 Echoing the conclusions of other witnesses at the hearings, Dean Charles Kothe stated, “I find the references to the alleged sexual harassment not only unbelievable but preposterous. I’m convinced that such is a product of fantasy.” Hearings, supra note 4, at 553 (quoting affidavit). John Doggett maintained, “I believe that Anita Hill believes what she has said. . . . [But] the things she was saying in my mind were absolutely, totally beyond the pale of reality.” Id. at 573. For lay opinions that Professor Hill suffered from “Fatal Attraction” syndrome, see Price, supra note 1, at A1. In debate on the Senate floor, Senator Strom Thurmond attempted to buttress these lay impressions with input from “experts”: “I have been contacted by several psychiatrists, suggesting that it is entirely possible that she is suffering from delusions. Perhaps she is living in a fantasy world.” 102 Cong. Rec. S14,649 (daily ed. Oct. 15, 1991).

Senator Thurmond apparently referred to erotomania, or De Clerambault’s syndrome, an extremely rare disorder in which victims, mainly women, suffer from the delusion that they are having an affair with someone of higher social status. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 297 (4th ed. 1994) [hereinafter DSM IV]. Thomas supporters considered having experts testify that Professor Hill may suffer from erotomania. Jane Mayer & Jill Abramson, Strange Justice 306-09 (1994). For the view that erotomania may be more a product of men’s wishful thinking than a true psychotic disorder, see Alessandra Stanley, Erotomania: A Rare Disorder Runs Riot—in Men’s Minds, N.Y. TIMES, Nov. 10, 1991, § 4, at 2 (noting that Geraldo Rivera, a self-proclaimed target of a woman with erotomania, could not find enough women with the disorder to devote an episode of his talk show to the topic).

7 David Brock portrays Professor Hill as sex-obsessed and foul-mouthed. Brock, supra note 3, at 957-58. He reports that Hill had “sexually taunted” one student, who de-
And this is the worst thing: they're just two in a tide of devious, deceived, or deranged women looking to haul men into the limelight to answer frivolous or even false claims of sexual harassment. Congress has decided to let these women go for men's wallets—the Civil Rights Act of 1991 enables sex discrimination victims to seek compensation for mental anguish and emotional distress without resorting to tort actions. So: What's a guy to do? One answer: Sic a shrink on 'em.

Court-ordered mental examinations of sexual harassment plain-

scribed Hill as "the world's kinkiest law professor." Id. at 356. Other students alleged that Hill put pubic hair in their papers. Id. at 355-56 (citing affidavit of student Lawrence Shiles). Even conservative commentators have decried these largely unsubstantiated attacks on Professor Hill's morality. See, e.g., Jacob Cohen, Truth and Consequences, NAT'L REV., July 5, 1993, at 47, 49 (book review) (declaring Brock's "psychoanalytic rampage" to be "disgusting").

Similar innuendo surfaced about Paula Jones. Allegedly, she "wears tight skirts and high heels" and has "been observed pinching men on the butt." Katherine Boo & Christopher Georges, Tess of the D'Ozarks? Why the Likes of Paula Jones Should Get the Benefit of Our Doubt, WASH. POST, May 22, 1994, at Cl.

Professor Hill's testimony is widely credited with prompting a significant increase in the number of sexual harassment charges filed. According to the Equal Employment Opportunity Commission, sexual harassment claims in the year following the hearings increased by nearly 50% over the prior year. Polly Basore Elliot, Sex Harassment Filings Keep Rising, DALLAS MORNING NEWS, Oct. 25, 1992, at 5H.

This Note refers to sexual harassment plaintiffs generically as women. Men have also raised sexual harassment claims. See, e.g., Harvey v. Blake, 915 F.2d 226, 227 (5th Cir. 1990); Huebschen v. Department of Health & Social Sers., 547 F. Supp. 1168 (W.D. Wis. 1982), rev'd, 716 F.2d 1167 (7th Cir. 1983); see also Man Wins $1 Million Sex Harassment Suit, N.Y. TIMES, May 21, 1993, at A15 (reporting the verdict in Gutierrez v. California Acrylic Indus., No. BC055641 (Cal. Super. Ct. May 24, 1993), a suit brought by a male worker against a female supervisor). Women, however, raise the overwhelming majority of sexual harassment claims. See id. (citing EEOC statistics that men filed 968 of 10,577 sexual harassment claims in 1992 and 514 out of 6,886 claims in 1991).

When the mental or physical condition of a party is "in controversy" and the oppos-

ing party has "good cause" to explore that condition, a court may order an examination by "a suitably licensed or certified examiner." FED. R. CV. P. 35(a). The examination is gen-

erally conducted by a psychiatrist or a psychologist. The two fields are distinct in focus and methodology, but overlap substantially. Defendants will often use experts from both fields in tandem, employing a psychologist to administer personality tests that provide the basis for a psychiatrist's diagnosis and testimony. Wayne N. Outten & Jack A. Raisner, Cross-Examining a Defense Psychologist in a Sexual Harassment Case, in SEXUAL HARASSMENT LITIGATION 1993, at 253, 265 (PLI Litig. & Admin. Practice Course Handbook Series No. H-463, 1993). Courts will thus often permit separate Rule 35 examinations by a psychologist and a psychiatrist. See Ziemann v. Burlington County Bridge Comm'n, 155 F.R.D. 497 (D.N.J. 1994) (noting differences between psychological and psychiatric analysis, and permitting dual examinations of allegedly psychiatrically disabled sexual discrimination plaintiff). Ex-
tiffs arguably present defendants and factfinders with a powerful tool for ferreting out false or frivolous claims, or at least for rebutting claims of compensable mental anguish. This tool, however, can be a distressingly blunt weapon. Compelled mental examinations may best serve defendants not by illuminating facts at issue in a case, but by intimidating potential sexual harassment plaintiffs into silence. The scope of such examinations can be dauntingly broad and invasive, permitting inquiry into the plaintiff's entire psychological and sexual history. The specter of this invasive inquiry may discourage victims from bringing valid claims.

More fundamental, routine use of compelled mental examina-

cept where explicitly stated, this Note does not distinguish between psychological and psychiatric examinations.

Evidence indicates that some institutions use the threat of forced “fitness-for-duty” mental evaluations to intimidate and retaliate against persons who claim sexual harassment and discrimination. Margaret F. Jensvold, Workplace Sexual Harassment: The Use, Misuse, and Abuse of Psychiatry, 23 Psychiatric Annals 498, 443 (1993) (citing anecdotal evidence which suggests “that the practice is common and widespread”). Much caselaw and anecdotal evidence supports this assertion. See, e.g., Patterson v. County of Fairfax, No. 94-1218, 1995 U.S. App. LEXIS 70, at *3 (4th Cir. Jan. 4, 1995) (discussing plaintiff's charge that she was forced to undergo three psychological examinations after she had filed discrimination and harassment charges against the EEOC); Mihalik v. Illinois Trade Ass’n, No. 93-C-6782, 1994 U.S. Dist. LEXIS 2015, at *8 (E.D. Ill. Feb. 25, 1994) (detailing plaintiff's charge that she was ordered to submit to a psychiatric examination immediately after her supervisor was subpoenaed to testify in a sexual harassment case which the plaintiff had brought against a previous employer); Clinton Selects Admiral to Lead Forces in Pacific, N.Y. Times, July 2, 1994, § 1, at 8 (stating that Navy lieutenant was ordered to undergo a psychiatric evaluation after filing sexual harassment complaint); Ruth Larson, FBI Agent Quits, Claims Reprisal for Harassment Case, Wash. Times, Oct. 12, 1993, at A10 (reporting FBI agent’s claim that she was subjected to psychological examinations after she charged a high-ranking agent with sexual assault and harassment); Eric Schmitt, Harassed, Female and Navy, N.Y. Times, June 5, 1994, § 4, at 2 (stating that another Navy lieutenant was “forced to spend a three-day weekend in a locked psychiatric unit” after she refused to drop a sexual harassment complaint).


6 See, e.g., Robinson v. Jacksonville Shipyards, Inc., 118 F.R.D. 525, 531 (M.D. Fla. 1988) (stating that “reporting of sexual harassment claims would certainly be discouraged” if courts endorsed “mental examinations in every Title VII hostile work environment sexual harassment case”); Priest v. Rotary, 98 F.R.D. 755, 761 (N.D. Cal. 1988) (noting that allowing unchecked discovery of plaintiff’s sexual history would discourage reporting of valid claims). In a similar vein, members of Congress noted that the cruel scrutiny and skepticism which greeted Anita Hill's claims are not atypical and may discourage victims from seeking remedies. See 107 Cong. Rec. S14,649 (daily ed. Oct. 15, 1991) (testimony of Sen. Leahy) (warning that Professor Hill's experience “is an object lesson for women about the risk of speaking out”). Professor Hill has noted that procedural and evidentiary rules that permit a sexual harassment victim's psychological history and past relationships to be scrutinized create a chilling effect on potential plaintiffs. Thaai Walker, Anita Hill Tells of Stress in Sexual Harassment Cases, S.F. Chron., Aug. 5, 1993, at A7.
tions is arguably a vestige of an outdated regime that focused undue scrutiny on sexual misconduct victims. Until recently, commentators urged that women alleging sexual abuse submit to a mental examination. While modern courts have resoundingly rejected this position, courts and legislatures have long embraced other procedural and substantive hurdles that institutionalized distrust of women who allege sexual misconduct. Like rape victims, sexual harassment plaintiffs have typically faced unique legal obstacles that effectively place their virtue and veracity on trial. Reform efforts, targeted at

17 See infra note 168 and accompanying text (discussing long-prevalent view that sexual assault victims should submit to psychiatric evaluation given women's supposed tendency to falsely or vindictively accuse men of rape).

18 See infra notes 164-67 and accompanying text.

19 For example, American courts often incorporated into jury instructions Lord Hale's warning that rape "is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent." 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 655 (1778). See, e.g., People v. Benson, 6 Cal. 221, 223 (1856). This practice continued into the 1970s. See, e.g., People v. Rincon-Pineda, 558 P.2d 247, 252, 256 (Cal. 1975) (en banc) (holding that the trial court failed to comply with controlling precedent by refusing to give a cautionary instruction based on Hale's warning, but that the instruction has "outworn its usefulness, and in modern circumstances is no longer to be given mandatory application"). See generally SUSAN ESTRICH, REAL RAPE 27-56 (discussing doctrinally-entrenched distrust of alleged rape victims).

20 These requirements include actual resistance, corroboration, and fresh complaint. According to Professor Susan Estrich:

Rape is the only crime whose victims are almost exclusively female. And it is the only crime which is defined more by the actions, reactions, motives, and inadequacies of the victim than by those of the defendant. . . . We do not require people to resist a muggers, even if the muggers was once a friend. We do not insist on witnesses to robbery. We rarely question the virtue of the robbed store clerk or even the defrauded company owner. We do not downgrade larceny if the victim wore an expensive suit or walked on a dangerous street, or even if he contributed to panhandlers in the past. Yet we require rape victims to prove their virtue, and we impose obligations of actual resistance, corroboration, and fresh complaint on them.

Susan Estrich, See at Work, 43 STAN. L. REV. 813, 815 (1991). See also THE LEGAL BIAS AGAINST RAPE VICTIMS, 61 A.B.A. J. 464 (1975) (illustrating the double standard in rape law with a hypothetical cross-examination of a robbery victim, insinuating that his expensive suit and history of philanthropy were evidence that he asked to be robbed).

Much sexual harassment caselaw supports Professor Estrich's contention that "[t]he very same doctrines . . . are becoming familiar tools in sexual harassment cases." Estrich, supra. Several courts have refused to find actionable sexual harassment where plaintiffs failed to object strenuously enough to vulgar behavior. See, e.g., Dockter v. Rudolf Wolff Futures, Inc., 684 F. Supp. 532, 533 (N.D. Ill. 1988) ("Although Plaintiff rejected [her supervisor's sexual advances], her initial rejections were neither unpleasant nor unambiguous, and gave [him] no reason to believe that his moves were unwelcome.")., aff'd, 915 F.2d 456 (7th Cir. 1990); Ukarish v. Magnesium Elektron, 31 Fair Empl. Prac. Cas. (BNA) 1315, 1319 (D.N.J. 1983) (holding that plaintiff's participation in sexual banter precluded harassment claim despite indications in her diary that such banter was unwelcome); see also Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68-69 (1986) (stating that "the gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome'" and that evidence such as plaintiff's "provocative dress and publicly expressed sexual fantasies" is "obviously relevant" to inquiry into whether advances were unwelcome). Other courts have denied relief where harassment victims could not present first-hand corroboration.
focusing inquiry on the behavior of the accused rather than the accuser, have eliminated many of these obstacles in rape actions. Similarly, sexual harassment standards have increasingly steered factfinders away from scrutinizing the behavior and mental state of the accuser and towards encouraging victims to act vigorously as "private attorneys general" to eradicate sexual harassment.

Unfettered use of adverse mental examinations is adverse to this trend. Several factors inherent in mental health evaluations make compelled psychiatric assessments attractive to harassers. Most notably, psychiatry and psychology tend "to focus on the individual's own contribution to problems and on intra-individual vulnerabilities, as opposed to what is being done to a person." Given this victim-centered focus, it is not surprising that some forensic clinicians maintain that psychological peculiarities common in women who claim sexual harassment and problems of proof inherent in sexual harassment ac-

See, e.g., Burns v. Terre Haute Regional Hosp., 581 F. Supp. 1301, 1308 (S.D. Ind. 1983) (refusing to find actionable sexual harassment when plaintiff failed to present direct corroboration of alleged misconduct, despite evidence that plaintiff described the incident to her husband and co-workers). Finally, courts have rebuffed claims where victims fail to immediately report harassment. See, e.g., Highlander v. K.F.C. Nat'l Management Co., 805 F.2d 644, 650 (6th Cir. 1986) (citing plaintiff's failure to report alleged proposition for three months as support for finding that plaintiff was not offended by the incident).

The corroboration requirement has largely been eliminated because a rape victim's testimony is now generally believed to be as reliable as any other form of evidence. See Mich. Comp. Laws Ann. § 750.520(h) (West 1992); United States v. Sheppard, 569 F.2d 114, 117 (D.C. Cir. 1977). See also Note, The Rape Corroboration Requirement: Repeal Not Reform, 81 Yale L.J. 1365 (1972) (arguing that corroboration requirement is unjustifiable). In addition, courts now disfavor evidence of victims' past sexual behavior to show consent to an alleged rape. See, e.g., Winfield v. Virginia, 301 S.E.2d 15, 19 (Va. 1983) (finding "no logical connection between a woman's willingness to share intimacies with another man with whom she might have had a special relationship" and her consent to intercourse with the defendant). See generally Note, If She Consented Once, She Consented Again: A Legal Fallacy in Forcible Rape Cases, 10 Val. U. L. Rev. 127 (1976) (arguing that much evidence of a victim's past sexual behavior should be inadmissible). Reform efforts led to the enactment of rape shield statutes—which sharply constrain defendants' ability to introduce evidence of complainants' sexual history—in the Federal Rules of Evidence, Fed. R. Evid. 412, and in every state except Arizona, see Western Empire, Denver Post, June 22, 1994, at B4 (reporting Utah's adoption of rape-shield rule, the forty-ninth state to do so). For a list and general discussion of state rape shield statutes, see Sakthi Murthy, Comment, Rejecting Unreasonable Sexual Expectations: Limits on Using a Rape Victim's Sexual History to Show the Defendant's Mistaken Belief in Consent, 79 Cal. L. Rev. 541, 555-57 (1991).

See infra part I.B.3 (discussing abolition of the requirement that plaintiffs demonstrate actual psychological injury to state a valid Title VII claim).


Jensvold, supra note 14, at 442.

Id.
tions necessitate extensive mental examinations of nearly every sexual harassment plaintiff. Such arguments echo those once used to support the now discredited contention that nearly all rape victims should undergo mental examinations. Uncritical acceptance of this position by contemporary courts would subvert the trend toward sexual harassment law reform by focusing undue scrutiny on the virtue and veracity of victims rather than on the behavior of their harassers.

As the number of sexual harassment victims seeking compensatory damages under the Civil Rights Act of 1991 climbs, courts will face increasing attempts to compel these plaintiffs to submit to mental examinations. Thus far, courts have reached no consensus as to whether, or under what circumstances, such plaintiffs may be compelled to submit to an examination. Recent commentary, drawing upon the treatment of motions to compel examinations in common-law actions for mental injuries, suggests that the answer is simple: by seeking damages for emotional distress, the sexual harassment plaintiff exposes herself to an adverse examination.

27 See infra parts III.A., III.B.3.
28 See infra note 163.
29 Actions seeking damages under the Civil Rights Act of 1991 are only beginning to percolate through the courts. The Supreme Court recently held that the damages provision of the Civil Rights Act of 1991 does not apply retroactively. Landgraf v. USI Film Prods., 114 S. Ct. 1483, 1508 (1994). Thus, sexual harassment plaintiffs may only seek compensation under the 1991 Act for conduct occurring since November 21, 1991. Id. at 1506.
30 Compare Jansen v. Packaging Corp. of Am., 158 F.R.D. 409 (N.D. Ill. 1994) (granting examination) with Bridges v. Eastman Kodak Co., 850 F. Supp. 216 (S.D.N.Y. 1994) (denying examination). The Jansen court limited its holding in two key respects. First, it stressed that plaintiff's claim of continuing, rather than past, emotional suffering warranted an examination. 158 F.R.D. at 410. See also Curtis v. Express, Inc., 868 F. Supp. 467 (N.D.N.Y. 1994) (disallowing mental examination of racial discrimination plaintiff seeking damages for past emotional distress under Title VII and New York human rights law); Bridges, 850 F. Supp. at 222 (suggesting that claim of ongoing mental injury may provide sufficient basis for compelled examination); infra note 143 and accompanying text. Second, expressing skepticism that the defendant should be allowed to designate the examining expert, the Jansen court ordered the parties to reach consensus on an “independent” examiner. 158 F.R.D. at 411. In so holding, the court recognized “that mental examinations are particularly sensitive (usually more so than physical examinations), both because of the very different (and lesser) degree of objectivity that they are typically able to provide and because of the special dangers of intrusiveness that they present.” Id. at 410. The Bridges court refused to compel mental examinations of sexual harassment plaintiffs who sought mental anguish damages under New York human rights law, see N.Y. Exec. Law § 297(4)(c)(iii) (McKinney 1993). While the court held that the plaintiffs' claims for compensatory damages under the 1991 Civil Rights Act were invalid because the Act is non-retroactive, 850 F. Supp. at 219, its analysis of the issue of compelled mental examinations focuses on distinctions between antidiscrimination actions and tort actions. Id. at 222. The Bridges court’s reasoning would thus readily apply to actions for emotional distress damages under the 1991 Civil Rights Act.
31 See Outten & Raisner, supra note 12, at 265 (“[V]irtually every court will order a requested mental examination when [compensatory damages for emotional distress under the 1991 Act] are sought.”); Marian C. Haney, Litigation of a Sexual Harassment Case After the
This Note proposes that this issue is not so easily resolved and urges that courts considering such motions carefully balance the benefits and costs of granting them. In many circumstances, this balance will favor denial of the motion. Because a court must ground its inquiry in the rapidly evolving concerns behind and standards employed in sexual harassment cases, Part I of this Note examines the evolution of sexual harassment law. This Part notes that the law has gone from affording virtually no recognition of sexual harassment to acknowledging it as a pervasive social problem and providing an increasingly comprehensive remedial scheme for victims. In the process, courts have stripped away legal standards and practices that devalued women’s perspectives and discouraged them from bringing suit. Part II explores the historical treatment of motions to compel mental examinations, both generally and in sexual harassment cases. This Part notes that courts have found many circumstances in which compelled mental examinations are inappropriate and have expressed heightened concern about such examinations in sexual misconduct cases.

Part III discusses factors that courts facing motions to compel examinations should consider as they balance the interests of the parties involved. This Part argues that, in most cases, the privacy interests of plaintiffs, the social interests embodied in the 1991 Civil Rights Act, and the general tide of sexual harassment legal reform outweigh the probative value of mental examinations to the defendant and the factfinder. Part IV proposes ancillary reform measures designed to prevent abuse of compelled examinations while preserving defendants’ rights to respond to charges of sexual harassment.

I

THE EVOLUTION OF THE SEXUAL HARASSMENT CAUSE OF ACTION

“Sexual harassment is a problem with a long past but a short history.”

Sexual harassment has been pervasive ever since women en-

Civil Rights Act of 1991, 68 Notre Dame L. Rev. 1087, 1051-52 (1993) (suggesting that any mental anguish claim places the victim’s emotional condition in controversy and thus warrants a mental examination, and that plaintiffs may need to use expert testimony to substantiate emotional distress claims in virtually every case).

32 Louise F. Fitzgerald & Sandra L. Shullman, Sexual Harassment: A Research Analysis and Agenda for the 1990s, 42 J. Vocational Behav. 5, 23 (1993).

33 Surveys have consistently shown that large numbers of women suffer workplace sexual harassment. Federal government surveys conducted in 1987 and 1980 both found that over 40% of women respondents had been subjected to some form of sexual harassment. United StatesMerit Systems Protection Board, Sexual Harassment in the Federal Government: An Update 3 (1988); United States Merit Systems Protection Board, Sexual Harassment in the Federal Workplace: Is It a Problem? 2 (1981).
tered the workforce. It was not, however, widely recognized as a social and legal problem until the mid-1970s. Since then, sexual harassment has undergone a fitful and controversial evolution as a legal cause of action. This Part will briefly sketch that evolution. It will first examine the traditional common-law treatment of sexual harassment, then trace the development of sexual harassment as sex discrimination under Title VII of the Civil Rights Act of 1964. This Part will focus particularly on the continuing evolution of the "hostile work environment" claim under Title VII and note that standards for proving such a claim have become more hospitable to plaintiffs, thereby advancing Title VII's goal of eradicating workplace discrimination. Finally, this Part will outline the provisions of and intent behind the 1991 Civil Rights Act.

Other recent studies have found that 40-60% of women say that they have been harassed at some point during their careers. Kara Swisher, Laying Down the Law on Harassment; Court Rulings Spar Firms to Take Preventive Track, WASH. POST, Feb. 6, 1994, at H1, H5. See generally Barbara A. Gutek, Understanding Sexual Harassment at Work, 6 Notre Dame J. L. Ethics & Pub. Pol'y 395, 343-45 (1992) (summarizing studies of the frequency of sexual harassment and concluding that one-half to one-third of all working women have been harassed). Informal surveys have reported that sexual harassment occurs with even greater frequency. See, e.g., Claire Safran, What Men Do to Women on the Job: A Shocking Look at Sexual Harassment, REDBOOK, Nov. 1976, at 149, 217 (reporting that nearly 90% of respondents to readers' poll stated they had received unwanted attention at work, ranging from "leering and ogling" to overt requests for sexual favors); Ronni Sandroff, Sexual Harassment: The Inside Story, WORKING WOMAN, June 1992, at 47-51 (reporting that over 60% of nearly 10,000 readers surveyed had been harassed).

Documented accounts of workplace sexual harassment of women predate the industrial revolution. For historical accounts, see LIN FARLEY, SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB 28-44 (1978); KERRY SEGRAVE, THE SEXUAL HARASSMENT OF WOMEN IN THE WORKPLACE, 1600 TO 1993 passim (1994).

The term "sexual harassment" did not surface in legal and social usage until 1975. CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 27 n.13 (1979). Initial awareness of the pervasiveness of sexual harassment was largely spurred by surveys and articles published in the popular media. See, e.g., Safran, supra note 33. Professor Barbara Gutek observes that the sudden "discovery" of sexual harassment was counterintuitive, as it defied the prevailing notion that "women were believed to benefit from . . . sexual behaviors at work, gaining unfair advantage and acquiring perks and privileges from their flirtatious and seductive behavior." Gutek, supra note 33, at 336. She further notes that popular entertainment continues to portray women who use their sexuality to attain work-related goals. Id. at 336 n.2. Characteristically, the only successful fictional treatments of sexual harassment—Michael Crichton's novel Disclosure, see CRICHTON, supra note 2, and the 1994 Warner Brothers film based on the novel—feature a woman who attempts to seduce a male underling and then seeks to eliminate him from the workplace by bringing a false harassment claim.

A. Sexual Harassment Under Tort Law

In theory, tort law should provide redress to sexual harassment victims: they are, after all, victims of intentionally or negligently inflicted harm, and they frequently suffer loss of job status as well as psychic and physical harm.37 In practice, until courts recognized sexual harassment as actionable sex discrimination, common-law remedies provided the only redress available to victims. Sexual harassment, however, does not fit neatly into traditional tort theories.38 Thus, while plaintiffs have continued to use tort claims for compensatory and punitive damages to supplement the limited remedies available under Title VII,39 the common law has failed to provide a coherent scheme that enables victims to combat workplace sexual harassment.40

Well before the phrase “sexual harassment” entered the lexicon, women were awarded damages for sexual invasions in actions based on assault and battery.41 These torts have afforded redress for some modern workplace harassment victims as well,42 particularly in cases of outright sexual molestation.43 Application of these torts to workplace

37 See Gutek, supra note 33, at 348-50 (surveying studies of the negative consequences of sexual harassment for women workers, which range from decreased job performance to physical and emotional illness).

38 See MacKINNON, supra note 35, at 161 (“Although the facts of sexual discrimination have a long history in women’s suffering, the prohibition on sex discrimination as such lacks a common law history.”); see also Terry M. Dworkin et al., Theories of Recovery for Sexual Harassment: Going Beyond Title VII, 25 SAN DIEGO L. REV. 125 (1988) (arguing that the nature of sexual harassment claims tends to diminish the possibility of recovery in tort).

39 See, e.g., Phillips v. Smalley Maintenance Serv., Inc., 711 F.2d 1524, 1532 (11th Cir. 1983) (accepting jurisdiction of state law claims pendant to plaintiff’s Title VII claim).

40 In response to the incomplete remedies provided by Title VII and the inadequacy and rigidity of state tort law, one commentator has proposed the implementation of a specific tort claim for sexual harassment. See Krista J. Schoenheider, Comment, A Theory of Tort Liability for Sexual Harassment in the Workplace, 134 U. PA. L. REV. 1461 (1986). Another has proposed recognition of such a tort because sexual harassment does not fit the paradigm of sex discrimination. See Ellen Frankel Paul, Sexual Harassment as Sex Discrimination: A Defective Paradigm, 8 YALE L. & Pol’Y REV. 333, 362-63 (1990).

41 Early sexual invasion cases finding assault and/or battery include: Hatchett v. Blacketer, 172 S.W. 533, 534 (Ky. 1915) (upholding an award of $10,000 against a man who unlawfully detained a woman and squeezed her breast); Ragsdale v. Ezell, 49 S.W. 775, 776 (Ky. 1899) (finding assault and battery when a man squeezed the breast of a woman and touched her face); Martin v. Jansen, 193 P. 674 (Wash. 1920) (awarding damages to a woman who claimed the defendant lewdly and lasciviously fondled her without consent). Catherine MacKinnon notes that these courts’ willingness to provide civil redress for sexual invasions stemmed from the era’s relative willingness to equate women’s virtue with their value. MacKINNON, supra note 35, at 164.


43 See, e.g., Valdez v. Church’s Fried Chicken, Inc., 683 F. Supp. 596 (W.D. Tex. 1988) (awarding punitive damages for attempted rape); Gilardi v. Schroeder, 672 F. Supp. 1043 (N.D. Ill. 1986) (awarding damages to a woman who had been drugged and raped by her employer), aff’d, 833 F.2d 1226 (7th Cir. 1987).
harassment, however, is obviously limited: assault and battery require threatened or actual physical contact.\textsuperscript{44} They do not, therefore, afford relief for verbal harassment, no matter how pervasive or severe the abuse.\textsuperscript{45}

Victims of verbal harassment can succeed in suits alleging intentional infliction of emotional distress.\textsuperscript{46} Plaintiffs alleging the tort must demonstrate that the defendant acted outrageously, and in so doing intentionally or recklessly inflicted severe emotional distress upon the plaintiff.\textsuperscript{47} Theoretically, a defendant's creation of a sexually hostile work environment\textsuperscript{48} should per se satisfy the elements of intentional infliction of emotional distress.\textsuperscript{49} A hostile work environment is essentially one that a reasonable person would consider abusive—hence, one that contemporary social standards would deem outrageous.\textsuperscript{50} Furthermore, tort law has embraced the principle that employment status entitles a person to heightened protection from insult and outrage at her workplace.\textsuperscript{51}

\textsuperscript{44} Assault and battery are separate actions, though plaintiffs often bring them in tandem. Assault occurs when a person "acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact and . . . the other is thereby put in such imminent apprehension." \textit{Restatement (Second) of Torts} § 21 (1965). Battery requires unwelcome intentional contact that is harmful or offensive. \textit{See id.} § 18.

\textsuperscript{45} \textit{See id.} § 31 cmt. a (noting that "mere words do not constitute an assault").

\textsuperscript{46} \textit{See, e.g.,} Coleman v. American Broadcasting Co., 38 Fair Empl. Prac. Cas. (BNA) 65, 70 (D.D.C. 1985) (dismissing defendants' motion for summary judgment on grounds that "sexual advances, verbal comments, [and] sexual solicitations" may "rise to a level supporting intentional infliction of emotional distress").

\textsuperscript{47} \textit{Restatement (Second) of Torts} § 46 (1965).

\textsuperscript{48} \textit{See infra part I.B.2.} (discussing hostile environment cause of action).

\textsuperscript{49} 1 Alba Conte, Sexual Harassment in the Workplace: Law and Practice 407 (2d ed. 1994). Some courts have accepted this view. \textit{See, e.g.,} Fisher v. San Pedro Penninsula Hosp., 262 Cal. Rptr. 842, 858 (Ct. App. 1989) ("[B]y its very nature, [hostile environment] sexual harassment in the work place is outrageous conduct as it exceeds all bounds of decency usually tolerated by a decent society."); Howard Univ. v. Best, 484 A.2d 958, 986 (D.C. 1984) (rejecting the view that "degrading and humiliating" harassment amounted at worst to a "social impropiety" rather than an outrage).

\textsuperscript{50} \textit{See} Retherford v. AT&T Communications, Inc., 844 P.2d 949, 978 (Utah 1992) ("[O]ur society has ceased seeing sexual harassment in the work place as a playful inevitability that should be taken in good spirits . . . . [T]he conduct generally labeled sexual harassment is outrageous and intolerable and . . . satisfies the elements of the tort of intentional infliction of emotional distress."); Fisher, 262 Cal. Rptr. at 858; Benson A. Wolman, \textit{Verbal Sexual Harassment on the Job as Intentional Infliction of Emotional Distress}, 17 \textit{Cap. U. L. Rev.} 245 (1988) (arguing that social standards of outrageousness have evolved towards protection of harassment victims and will continue to do so).

\textsuperscript{51} 1 Conte, \textit{supra} note 49, at 407. Outrageousness is often determined by the social context of the act:

[T]he work culture in some situations may contemplate a degree of teasing and taunting that in other circumstances might be considered cruel and outrageous. But though the social context may make some questionable conduct tolerable, the same social context may make other acts especially outrageous. Sexual harassment on the job is undoubtedly an intentional infliction of emotional distress, for example, and harassment is probably
In practice, however, the tort of intentional infliction of emotional distress has proven a haphazard mechanism through which to combat sexual harassment. First, state standards for proving the tort vary: some states bar claims of intentional infliction of emotional distress in the absence of demonstrable physical harm. Second, worker's compensation statutes bar many claims for employment-related torts. Finally, notions persist that sexually charged behavior is too much a part of the fabric of working life to be considered "outrageous." Consequently, the tort of intentional infliction of emotional distress has not offered a consistent scheme for compensating sexual harassment victims.

Even if sexual harassment fit more comfortably into traditional tort theory, the common law would still not fully address the issue of

more readily found in the acts of a supervisor than in the acts of acquaintances at a dinner party.


In addition, tort law should be particularly responsive to persons in positions of authority in the workplace who use their power to intimidate and harass: "The extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other . . . ." RESTATEMENT (SECOND) OF TORTS § 46 cmt. e (1965).


Other states, however, have held that tort claims arising from sexual harassment are not barred by workers' compensation statutes. See, e.g., Bennett v. Furr's Cafeterias, Inc., 549 F. Supp. 887, 890 (D. Colo. 1982) (holding that emotional trauma caused by sexual harassment is not an employment-related risk, and thus action was not barred by exclusivity provision); Ford v. Revlon, Inc., 754 F.2d 550, 557 (Ariz. 1987) (holding that harassing acts were intentional, not accidental, and thus outside the scope of workers' compensation exclusion). See generally Jane Byeff Korn, The Fungible Woman and Other Myths of Sexual Harassment, 67 TUL. L. REV. 1363, 1378-1417 (1993) (discussing the split among states regarding exclusion of sexual harassment tort claims and arguing against exclusion).

54 See Andrews v. City of Philadelphia, 895 F.2d 1469, 1486-87 (3d Cir. 1990) (holding that, "as a general rule" under Pennsylvania law, a claim of sexual harassment alone does not rise to the level of outrageousness required for recovery); Paroline v. Unisys Corp., 879 F.2d 100, 112-15 (4th Cir. 1989) (holding that suggestive remarks and non-vulgar touching are insufficiently outrageous under Virginia law); Sudstill v. Borg Warner Leasing, 806 F.2d 1005, 1008 (11th Cir. 1986) (finding dirty jokes and profane suggestions insufficiently outrageous under Florida law); see also Peter G. Nash & Jonathan R. Mook, Employee Tort Actions for Sexual Harassment in Virginia: Negotiating the Liability Mine Field, 1 GEO. MASON U. CIV. RTS. L.J. 247, 250 (1990) (stating that "it will be the rare employment situation where [shocking and outrageous] verbal abuse can meet the stringent requisite[s]" of the intentional infliction of emotional distress cause of action).
sexual harassment. Workplace sexual harassment is a pervasive social ailment as well as a personal problem for victims.\textsuperscript{55} Should the law view sexual harassment only as a tort—a personal cause of action—it would ignore this social dimension\textsuperscript{56} and fail to recognize that sexual harassment is inextricably bound with other elements of gender discrimination that hinder women's employment opportunities.\textsuperscript{57} Led by Catherine MacKinnon, feminist scholars thus urged recognition of sexual harassment as a form of sex discrimination actionable under federal civil rights law.\textsuperscript{58}

\textbf{B. Sexual Harassment as Sex Discrimination Under Title VII}

Title VII of the Civil Rights Act of 1964 prohibits sex-based discrimination in employment.\textsuperscript{59} It does not, however, mention sexual

\begin{itemize}
\item \textsuperscript{55} See supra note 33 and accompanying text.
\item \textsuperscript{56} Professor MacKinnon notes:
  
  The . . . suggestions that sexual harassment be treated as a tort—a private harm—applies, unstated, the view that the interest to be protected is not so much an interest of women as a sex in employment opportunities as it is a personal interest . . . . To the extent that tort theory fails to capture the broadly social sexuality/employment nexus that comprises the injury of sexual harassment, by treating the incidents as if they are outrages particular to an individual woman rather than integral to her social status as a woman worker, the personal approach on the legal level fails to analyze the relevant dimensions of the problem.

  \textit{MacKinnon, supra note 35, at 88.}

\item \textsuperscript{57} Disparity in wages is another such problem. While the earnings gap has consistently eroded for over a decade, in 1992 women earned 75.4% of what men earned. \textit{The American Woman 1994-95} 308-09 (Cynthia Costello \& Anne J. Stone eds., 1994) (citing \textit{Bureau of Labor Statistics, U.S. Dep't of Labor, Employment and Earnings} Table 56 (1993)). In addition, women remain concentrated in "traditional" occupations. See \textit{Francine D. Blau \& Marianne A. Ferber, The Economics of Women, Men, and Work} 155-61 (1986).


\item \textsuperscript{59} \textit{42 U.S.C. § 2000-e(a) (1988)} states that "[i]t shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin" (emphasis added).

  It is essentially an accident that Title VII addresses sex-based discrimination at all. The amendment adding the word "sex" was advanced by Southern congressmen opposed to the Act in an eleventh-hour attempt to defeat its passage. See 110 Cong. Rec. 2577-84 (1964) (remarks of Rep. Smith and others); Francis J. Vaas, \textit{Title VII: Legislative History}, 7 B.C.
harassment. Early attempts by sexual harassment victims to assert a cause of action under Title VII failed; deprived of statutory guidance as to what constitutes sex-based discrimination, federal courts initially held that sexual harassment was not discrimination based on gender. These courts instead characterized harassment as interpersonal conflicts stemming from characteristics peculiar to the individual involved. In 1976, however, a district court ruled in Williams v. Saxbe that sexual harassment is sex-based discrimination which violates Title VII. Circuit courts tentatively followed suit.

1. Quotid Pro Quo Harassment

These early suits established a cause of action for quid pro quo harassment, in which an employee's response to "unwelcome sexual advances [or] requests for sexual favors" results in a grant or denial of tangible job benefits. Quid pro quo causes of action arise only under narrowly-defined factual circumstances. A plaintiff must

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Cf. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 63-64 (1986) (stating that the last minute addition of sex-based discrimination to Title VII left the Court with "little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex'"). No hearings were held on the amendment, and it was approved after sharply constricted debate. Vaas, supra note 59, at 442.


See, e.g., Corne, 390 F. Supp. at 163 (holding that a supervisor's sexually inappropriate conduct was "nothing more than a personal proclivity, peculiarity or mannerism"); Barnes, 13 Fair Empl. Prac. Cas. (BNA) at 123-24 (stating that allegedly harassing conduct amounted to "subtleties of an inharmonious personal relationship" and thus did "not evidence an arbitrary barrier to continued employment based on plaintiff's sex"). See also Ann C. Juliano, Note, Did She Ask For It?: The "Unwelcome" Requirement in Sexual Harassment Cases, 77 Cornell L. Rev. 1558, 1568 (1992) (summarizing these courts' reasoning: "Jane Doe was harassed because she was Jane Doe, not because she was a woman."). Some of these courts suggested that, since the harassment amounted to interpersonal wrongdoing, tort law would provide appropriate remedies. See, e.g., Tomkins, 422 F. Supp. at 556; Barnes, 13 Fair Empl. Prac. Cas. (BNA) at 124.


Tangible benefits include continued employment, transfers, promotions, favorable evaluations, and pay raises. Tomkins, 568 F.2d at 1048-49.

See Estrich, supra note 20, at 854 (arguing that requirements of the quid pro quo cause of action might make "all but the most perfect plaintiffs unable to establish the requisite nexus, and all but the most perfectly stupid defendants able to rebut successfully a prima facie case").
proven, in essence, that someone with authority to change her job status told her to "sleep with me or I'll fire you," and that the denial or receipt of job benefits hinged on her response. Indeed, the first successful sexual harassment suits under Title VII were brought by women who had been fired for refusing sexual advances from supervisors.

2. Hostile Environment Harassment

While courts' acknowledgement of quid pro quo harassment marked a significant development, this cause of action failed to address a more pervasive and elusive form of harassment: sexually-charged abuse that pervades the work environment but does not directly lead to the loss of tangible job benefits. In the 1980s, however, courts expanded the definition of sexual harassment to encompass claims alleging an abusive work environment which did not directly deprive the victim of tangible job benefits.

Spurred by the Equal Employment Opportunity Commission's 1980 Guidelines on Discrimination Because of Sex (EEOC Guidelines), courts began to find Title VII violations where employers cre-

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68 See, e.g., 1 Conte, supra note 49, at 22. In contrast, employers, supervisors, coworkers, customers, or clients can create a hostile work environment. Id.

69 The defendant may respond by asserting that no unwelcome sexual advance occurred, or that, even if such an advance did occur, any adverse employment decision stemmed from nondiscriminatory motives. Lindemann & Kadue, supra note 36, at 130.

70 See Barnes, 561 F.2d at 990 (finding that plaintiff was "asked to bow to [supervisor's sexual demands] as the price for holding her job"); Williams, 413 F. Supp. at 656 (finding that the plaintiff was harassed and ultimately fired for refusing supervisor's sexual advances).

71 Such abuse generally falls into one of three categories: (1) sexual advances which do not amount to quid pro quo harassment, see supra part I.B.1; (2) gender-based animosity, in which a female employee, often in a traditionally male occupation, is abused by males who resent her presence; or (3) a sexually charged workplace, such as one which features open displays of pornography or unremitting sexual misbehavior. Barbara Lindemann & David D. Kadue, Primer on Sexual Harassment 15 (1992).

72 29 C.F.R. § 1604.11 (1995). The 1980 Guidelines broadened the definition of sexual harassment that violates Title VII to include "conduct [that] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." The Guidelines prompted a massive increase in Title VII sexual harassment litigation. In 1980, the EEOC reported that complainants filed 75 sexual harassment claims; in 1981, that figure jumped to 3,812. 1 Conte, supra note 49, at 33.

The 1980 Guidelines, formulated during the Carter Administration, received heavy criticism from President-elect Ronald Reagan's transition team. The group's report, co-authored by transition team member and future EEOC chair Clarence Thomas, concluded that "[t]he elimination of personal slights and sexual advances which contribute to an 'intimidating, hostile, or offensive working environment' is a goal impossible to reach. Expenditures of the EEOC's limited resources in pursuit of this goal is unwise." See Paul Taylor, Thomas's View of Harassment Said to Evolve, Wash. Post, October 11, 1991, at A10. The Reagan Administration's fears about expanding definitions of sexual harassment prompted it to urge the Supreme Court to limit availability of the hostile environment
ated or condoned sexually hostile work environments. In 1982, the
Eleventh Circuit clarified the elements of a prima facie hostile
environment case in *Henson v. City of Dundee*:

1. the employee belongs to a protected group,
2. the employee was subjected to unwelcome sexual harassment,
3. the harassment complained of was based on gender,
4. the harassment affected a term, condition, or privilege
cause of action. *See* Brief for United States as Amicus Curiae at 12-13, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (No. 84-1979) (asserting that distinctions between sexual harassment and "natural" sexual attraction in the workplace are inherently difficult to ascertain and urging that the Court not extend vicarious liability to hostile environment actions).

In *Bundy v. Jackson*, 641 F.2d 934, 943-44, 948 n.15 (D.C. Cir. 1981), the Court of Appeals for the District of Columbia declared itself the first federal appellate court to explicitly adopt the 1980 Guideline's sexually hostile work environment provisions. The court noted that hostile environment claims were not novel: courts had previously found racially hostile work environments to violate Title VII. *See*, e.g., Firefighters Inst. for Racial Equality v. City of St. Louis, 549 F.2d 506, 514-15 (8th Cir.) (holding that segregated eating clubs condoned by employer created a discriminatory work environment), cert. denied, 434 U.S. 819 (1977); *Rogers v. EEOC*, 454 F.2d 284 (5th Cir. 1971) (finding that employer's practice of segregating optometry patients created a hostile work environment), cert. denied, 406 U.S. 957 (1972).

Some circuits have slightly reformulated the elements of a prima facie hostile work environment claim. *See*, e.g., *Swentek v. USAir, Inc.*, 830 F.2d 552, 557 (4th Cir. 1990) (requiring (1) unwelcome conduct amounting to (2) harassment based on sex which is (3) "sufficiently severe or pervasive to create an abusive working environment," and (4) some basis for imputing liability to the employer); *Carrero v. New York City Hous. Auth.*, 890 F.2d 569, 578 (2d Cir. 1989) (requiring (1) unwelcome conduct that is (2) prompted by gender and (3) sufficiently pervasive to create an environment antithetical to "priority of merit").

In sex discrimination cases, only a stipulation that the employee is a man or a woman is required. *Henson*, 682 F.2d at 903.

Courts have generally held that harassing behavior need not be explicitly sexual to qualify as sex discrimination so long as it amounts to unequal treatment based on gender. *See*, e.g., *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 905 (1st Cir. 1988) (holding that male workers' verbal attacks, while not explicitly sexual, were charged with "anti-female animus" and thus contributed to a hostile environment); *McKinney v. Dole*, 765 F.2d 1129, 1138 (D.C. Cir. 1985) (holding that conduct which would not occur but for the sex of the harassed employee is actionable sexual harassment, even if the conduct does not consist of sexual advances or other overtly sexual conduct).

The EEOC's Guidelines were initially misleading with respect to whether conduct must be of a "sexual nature" to be actionable. *See* 29 C.F.R. § 1604.11(a) (stating that sexual harassment consists of "sexual advances... and other verbal or physical conduct of a sexual nature"). Some courts were confused by this language. *See*, e.g., *Reynolds v. Atlantic City Convention Ctr. Auth.*, 53 Fair Empl. Prac. Cas. (BNA) 1852, 1867-68 (D.N.J. 1990) (holding that male co-workers' refusal to work with complainant was not sexual harassment because it was not "conduct of a sexual nature"). The EEOC has since made it clear that proof of sexual activity or language is not necessary to prove unlawful sexual harassment; the harassment need only be "sufficiently patterned or pervasive" and directed at employees because of their gender. EEOC Policy Guidance on Sexual Harassment, 8 Fair Empl. Prac. Man. (BNA) 405:6692 (March 19, 1990).

The court noted that this element is generally a "simple matter" because "[i]n the typical case in which a male supervisor makes sexual overtures to a female worker, it is obvious that the supervisor did not treat male employees in a similar fashion." *Henson*, 682 F.2d at 904. However, where "a supervisor makes sexual overtures to workers of both sexes
of employment, and (5) the employer is liable under respondeat superior. The court established that psychological well-being is a term, condition, or privilege of employment. In Meritor Savings Bank v. Vinson, the Supreme Court acknowledged that "Title VII is not limited to 'economic' or 'tangible' discrimination" and that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive working environment." 


The Meritor Court attempted to establish a standard for proving that a work environment is hostile: "For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.' The Court asserted that "[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'" Drawing from the EEOC Guidelines, the Court held that

or where the conduct complained of is equally offensive to male and female workers," Title VII does not apply. Id. Presumably, then, Title VII provides no cause of action for bisexual harassment. Cf. Sheehan v. Purolator, Inc., 839 F.2d 99, 105 (2d Cir.) (affirming judgment against plaintiffs on the ground that "abusive" supervisor's "temper was manifested indiscriminately toward men and women"), cert. denied, 488 U.S. 891 (1988). A few courts and commentators have considered this an indication that Congress did not intend for sexual harassment to fall under Title VII's definition of sex discrimination. See Vinson v. Taylor, 760 F.2d 1330, 1333 n.7 (D.C. Cir. 1985) (Bork, J., dissenting from denial of rehearing) (doubting that Congress intended Title VII to prohibit any form of sexual harassment because it does not prohibit bisexual harassment), aff'd on other grounds sub nom. Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986); Come v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975) (stating that unwanted sexual advances must be outside Title VII's contemplation because bisexual advances would not provide basis for suit), vacated on procedural grounds, 562 F.2d 55 (9th Cir. 1977); Paul, supra note 40, at 351.

Where the plaintiff attempts "to hold [an] employer responsible for the hostile environment created by the plaintiff's supervisor or co-worker, she must show that the employer knew or should have known of the harassment in question and failed to take prompt remedial action." Henson, 682 F.2d at 905 (footnote omitted). The employee may prove such knowledge by showing that she complained to higher management, or by showing that the harassment is pervasive. Id. Presumably, then, Title VII provides no cause of action for bisexual harassment. Cf. Sheehan v. Purolator, Inc., 839 F.2d 99, 105 (2d Cir.) (affirming judgment against plaintiffs on the ground that "abusive" supervisor's "temper was manifested indiscriminately toward men and women"), cert. denied, 488 U.S. 891 (1988). A few courts and commentators have considered this an indication that Congress did not intend for sexual harassment to fall under Title VII's definition of sex discrimination. See Vinson v. Taylor, 760 F.2d 1330, 1333 n.7 (D.C. Cir. 1985) (Bork, J., dissenting from denial of rehearing) (doubting that Congress intended Title VII to prohibit any form of sexual harassment because it does not prohibit bisexual harassment), aff'd on other grounds sub nom. Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986); Come v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975) (stating that unwanted sexual advances must be outside Title VII's contemplation because bisexual advances would not provide basis for suit), vacated on procedural grounds, 562 F.2d 55 (9th Cir. 1977); Paul, supra note 40, at 351.

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the existence of sexual harassment must be determined "in light of the 'record as a whole' and 'the totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.'"\(^8\)

In response to Meritor, the circuit courts adopted semantically similar tests for evaluating the "totality of the circumstances" to determine whether a work environment was sufficiently hostile to violate Title VII. All the standards focused on the objective perception of a "reasonable" individual: Would a reasonable person find the work environment hostile, based on some analysis of the totality of circumstances? Thus, the courts firmly established that Title VII is not "a vehicle for vindicating the petty slights suffered by the hypersensitive."\(^8\) In applying and refining their standards, however, the circuits presented divergent views as to how hostile a defendant's actions or how severe a plaintiff's injury must be to trigger Title VII remedies.

a. **Split Circuits: The Unreasonableness + Actual Injury Test v. the Purely Objective Standard**

In Rabidue v. Oscoela Refining Co.,\(^87\) the Court of Appeals for the Sixth Circuit applied a strict objective/subjective test for evaluating an allegedly hostile work environment. Under this dual standard, the plaintiff must show (1) that the harasser's conduct was objectively unreasonable and would "affect seriously the psychological well-being of [a] reasonable person under like circumstances"\(^88\) and (2) that the plaintiff actually "suffered some degree" of psychological injury.\(^89\) Other circuits adopted forms of the Rabidue test, requiring that plaintiffs show psychological injury in addition to satisfying an objective standard.\(^90\)

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\(^8\) Meritor, 477 U.S. at 69 (quoting EEOC Guidelines, 29 C.F.R. § 1604.11(b)).

\(^86\) Zabkowicz v. West Bend Co., 589 F. Supp. 780, 784 (E.D. Wis. 1984), aff'd in part and rev'd in part on other grounds, 789 F.2d 540 (7th Cir. 1986).


\(^88\) Id. at 620.

\(^89\) Id.

\(^90\) See, e.g., Brooms v. Regal Tube Co., 881 F.2d 412, 418-19 (7th Cir. 1989); Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 1561 (11th Cir. 1987); see also Scott v. Sears,
The EEOC, however, specifically repudiated the Rabidue approach, stating in a 1990 policy guide that a plaintiff need not show psychological injury to state a valid hostile environment claim. In Ellison v. Brady, the Court of Appeals for the Ninth Circuit adopted the EEOC's approach and rejected the actual injury requirement. The court stated that proper inquiry in hostile environment claims focuses on the harasser's conduct rather than the victim's mental fortitude, and that "Title VII's protection of employees from sex discrimination comes into play long before the point where victims of sexual harassment require psychiatric assistance." The EEOC subsequently expressed strong approval of the Ninth Circuit's position, stating that the actual injury requirement "misdirects the inquiry in a way that undermines Title VII's prohibitions on discrimination in employment." Other circuit courts, without specifically addressing the propriety of the actual injury requirement, adopted standards that did not require plaintiffs to demonstrate actual mental injury in order to state a valid hostile environment claim.

Roebuck & Co., 798 F.2d 210, 214 (7th Cir. 1986) (denying recovery to plaintiff who did not show that she was psychologically debilitated by sexual harassment). Cf. Paroline v. Unisys Corp., 879 F.2d 100, 105 (4th Cir. 1989) (requiring plaintiff to demonstrate that harassment either "significantly affected her psychological well-being" or "interfered with her ability to perform her work"), vacated in part 900 F.2d 27 (4th Cir. 1990).

91 EEOC Policy Guidance on Sexual Harassment, supra note 76, at 405:6690 n.20. See also Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae at 14-22, Harris v. Forklift Systems, 114 S. Ct. 367 (1993) (No. 92-1168) [hereinafter EEOC Brief] (detailing the EEOC's opposition to the "actual injury" prong of the Rabidue test). The EEOC notes that the requirement of psychological injury in hostile environment sexual harassment actions may stem from a misreading of racial hostile environment cases. Id. at 15-17. Cases like Bundy v. Jackson, 641 F.2d 934, 944 (D.C. Cir. 1981), and Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972), discuss psychological injury to explain why hostile work environment actions are available where no economic harm exists. Rabidue and its progeny transformed that language into the actual injury requirement. In contrast, the Sixth Circuit has explicitly held that plaintiffs alleging a racially hostile environment need not show actual injury to establish a Title VII claim. Davis v. Monsanto Chemical Co., 858 F.2d 345, 349 (6th Cir. 1988), cert. denied, 490 U.S. 1010 (1989).

92 924 F.2d 872 (9th Cir. 1991).

93 Id. at 877-78. See also Brief for Amicus Curiae, American Psychological Association at 9-11, Harris v. Forklift Systems, 114 S. Ct. 367 (1993) (No. 92-1168) [hereinafter APA Brief] (presenting research demonstrating that the presence and degree of psychological injury do not effectively measure the severity of the harassment).

94 EEOC Brief, supra note 91, at 20.

95 See, e.g., Burns v. McGregor Elec. Indus., Inc., 955 F.2d 559, 564 (8th Cir. 1992); Carrero v. New York City Hous. Auth., 890 F.2d 569, 577-78 (2d Cir. 1989). Cf. Andrews v. City of Philadelphia, 895 F.2d 1469, 1482-83 (3d Cir. 1990) (requiring a showing that "the alleged conduct injured this particular plaintiff," but the plaintiff must demonstrate only that "the discrimination detrimentally affected" her).
b. The Death of the Actual Injury Test: Harris v. Forklift Systems, Inc.

In 1993, the Supreme Court unanimously rejected the "actual injury" test. *Harris v. Forklift Systems, Inc.*, which reversed a decision from the Rabidue circuit, held that a sexual harassment victim need not suffer psychological injury in order to prevail in a Title VII action. Conduct that is "severe or pervasive enough to create an objectively hostile work environment—an environment that a reasonable person would find hostile or abusive—" violates Title VII. The Court added a mild subjective prong to this standard, stating that the victim must "subjectively perceive the environment to be abusive" for the harassment to alter the conditions of the victim's employment. Justice O'Connor did not further clarify how this test should be applied, noting that it is not "a mathematically precise test" and that "whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances." Psychological harm is but one factor; others include frequency and severity of conduct and whether the work environment unreasonably interferes with the employee's work.

In some ways, *Harris* is only a small step forward. As Justice Scalia and others have noted, it does not offer clear guidelines for defining a hostile work environment. It also fails to adopt a "rea-

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97 The Sixth Circuit affirmed without opinion the district court’s holding that plaintiff Theresa Harris did not demonstrate the requisite psychological injury. 976 F.2d 733 (6th Cir. 1992), aff’d without opinion 61 Fair Empl. Prac. Cas. (BNA) 240 (M.D. Tenn. 1991), rev’d, 114 S. Ct. 367 (1993). This reluctance to speak on the issue stems, according to one commentator, from the Sixth Circuit’s defensive posture regarding *Rabidue* and resulting reluctance to make any quotable statements regarding sexual harassment. Anne C. Levy, *Sexual Harassment Cases in the 1990s: “Backlashin” the “Backlash” Through Title VII*, 56 ALB. L.R. 1, 22 & n.112 (1992) (citing wave of Sixth Circuit sexual harassment opinions from 1990 to 1992 not recommended for full-text publication).
98 *Harris*, 114 S. Ct. at 370.
99 *Id.*
100 *Id.* at 371. This vagueness worries Justice Scalia: "'Abusive' . . . does not seem to me a very clear standard—and I do not think clarity is at all increased by adding the adverb 'objectively' or by appealing to a 'reasonable person's' notion of what the vague word means." *Id.* at 372 (Scalia, J., concurring).
101 *Id.* at 371.
103 See *supra* note 100; see also Bettina B. Plevan, *Harris Won't End Harassment Questions*, NAT'L L.J., Dec. 6, 1993, at 19 (asserting that the Court missed an opportunity in *Harris* to clarify hostile environment standards); Gayle S. Sanders & Susan C. Stanley, *Courts Contemplate Harassment Claims After Harris Decision*, NAT'L L.J., Feb. 28, 1994, at S10 (noting that *Harris* does not clarify standards for evaluating a hostile work environment, and that subsequent cases have been decided on an *ad hoc* basis).
sonable woman” or “reasonable victim” standard for evaluating a hostile environment, as amici advocated. Its rejection of Rabidue’s “actual injury” requirement, however, reaffirms the evolving realization of Title VII as a transforming social force. The “actual injury” test compromised Title VII’s power to transform workplaces by unduly focusing inquiry on the mental fortitude of discrimination victims. Harris cements the notion that a primary aim of Title VII is to eradicate gender-based hostility from the workplace, and that judicial inquiry in sexual harassment actions must focus on that goal.

4. The 1991 Civil Rights Act

Although Title VII evolved during the 1970s and 1980s into a formidable remedial tool, a major obstacle remained that discouraged sexual harassment victims from invoking it: many plaintiffs found that bringing a Title VII action literally did not pay. Title VII permitted gender discrimination victims to recover only modest equitable compensation—back pay, an injunction against the discriminatory behav-


105 See, e.g., Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971) (noting that the primary purpose of Title VII is to achieve equality of employment opportunities and to remove long-standing barriers that favored white employees).

The Rabidue court acknowledged that Title VII exists to transform discriminatory workplaces: the majority, quoting the district court below, characterized Title VII as “the federal court mainstay in the struggle for equal employment opportunity for the female workers of America.” Id. at 621 (quoting Rabidue v. Osceola Refining Co., 584 F. Supp. 419, 430 (E.D. Mich. 1984) (Newblatt, J.), aff’d, 805 F.2d 611 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987)). In the very next sentence, however, the court stated that “it is quite different to claim that Title VII was designed to bring about a magical transformation in the social mores of American workers.” Id. (quoting 584 F. Supp. at 430).

To some extent, the Rabidue court acknowledged its error two years later in Davis v. Monsanto Chemical Co., 858 F.2d 345 (6th Cir. 1988), cert. denied, 490 U.S. 1110 (1989):

In reading [the Rabidue “magical transformation”] passage... one should place emphasis on the word “magical,” not the word “transformation.” Title VII was not intended to eliminate immediately all private prejudice and biases. That law, however, did alter the dynamics of the workplace because it operates to prevent bigots from harassing their co-workers... In essence, while Title VII does not require an employer to fire all “Archie Bunkers” in its employ, the law does require that an employer take prompt action to prevent such bigots from expressing their opinions in a way that abuses or offends their co-workers. By informing people that the expression of racist or sexist attitudes in public is unacceptable, people may eventually learn that such views are undesirable in private, as well. Thus, Title VII may advance the goal of eliminating prejudices and biases in our society.

Id. at 350 (citations omitted).

106 See, e.g., APA Brief, supra note 93, at 11.
ior, and reinstatement to their jobs. Most sexual harassment victims, however, lose far more than a salary and a job; at the very least, they suffer humiliation, embarrassment, and loss of self esteem, and many suffer more severe psychological and physical consequences.

Courts, however, consistently rebuffed plaintiffs' attempts to recover compensatory or punitive damages under Title VII.

The 1991 Civil Rights Act provides a scheme through which victims of gender-based discrimination may better obtain redress. Its prime goal is empowerment: Congress intended the Act to encourage victims to act as "private attorneys general" in the effort to eradicate workplace discrimination. The Act permits victims of sex discrimination to pursue compensatory and punitive damages, though it limits the amount of recoverable damages based on the number of persons employed by the respondent firm. Plaintiffs may seek compensation for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses."

Congressional reports on the 1991 Act recognize the obvious: victims of sexual harassment often lose more than a few days' pay, a serene work environment, or a job. Victims naturally suffer emo-

108 See Gutek, supra note 33, at 348-50 (surveying studies of the negative consequences of sexual harassment for women workers, which range from decreased job performance to physical and emotional illness).
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tional distress and pain, for which the Civil Rights Act of 1964 offered little recourse. The 1991 Act remedies this shortcoming by providing plaintiffs with the opportunity to be "made whole" without resorting to tort action.\textsuperscript{115} Plaintiffs must, however, meet "strict standards" to recover compensatory damages: they must "prove actual injury or loss."\textsuperscript{116} This requirement may significantly impact defendants' attempts to compel plaintiffs to submit to a mental examination.

II

\textbf{JUDICIAL TREATMENT OF MOTIONS TO COMPEL MENTAL EXAMINATIONS}

To compel a mental examination of an adverse party, the movant must show that the mental condition of the party to be examined is "in controversy."\textsuperscript{117} After \textit{Harris}, a defendant cannot effectively argue that a sexual harassment plaintiff's mere invocation of Title VII places her mental condition in controversy, for a post-\textit{Harris} plaintiff need not show actual psychological injury to establish Title VII liability.\textsuperscript{118} The bulk of the factfinder's inquiry must focus not on how the plaintiff responded to workplace conditions, but on whether a reasonable person would find those conditions hostile. Consequently, a plaintiff places her work environment—not her mental condition—in controversy.

If, however, a plaintiff seeks damages for mental anguish under the 1991 Civil Rights Act, she must prove "actual injury or loss." Once the factfinder finds liability, it must, to some extent, shift its inquiry to the plaintiff's mental state to determine what compensable effect the harassment had on her.\textsuperscript{119} Consequently, a post-\textit{Harris} defendant could argue that a request for mental anguish damages automatically places the plaintiff's mental condition at issue and provides the defen-


\textsuperscript{117} Fed. R. Civ. P. 35(a).

\textsuperscript{118} \textit{Cf.} Jan Hoffman, \textit{Plaintiffs' Lawyers Applaud Decision}, \textit{N.Y. Times}, Nov. 10, 1993, at A22 (quoting attorney Sarah Burns' assertion that \textit{Harris} eliminates "the impetus that was gaining steam that a plaintiff would be opening herself up to a psychological examination by alleging a hostile work environment"); Merrick Rossein, \textit{on The Week in Review} (CNN television broadcast, Nov. 14, 1993) ("[W]hy [the elimination of the actual injury requirement] is so important is that often, when women would file complaints of sexual harassment, employers' attorneys would then say, 'Your life is an open book, and we're going to require you to have a mental examination,' and really attack a woman's character. That will no longer be possible.").

\textsuperscript{119} \textit{Cf.} Paul C. Sprenger, \textit{Current Discovery Issues in Sexual Harassment Claims}, in \textit{SEXUAL HARASSMENT LITIGATION 1993}, \textit{supra} note 12, at 111, 123 (observing that discovery of medical information may be relevant to damages issues but not in the liability phase of a bifurcated trial).
plaint with good cause to explore that condition through a mental examination.

This Part will demonstrate that this argument is at best overstated. Precedent and procedure rules forbid courts from routinely compelling mental or physical examinations; rather, in each instance, courts must carefully weigh the competing interests at stake. This Part will briefly explore those interests and courts’ treatment of them. It will note that courts have found that a plaintiff’s claims of emotional distress or mental anguish do not necessarily grant a defendant license to compel a mental examination. It will then explore the unique policy concerns that attend motions to compel sexual assault and sexual harassment victims to submit to mental examinations. Treatment of these motions has evolved: while courts and commentators once considered mental examinations necessary to protect falsely accused defendants from deluded or vindictive victims, courts now express heightened concern for the privacy interests of sexual harassment plaintiffs and the policy implications at stake.

A. Controversy and Cause: Historical Treatment of Motions to Compel Medical Examinations

Attempts to compel litigants to submit to mental or physical examinations pit two powerful interests against one another: concern for accuracy and fairness in the litigation process versus individuals’ right to privacy. Historically, concerns for litigants’ privacy have prevailed. In 1891, the Supreme Court held in Union Pacific Railway Co. v. Botsford that federal courts had no inherent power to order medical examinations.120 The Court stated that such examinations intrude upon the “sacred . . . inviolability of the person,” and are especially invasive to women.121 The dissenters contended that fairness demanded that personal injury defendants be allowed to examine claimed injuries, asserting that “truth and justice are more sacred than any personal consideration.”122

Ultimately, the dissenters’ position seemed to prevail. In 1938, the Federal Rules of Civil Procedure became effective.123 Discovery provisions,124 designed to promote fairness and unearth truth, included Rule 35, which authorized courts to compel physical and

120 141 U.S. 250 (1891). Nine years later, however, the Court sanctioned federal court-ordered examinations in states that allowed their courts to compel examinations. Camden & Suburban Ry. Co. v. Stetson, 177 U.S. 172 (1900).
121 Botsford, 141 U.S. at 251-52.
122 Id. at 259 (Brewer, J., dissenting).
mental examinations.\textsuperscript{125} Three years later, the Court upheld the Rule’s validity by a 5-4 vote.\textsuperscript{126} In time, the notion that medical examinations inherently infringe upon sacred rights dissipated—in 1955, one commentator accurately stated that “the argument that physical examinations are of themselves an infringement of personal liberty is today an anachronism.”\textsuperscript{127} Concerns for litigants’ privacy rights are, however, written into Rule 35. The Rule does not allow examinations as a matter of right; rather, it requires that the party seeking an examination show that the condition to be examined is “in controversy” and that the movant has “good cause” to compel the examination.\textsuperscript{128} Motions to compel examinations therefore receive greater judicial scrutiny than other discovery requests.

In \textit{Schlagenhauf v. Holder},\textsuperscript{129} the Supreme Court clarified the degree to which courts must scrutinize motions to compel examinations under Rule 35. The Court first stated that parties do not waive their right to inviolability simply by seeking redress for injuries.\textsuperscript{130} The Court then held that Rule 35’s “in controversy” and “good cause” requirements “are not met by mere conclusory allegations of the pleadings—nor by mere relevance to the case—but require an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination.”\textsuperscript{131} The Court cautioned against routinely granting requests to compel Rule 35 examinations, demanding “a discriminating application by the district

\begin{itemize}
  \item \textsuperscript{125} 308 U.S. at 708.
  \item \textsuperscript{126} Sibbach v. Wilson & Co., 312 U.S. 1 (1941). The Court held that enacting Rule 35 did not exceed its power under the Rules Enabling Act, 28 U.S.C. § 2072 (1988), because the rule did not impinge on substantive rights. 312 U.S. at 13. The Court reasoned that the rule did not compromise important rights to freedom from bodily invasion because a party is free to refuse to comply with the examination order. \textit{Id.} at 14. Justice Frankfurter vehemently dissented, protesting that compelled examinations are “an invasion of the person,” which thus “stand on a very different footing from [other discovery issues].” \textit{Id.} at 18 (Frankfurter, J., dissenting).
  \item \textsuperscript{128} The pertinent text of Rule 35 reads as follows: \textit{ORDER FOR EXAMINATION.—}When the mental or physical condition \ldots of a party \ldots is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner \ldots. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.
  \item \textsuperscript{129} 379 U.S. 104 (1964).
  \item \textsuperscript{130} \textit{Id.} at 113-14.
  \item \textsuperscript{131} \textit{Id.} at 118.
\end{itemize}
judge of the limitations prescribed by [the Rule]."\textsuperscript{132} A movant thus must produce sufficient information, through affidavits or even an evidentiary hearing, to justify an examination.\textsuperscript{133} However, in cases where the plaintiff asserts a physical or mental injury in a negligence action, the Court noted that "the pleadings alone" would generally place her mental condition in controversy.\textsuperscript{134}

B. Pleadings, Privacy, and Probative Value: Contemporary Treatment of Motions to Compel Physical and Mental Examinations

When plaintiffs plead physical injury in a tort action, courts routinely order examinations based on the pleadings alone.\textsuperscript{135} There is, in such cases, little question either that the plaintiff's injury is in controversy, or that, in most circumstances,\textsuperscript{136} the defendant has good cause to probe the plaintiff's condition. Assume, for instance, that a plaintiff sought compensation for a broken back. The defendant would need to employ a doctor to examine the injury and assess its severity. Without a physical examination, the defense would be hampered in its ability to rebut plaintiff's claims (which the plaintiff's expert witness would almost certainly support) that the injury was caused in a certain way, was of a certain severity, caused a certain amount of pain and discomfort, and would disable the plaintiff for a certain period of time. An examination is the only way the expert can make the necessary evaluations, and medical science is sufficiently advanced to afford accurate diagnosis of most physical injuries. Thus, the expert's scientific knowledge would aid the factfinder in determining issues of causation and damages.\textsuperscript{137} Furthermore, the court would have little trouble protecting the plaintiff from unwarranted invasions of privacy, as it could circumscribe the scope of the examination by permitting the expert to explore only the alleged back injury.

These obvious conclusions, however, do not extend to claims of

\textsuperscript{132} Id. at 121.
\textsuperscript{133} Id. at 119.
\textsuperscript{134} Id.
\textsuperscript{136} Courts have, however, held that parties do not have good cause to compel unduly risky or painful examinations. See, e.g., Stinchcomb v. United States, 132 F.R.D. 29 (E.D. Pa. 1990) (refusing to order a spinal tap, brain scan, and other tests requiring sedation and immobilization of a ten-year-old, brain-damaged plaintiff).
\textsuperscript{137} Fed. R. Evid. 702 sets the standard for admissibility of expert testimony: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."
emotional distress, mental anguish, or pain and suffering. Both state and federal courts have frequently held that such claims do not place a party's mental condition in sufficient controversy to warrant an examination. For instance, one state appellate court has noted that pain and suffering are common experiences, and thus "psychiatric apple polishing" will do little to aid the factfinder in assessing the harm. Similarly, in Coates v. Whittington, the Texas Supreme Court refused to compel an examination of a personal injury plaintiff who claimed mental anguish commensurate with her physical injuries, reasoning that plaintiffs should not be found to waive their deep privacy interests simply because they seek compensation for mental anguish associated with an injury. Other courts have also held that general allegations of distress and anguish, while compensable, are not claims of specific psychiatric injury, and thus do not put the claimant's mental condition in controversy. Courts have also denied examinations when plaintiffs claim that their injuries were suffered wholly in the past, obviating the need for a current examination. Finally, several of these courts have noted that plaintiffs did not plan

138 An example of courts' greater reluctance to order mental examinations is Stuart v. Burford, 42 F.R.D. 591 (N.D. Okla. 1967). The court granted a physical examination of a tort plaintiff but refused to order a mental examination despite plaintiff's claims for damages for emotional distress and mental anguish. Id. at 592-93. Stating that it was "not fully satisfied that the mental condition of the plaintiff is in controversy or that good cause has been shown for [a mental] examination," the court requested a report from the doctor conducting the physical examination as to the need for a mental examination. Id. at 593.

139 Webb v. Quincy City Lines, Inc., 219 N.E.2d 165, 167-68 (Ill. App. Ct. 1966) ("Pain and suffering to a greater or less [sic] degree is the common experience of mankind. Juries understand it. We doubt that any psychiatric apple polishing will aid it . . . ."). The court noted that pain and suffering and similar "mental" conditions are at least collaterally at issue in many actions, and that to allow examinations in such cases "is to permit time consuming excursions into the hinterlands of speculation and to lose sight of the main event in the big tent while fiddling around with the side shows." Id. at 167.

140 758 S.W.2d 749 (Tex. 1988).

141 Id. at 752. California discovery rules mandate a similar outcome: state law prohibits mental examinations, absent a showing of exceptional circumstances, where a party stipulates that "no claim is being made for mental and emotional distress over and above that usually associated with the physical injuries claimed, and no expert testimony regarding this . . . distress will be presented at trial." CAL. CIV. PROC. CODE § 2032(d) (West Supp. 1995).


143 See, e.g., Winters v. Travia, 495 F.2d 839, 840-41 (2d Cir. 1974) (vacating the trial court's order compelling a mental examination of a plaintiff claiming no present mental injuries beyond an "unpleasant memory"); Coca-Cola Bottling Co. v. Negron Torres, 255 F.2d 149 (1st Cir. 1958) (affirming trial court's discretion to deny motion to compel examination of a plaintiff claiming past physical and emotional suffering); Benchmaster, Inc. v. Kawaikele, 107 F.R.D. 752, 754 (E.D. Mich. 1985) (disallowing examination of plaintiff concerning his past mental condition because psychiatric testimony concerning that period would be speculative); Tyler, 561 P.2d at 1263; see also Hodges v. Keane, 145 F.R.D. 392, 394-35 (S.D.N.Y. 1993) (affirming that allegations of past emotional suffering do not necessar-
to have a psychiatrist testify on their behalf at trial, a factor which counsels against finding their mental condition in controversy.144

Conversely, courts that have found a plaintiff's mental condition to be in controversy generally do so when plaintiffs seek high damage awards for severe, ongoing mental injuries and plan to have a friendly psychiatrist testify at trial.145 In such cases, psychiatric testimony is more likely to aid a jury in assessing the cause and extent of the injury. In addition, fairness dictates that defendants have an opportunity to rebut the plaintiff's expert.146

Even if a plaintiff places her condition in controversy, procedural rules demand that the party seeking to compel an examination show good cause for that examination.147 The movant thus must show that the information sought cannot be found through less intrusive discovery techniques.148 If a court determines that the movant has already obtained the necessary information from other discovery sources, it will deny the motion to compel the examination.149 Furthermore,
courts may also find good cause lacking if a movant attempts to subject a party to repeated and cumulative examinations.\footnote{150}

Finally, even if movants satisfy the "in controversy" and "good cause" requirements, courts retain discretion to deny or limit the scope of proposed examinations.\footnote{151} If, for example, the examining expert seeks to use unreliable evaluative techniques, the court may deny the motion. In \textit{Usher v. Lakewood Engineering & Manufacturing Co.},\footnote{152} the District Court for the Northern District of Illinois ordered a psychiatric evaluation of a sex discrimination plaintiff, but refused to allow the defendant to conduct a battery of psychological tests. The court accepted the plaintiff's demonstration of "the inadequacy of the correlation factors and the validity factors of all" the tests at issue.\footnote{153} Thus, according to the court, while the tests might uncover relevant evidence, the probative value of such evidence "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."\footnote{154}

Despite the Supreme Court's conclusion that a claim of mental injury in a negligence action will generally place the claimant's mental condition in controversy,\footnote{155} courts have often concluded that a claim of mental anguish does not place the pleader's mental condition in controversy. Furthermore, courts have adhered to \textit{Schlagenhauf's} mandate that defendants show good cause for compelling an examination.


\footnote{152}158 F.R.D. 411 (N.D. Ill. 1994).

\footnote{153}Id. at 415. In reaching its conclusion that the plaintiff had "by far the better of the argument," \textit{id.} at 414, the court relied upon the factors for evaluating expert testimony announced in \textit{Daubert v. Merrell Dow Pharmaceuticals, Inc.}, 115 S. Ct. 2786 (1993). \textit{Daubert} counsels courts to consider, among other things, "the known or potential rate of error" of a proposed expert evaluation. 115 S.Ct. at 2797.

\footnote{154}158 F.R.D. at 413 (citing \textit{Fed. R. Evm. 403}). The court further noted that "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force . . . exercises more control over experts than over lay witnesses." \textit{Id.} (quoting \textit{Jack B. Weinstein, Rule 702 of the Federal Rules of Evidence is Sound; It Should Not Be Amended}, 138 F.R.D. 631, 632 (1991)). For further discussion of the questionable validity and reliability of psychological testing, see \textit{infra} note 253.

\footnote{155}See \textit{supra} text accompanying note 134.
Finally, even where defendants meet the requirements of Rule 35, courts have curtailed potentially invasive examinations of dubious value to the factfinding process. Thus, while the notion that medical examinations are per se an invasion of liberty rights has faded, courts have remained vigilant in assessing whether a proposed adverse mental examination would unduly intrude upon a party's privacy rights.

C. Treatment of Motions to Compel Sexual Misconduct Accusers to Submit to Mental Examinations

Motions to compel mental examinations of women who allege sexual misconduct have long aroused particularly acute concerns. Unlike other criminal or intentionally tortious behavior, sexual activity is obviously not condemned in and of itself. Therefore, defendants in sexual misconduct cases frequently do not contest that sexual behavior occurred, but rather attest that the complainant acted as if she welcomed the behavior, or perhaps that she overreacted to "normal" sexual horseplay. Moreover, sexual misconduct cases frequently amount to "he said, she said" credibility contests. Hence, the sexual proclivities and veracity of the complainant become relevant to some degree. A sexual misconduct defendant may thus have cause to explore those issues through a mental examination.

On the other hand, exploring sexual history and credibility through a psychiatric examination implicates powerful policy concerns. The Schlagenhauf Court held that a complainant does not waive her substantive right to privacy simply by seeking legal redress for injuries. The Supreme Court has subsequently held that people have a fundamental right of privacy upon which the state may not encroach absent a compelling interest. A searching examination of a com-

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156 See supra text accompanying note 127.
157 See, e.g., Phillips v. Smalley Maintenance Servs., Inc., 711 F.2d 1524 (11th Cir. 1983) (finding in favor of complainant, who claimed that her boss demanded oral sex in his closed office; the boss denied the claims); Hall v. F.O. Thacker Contracting Co., 24 Fair Empl. Prac. Cas. (BNA) 1499 (N.D. Ga. 1980) (finding in favor of a supervisor who denied his secretary's charge that he privately offered her $5000 per week to sleep with him); see also Alex Kozinski, Forward to LINDEMANN & KADE, supra note 36, at vii ("[C]harges of sexual harassment, like those of rape, child molestation and spousal abuse, can raise some of the most difficult problems of proof in the law, because some of the most egregious conduct... occurs in private, with the participants doubling as the only witnesses.").
158 See supra note 190 and accompanying text.
159 The Court first explicitly recognized the fundamental right to privacy in Griswold v. Connecticut, 381 U.S. 479 (1965) (establishing marital right of privacy). See also Eisenstadt v. Baird, 405 U.S. 438 (1972) (extending right of procreative autonomy to individuals, whether married or unmarried); Schmerber v. California, 384 U.S. 757, 767-68 (1966) (finding an unreasonable blood test would be an infringement of the right of privacy). Several state constitutions explicitly provide a right of privacy. See, e.g., ALA. CONST. art. 1, § 22; CAL. CONST. art. 1, § 1; HAW. CONST. art. 1, § 6.
plaintant’s psyche and sexual history implicates this right. Furthermore, courts and legislatures have increasingly expressed concern that the specter of a compelled mental examination may deter victims from reporting sexual misconduct, and that such inquiry unduly focuses on the complainant rather than on the misconduct for which she seeks redress.

The balance of this Part will focus on how these competing concerns have informed judicial treatment of motions to compel mental examinations of sexual misconduct complainants. It will first briefly discuss mental examinations of sexual assault victims in criminal cases. As rape law reform has taken hold, treatment of motions to compel such examinations has transformed: while influential commentators once considered such examinations essential, they are now roundly prohibited. This transformation has influenced the scope of permissible discovery in sexual harassment cases.

1. Sexual Assault Victims

Traditionally, courts and commentators expressed profound concern that rape charges are difficult to refute, and that deluded or vindictive women might ruin men’s reputations by unjustly accusing them of rape. Throughout much of this century, commentators advocated that sexual assault complainants undergo psychiatric examinations to assess their credibility and to guard against false claims.

160 Cf. Daury v. Smith, 842 F.2d 9 (1st Cir. 1988) (holding that the right of privacy encompasses the right to refuse to submit to an unreasonable psychiatric examination).
162 See supra note 19.
163 John Henry Wigmore recommended that all female rape victims be required to undergo psychiatric examinations. 3A JOHN HENRY WIGMORE, EVIDENCE § 924a, at 737 (Chadbourn rev. 1970) ("No judge should ever let a sex offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician."). Wigmore justified his recommendation by noting that “[m]odern psychiatrists have amply studied the behavior of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multiform . . . . " Id. at 736; see also id. at 740-46 (citing case studies and letters from mental health experts to support recommendation). For detailed criticism of Wigmore’s use and misuse of authority to support his claims, see Leigh B. Bienen, A Question of Credibility: John Henry Wigmore’s Use of Scientific in Section 924a of the Treatise on Evidence, 19 CAT.-W. L. REV. 235 (1983). In 1938, the American Bar Association adopted the following statement:

Today it is unanimously held . . . by experienced psychiatrists that the complainant woman in a sex offense should always be examined by competent experts to ascertain whether she suffers from some mental or moral delusions or tendency, frequently found especially in young girls, causing distortion of the imagination in sex cases.


Later commentators supported these recommendations to varying degrees. See, e.g., CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 45, at 99 (1954) (supporting Wigmore’s position, citing the "special danger of sympathy swaying judgment on credi-
Contemporary courts, legislatures, and commentators have rejected this idea. Courts seldom compel examinations of adult sexual assault complainants because the specter of such probing is likely to deter victims from reporting crimes, thwarting the state’s compelling interest in enforcing the law. Courts have also held that such motions invade the complainant’s right to privacy. Several courts have
appealed to the spirit of rape shield rules to support denial of psychiatric examinations of sexual assault victims.\textsuperscript{167}

2. Sexual Harassment Plaintiffs

Courts have expressed similar concerns when addressing motions to compel psychiatric examinations of sexual harassment plaintiffs. In Robinson \textit{v.} Jacksonville Shipyards, \textit{Inc.},\textsuperscript{168} the District Court for the Middle District of Florida summarized these concerns, cautioning that plaintiffs facing a mental examination in a Title VII case "would face sexual denigration in order to secure their statutory right to be free from sexual denigration."\textsuperscript{169} Furthermore, the specter of such examinations may deter harassment victims from bringing suit, thereby thwarting the strong public interest in eradicating sexual harassment.

However, arguments in favor of compelling psychiatric examinations of sexual harassment plaintiffs, or of at least not presumptively barring them, are stronger in civil sexual harassment actions than in rape prosecutions. A rape complainant is not a party to an action, but a witness.\textsuperscript{170} In addition, examinations of rape complainants are usually geared towards assessing credibility, a collateral issue; therefore, a rape victim's mental condition is not directly in controversy.\textsuperscript{171} A civil sexual harassment plaintiff, however, arguably places her mental condition squarely in controversy, at least if she seeks damages for mental injuries.

Courts have attempted to draw bright-line rules to handle Rule 35 motions in sexual harassment actions. Generally, plaintiffs who seek equitable remedies under Title VII do not place their mental condition in sufficient controversy to warrant an examination;\textsuperscript{172} those seek-

\textsuperscript{167} See, e.g., Virgin Islands \textit{v.} Scuito, 623 F.2d 869, 875-76 (3d Cir. 1980) (upholding the trial court's reliance on the spirit of the federal rape shield rule in denying psychiatric examination of rape complainant); State \textit{v.} Tomlinson, 515 N.E.2d 963, 965 (Ohio 1986) ("[R]equiring victims to undergo psychiatric evaluations prior to being permitted to testify violates the spirit of [Ohio's rape shield statute] by subjecting the victim to an intense probing of his or her prior sexual experiences."); Commonwealth \textit{v.} Widrick, 467 N.E.2d 1353, 1357 (Mass. 1984).

\textsuperscript{168} 118 F.R.D. 525 (M.D. Fla. 1988).

\textsuperscript{169} Id. at 531 (citing Catharine A. MacKinnon, Feminism Unmodified 114 (1987)).

\textsuperscript{170} See Bangle & Haage, \textit{supra} note 164, at 983.

\textsuperscript{171} Id.

ing tort remedies generally do.\textsuperscript{173}

\textbf{a. Title VII Plaintiffs}

The leading Title VII case considering a motion to compel a psychiatric examination is \textit{Robinson v. Jacksonville Shipyards, Inc.}\textsuperscript{174} Lois Robinson, a welder, alleged that rampant pornography at her work site caused her emotional distress.\textsuperscript{175} She sought back pay for work days lost due to her distress, as well as injunctive and declaratory relief.\textsuperscript{176} The defendant, attempting to prove that the plaintiff was hypersensitive to pornography, moved to compel a psychiatric examination.\textsuperscript{177} The court denied the motion. It stated that, to establish her claim, the plaintiff must satisfy an objective standard: she must prove that she endured harassment which "could be objectively classed as the kind that would seriously affect the psychological well being of a reasonable individual."\textsuperscript{178} Because this standard focuses on "the defendant's conduct, not the plaintiff's perception or reaction to [that] conduct,"\textsuperscript{179} the court stated that "application of [the objective standard] is not informed by evidence which may be obtained in a mental examination."\textsuperscript{180} The court consequently held that the plaintiff did not place her mental condition in controversy.\textsuperscript{181}

The court thus established that Title VII inquiry focuses on the harassing conduct, obviating the need to explore the accuser's mental condition. Furthermore, the court recognized that the plaintiff's privacy concerns are enmeshed with the public policy concerns underlying Title VII: if the court allows undue mental examinations, it would not only deprive the plaintiff of her right to be free from sexual denigration, but would also "undercut[ ] the remedial effect intended by Congress in enacting Title VII" by discouraging victims from bringing valid claims.\textsuperscript{182} The court noted, however, that its response to the mo-

\begin{footnotesize}
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\item[174] 118 F.R.D. 525 (M.D. Fla. 1988).
\item[175] Id. at 526.
\item[176] Id. Ms. Robinson initially sought compensation under tort law for her emotional distress, but later dropped this claim. Id.
\item[177] Id. The magistrate in the case initially granted the defendant's motion. Id.
\item[178] Id. at 530.
\item[179] Id. at 531 (quoting Jennings v. D.H.L. Airlines, 101 F.R.D. 549, 551 (N.D. Ill. 1984)).
\item[180] Id.
\item[181] Id.
\item[182] Id.
\end{itemize}
\end{footnotesize}
tion to compel the mental examination would likely have been different had the plaintiff sought compensation for emotional distress in a pendent tort action, as such a claim would have been more likely to put her mental condition in controversy.\textsuperscript{183}

b. Tort Claimants

Courts generally have agreed with the \textit{Robinson} court's tort/non-tort distinction. Most courts that have considered the issue have held that sexual harassment plaintiffs seeking compensatory damages for emotional distress and psychiatric injuries under tort law place their mental condition in sufficient controversy to warrant a mental examination.\textsuperscript{184}

i. Examination Granted: \textit{Vinson v. Superior Court}

A seminal decision by the California Supreme Court, \textit{Vinson v. Superior Court}\textsuperscript{185} displays reasoning typical in the line of cases ordering mental examinations of tort plaintiffs. The plaintiff alleged that harassment by an interviewer under whom she eventually worked caused her continuing emotional distress, loss of sleep, anxiety, mental anguish, humiliation, and reduced self-esteem, for which she sought compensation under state tort law.\textsuperscript{186} Interpreting a procedural rule similar to Rule 35,\textsuperscript{187} the court held that her claims of "various mental and emotional ailments" placed her mental state in controversy.\textsuperscript{188} Furthermore, the court stated that her claim that the defendant caused her severe psychiatric injury implicitly asserted that her injuries were not caused by a preexisting mental condition; she had therefore provided the defendant with good cause to explore other potential causes of her injuries.\textsuperscript{189} The court rejected the plaintiff's argument that the state's interest in eradicating sexual harassment by encouraging victims to bring suit should exempt harassment plaintiffs from mental examinations.\textsuperscript{190} The court reasoned that the state does not have a "greater interest in preventing emotional distress in sexual harassment victims than it has in preventing such distress in the victims of any other tort."\textsuperscript{191}

The \textit{Vinson} court limited its holding in two respects. First, it re-

\begin{itemize}
\item \textsuperscript{183} \textit{Id.} at 528.
\item \textsuperscript{184} See supra note 173 and accompanying text.
\item \textsuperscript{185} 740 P.2d 404 (Cal. 1987).
\item \textsuperscript{186} \textit{Id.} at 407.
\item \textsuperscript{187} Cal. Civ. Proc. Code § 2032(a) (West 1986) (repealed 1987) (requiring that condition be "in controversy" and that "good cause" exist for the examination).
\item \textsuperscript{188} 740 P.2d at 409.
\item \textsuperscript{189} \textit{Id.} at 409-10.
\item \textsuperscript{190} \textit{Id.} at 414.
\item \textsuperscript{191} \textit{Id.}
stricted the scope of the examination, holding that the plaintiff's right to privacy precluded the defendant from exploring her sexual history and practices. Second, the court stated in dicta that it would not order an examination in a "simple sexual harassment claim asking compensation for having to endure an oppressive work environment" where the complainant did not seek monetary damages for ongoing psychological injuries.

ii. Examination Denied: Cody v. Marriott Corp.

Not all courts have adhered to the tort/non-tort dichotomy advanced in Vinson and suggested in Robinson. In Cody v. Marriott Corp., the court considered a motion to compel a psychiatric examination of a sexual harassment plaintiff who sought damages for emotional distress. Refuting the defendant's contention that "an allegation of 'emotional distress' is synonymous with 'mental condition,'" the court held that a claim for emotional distress damages does not automatically place the plaintiff's mental condition in controversy. The court distinguished a claim of emotional distress from a claim of a psychiatric disorder requiring psychiatric or psychological treatment and stated that it would likely order an examination if the plaintiff secured the services of a psychiatrist or psychologist to testify at trial on her behalf.

D. Summary

While it has been criticized as sparsely reasoned, Cody actually harmonizes the rationales of the courts denying mental examinations in tort, sexual assault, and statutory sexual harassment actions. The opinion consequently offers guidance for courts considering a motion to compel a mental examination of a plaintiff seeking damages under the 1991 Civil Rights Act. First, the court embraced the reasoning that tort plaintiffs do not necessarily place their mental conditions in controversy if they merely claim mental distress rather than psychiat-

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192 Id. at 411. However, the court refused to allow plaintiff's counsel to be present during the examination, reasoning in part that an attorney would be unlikely to understand the psychiatric relevance of the questioning. Id. at 412. See Amy C. Hirschkron, Women and California Law, IV Employment Law, A. Sexual Harassment, 18 Golden Gate U. L. Rev. 627, 631 (1988) (criticizing the court for failing to allow plaintiff's attorney to be present during the examination because doing so would have "actively promote[d the court's] stated policy of protecting the privacy of sexual harassment plaintiffs").
193 740 P.2d at 409.
195 Id. at 422 n.2.
196 Id. at 423.
197 Linde mann & Kadue, supra note 36, at 560.
198 See id. at 560 n.45 (noting that the Cody court's reasoning "resembles that used in sexual assault cases").
ric injury, or if they do not intend to have a friendly psychiatrist testify, or if they claim mental anguish commensurate with other demonstrated injuries. Second, the court was mindful of the public policy concerns and the plaintiff's privacy interests that have fueled reform of sexual assault and sexual harassment law, and recognized that a claim for anguish caused by discrimination does not render those concerns irrelevant. In addition—like Harris, Robinson, and the tide of reform in sexual harassment law—Cody underscores that the primary inquiry in hostile environment cases, does not demand an exploration of the plaintiff's psyche. Taking these factors into consideration, courts should view with strong skepticism a motion to compel a mental examination of a Title VII plaintiff who seeks limited compensation under the 1991 Civil Rights Act for mental anguish caused by objectively hostile behavior.

III

CONSIDERATIONS FOR JUDICIAL TREATMENT OF MOTIONS TO COMPEL MENTAL EXAMINATIONS IN SEXUAL HARASSMENT ACTIONS UNDER THE "NEW" TITLE VII

Courts disagree as to whether and when plaintiffs claiming mental distress may be compelled to submit to mental examinations. Strong and evolving policy concerns counsel against ordering sexual harassment plaintiffs to submit to such examinations. Nevertheless, recent commentary suggests that a court need not deeply ponder a motion to compel a mental examination of a hostile environment plaintiff seeking statutory damages for anguish and distress. This commentary seems to presume the following: To prevail on her claim for compensation, a plaintiff must prove that the harassment caused her actual mental injury and must give some evidence of the extent of that injury. Her claim is, in essence, a tort claim. Thus, her pleadings alone place her mental state in controversy and provide the defendant with good cause to probe the extent and cause of her alleged injury.

This Part will argue that this issue is not so easily resolved. At a minimum, Schlagenhauf mandates that courts scrutinize every Rule 35 motion. As noted above, a mental anguish claim does not automatically place a claimant's mental condition in controversy. A court

199 See Cody, 103 F.R.D. at 423; supra notes 138-44 and accompanying text.
200 103 F.R.D. at 422-23.
201 See supra note 31 and accompanying text.
202 See Schlagenhauf v. Holder, 379 U.S. 104, 121-22 (1964) (admonishing against routine granting of Rule 35 motions). Recent commentary has noted that almost all plaintiffs suing under Title VII will seek damages for emotional distress under the 1991 Act. See supra note 31. Nearly all sexual harassment plaintiffs would thus be subject to an examination order, a result the Robinson court deemed "unacceptable." 118 F.R.D. at 531.
must carefully balance the competing justifications for and against granting the motion. In the process, it must thus consider crucial questions: Is the plaintiff's mental condition really in controversy? Of what significance is the fact that she seeks statutory rather than common-law compensation? What value will the examination offer the factfinder and the defendant? Does the jury need expert assistance to assess mental anguish damages? How important are the plaintiff's interests in avoiding the examination?

This Part will propose and discuss issues that courts should consider as they grapple with these questions and balance the interests of the parties. It will first discuss the mental examination process and the value of that process to the defendant and the factfinder. It will then outline factors that call into question the need for mental examinations in most sexual harassment actions where plaintiffs seek mental anguish damages under the 1991 Civil Rights Act.

A. Value of the Mental Examination to the Defendant and the Factfinding Process

When adjudicating a Rule 35 motion, the court must first examine why the defendant feels it necessary to compel a mental examination and ascertain what will take place during the exam. Ostensibly, the examination, which may be performed by anyone who is properly licensed or certified, allows the defendant to determine whether, and to what extent, the plaintiff has been psychologically injured.

Arguably, assessment of damages and causation are the only justifiable purpose for a mental examination, as liability for creation of a hostile work environment is determined according to the objective standard endorsed by the Harris court; inquiry under such a standard is "not informed by evidence which may be obtained in a mental examination." Nevertheless, at least one defense-oriented commentator in-

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204 The Rule was amended in 1991 to permit any qualified person, rather than just physicians and psychologists, to conduct examinations. Fed. R. Civ. Pro. 35 advisory committee's note.

205 To assess the "damage" done to a sexual harassment plaintiff, a forensic psychiatrist will probe into her reaction to the harassment—typical reactions range from discomfort to depression and paranoia—and note symptoms of diagnosable psychiatric disorders as found in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, see supra note 6. Renee L. Binder, Sexual Harassment: Issues for Forensic Psychiatrists, 20 Bull. Am. Acad. Psychiatry & L. 409, 413-14 (1992). It is important to note that even "[s]evere distress is not equivalent to and does not necessarily result in a psychiatric diagnosis." Eric H. Marcus, Sexual Harassment Claims: Who Is a Reasonable Woman?, 44 Labor L.J. 646, 648 (1993). A victim thus can experience considerable levels of compensable distress without suffering diagnosable "injury."

206 Robinson, 118 F.R.D. at 531.
sists that clinicians should inquire beyond damages to issues that "might provide the very basis of the claim itself." The defendant may thus desire to use the examination to uncover a plaintiff's attempts at and motives for fabricating or embellishing her claim, to determine whether she falsely attributes psychological trauma resulting from outside stressors to the workplace, and to reveal whether she tends to be hypersensitive to sexual stimuli.

Accomplishing these objectives requires an extensive and broad-ranging examination. Psychiatrist Sara Feldman-Schorrig and attorney James McDonald recommend that a clinician use five separate methods when performing an examination. The examiner first assesses the credibility of the plaintiff, looking for three types of falsification: lies, pathological lies, and delusions. Second, he records the plaintiff's version of the history of her injury, fully exploring any contradictions or inconsistencies. Third, the examiner explores the plaintiff's psycho-social history, focusing on early interpersonal relations—especially dysfunctional ones—adolescent sexual activities, attitudes toward men, and sexual practices. Fourth, the examiner assesses the plaintiff's mental status based on the sum of the exam-


208 Sara P. Feldman-Schorrig & James J. MacDonald, Jr., The Role of Forensic Psychiatry in the Defense of Sexual Harassment Cases, 20 J. PSYCHIATRY & L. 5, 7-8 (1992); see also Martin Blinder, PSYCHIATRY IN THE EVERYDAY PRACTICE OF LAW § 5.22(e), at 28-31 (3d ed. Supp. 1993) (noting that many allegations of sexual harassment prove to be unsupported because psychiatric examinations reveal that claimants (1) fabricate emotional damage, (2) are clinically paranoid, (3) unconsciously displace unrelated trauma, and thus overact to benign incidents, (4) suffer from a personality disorder, causing them to create the harassing situation, or (5) are hypersensitive or hypervigilant to sexual stimuli).


210 Id. at 23-26. While Feldman-Schorrig and McDonald state that clinicians are trained to recognize these types of falsification, studies indicate that psychiatrists are no better at lie detection than laypersons. See, e.g., Paul Elkman & Maureen O'Sullivan, Who Can Catch a Liar?, 46 AM. PSYCHOLOGIST 913 (1991) (finding that, among a sample of psychiatrists, law enforcement personnel, and others, only Secret Service agents performed better than chance in detecting lying). Mental health professionals generally agree that, "[c]ontrary to popular belief, [they have] no magical powers by which to discern truthfulness or exaggeration." Marcus, supra note 205, at 648. See also Ralph Slovenko, PSYCHIATRY AND LAW 54 (1973) ("A sharp poker player probably knows better than a psychiatrist whether a person is lying ... . A psychiatrist is a doctor, not a lie detector."); Edward Dolnick & Benedict Carey, The Great Pretender, HEALTH, July-Aug. 1992, at 30, 32 (quoting psychiatrist Gordon Deckert: "[Pathological liars] can look you right in the eye and without a hint of discomfort tell you the most blatant lies. . . . There's no way you can pick it up."). In expressing his doubt that psychiatric testimony would have shed much light on Clarence Thomas's nomination hearings, psychiatrist Paul Applebaum stated that "[p]sychiatric evaluations are good at telling you lots of things, but whether people are lying or telling the truth is not one of them." Andrew Rosenthal et al., Psychiatry's Use in Thomas Battle Raises Ethics Issue, N.Y. TIMES, Oct. 20, 1991, § 1, at 25.

211 Feldman-Schorrig & McDonald, supra note 208, at 26.

212 Id. at 26. For an exegesis of a forensic psychiatrist's strategy in taking a personal
Finally, the examiner runs the plaintiff through a battery of personality tests to determine, among other things, whether she is exaggerating or concealing psychopathology.\(^{214}\)

A defendant's reasons for subjecting a plaintiff to such a searching examination are simple: the plaintiff has claimed that she has been mentally harmed by sexual misconduct. She may be exaggerating this claim, or faking it entirely. Or perhaps she is not faking her anguish, but erroneously attributing it to the workplace rather than to the outside stressors that actually caused the distress. Maybe she is hypersensitive to sexual cues, or has a personality disorder that led her to create the situations which gave rise to her claims. The defendant would claim that, by seeking compensation for mental anguish, the

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213 Feldman-Schorrig and McDonald acknowledge that a clinician may not be permitted to take as extensive a personal history as they advocate if the court follows Vinson's refusal to allow psychiatric inquiry into a plaintiff's sexual history and practices. Feldman-Schorrig & McDonald, supra note 208, at 26 n.75. They assert that their article demonstrates that such inquiry is relevant, and that in most circumstances, defendants should be able to discover such evidence. Id. The authors renew this claim in a later piece, but recognize that a "plaintiff's voluntary sexual conduct outside the workplace involving persons other than her coworkers would ordinarily be of little use in determining whether sexual harassment occurred as alleged." James J. McDonald, Jr. & Sara P. Feldman-Schorrig, The Relevance of Childhood Sexual Abuse in Sexual Harassment Cases, 20 Employee Rel. L.J. 221, 233 (1994). They insist, however, that evidence of childhood sexual abuse should be routinely discoverable in sexual harassment actions. Id. at 231-34.

214 Feldman-Schorrig & McDonald, supra note 208, at 27. Personality tests are divided into two categories: psychometric (objective) and projective (subjective) tests. BLINDER, supra note 208, § 16.3, at 793-94. In the best-known and most commonly used psychometric test, the Minnesota Multiphasic Personality Inventory (MMPI), the subject responds to an extensive series of true-false questions. Id. For a thorough discussion of courtroom use of the MMPI and various revised versions, see KENNETH S. POPE, THE MMPI, MMPI-2 & MMPI-A IN COURT (1993). In the best known projective personality test, the Rorschach, the subject interprets a series of inkblots on cards. The answers to each type of test, as interpreted by the competent examiner, form the basis for a psychological profile of the examinee's personality; thus, "[a] careless or biased interviewer can literally create the kind of patients expected"); Marcus, supra note 205, at 649 (noting that "[i]t is not at all unusual" for opposing forensic examiners to make opposite findings based on MSEs, and that unrecognized "value judgments... can lead to a gross distortion of the findings").
plaintiff has put all these "maybes" at issue. A mental examination, the defendant would argue, offers the best way to turn each of those "maybes" into a "yes" or a "no."

B. Policy, Probative Value, and Privacy: Factors Counseling Against Mental Examination Orders

The balance of this Part will present reasons why a court should say "no" to a defendant's motion to compel a sexual harassment plaintiff to submit to a mental examination. First, an action for damages under the Civil Rights Act of 1991 is not a tort action and should not be treated as such. Instead, the strong policy concerns embodied in the 1991 Act should dictate limits on the need for medical testimony to support mental anguish claims and thus should limit the propriety of compelled mental examinations in modern sexual harassment actions. Second, psychiatrists and psychologists are ill-equipped to offer substantial aid to factfinders in determining the presence and extent of mental anguish or emotional distress. Third, much of the focus of an adverse mental examination seems to be not on gauging emotional injury, but on assessing the credibility of the plaintiff, an area where courts generally do not allow experts to aid the trier of fact. Finally, the use of mental examinations in sexual harassment actions implicates special concerns for plaintiffs' privacy and paves the way for unchecked discovery abuse. Taken together, these considerations counsel against compelling plaintiffs to submit to mental examinations, or at least in favor of dramatic limits on the scope of such examinations, in many actions for damages under the 1991 Civil Rights Act.

1. The Thumb on the Scale: Policy, Standards of Proof, and the Inference of Emotional Harm in Discrimination Actions

The idea that a plea for mental anguish damages under the 1991 Act should be treated the same as a similar tort claim makes intuitive sense. After all, the 1991 Act essentially seems to "tortify" Title VII. Because most courts considering the issue have held that a sexual harassment victim's claim for mental anguish damages under tort law will generally place her mental condition in controversy, a defendant may argue that a court needs to do little balancing of the parties' interests before granting a motion to compel an examination of a sexual harassment plaintiff seeking statutory compensation for mental

215 Cf. Vinson v. Superior Court, 740 P.2d 404, 409 (Cal. 1987) ("[B]y asserting a causal link between her mental distress and defendants' conduct, plaintiff implicitly claims it was not caused by a preexisting mental condition, thereby raising the question of alternative sources for the distress.").


217 See supra note 173.
anguish. Some state courts require that plaintiffs alleging the tort of intentional infliction of emotional distress support their claims with medical testimony, \(^{218}\) a practice that supports the notion that any claim seeking tort-like compensation for mental anguish puts the claimant's mental condition in controversy.

The 1991 Act, however, did not privatize Title VII. Despite its new tort-like provisions, Title VII remains a civil rights scheme. A primary aim of the 1991 Act's compensation scheme is to foster enforcement of antidiscrimination law by empowering victims and encouraging them to act as "private attorneys general" to eradicate workplace discrimination. \(^{219}\) The compensation provisions thus do not exist solely to provide private remedies for private harms, but also to spur private action for the public good.

As a consequence, discovery and evidentiary doctrines which may apply to common law actions should not necessarily apply to actions brought under Title VII. \(^{220}\) Courts and the public have increasingly recognized that discriminatory harassment invariably causes some level of mental anguish. \(^{221}\) Consequently, in actions brought under other state and federal antidiscrimination statutes, "an aggrieved individual need not produce the quantum and quality of evidence to prove compensatory damages [she would have had to produce] under tort law." \(^{222}\) Courts have specifically held that a plaintiff need

\(^{218}\) See Kazantsky v. King David Memorial Park, Inc., 527 A.2d 988, 995 (Pa. 1987) ("Given the advanced state of medical science, it is unwise and unnecessary to permit recovery to be predicated on an inference based on the defendant's 'outrageness' without expert medical confirmation that the plaintiff actually suffered the claimed distress."). Other states, however, do not require medical testimony to support emotional distress claims. See, e.g., Latremore v. Latremore, 584 A.2d 626, 632-83 (Me. 1990); Mostenbocker v. Potts, 863 S.W.2d 126, 134-36 (Tex. 1993).


\(^{220}\) Cheryl Zemelman notes that courts have "privatized" Title VII, allowing common law doctrines to limit the availability of antidiscrimination remedies and thus inappropriately restricting the reformatory power of Title VII. Cheryl Krause Zemelman, Note, The After-Acquired Evidence Defense to Employment Discrimination Claims: The Privatization of Title VII and the Contours of Social Responsibility, 46 STAN. L. REV. 175, passim (1993). Zemelman specifically notes that courts have, since the late 1970s, abandoned a "public policy" model of Title VII and focused on principles of contract and tort law to develop the increasingly preclusive after-acquired evidence defense to discrimination claims. See id. at 197-202. At least in this context, however, the Supreme Court has unanimously repudiated the privatization of antidiscrimination law. See McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879 (1995) (rejecting the after-acquired evidence defense as a bar to recovery in employment discrimination actions).

\(^{221}\) Cf. Larry Heinrich, The Mental Anguish and Humiliation Suffered by Victims of Housing Discrimination, 26 J. MARSHALL L. REV. 39, 43-44 (1992) (discussing findings by the Kentucky Commission on Human Rights which led to the conclusion that "there is a legitimate presumption of embarrassment and humiliation in all instances of discrimination" which supports "a basic monetary standard for compensation" where plaintiffs prove discrimination) (citing KENTUCKY COMM'N ON HUMAN RIGHTS, DAMAGES FOR EMBARRASSMENT AND HUMILIATION IN DISCRIMINATION CASES (1980)).

not present expert testimony to support a damages award for emotional distress under antidiscrimination or other civil rights laws, even where such testimony would be required in a tort action. Some courts have held that a finding of statutory discrimination alone "permits the inference of emotional distress as a normal adjunct of the defendant's actions." (holding that a sexual harassment plaintiff seeking compensation for emotional distress under New York antidiscrimination law need not present medical testimony to prove her claim). See also Bournewood Hosp., Inc. v. Massachusetts Comm. Against Discrimination, 358 N.E.2d 255, 243 n.11 (Mass. 1976) (noting that "[t]he standards applicable to an award of damages for emotional distress, pain, and suffering under [state civil rights law] are, for obvious reasons of statutory construction and policy, not as stringent as those applicable to actions of tort for intentional infliction of emotional distress"); Chomicki v. Wittkind, 381 N.W.2d 561, 566-67 (Wis. Ct. App. 1985) (upholding mental anguish award under state civil rights law even though evidence offered by plaintiff would not have satisfied common-law injury requirement).

For example, the court in Bolden v. Southeastern Pa. Transp. Auth., 21 F.3d 29, 33 (3d Cir. 1994), upheld a $250,001 award for emotional distress to a plaintiff suing under 42 U.S.C. § 1983 (1988) based upon the narrative testimony of the plaintiff, members of his family, and two of his friends. The Third Circuit affirmed that a civil rights plaintiff need not present medical testimony to support a claim of emotional distress, even though Pennsylvania state law requires medical testimony in intentional infliction of emotional distress cases. Id. at 34 & n.3 (noting that "[a]ll of the courts of appeals that have expressly considered this issue have [so] held," and that this approach "is more consistent with the broad remunerative purpose of the civil rights law"); see also Miner v. City of Glen Falls, 999 F.2d 655, 663 (2d Cir. 1993) (upholding mental anguish award under state civil rights law even though evidence offered by plaintiff would not have satisfied common-law injury requirement).

Bournewood Hospital, 358 N.E.2d at 243. See also Bolden, 21 F.3d at 33 (noting that "a jury could have inferred emotional distress from the [circumstances of plaintiff's loss]"); United States v. Balistrieri, 981 F.2d 916, 928 (7th Cir. 1992) ("The more inherently degrading or humiliating the defendant's action is, the more reasonable it is to infer that a person would suffer humiliation or distress from that action . . . ."); Johnson, 940 F.2d at 1198 (holding that compensable "humiliation and emotional distress may be established by testimony or inferred from the circumstances"); Hunter v. Allis-Chalmers Corp., 797 F.2d. 1417, 1425 (7th Cir. 1986) (Posner, J.) (upholding damage award supported primarily by reference to the "very ugly and wounding" racial harassment aimed at the plaintiff, as well as "the usual and inevitably self-serving testimony of [plaintiff] and his wife"); Buckley Nursing Home, Inc. v. Massachusetts Comm. Against Discrimination, 478 N.E.2d 1292, 1298 (Mass. App. Ct. 1985) (citing the "deep hurt usually felt by the victim of discrimination" as support for an inference of emotional distress in employment discrimination actions); Ezra E. H. Griffith & Elwin J. Griffith, Racism, Psychological Injury, and Compensatory
The 1991 Civil Rights Act recognizes that sexual harassment, like other forms of discrimination, is an inherently injurious act.\(^\text{225}\) Courts should recognize that a sexual harassment plaintiff's claims of humiliation, distress, anguish, and the like under the 1991 Act are claims of discrimination-induced injury that do not necessarily place the plaintiff's mental condition in controversy. The compensable degree of such injury can, in many cases, be inferred from the circumstances of the harassment and bolstered by lay testimony from the plaintiff and others that the harassment caused her to feel a commensurate level of humiliation, embarrassment, distress, and anguish. In short, the plaintiff may prove "actual injury or loss" by focusing attention on the harassing behavior and testifying that her reaction was a "normal adjunct" of that behavior.\(^\text{226}\) She is thus much like the plaintiff in *Coates v. Whittington:*
\(^\text{227}\) she only seeks mental anguish damages commensurate with her other "injury."\(^\text{228}\) In this case, the other "injury" is the hostile work environment which she was forced to endure. Such a

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\(^\text{225}\) See H.R. Rep. No. 40(I), supra note 11, at 64-65, reprinted in 1991 U.S.C.C.A.N. at 602-03 ("Monetary [sic] damages... are necessary to make discrimination victims whole for the terrible injury to their careers, to their mental and emotional health, and to their self-respect and dignity.").

\(^\text{226}\) At least one court has not been receptive to this argument. See Smedley v. Capps, Staples, Ward, Hastings & Dodson, 820 F. Supp. 1227, 1232 (N.D. Cal. 1993) (compelling psychological examination even though plaintiff dropped tort claims, maintained that she would not present expert testimony or seek damages for medical expenses, and stated that she would only present evidence of "normal" emotional distress). The author is aware that many plaintiffs, in the interest of maximizing damages, claim that they suffer Post-Traumatic Stress Disorder (PTSD), see DSM IV, supra note 6, at 247, or some other form of psychiatric injury, and that such claims most likely put their mental condition in controversy. See Haney, supra note 31, at 1052 (stating that "[t]he potential recovery [under the 1991 Act] will cause, if not necessitate, the plaintiff's use of expert testimony in virtually every case"). While many victims of sexual harassment are severely traumatized, and increased recognition and invocation of such conditions as PTSD can serve to validate their experiences, the perceived need to pin psychiatric labels on victims in order to legitimize their claims is troubling and ultimately debilitating. See Susan Stefan, *The Protection Racket: Rape Trauma Syndrome, Psychiatric Labelling, and Law,* 88 Nw. U. L. Rev. 1271 (1994) (arguing that admission of expert testimony regarding rape trauma syndrome in criminal sexual assault cases, though lauded as a significant reform by some feminists, ultimately delegitimizes women's reactions to rape). Victims' narratives regarding the circumstances of harassment should carry considerable weight in the damages phase as well as the liability phase of a sexual harassment action; the damages inquiry should not be summarily transformed into a battle over which psychiatric label best applies to the plaintiff.

\(^\text{227}\) 758 S.W.2d 749 (Tex. 1988).

\(^\text{228}\) See *supra* notes 142-43 and accompanying text.
NOTE—CIVIL RIGHTS ACT OF 1991

claim places the injurious environment—not the plaintiff's mental condition—in controversy.\footnote{See Robinson, \textit{supra} note 224, at 67 ("[I]t is not accurate to say that a plaintiff in an employment discrimination case has 'introduced' her mental 'condition' into the litigation by alleging emotional distress. It is more accurate to say that the defendant introduced it by discriminating against the plaintiff.").} Even in the damages phase of a Title VII sexual harassment action, the focus should remain, to some extent, on the harassment rather than on the victim.

2. \textit{Expertise and Intangibility: The Difficulty of Psychiatric and Psychological Assessment of Emotional Distress Claims}

The court should also carefully consider the extent to which a mental examination will aid the trier of fact. While forensic psychiatry and psychology are omnipresent in the legal arena and suitable for many purposes, they are not precise diagnostic tools. This is especially true in emotional distress actions, which focus on common reactions and emotions that are not classified as mental illness and are thus within the capacity of the jury to assess. Furthermore, emotional distress and pain are intangible and hence difficult for experts or anyone else to quantify. Thus, in many cases where plaintiffs allege that sexual harassment caused emotional distress or similar injuries, mental examinations are unlikely to offer the factfinder much assistance on matters of causation or damages.

It is axiomatic that in nearly every case where injury is alleged, experts retained by the opposing parties will disagree as to the nature, cause, and extent of the injury.\footnote{This practice has long caused consternation among members of the judiciary: Under present procedure, where the medical testimony comes from no objective or necessarily qualified source, and only through the hirelings of the parties, partisan experts, medical mouthpieces, the jury is more apt to be confused than enlightened by what it hears. It hears black from one expert, white from the other, a maximizing or minimizing of injuries in accordance with the interest of the source of payment for the testimony. Hon. David W. Peck, \textit{Impartial Medical Testimony}, 22 F.R.D. 21, 22 (1958).} However, in physical injury cases, medical experts will at least base their conclusions upon scientifically valid diagnostic processes, and their range of available conclusions will be limited by objectively determinable factors. Psychiatric diagnosis and psychological evaluation are fundamentally more subjective and imprecise, and admittedly less "scientific," than other forms of medical diagnosis.\footnote{Commentators from both the scientific and legal communities harshly criticize notions that psychiatrists and psychologists can offer scientifically supported and accurate diagnoses. \textit{See, e.g.}, Lee Coleman, \textit{The Reign of Error: Psychiatry, Authority, and Law} 20 (1984) ("Psychiatric labeling, or diagnosis, will always be more uncertain than diagnosis in medicine.... [I]t is not the truly scientific process that occurs in medicine...."); David Faust & Jay Ziskin, \textit{The Expert Witness in Psychology and Psychiatry}, \textit{Science}, July 1, 1988, at 31-32 (summarizing studies that call into question the validity and reliability of clinical diagnoses).} Studies have shown that mental health clini-
Clinicians will often disagree about diagnoses, and that when they do agree, they are often wrong. Specifically, clinicians tend to find pathology where none exists, or to overestimate the extent of pathology. This imprecision does not render the mental health "sciences" invalid for most purposes. Clinicians are trained to focus on their patients' subjective reality, and such a focus is invaluable for providing therapy; in this context, findings of pathology operate as guides to treatment, rather than as objectively "true" assessments. To provide aid to a factfinder, however, diagnoses must offer reliable insight into the objective truth. At this stage in their development, except in cases of fairly severe pathology, it is questionable whether the mental health sciences can provide such reliable insight.

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See 1 ZISKIN & FAUST, supra note 214, at 82-156.

233 The most famous study can be found in David L. Rosenhan, On Being Sane in Insane Places, 179 SCIENCE 250 (1973). In the study, eight sane "pseudo patients" sought admission to psychiatric hospitals, claiming that they heard voices which said "empty," "hollow," and "thud." They claimed no other symptoms, and upon admission to the psychiatric wards did not simulate any symptoms of abnormality. In patient interviews, they recounted significant events of their lives as those events actually occurred; besides alleging hearing voices, they did not lie. All patients were diagnosed schizophrenic (except one, who was found manic depressive). Each was kept in the hospital for an average of 19 days. Significantly, a large number of patients at the hospitals at least suspected that the pseudo-patients were sane, while none of the hospital staff held such suspicions. For a critique of the Rosenhan study, see Robert L. Spitzer, On Pseudoscience in Science, Logic in Remission, and Psychiatric Diagnosis: A Critique of Rosenhan's "On Being Sane in Insane Places", 84 J. ABNORMAL PSYCHOL. 442 (1975).

234 See 1 ZISKIN & FAUST, supra note 214, at 372-80 (summarizing literature which documents clinicians' tendency to overdiagnose abnormality). While most criticism of the proliferation of psychiatric and psychological testimony in civil litigation focuses on plaintiffs' use of such testimony to inflate damage awards, the tendency to routinely find pathology seems to infect both plaintiffs' and defendants' experts in sexual harassment actions. Typically, plaintiffs' experts find that victims suffer from post-traumatic stress disorder or major depression caused solely by sexual harassment; defendants' experts tend to find that victims suffer from personality or adjustment disorders that caused them to provoke or misperceive interpersonal workplace problems. See Barbara L. Long, Psychiatric Diagnoses in Sexual Harassment Cases, 22 BULL. AM. ACAD. PSYCHIATRY & L. 195, 197 (1994) (summarizing diagnoses of 44 sexual harassment plaintiffs). Psychiatrist Margaret Jensvold asserts that clinicians have particularly tended to overdiagnose pathology in women or evaluate women "in sexually stereotyped and stigmatizing ways" while failing to take their legitimate claims of abuse seriously. Jensvold, supra note 14, at 443.

235 Many critics of psychology and psychiatry's expansive role in the legal system emphasize that assessment and diagnosis are valid insofar as they aid the clinician in establishing a therapy program for a patient. These critics merely object to perceptions held by the public and the legal community that psychiatrists and psychologists can provide objectively "true" evaluations that aid legal factfinders in their mission. See COLEMAN, supra note 231, at 20-21 (asserting that psychiatry does not need to be scientifically precise, and that its shortcomings only become serious when "society invests [psychiatric labels] with a precision and certainty they do not have and allows them to influence public policy"); Faust & Ziskin, supra note 231, at 32 (noting that clinicians focus primarily on their patients' subjective reality and are minimally trained to determine objective reality); Jensvold, supra note 14, at 442 (stating that "psychiatric truth" and "legal truth" are often different).
It is especially questionable whether mental health clinicians can offer a factfinder valuable insight in most actions where parties claim mental and emotional distress. Even serious distress, though compensable in court, is not a mental illness or disorder subject to psychiatric diagnosis. Rather, mental distress is a universal human condition. The Restatement (Second) of Torts describes emotional distress as encompassing "all unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, chagrin, disappointment, worry, and nausea." Factfinders are capable of assessing such universal conditions by drawing upon their own experiences. Expert testimony would not be needed to help a factfinder gauge the severity and compensability of the plaintiff's distress; consequently, a mental examination would not aid the factfinding process.

Significantly, mental health experts have agreed with this assessment of the probative value of mental examinations in sexual harassment cases. In its amicus brief in Vinson v. Superior Court, the California Psychiatric Association argued that no psychological examination is necessary when a sexual harassment plaintiff merely alleges emotional distress and does not seek further psychiatric treatment. The association stated that there is no good cause for an examination in such a case, and that a jury would not need expert testimony to appreciate that sexual harassment causes emotional distress.

Finally, mental examinations of plaintiffs claiming mental anguish are unlikely to aid the factfinder in calculating monetary damages. Emotional injuries are inherently intangible. Consequently, courts have long held that the trier of fact has wide latitude to determine appropriate compensation for emotional distress, pain,
and suffering. Mental health professionals are usually unable to provide much assistance to the factfinder when it attempts to place a price tag on an intangible loss.

3. Collateral Issues and the Credibility Gap: The Impropropriety of Using Mental Examination to Assess Threshold Matters and Credibility

Feldman-Schorrig and McDonald advocate the use of extensive examinations aimed at determining whether plaintiffs are hypersensitive or otherwise prone to exaggerating or misperceiving innocuous sexual behavior. They admit that such exploration aims to "accomplish a great deal more" than merely assess damages; indeed, this inquiry delves into "the very basis of the claim itself." In essence, Feldman-Schorrig and McDonald have already lost this battle. Harris cemented the doctrine that factfinders must employ an objective standard to assess alleged harassment. Inquiry under this standard is not informed by reference to the mental state of the victim.


244 Feldman-Schorrig & McDonald, supra note 208, at 11.

245 Id. at 7.

246 Feldman-Schorrig, supra note 207, at 332.

247 Feldman-Schorrig and McDonald do not contend that forensic evaluations are necessary to challenge the issue of liability, as opposed to damages, in all suits where plaintiffs seek compensation for emotional distress. However, they assert that "special issues" germane to sexual harassment actions counsel in favor of broad use of adverse examinations. Id. They focus on the fact that many sexual harassment claims pit only the uncorroborated testimony of the alleged harasser against that of the alleged victim, see id., and that the sexual and psychic idiosyncrasies of many victims may lead these women to fabricate claims or misperceive innocuous sexual behavior, see id. at 343-64 (stating that "[w]omen who file sexual harassment claims often have a history of childhood sexual abuse," and detailing the role such abuse may play in causing victims to invite or misperceive alleged abuse); Feldman-Schorrig & McDonald, supra note 208, at 13 (asserting that exploration of "the psychological makeup of women who file such claims" is critical because "extraneous factors" may lead victims to exaggerate or falsify claims). These arguments are disturbingly similar to those advanced by Wigmore and others to support the claim that alleged victims of criminal sexual misconduct should undergo mental evaluation before being allowed to testify. See supra note 163 and accompanying text. The concerns expressed by Feldman-Schorrig and McDonald, as well as by Wigmore, are valid to some degree—rape and sexual harassment can be difficult claims to disprove (though it must be remembered that prosecutors and plaintiffs must satisfy difficult standards of proof), and the "psychic complexes" of some claimants may lead to specious charges. As courts and legislatures have increasingly recognized, however, these concerns cannot be allowed to dominate sexual misconduct jurisprudence at the expense of powerful competing concerns.


249 See Robinson v. Jacksonville Shipyards, Inc., 118 F.R.D. 525, 531 (M.D. Fla. 1988). The Supreme Court in Harris noted that psychological harm to the plaintiff is a "relevant factor" in evaluating a hostile environment claim, but held that "no single factor is required" to establish liability. 114 S. Ct. at 371.
Thus, to the extent a defendant seeks a mental examination to counter threshold issues of Title VII liability—in other words, to help establish that the plaintiff is “hypersensitive” or is not a “reasonable person”—courts should deny Rule 35 motions.\(^{250}\)

In a closely related point, Feldman-Shorrig and McDonald assert that a major purpose for the mental examination is to assess the plaintiff’s credibility.\(^{251}\) Like evaluating the hostility of the work environment at issue in a given case, assessing credibility is the task of the factfinder. Consequently, courts have consistently denied motions to compel parties to submit to mental examinations to ascertain their credibility.\(^{252}\) Moreover, studies indicate that mental health clinicians are often no more likely than laypersons to determine whether a witness is telling the truth.\(^{253}\) A court therefore should not grant a Rule

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\(^{250}\) Feldman-Schorrig and McDonald misperceive the role of the objective hostile environment standard. The standard exists “to shield employers from having to accommodate the idiosyncratic concerns of the rare hyper-sensitive employee.” Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991). The standard accomplishes this by requiring the plaintiff to show that the harassing conduct would alter the conditions of employment for a hypothetical reasonable person (or, under Ellison, a reasonable woman), regardless of the conduct’s actual effect on the plaintiff. Thus, if the factfinder concludes that the harassing conduct would not have had such an effect on a reasonable person, the plaintiff loses even if the conduct seriously affected her well-being. The plaintiff does not, however, bear the burden of showing that she is a reasonable person. Whether or not the plaintiff is “hypersensitive” is thus not directly at issue in the liability phase of a hostile environment action. See Robinson, 118 F.R.D. at 531 (rejecting defendants’ claim that allegedly hypersensitive plaintiff placed her mental condition in controversy by alleging that “her psychological well being, as well as the psychological well being of all reasonable individuals exposed to like circumstances, is seriously affected by defendants’ behavior”). Feldman-Schorrig and McDonald have no basis for their claim that clinicians should be allowed to explore the threshold “issue” of whether the plaintiff is “hypersensitive” or “reasonable.” See, e.g., Feldman-Schorrig & McDonald, supra note 208, at 12; Feldman-Schorrig, supra note 207, at 336. If their argument were accepted, all plaintiffs seeking to meet an objective standard of proof would put their mental conditions in controversy, as they would be tacitly claiming that they are “reasonable” persons.

\(^{251}\) Feldman-Schorrig & McDonald, supra note 208, at 23-26.

\(^{252}\) See, e.g., Tyler v. District Court, 561 P.2d 1260, 1263 (Colo. 1977) (dismissing claim that party’s mental condition was in controversy because it might bear on his credibility); Connolly v. Labowitz, No. 83C-AU-1, 1985 WL 189306 at *1 (Del. Super. Ct. Nov. 5, 1985); Landau v. Laughren, 357 S.W.2d 74 (Mo. 1962); see also United States v. Fountain, 840 F.2d 509, 517 (7th Cir.) (noting that the court below was properly leery of psychiatric examinations of witness and psychiatric testimony about witness credibility because “the jury can observe for itself . . . the witness’s behavior”), cert. denied, 488 U.S. 982 (1988); United States v. Barnard, 490 F.2d 907, 912 (9th Cir. 1973) (“[T]he jury is the lie detector in the courtroom.”), cert. denied, 416 U.S. 959 (1974).

\(^{253}\) See supra note 210; see also Marianne Wesson, Historical Truth, Narrative Truth, and Expert Testimony, 60 Wash. L. Rev. 331 (1985) (noting that experts cannot provide an accurate version of historical truth because stories inevitably transform during the therapeutic/diagnostic process).

In a limited area, techniques used by mental health clinicians can to some degree assess credibility. Certain psychological tests, particularly the MMPI, offer validity scales that help reveal whether a plaintiff is “malingering,” feigning psychological injury, or concealing psychosis. See Feldman-Schorrig & McDonald, supra note 208, at 27 (declaring the
motion for the purpose of assessing the plaintiff's credibility.

4. Privacy, Prejudice, and Potential Mischief: The Plaintiff's Interests

Courts have long expressed solicitude for the privacy interests of sexual harassment plaintiffs and have routinely barred discovery of evidence relating to plaintiffs' sexual history. More recently, Congress and the drafters of the Federal Rules of Evidence codified these concerns by extending the federal rape shield rule to civil actions; the amended Rule 412 sharply constrains admissibility of evidence regarding the sexual behavior and predisposition of sexual harassment victims. The drafters explicitly intended this

MMPI "eminently valuable in the detection of classic malingering"); Marcus, supra note 205, at 649. Such tests may arguably be relevant in the damages phase of a Title VII trial. Numerous studies, however, call into question the ability of psychological assessment methods to accurately detect malingering. See, e.g., 2 Ziskin & Faust, supra note 214, at 850-76. Moreover, studies indicate that tests may be accurate at detecting malingering of more severe forms of psychosis, but are less attuned to detecting malingering of Post-Traumatic Stress Disorder, see Paul R. Lees-Haley, Malingering Post-Traumatic Stress Disorder on the MMPI, 2 FORENSIC REP. 89 (1989) (reporting an erroneous classification rate of 52% to 80%), depression and generalized anxiety disorder, Richard Rogers et al., Feigning Specific Disorders: A Study of the Personality Assessment Inventory, 60 J. PERSONALITY ASSESSMENT 554 (1993) (finding the negative impression validity scale PAI marginally effective in detecting feigned depression, and ineffective in detecting malingering of generalized anxiety disorder), and emotional distress, Paul R. Lees-Haley, MMPI-2 F and F-K Scores of Personal Injury Malingers in Vocational Neuropsychological and Emotional Distress Claims, 9 J. FORENSIC PSYCHOLOGY 5 (1991) (suggesting that lower cutoff scores should be used for personal injury malingerers than for criminal defendants feigning insanity or incompetence). At least one court, questioning the reliability and validity of personality testing, refused to compel a sexual harassment plaintiff to submit to a battery of tests which included the MMPI-2. See Usher v. Lakewood Eng'g & Mfg. Co., 158 F.R.D. 411, 412-14 (N.D. Ill. 1994).


(a) EVIDENCE GENERALLY INADMISSIBLE.—The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct . . .

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) EXCEPTIONS.—

(2) In a civil case, evidence offered to prove the sexual behavior or


Rule to significantly curtail discovery of a victim's sexual history.\textsuperscript{257} This protection, according to the drafters, is designed "to encourage victims to come forward" with civil actions by eliminating the threat of intimidating, invasive, and embarrassing discovery and disclosure of intimate details.\textsuperscript{258} Consequently, in most cases, courts will likely limit the scope of a compelled examination to prohibit the sweeping exploration of the plaintiff's sexual history urged by defense-oriented clinicians.\textsuperscript{259} Implementing such protections, however, can prove difficult. While Rule 412 may serve to prevent discovery of sexual history, it will not prevent broad inquiry into other aspects of a plaintiff's psychological history. Sexuality inevitably bleeds into many nooks of most people's lives (especially according to Freudian psychiatrists\textsuperscript{260}). Thus, it would not be difficult for the examiner to stray, during the course of an "open ended . . . spontaneous" examination,\textsuperscript{261} beyond the permitted scope of the examination into sexual matters.\textsuperscript{262} Such

\textsuperscript{257} While evidence rules do not apply to discovery, the Advisory Committee noted that: In order not to undermine the rationale of Rule 412 . . . courts should enter appropriate orders . . . to protect the victim against unwarranted inquiries . . . . Courts should presumptively issue protective orders barring discovery unless the party seeking discovery makes a showing that the evidence sought to be discovered would be relevant under the facts and theories of the particular case, and cannot be obtained except through discovery. In an action for sexual harassment, for instance, while some evidence of the alleged victim's sexual behavior and/or predisposition in the workplace may perhaps be relevant, non-work place conduct will usually be irrelevant. 

\textsuperscript{258} Id., 154 F.R.D. at 528.

\textsuperscript{259} See supra note 212 and accompanying text; see also Feldman-Schorrig, supra note 207, at 342 (asserting that "[a] sexual harassment claimant's sexual history (including, in particular, any history of incest, sexual abuse, or rape) is indispensable to an accurate understanding of a variety of clinical and legal issues in the case").

\textsuperscript{260} Freudian theorists postulate that innate biological drives, especially the sexual drive, are primary determinants of human behavior. Peter Shea, Psychiatry in Court 19 (1993).

\textsuperscript{261} See Feldman-Schorrig & McDonald, supra note 208, at 26.

\textsuperscript{262} See Zabkowicz v. West Bend Co., 585 F. Supp. 635 (E.D. Wis. 1984) (noting that
invasions—whether innocent or invidious—would go undetected because prevailing federal practice does not allow the plaintiff to have counsel, an observer, or a recording device at the examination.\textsuperscript{263}

This invasiveness may not only be embarrassing and offensive—it can also lead to the admission of otherwise inadmissible evidence. According to Federal Rule of Evidence 703, expert witnesses may testify regarding any facts which they would normally deem relevant in reaching their expert opinion, even if those facts would not otherwise be admissible.\textsuperscript{264} Should an examiner extract information regarding the victim's sexual history, the examiner could reveal that information at trial under Rule 703.\textsuperscript{265} Moreover, examiners may circumvent limits on hearsay evidence by asking the examinee questions containing hearsay, then repeating the question and the answer to it at trial.\textsuperscript{266} Thus, the examination offers opportunities for abuse by allowing the defendant to slip embarrassing or damaging evidence before the trier of fact.

C. Outcome of the Balancing Test

A compelled mental examination offers limited aid to the factfinder; conversely, it is potentially invasive, easily abused, and difficult for either the court or the plaintiff's attorney to monitor. Consequently, the balancing test should favor the Title VII plaintiff in many cases. This balance shifts somewhat, however, if the plaintiff plans to be examined by and offer the testimony of a friendly expert,\textsuperscript{267} or if she claims damage or distress beyond that which would normally stem from the alleged harassing conduct.

Even in cases that warrant a mental examination, a court should view the motion skeptically, scrutinizing the defendant's alleged motives and proposed methods. Recent opinions by Senior Judge Milton I. Shadur of the Northern District of Illinois illustrate such an ap-
proach. In *Jansen v. Packaging Corp. of America*, Judge Shadur granted the defendant's motion to examine a sexual harassment plaintiff who sought damages for continuing emotional distress.\(^{268}\) However, concerned about the "particularly sensitive" nature of mental examinations,\(^{269}\) the judge ordered that an independent examiner conduct the evaluation.\(^{270}\) In doing so, the judge expressed thinly veiled skepticism of the defendant's motives:

If the real purpose of [defendant's] motion is . . . to obtain an independent and impartial insight into [plaintiff's] claims of mental harm, that purpose would seem to be better served by assuring true independence on the part of the examiner, rather than by forcing [plaintiff] into a battle of the experts that she has not sought to join (let alone to initiate).\(^{271}\)

Similarly, in *Usher v. Lakewood Engineering & Manufacturing Co.*, Judge Shadur viewed the defendant's proposed methods with skepticism, allowing a clinical evaluation of the plaintiff but denying defendant's proposed battery of psychological tests.\(^{272}\)

In both cases, Judge Shadur exercised his discretion to "provid[e] a level playing field for the parties."\(^{273}\) Denial or modification of a proposed adverse mental examination hardly tilts the playing field against a defendant. Just as a sexual harassment victim may establish the cause and extent of her emotional distress through her own testimony and that of corroborating witnesses, the defense may seek out discovery and testimony from witnesses familiar with the plaintiff and her workplace. These witnesses could rebut plaintiff's charges regarding the hostility of the work environment and the cause and extent of her mental anguish. These witnesses could also testify regarding the plaintiff's credibility. Similarly, denial of a mental examination would not bar the defendant from using other discovery devices against the plaintiff. Through interrogatories, requests for document production, and depositions, the defendant may probe inconsistencies in the plaintiff's charges and attempt to identify alternative causes of the plaintiff's claimed distress.

IV

Ancillary Reforms

Just as mental examinations should not be granted as a matter of

\(^{268}\)158 F.R.D. 409, 410 (N.D. Ill. 1994). *See also* discussion *supra* note 30.

\(^{269}\)158 F.R.D. at 410.

\(^{270}\)Id. at 411.

\(^{271}\)Id.

\(^{272}\)158 F.R.D. 411, 412-14 (N.D. Ill. 1994). *See discussion supra* notes 152-54 and accompanying text.

\(^{273}\)Usher, 158 F.R.D. at 414; *see also* Jansen, 158 F.R.D. at 411 (discussing need for "a level playing field" as a factor in Rule 35 determinations).
right, they should not be denied as a matter of right. Decisions regarding the appropriateness of compelled mental examinations of sexual harassment plaintiffs are best left to the discretion of the courts, provided that they strike the appropriate balance among all interests involved. Thus far, this Note has advocated no black letter rules, but rather has presented factors recognized by existing law and policy which should guide courts as they consider motions to compel mental examinations of sexual harassment plaintiffs. Certain procedural reforms, however, can help to establish basic parameters for a court's exercise of discretion. This Part will briefly address several measures designed to prevent and deter invidious use of mental examinations and to provide an avenue for review of examination orders.

A. Discovery Shield Rules

By adopting amendments that extend application of the federal rape shield law to civil actions, Congress has provided courts with a valuable tool for curtailing abuse of Rule 35 examinations of sexual harassment plaintiffs. Because it is an evidence rule, however, amended Rule 412 is ill-suited to the task of fully eradicating unduly invasive discovery. In letter and spirit, discovery rules are far more liberal than evidence rules, allowing parties license to seek information that may not be admissible at trial. Some courts will be inclined to permit discovery of evidence that may ultimately prove inadmissible under Rule 412. For potential plaintiffs, wary of the specter of an intrusive examination, this prospect may be enough to deter many from bringing suit. Thus, though now designed to encourage sexual harassment victims to come forward, Rule 412 may take hold too late in the litigation process to serve this objective.

Consequently, Rule 412 should be supplemented with amend-

274 See supra notes 258-59 and accompanying text. The federal evidentiary shield is not the first in the country to constrain sexual history evidence in civil actions—California enacted evidentiary shields for sexual harassment complainants in the 1980s. Cal. Evid. Code §§ 1106 (West Supp. 1995) & Cal. Gov’t Code § 11513 (West Supp. 1995) bar opinion evidence, reputation evidence, and evidence of specific sexual conduct to prove consent by the plaintiff or lack of injury to the plaintiff, unless the sexual conduct was with the alleged harasser.

275 See Fed. R. Civ. P. 26(b)(1) (stating that “[t]he information sought [through discovery] need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence”). While Rule 35 is more restrictive on its face than other discovery rules, courts have still noted that, “[a]s a pretrial discovery rule, . . . Rule 35(a) should be interpreted liberally in favor of granting discovery.” In re Certain Asbestos Cases, 112 F.R.D. 427, 492 (N.D. Tex. 1986) (ordering autopsy of decedent).

276 Cf. Hodges v. Keane, 145 F.R.D. 382, 385 (S.D.N.Y. 1993) (permitting psychiatric examination of plaintiff with demonstrated psychosis, but cautioning that the fruits of the examination may be sufficiently confusing or prejudicial to bar admission at trial).

277 See supra note 258 and accompanying text.
ments to discovery rules that set high thresholds for discovery of harassment plaintiffs' sexual history. California and Iowa have enacted such rules. In tandem with evidentiary shields, discovery shields would ensure that sexual harassment suits do not become invasive and embarrassing forays into the plaintiffs' psyches and sexual histories, and that plaintiffs do not find their virtue on trial when they simply attempt to "secure their statutory right to be free from sexual denigration.”

B. Presence of Counsel, Observer, or Recording Devices

Rule 35 is silent as to whether a court may order that an adverse examination be observed by the examinee's counsel or a third party. Generally, federal courts faced with the issue have ruled that parties have no right to have counsel present during an examination. These courts have reasoned that the examination should not take on the flavor of an adversarial procedure: "The very presence of a lawyer for one side will inject a partisan note into what should be a wholly

In any civil action . . . alleging conduct that constitutes sexual harassment, sexual assault, or sexual battery, any party seeking discovery concerning the plaintiff's sexual conduct with individuals other than the alleged perpetrator is required to establish specific facts showing good cause for that discovery, and that the matter sought to be discovered is relevant to the subject matter of the action and reasonably calculated to lead to the discovery of admissible evidence.

This rule has effectively constrained defendants' attempts to delve into plaintiffs' arguably relevant sexual histories and attitudes. In Knoettgen v. Superior Court, 273 Cal. Rptr. 636 (Cal. Ct. App. 1990), a California appeals court denied discovery concerning sexual assaults that plaintiff suffered as a child even though the defendant's forensic psychiatrist believed that those incidents affected the plaintiff's current perceptions of sexuality. In Mendez v. Superior Court, 253 Cal. Rptr. 731, 739-41 (Cal. Ct. App. 1988), the court denied discovery of a tort complainant's sexual activities with co-workers and others outside of work, even though such activities may have been relevant to the cause of her alleged distress.

279 Iowa Code § 668.15 (Supp. 1994). While the language of the Iowa rule tracks that of the California rule, see supra note 278, it has been more narrowly interpreted. See Weiss v. Amoco Oil Co., 142 F.R.D. 311, 314 (S.D. Iowa 1992) (holding that § 668.15 did not bar defendant from deposing plaintiff about her sexual conduct with other employees about which the defendant knew).


objective inquiry." If allowed into the examination, lawyers would to some degree assume control over it. They would thus usurp the doctor’s role as an objective seeker of truth.

Not all federal courts have accepted this reasoning. In Zabkowicz v. West Bend Co., the District Court for the Eastern District of Wisconsin ruled that a sexual harassment plaintiff may have a third party, including her lawyer, attend a compelled psychiatric examination. The court noted that a forensic examination is essentially an adversarial proceeding. Consequently, the plaintiff’s interest in protection from unsupervised adversarial interrogation outweighed the defendant’s interest in unfettered discovery. More recently, in Vreeland v. Ethan Allen, Inc., the District Court for the Southern District of New York permitted plaintiffs’ attorney in an employment discrimination action to attend psychological examinations, reasoning that “the presence of the attorney is more likely to produce a higher quality of justice and fairness in the ensuing trial.” In addition, numerous state courts have held that an examinee may have her attorney present unless the examining party can show good cause to exclude counsel. Finally, some states’ procedural rules dictate that parties have a right to have counsel present at adverse examinations.

Courts that have allowed attorneys to attend examinations reject the notion that an adverse forensic evaluation is not an adversarial event. The defendant’s expert is not a neutral officer of the court sought for his expertise, but a hired gun. A mental examination,

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284 585 F. Supp. 635 (E.D. Wis. 1984), aff’d in part and rev’d in part on other grounds, 789 F.2d 540 (7th Cir. 1986).
285 Id. at 636.
286 Id.
287 Id.
289 Id. at 551.
291 See, e.g., 735 ILCS § 5/2-1003(d) (1993) (“[T]he plaintiff has the right to have his or her attorney, or such other person as the plaintiff may wish, present at such physical or mental examination.”). Other states’ rules permit a plaintiff’s “representative” to attend an examination. See Ariz. R. Civ. P. 35(a); Okla. Stat. tit. 12, § 3235(d) (1994).
then, can often amount to a "de facto deposition." Allowing such a proceeding without the presence of counsel poses substantial dangers to plaintiffs, as the unchecked examiner could extract, and potentially introduce as evidence, information outside the permissible scope of the examination. Consequently, Rule 35 should be amended to allow the examinee's counsel to attend the examination if the examining party cannot show good cause to bar counsel. Courts should maintain discretion to confine counsel to a passive role, permitting interruption of the examination only for demonstrable good cause.

In the alternative, Rule 35 could be amended to allow a less controversial form of monitoring. Some courts that have not allowed counsel to attend examinations have allowed the examinee to bring her own doctor or other third party to observe the examination. Other courts have allowed parties to tape record the examination. Such a provision is written into some states' discovery rules. While these compromise solutions may not fully protect the examinee from unduly invasive inquiry, they would allow the parties and the court to monitor the examination unobtrusively.

C. Expanded Availability of Interlocutory Appeal

Currently, a party who objects to an order compelling an adverse medical examination faces a difficult choice: either submit to the examiner selected by defendant to examine plaintiff is not necessarily a disinterested, impartial medical expert, indifferent to the conflicting interests of the parties.

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293 Zabkowicz, 585 F. Supp. at 696. See also Langfelt-Haaland, 768 P.2d at 1145 (summarizing courts' reasoning that counsel can prevent examination from transforming into a "sort of deposition"); Shannon P. Duffy, Psychiatrist Cross-Examined by Plaintiffs, LEGAL INTELLIGENCER, Aug. 3, 1993, at 8 (reporting attorney's assertion that psychiatric examination of sexual harassment plaintiff "turned into something more like a cross examination than a psychological evaluation").

294 See supra part III.B.4.

295 See, e.g., Vreeland, 151 F.R.D. at 551 (requiring the attorney to "behave in an orderly fashion and not meddle or attempt in any way to direct or control the examination").


amination or risk potentially severe sanctions. Because it is not a final judgment, a discovery order generally is not subject to interlocutory review. On rare occasions, parties have successfully invoked exceptions to the final judgment rule and obtained interlocutory appeal of discovery orders. First, in cases where Rule 35 orders amounted to a clear abuse of discretion, courts of appeal have issued writs of mandamus. Second, courts have occasionally invoked the judicially-created collateral order doctrine to review Rule 35 orders. Finally, district courts may certify certain decisions for review. Generally, however, mandamus is rarely available to review Rule 35 orders. The Supreme Court has traditionally reserved the writ for exceptional cases involving clear abuses of discretion. See Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 383 (1953) (noting that the writ of mandamus should not be used as a substitute for appeal). The Schlagenhauf Court justified its use of mandamus because the case presented questions of first impression on the meaning of Rule 35; Winters v. Travia, 495 F.2d 839, 840-41 (2d Cir. 1974) (granting writ of mandamus overturning order that compelled a Christian Scientist to submit to mental and physical examinations).

The doctrine emerged from the Supreme Court’s decision in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). As stated in Cohen, the doctrine required that: (1) the district court’s order conclusively determine a disputed issue; (2) the right asserted in the order be collateral to and separable from the merits of the underlying action; (3) the right asserted be in danger of being irreparably lost; and (4) the question presented be serious and unsettled. Id. at 546-47. Subsequently, the Court modified these requirements somewhat. In Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978), the Court held that, to be appealable under the Cohen doctrine, an order must (1) “conclusively determine the disputed question,” (2) “resolve an important issue completely separate from the merits of the action,” and (3) “be effectively unreviewable on appeal from a final judgment.”

In Acosta v. Tenneco Oil Co., 913 F.2d 205, 207 (5th Cir. 1990), the court allowed a plaintiff’s appeal of an order for a compelled examination by a vocational expert. In finding that the requirements for the collateral order doctrine were met, the court cited the four elements presented in Cohen, id. at 207-08, rather than the more restrictive post-Cohen requirements. See supra note 303. Consequently, the court did not require that the examination order be effectively unreviewable on appeal from a final judgment.
interlocutory appeal;\textsuperscript{305} in theory, Rule 35 orders might be appealable by this route.\textsuperscript{306} In practice, however, each of these avenues for ob-

This requirement, however, proved the downfall of an employment discrimination plaintiff’s attempt to appeal an order to submit to a compelled mental examination. Reise v. Board of Regents, 957 F.2d 293 (7th Cir. 1992) (Easterbrook, J.). The court rejected Acosta’s reasoning, finding that a Rule 35 order is not effectively unreviewable on appeal from final judgment. \textit{Id.} at 295. The plaintiff, according to Judge Easterbrook, could always refuse to comply with the examination order; as a sanction, the trial court would most likely strike plaintiff’s claim for damages. \textit{Id.} The plaintiff could then, if he prevailed on the merits, appeal the order striking the damages claim and receive review of the Rule 35 order. \textit{Id.}

The Second, Sixth, and Seventh Circuits have completely rejected the use of the collateral order doctrine to review discovery orders. \textit{See, e.g.,} Chase Manhattan Bank, N.A. v. Turner & Newell, PLC, 964 F.2d Cir. 159, 162-63 (2d Cir. 1992); Richards v. Firestone Tire & Rubber, 928 F.2d 241 (7th Cir. 1991); FDIC v. Ernst & Whitney, 921 F.2d 83, 85 (6th Cir. 1990). Others, however, have sanctioned such use. \textit{See, e.g.,} Acosta, 913 F.2d at 208; \textit{In re} Rafferty, 864 F.2d 151, 154-55 (D.C. Cir. 1988). For a view that the collateral order doctrine should be interpreted to allow review of discovery orders, see Nicole E. Paolini, \textit{Note,} The Cohen Collateral Order Doctrine: The Proper Vehicle for Interlocutory Appeal of Discovery Orders, 64 Tul. L. Rev. 215 (1989).

\textsuperscript{305} 28 U.S.C. § 1292(b) (1988). If the trial judge determines that an “order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation,” she may certify that order for appeal, which the court of appeals has discretion to permit. \textit{Id.} Courts have offered divergent definitions of what amounts to a “controlling question of law.” Some have held that an issue may, in a practical sense, be controlling if interlocutory appeal would save delay and costs. \textit{See, e.g.,} Katz v. Carte Blanche Corp., 496 F.2d 747, 755 (3d Cir.) (en banc), \textit{cert. denied}, 419 U.S. 885 (1974). Others have rejected this reasoning, noting that a controlling question must be one that could materially affect the outcome of an action, and that it is not enough that immediate review may materially advance the litigation. \textit{See, e.g.,} \textit{In re} Cement Antitrust Litig., 673 F.2d 1020, 1026-27 (9th Cir. 1982), \textit{aff'd sub nom.} Arizona v. Ash Grove Cement Co., 459 U.S. 1190 (1989).

Wright and Miller state that “it is difficult to believe that a discovery order will present a controlling question of law” and consequently that review under § 1292(b) usually should not be allowed. \textit{Wright et al., supra} note 301, § 2006, at 83. Most courts have adopted this approach. \textit{See, e.g.,} Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1118 n.14 (3d Cir. 1986) (noting that appeal under § 1292(b) would not be available to review district court’s modification of protective order).

\textsuperscript{306} In 1978, two appellate courts granted appeals under § 1292(b) to review orders that were potentially more invasive and violative of important substantive rights than standard discovery requests. \textit{See Belcher v. Bassett Furniture Indus., Inc.,} 588 F.2d 904 (4th Cir. 1978) (granting appeal and reversing district court order that improvidently permitted inspection of defendant’s plants); Herbert v. Lando, 568 F.2d 974 (2d Cir.) (reviewing journalist’s claim that order compelling discovery of materials culled in preparation for an allegedly defamatory broadcast violated the First Amendment), \textit{rev’d on the merits}, 441 U.S. 153 (1978); \textit{see also} Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir.) (reviewing ruling on scope of attorney-client privilege and its effect on discovery order), \textit{cert. denied}, 401 U.S. 974 (1970). Rule 35 orders, particularly for mental examinations of sexual harassment victims, are potentially more invasive than other forms of discovery and implicate vital privacy rights. \textit{See supra} part II. Consequently, such orders should be reviewable under § 1292(b).

In practice, however, § 1292(b) has never been used to obtain review of a Rule 35 order. \textit{See Joseph G. Maye, Comment, Interlocutory Appeals of Rule 35 Medical Examination Orders,} 61 UMKC L. Rev. 503, 525 n.177 (1993) (basing conclusion on Westlaw search, updated by this author). The likely reason for this is the prevailing notion that § 1292(b) applies only to “big” cases. \textit{See Kraus v. Board of County Rd. Comm’rs,} 864 F.2d 919, 922
taining prejudgment review of discovery orders is profoundly limited.307

As discovery has come to dominate litigation,308 members of the legal community have expressed increasing concern that abuse and overuse of discovery procedures intrude upon individuals' privacy rights and impede justice.309 Allowing interlocutory appeals of potentially invasive or abusive discovery orders could curb such practices. Therefore, despite judicial distaste for expansion of appellate jurisdiction,310 commentators have expressed increasing enthusiasm for loosening restrictions on interlocutory appeals.311 Congress has recently passed legislation allowing the Supreme Court to prescribe rules (1) to clarify the final order rule312 and (2) to define circumstances in which otherwise unappealable interlocutory orders may be appealed.313 Legislative history suggests that Congress intends these rules to streamline the interlocutory appeal process and make such appeals more readily available.314 One commentator has recently suggested modifying procedural rules to create a streamlined process for interlocutory appeals of discovery orders that would violate substantial

(6th Cir. 1966). Rule 35 orders generally arise in "ordinary suits for personal injuries" and thus are not appropriate subjects for 1292(b) review. Id. For discussion and criticism of the "big case" requirement, see Michael E. Solimine, Revitalizing Interlocutory Appeals in the Federal Courts, 58 Geo. Wash. L. Rev. 1165, 1193-95 (1990).

307 See supra notes 302-06.
308 "The journey from complaint to resolution is a slow trek across the badlands of discovery." Discovery, Litig., Fall 1988, at 7.
309 Such concerns are not new. Over 15 years ago, the Pound Conference observed that:

There is a very real concern in the legal community that the discovery process is now being overused. Wild fishing expeditions . . . seem to be the norm. Unnecessary intrusions into the privacy of the individual, high costs to the litigants, and correspondingly unfair use of the discovery process as a lever toward settlement have come to be part of some lawyers' trial strategy.


311 These commentators differ on the proper avenue for reform. See Solimine, supra note 506, at 1175-83 (arguing for increased use of § 1292(b) appeals); Daniel J. Lawler, Comment, Appellate Review of Discovery Orders in the Federal Courts, 1980 S. Ill. L.J. 399 (advocating greater use of mandamus to review discovery orders); Paolini, supra note 304, 233-34 (suggesting a modified form of the Cohen collateral order doctrine to permit more frequent appeal of discovery orders).
314 See Matye, supra note 306, at 530-31 (discussing the legislative history of the Acts). Matye also notes that Congress earlier considered legislation that would have permitted interlocutory appeals that were "essential to protect substantial rights which cannot be effectively enforced on review after final decision." Id. at 529 (quoting H.R. Rep. 3152, 100th Cong., 1st Sess. § 702(a) (1987)).
privacy rights or substantially hinder a party's ability to try the lawsuit.\(^{315}\)

Such reform would aid in ensuring adequate protection of the privacy interests of sexual harassment plaintiffs. It would also protect defendants' interests where courts deny examinations for which defendants have good cause.\(^{316}\) Furthermore, increased use of interlocutory appeals would allow appellate courts to clarify the proper scope and application of Rule 35 in sexual harassment cases. As this Note has stressed, social attitudes and legal responses to sexual harassment are rapidly evolving. This evolution, and the powerful policy concerns fueling it, should affect trial courts' treatment of the discovery and use of evidence in sexual harassment actions. Allowing these issues to reach the circuit courts could hasten and deepen the impact of sexual harassment law reform by solidifying principles to guide district courts in enlightened exercises of discretion.

**CONCLUSION**

America's culture and legal system have made fitful progress towards recognizing the effects of workplace discrimination and compensating those who suffer through it. Increasingly, courts have recognized that a plaintiff who alleges a hostile work environment primarily places her working conditions in controversy. Her claims do not necessarily place her mental condition in sufficient controversy to warrant a broad and unsupervised probing of her personal and sexual history, even when she alleges that the hostile environment caused her emotional harm. Fairness dictates that defendants be allowed to vigorously protect themselves from sexual harassment charges. Commitment to social progress, however, demands that courts and legislatures vigorously weed out procedures that reflect outmoded responses to the claims of sexual misconduct victims and do little to advance the search for truth. This Note maintains that courts should engage in

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\(^{315}\) See Matye, *supra* note 306, at 532-35.

careful, context-sensitive consideration of the costs and benefits of compelling mental examinations of sexual harassment plaintiffs. Such an approach is not a large step towards legal reform. It is, however, an appropriate one.

Kent D. Streseman†

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