Hostile Environment Sexual Harassment Claims and the Unwelcome Influence of Rape Law

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HOSTILE ENVIRONMENT SEXUAL HARASSMENT
CLAIMS AND THE UNWELCOME
INFLUENCE OF RAPE LAW

Janine Benedet*

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INTRODUCTION

It has been less than twenty years since American courts first began
to recognize that sexual harassment at work might fall within Title
VII's prohibition of discrimination in employment on the basis of sex.¹
In that time, courts have expanded the definition of actionable sexual
harassment to include not only sexual demands that are implicitly or
explicitly tied to denial or receipt of a job benefit or sanction (quid pro
quo sexual harassment), but also conduct that has the effect of altering

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983 (D.C. Cir. 1977); Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044
(3d Cir. 1977).
the conditions of the plaintiff's employment by producing a hostile or abusive working environment (hostile environment sexual harassment).²

Coincident with this expansion in the nature of the conduct that may ground an employer's liability has been the development of a detailed framework within which the plaintiff must fulfill her burden of proving a prima facie case of sex discrimination. It is now generally accepted that a plaintiff, in order to make out a prima facie case of hostile environment sexual harassment, must show that:

(1) she is a member of a protected class;
(2) she was subject to unwelcome sexual harassment;
(3) the harassment was based on sex;
(4) the harassment was sufficiently severe or pervasive so as to alter the conditions of her employment and create an abusive working environment; and
(5) employer liability.³

This article considers the unwelcomeness requirement of the plaintiff's prima facie case. In particular, it examines the discussion of unwelcomeness found in the decision of the Supreme Court in *Meritor Savings Bank v. Vinson,*⁴ and the content given to this element by the subsequent decisions of lower courts. Such an inquiry reveals several parallels between the approach of courts to sexual harassment claims and their traditional treatment of the criminal offense of rape. The same biases and erroneous assumptions that have hampered an effective response to the physical violation of women have permeated the application of the purported remedy for their psychological violation on the job.⁵ The effectiveness of potential remedies for this unfairness should

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2. Bundy v. Jackson, 641 E2d 934 (D.C. Cir. 1981); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).
3. *Henson,* 682 E2d at 903–05. The courts then follow the basic structure of proof of a Title VII discrimination claim. Once the plaintiff has made out her prima facie case, the employer must articulate a legitimate, non-discriminatory reason for the existence of this difference in treatment. The onus is then on the plaintiff to prove that the proffered reasons are a mere pretext for illegal discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–04 (1973); Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993).
5. Of course, many sexual harassment suits include complaints of physical violations that could amount to criminal sexual assault. Similarly, rape is both an invasion of the victim's physical integrity and a repudiation of her equality and human dignity. Sexual harassment and rape are not only at times accomplished through identical
be evaluated in light of the underlying reasons for the errors made to date by the courts. If the framework ultimately chosen for proof of hostile environment sexual harassment claims is constructed in a manner that recognizes the reasons behind the reality of women's experiences at work, it may have transformative potential not only for discrimination claims under Title VII, but for the treatment of rape by the criminal law.

I. Developing the Unwelcomeness Requirement

A. Early Cases

The first appellate decision to recognize that a sexually hostile work environment violated Title VII did not mention the issue of unwelcomeness. Rather, it discussed the substance of the claim in a general way by analogy to the existing quid pro quo cases. However, by the time the Eleventh Circuit handed down its decision in *Henson v. City of Dundee*, the elements of a hostile environment sexual harassment claim had begun to be defined with some precision. In setting out the five components of a plaintiff's prima facie case, the court in *Henson* relied on the guidelines recently issued by the Equal Employment Opportunity Commission (EEOC), which suggested that hostile environment sexual harassment was a violation of Title VII—and defined sexual harassment as “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature....” The Eleventh Circuit interpreted this to mean that the plaintiff must show that she “was subject to unwelcome sexual harassment.” Despite the absence of an unwelcomeness issue on the facts of the case, the court defined this requirement to mean that the “... conduct must be unwelcome in the sense that the employee did not

acts, they also stem generally from the same exercise of domination over women and the rejection of their equal humanity. This renders the parallels in their legal treatment far from surprising.

6. *Bundy*, 641 F.2d at 934. The D.C. Circuit did note that there “was little or no basis in the record” for the comment of the district court that Bundy “took a casual attitude” toward the sexual advances. *Bundy*, 641 F.2d at 941–42.

7. 682 F.2d 897 (11th Cir. 1982).


9. *Henson*, 682 F.2d at 903 (emphasis in original). Given that the EEOC defines sexual harassment as conduct that is unwelcome, the modifier is redundant.
solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive." This definition remains the standard for plaintiffs bringing a Title VII sexual harassment claim.

B. Meritor Savings Bank v. Vinson

In formulating this definition of unwelcomeness, the Eleventh Circuit relied on the district court decision in *Meritor Savings Bank v. Vinson*. This case eventually would be the first sexual harassment claim to be considered by the Supreme Court. Mechele Vinson was employed for four years by the defendant bank, during which time she was promoted from teller-trainee to assistant branch manager. She alleged that during this time the branch manager, Sidney Taylor, subjected her to repeated demands for sexual intercourse, fondling in front of other employees, indecent exposure, and numerous instances of forcible rape. Vinson testified that she initially refused Taylor's demands for sex, but out of fear of losing her job, eventually submitted to him some forty or fifty times.

Taylor denied that any sexual activity had occurred. He testified that Vinson had in fact made advances toward him, which he declined. Taylor also suggested that Vinson had brought her suit to exact revenge after a dispute about whom the plaintiff was to train to be head teller.

The district court rejected the plaintiff's claim. Under the heading "Additional Findings," the trial judge noted:

If the plaintiff and Taylor did engage in an intimate or sexual relationship during the time of plaintiff's employment with [the bank], that relationship was a voluntary one by plaintiff having nothing to do with her continued employment at [the bank] or her advancement or promotions at that institution.12

On appeal, the District of Columbia Circuit reversed. The court of appeals held that the trial judge had erred in failing to consider whether the plaintiff had proven that she was subjected to sexual harassment by

10. Henson, 682 F.2d at 903.
way of a hostile work environment. The conclusion that the plaintiff had not been the victim of sexual harassment was therefore open to question. After referring to the passage quoted above, the court stated:

This finding leaves us uncertain as to precisely what the court meant. It could reflect the view that there was no Title VII violation because Vinson’s employment status was not affected, an error to which we already have spoken. Alternatively, the finding could indicate that because the relationship was voluntary there was no sexual harassment — no “[u]nwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature . . . creating an intimidating, hostile, or offensive working environment.” If, however, the evidence warranted a finding of sexual harassment by that standard, Vinson’s “voluntariness” had no materiality whatsoever.  

Relying on its recent decision in Bundy v. Jackson, the D.C. Circuit noted that an employee was not required to prove resistance to sexual advances in order to make out a Title VII claim. The court concluded:

A victim’s “voluntary” submission to unlawful discrimination of this sort can have no bearing on the pertinent inquiry: whether Taylor made Vinson’s toleration of sexual harassment a condition of her employment.

In a footnote, the court noted that the trial judge’s unexplained finding of voluntariness may have been predicated on the “voluminous testimony regarding Vinson’s dress and personal fantasies.” The court rejected the relevance of such evidence on the ground that “a woman does not waive her Title VII rights by her sartorial or whimsical proclivities.”

The defendants’ application for a rehearing en banc was denied. Judge Bork (joined by Judges Scalia and Starr) dissented from this denial on several grounds. Judge Bork argued that the decision of the

13. The court of appeals also found other errors relating to the treatment of employer liability and the admissibility of similar fact evidence in the plaintiff’s case in chief.

14. Meritor, 753 F.2d at 146 (footnotes omitted).


16. Meritor, 753 F.2d at 146 n.36.

17. Meritor, 753 F.2d at 146 n.36.

18. Meritor, 753 F.2d at 146 n.36.
court of appeals meant that "the supervisor charged may not prove that the sexual behavior, far from constituting harassment, was voluntarily engaged in by the other person, nor may the supervisor show that the charging person's conduct was in fact a solicitation of sexual advances." Thus, "sexual dalliance, however voluntarily engaged in, becomes harassment whenever the employee sees fit, after the fact, to so characterize it." Judge Bork also disagreed that evidence of the plaintiff's dress or behavior was irrelevant, particularly if evidence of the supervisor's behavior toward other employees was admissible.

The Supreme Court, in an opinion delivered by Justice Rehnquist, struck a middle ground. The Court agreed that sexual harassment, in both its quid pro quo and hostile environment forms, was actionable sex discrimination under Title VII. On the issue of voluntariness, the Court agreed with the court of appeals that the district court had erred in concluding that the voluntary nature of the sex barred relief. The Court interpreted the word "voluntary" as referring to the complainant not being "forced to participate against her will." "Voluntariness" was not a defense to a Title VII claim since "[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were "unwelcome.""

The Court distinguished these two concepts in the following terms: "The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary."

19. Meritor, 760 F.2d at 1330. The language of the "supervisor charged" and the "charging person" are incongruous in the civil context. Judge Bork's use of terms more appropriate to a criminal prosecution emphasizes that his concerns—that the woman wanted it, that she was in fact the aggressor, and that she can and will invoke the legal system after the fact—are those historically raised in the context of the crime of rape.
20. Meritor, 760 F.2d at 1330.
23. Meritor, 477 U.S. at 68.
24. Meritor, 477 U.S. at 68.
25. Meritor, 477 U.S. at 68. The trial judge did not explain his use of the word "voluntary." The District of Columbia Circuit and the Supreme Court interpreted it to mean acquiescence in the sexual acts, as opposed to forcible compulsion at the time of penetration. In other words, they took the trial judge to mean that the acts were not the crime of rape. Judge Bork, dissenting from the denial of the rehearing,
However, the Court disagreed that evidence of the “complainant’s sexually provocative speech or dress”\(^2\) was necessarily irrelevant to the issue of unwelcomeness. The district court, on remand, would have to weigh the probative value of such evidence against its potential for prejudice to the plaintiff.\(^2\)

II. Defining Unwelcomeness

The content of the unwelcomeness requirement is being developed by the courts on an ad hoc basis, apparently by reference to judicial common sense. Few decisions have considered the appropriateness of such an element in the prima facie case, or the ways in which it might operate to reinforce workplace inequality between women and men. Fewer still have recognized the ways in which this requirement, and the manner in which it has been applied, have rendered civil actions for sexual harassment in employment startlingly similar to the highly criticized traditional criminal rape prosecution.\(^2\) The next section of this article identifies those parallels, relying on the content given to the unwelcomeness requirement by various trial and appellate decisions.

A. The Presumption of Consent

Generally speaking, the element of unwelcomeness serves the same function in sexual harassment actions that the element of non-consent

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26. Susan Estrich makes a similar point in her article *Sex at Work*, 43 STAN. L. REV. 813, 815–16 (1991). Estrich confines her article primarily to harassment by supervisors; this article considers welcomeness in the context of harassment by coworkers as well.
does in a criminal rape trial. First, by making non-consent, or unwelcomeness, a part of what the plaintiff/prosecution must prove before the defendant is required to answer, the structure of the claim presumes that the woman bringing the complaint consented to or welcomed the conduct. In the context of a sexual harassment action, this means that it is presumed that the woman found the alleged conduct to be welcome. This is true even where a hostile work environment claim is based on sexual advances or physical touching. That the plaintiff proves by credible testimony that these events happened is not enough to establish a prima facie case; she must also prove that she did not want them to happen.

This presumption of consent has produced similar doctrinal consequences in both criminal rape law and in the law of sexual harassment. This suggests that the same assumptions that have led to vigorous criticism of the law of rape persist in the minds of judges in the sexual harassment context: namely, assumptions about the nature of women and their relationships with men. The remainder of this article will discuss the parallel elements of the two legal claims, the shared fallacies on which they are based, and the manner in which the tort of sexual harassment can be modified to better fulfill its avowed purpose of ensuring equality for women in the workplace.

B. Structure of the Claim/Elements of the Offense

The traditional criminal law formulation of the offense of rape is that of sexual penetration of a woman, not the wife of the perpetrator, by force and against her will. The majority of states still require proof of the two elements of force and non-consent.29

29. See, e.g., KAN. STAT. ANN. § 21.3502 (1988); CAL. PENAL CODE § 261(2) (West 1993). Some jurisdictions have amended the offense so that it is defined solely by reference to force. See, e.g., ALA. CODE § 13A-6-61 (1994); MICH. COMP. LAWS ANN. § 750.520b(1)(b) (West 1991). Nonetheless, in jurisdictions where consent is not provided as an express defense, courts have steadfastly read the element of non-consent back into the offense. See, e.g., People v. Stull, 127 Mich. App. 14, 338 N.W.2d 403, 406 (1983) (noting that although consent is not an element under the statute, "consent is clearly admissible to show lack of force or coercion"). Conversely, some jurisdictions have eliminated the force requirement such that the sole issue, on the wording of the statute, is non-consent. See, e.g., ALASKA STAT. § 11.41.410 (1989). However, the presence or absence of force is generally treated as relevant to non-consent.
In general, the element of force can be satisfied in one of two ways. First, the prosecution can show that the defendant gained sexual access to the complainant through the application of actual physical force. Second, the prosecution can meet the “by force” requirement by showing that, while no actual force was applied, intercourse was obtained by the use of threats. The class of threats considered sufficiently severe to be deemed “force” is generally restricted to those threats that engender a fear of death, abduction, or grievous bodily harm. Those who criticize the traditional formulation of the criminal law of rape point to the erroneous assumptions underlying the requirement that the prosecution prove both force and non-consent. Such a structure presumes both that the presence of force is consistent with consensual intercourse, and that the complainant considers the sex unwanted is not enough, in and of itself, to constitute the offense of rape.

In a hostile environment sexual harassment claim the plaintiff must show that the conduct on which her lawsuit is based was unwelcome. As noted above, this requirement functions as a non-consent standard for sexual harassment. The plaintiff must also show that the unwelcome harassment was sufficiently severe or pervasive so as to alter her conditions of employment and create an abusive working environment. This is known as the “unreasonableness” requirement. There is, of course, no *per se* requirement that a plaintiff prove force as part of her prima facie case in a hostile environment claim under Title VII. However, the unreasonableness and unwelcomeness elements offer an interesting parallel to the force/non-consent duality of criminal rape law.

To prove that the harassing conduct was unreasonable, the plaintiff must meet two standards. First, she must demonstrate that her working environment became, for her, hostile and abusive (the subjective test).

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30. See Catharine A. MacKinnon, Toward a Feminist Theory of the State 245 (1984) (advocating a compulsion standard and arguing that lack of consent is redundant); but see Susan Estrich, Rape, 95 Yale L.J. 1087, 1132 (1986) (advocating a consent standard as empowering women, but considering forcible penetration potentially compatible with consent). One could also argue that rape should be defined solely by reference to a consent standard, with proof of compulsion amounting to proof of non-consent and thus being redundant.

31. This requirement is based on the wording of Title VII, the scope of which extends to situations in which discrimination has affected “terms, conditions or privileges of employment.” 42 U.S.C. § 2000e-2(a)(1) (1982). If the harassment is not sufficiently severe and pervasive to alter the plaintiff’s working environment, it is not considered to have affected a “condition” of employment.

Second, the plaintiff must also show that a reasonable person would have considered such a working environment to be hostile and abusive (the objective test).[^1]

The presence of an objective standard indicates that some verbal or physical conduct of a sexual nature, even if unwanted by and unwelcome to the plaintiff, is not actionable sexual harassment. Some degree of harassment is thus permissible, regardless of its effects on the plaintiff, because it does not possess the characteristics that render it objectively unreasonable. The goal of this additional requirement is assertedly to protect employers from the "hyper-sensitive" plaintiff.[^2] But it also defines sexual harassment by the court's standard, leaving the defendant free to harass, as long as he does so mildly and occasionally. This ostensibly holds true even in cases where a defendant knows of a plaintiff's particular susceptibility and is well aware that he is making her working environment intolerable.

Moreover, the existence of the unreasonableness requirement, when coupled with the unwelcomeness requirement, also means that it is possible for a court to find that, notwithstanding the existence of an objectively hostile and abusive workplace, these working conditions were welcomed by the plaintiff.[^3] Just as force and consent are not treated as inherently inconsistent in the criminal law of rape, objectively severe or pervasive sexual harassment is considered potentially consistent with welcomeness.[^4]

[^1]: Harris v. Forklift Sys., 114 S. Ct. 367, 370 (1993); Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir. 1986) cert. denied, 481 U.S. 1041 (1987). The objective standard ignores the fact that, in civil suits, reasonableness tests are generally applied to defendants, not plaintiffs. It also runs contrary to the "thin skull" rule applicable in intentional tort claims.

[^2]: Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991). Similarly, force requirements in rape law are defended on the ground that accused persons must be protected from the false testimony of complainants that would be impossible to rebut if consent were the only issue.


[^4]: In practice, once the court makes a finding of welcomeness, it summarily concludes that the harassment was not subjectively severe or pervasive. This means that it is the presence of the objective component that renders the two elements distinct. See Estrich, supra note 28, at 833. Estrich argues that the subjectivity of the unwelcomeness element is fundamentally at odds with the other elements of the claim, which are measured objectively. This renders the unwelcomeness element either gratuitous or punitive, depending on the outcome of the reasonableness inquiry. I agree with this assessment, although it does not necessarily lead to the
C. Sexual History of the Plaintiff

In some cases, defendants have attempted to introduce evidence of the prior sexual behavior of the plaintiff. This has met with mixed results. Some judges have denied defendants' requests to cross-examine plaintiffs about their prior sexual behavior on the grounds that such evidence is not logically probative of any matter in issue in a Title VII sexual harassment suit. Other cases have permitted some discovery of the plaintiff's sexual history as relevant both to the question of what conduct the defendant thought was welcome, and to the issue of whether the plaintiff actually found the conduct unwelcome. Still other decisions contain extensive discussions of the plaintiff's sexual background without indicating which party sought to introduce such evidence, and for what purpose.

For example, in Richardson v. Great Plains Manufacturing Inc., the plaintiff argued that she had been subjected to sexual harassment by several coworkers and supervisors at the farm implement manufacturing plant at which she worked. The defendant employer moved for summary judgment. Richardson testified that she was subjected to lewd comments about her appearance, unwanted touching, sexual propositions, explicit comments by others about their own sexual behavior, and obscene jokes and cartoons. The court noted the defendant's evidence that the plaintiff participated in and initiated many of the

38. Weiss v. Amoco Oil Co., 142 F.R.D. 311, 316 (S.D. Iowa 1992) (allowing employee discharged for sexual harassment to depose victim regarding her sexual conduct with other employees during her employment, and of which the discharged plaintiff had knowledge). The court declined to extend the evidentiary shield rules of the Iowa Code to the case, since it was a wrongful dismissal suit and not a sexual harassment claim. Id. at 314. See Iowa Code § 668.15(1) (1991).
39. See, e.g., Gan v. Kepro Circuit Sys., 28 Fair Empl. Prac. Cas. (BNA) 639 (E.D. Mo. 1982) (noting that plaintiff had been terminated from a previous job following an attempt to "solicit a date" from a married company foreman, but not mentioning reasons that plaintiff left any other prior employment); Perkins v. General Motors Corp., 709 F. Supp. 1487 (W.D. Mo. 1989), aff'd in relevant part, 911 F.2d 22 (8th Cir. 1990), cert. denied, 499 U.S. 920 (1991) (findings of fact included childhood and marital abuse of plaintiff).
conversations. The court then went on to summarize the testimony of the plaintiff's psychologist, Dr. Schmidt. The court did not indicate which party called Dr. Schmidt as a witness, or on what basis his testimony was relevant or admissible. Yet, the court used his testimony as the basis for a detailed recitation of the course of the plaintiff's personal life since the age of eight, including repeated molestation as a child and sexual assault as a teenager. The court also described the plaintiff's troubled marital history and the problems of the plaintiff's daughter.

These observations formed the basis for Dr. Schmidt's opinion that the plaintiff was "especially prone to guilt and can very quickly feel victimized" and "is a dependent and manipulative person who relies heavily upon flirtatious behavior to relate to men."41 The court treated this testimony as evidence of welcomeness.42

In addition to using a plaintiff's history of sexual or physical abuse to suggest that she is oversensitive, mendacious, or sexually aggressive, at least one decision has considered the relevance of the plaintiff's sexually related activity outside the workplace to her threshold of unwelcomeness. In Burns v. McGregor Electronic Industries,43 the plaintiff worked in a stereo speaker manufacturing plant. She was repeatedly propositioned and touched by the plant owner, who asked her to pose nude for him and showed her advertisements for Playboy videos. She was also subjected to sexual slurs and comments from her supervisor and coworkers. The harassment intensified when the supervisor told the other workers that Burns had posed nude for two motorcycle magazines. The magazines were circulated around the plant.

The trial judge found that the plaintiff had not been subjected to unwelcome sexual harassment during her employment at the plant. He reached this conclusion in part because, "[i]n view of plaintiff's willingness to display her nude body to the public in Easy Riders [sic] publications, crude magazines at best, her testimony that she was offended by sexually directed comments and Penthouse and Playboy pictures is not credible."44

42. The court declined to grant summary judgment on the unwelcomeness issue, finding that there was a real factual dispute on this point. The court did grant summary judgment for the employer on the basis that the evidence clearly supported the company's argument that it took prompt and effective remedial action. Richardson, 1994 WL 324553 at *7-*8.
43. The first decision was reversed and remanded in Burns v. McGregor Elec. Indus., 955 F.2d 559 (8th Cir. 1992). The first trial decision is appended to the decision on remand, 807 F. Supp. 506, 511 (N.D. Iowa 1992).
44. Burns, 807 F. Supp. at 514.
The Eighth Circuit reversed, noting that the findings that the sexual advances were unwelcome and that they were not offensive to Burns were inherently inconsistent. However, the court concluded that while Burns did not solicit any of the conduct that occurred, the gossip, lewd talk, and petition to fire her were “incited by the nude photographs.” Therefore, this aspect of the work environment had to be considered separately from the owner’s advances, which had persisted throughout the plaintiff’s employment. Relying on the holding of the Supreme Court in *Meritor Savings* that a plaintiff’s sexually provocative speech and dress are relevant to welcomeness, the court held:

... in making the determination as to whether the conduct directed at Burns was unwelcome, the nude photo evidence, though relating to an activity engaged in by Burns outside of the workplace, may be relevant to explain the context of some of the comments and actions directed by [the owner] and coworkers to Burns.

On remand, the district court judge again found for the defendant. He explained that his earlier finding that the owner’s advances were unwelcome, but not offensive, was not internally inconsistent. The district court judge was of the view that the accepted definition of “unwelcome” required the plaintiff to show both that she did not solicit or invite the conduct and that it was offensive to her. In this case, the plaintiff had failed to meet the latter half of this disjunctive test. While the sexual advances were not solicited or invited, this alone was insufficient for a prima facie showing of unwelcomeness:

If offensiveness is to be determined by plaintiff’s reaction to the particular conduct of a particular person, then a finding

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45. *Burns*, 955 F.2d at 565.
47. *Burns*, 955 F.2d at 565. It is difficult to understand how such photos relate to the issue of unwelcomeness, except in the fashion adopted by the trial judge in this case. The only conceivable situation in which such photos might be relevant is where a plaintiff needed to introduce this evidence in order to explain why otherwise ambiguous comments of coworkers created a hostile work environment. In such a case, however, it would not matter whether the plaintiff actually posed for such photos, or that other employees merely said that she did.
48. Courts have held that such conduct must “be unwelcome in the sense that the employee did not solicit or invite it, and the employee regarded it as undesirable or offensive.” *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988) (quoting *Moylan v. Maries County*, 792 F.2d 746, 749 (8th Cir. 1986)). *See also Henson v. City of Dundee*, 682 F.2d 897, 903 (11th Cir. 1982).
that the sexual advances were unwelcome would also determine that they were offensive. On the other hand, if plaintiff's reaction to the person whose conduct was not welcome is viewed separately from plaintiff's reaction to the same conduct by someone else, the two findings are consistent. I considered them as separate issues. If the answer to the first question also answers the second question, why ask it? I determined from the record in the case including plaintiff's personal history (which need not be set out here), her manner of dress, her pierced, bejeweled nipples, the location of her tattoo, her interest in having her nude pictures appear in a magazine containing much lewd and sexually explicit material and her appearance on the stand that the type of conduct in which [the plant owner] engaged was not in and of itself offensive to her.\footnote{Burns, 807 F. Supp. at 508-09.}

The only coherent reading of this test is that it requires the plaintiff to show both that the conduct of the defendant was unwelcome, and that such conduct would always be offensive to her, no matter what its source. The plaintiff is, in effect, required to show that the conduct is globally unwelcome or, in other words, that she is not that kind of woman.

On a second appeal, the Eighth Circuit rejected this disjunctive approach, and entered judgment for the plaintiff.\footnote{Burns, 989 F.2d 959, 966.} It was sufficient to meet the unwelcomeness threshold that the owner's advances were "uninvited and offensive."\footnote{Burns, 989 F.2d at 962.} The fact that the plaintiff's photos had appeared in the magazines was not probative of this issue:

The plaintiff's choice to pose for a nude magazine outside work hours is not material to the issue of whether plaintiff found her employer's work-related conduct offensive. This is not a case where Burns posed in provocative and suggestive ways at work. Her private life, regardless of how reprehensible the trier of fact might find it to be, did not provide lawful acquiescence to unwanted sexual advances at her work place by her employer.\footnote{Burns, 989 F.2d at 963.}
The decision of the Supreme Court in *Meritor Savings*\(^5\) indicates that it is not in all circumstances unreasonable to relate the provocative attire and behavior of the plaintiff to the question of whether the acts complained of were unwelcome. It is unclear from the decision whether the inquiry is limited to the dress or speech of the plaintiff that occurs in the workplace and is known to the defendant. How much of it will be considered depends on the standard that is used to define unwelcomeness. If the focus is on the defendant’s state of mind, and whether he knew that his conduct was unwelcome, then everything about the plaintiff known to the defendant is potentially relevant. This would logically include behavior or statements that the plaintiff made outside the workplace, if it can be argued that they shed light on what she would welcome from him at work.

Yet if a purely subjective inquiry into what the plaintiff was actually feeling is required, it is possible that all of her speech and behavior that the defendant can dredge up will be admissible. Once it is accepted that such evidence is at all logically probative of this issue, there is little justification for excluding any of it. Thus, even in the case where a court focuses solely on whether the evidence indicates that the plaintiff found the alleged harassment unwelcome, and not on whether the defendant also believed it to be unwelcome, the court can choose to rely on at least as much of this same type of evidence in concluding that the sexual conduct was in fact welcomed. The result is an inquiry into what type of person the plaintiff is, and whether that type of person would have wanted to be propositioned, touched, or spoken to in the way that the defendant chose.

This approach is familiar to the rape prosecution, and is at the core of the widespread criticism that rape law puts the victim, rather than the accused, on trial. The character of the complainant was expressly relevant in the rape legislation found in many jurisdictions in the first half of the twentieth century.\(^5\) Gradually, rape statutes were redrafted to omit reference to the character of the victim, such that the law ostensibly recognized that all women could be raped.\(^5\) Nonetheless,

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54. See, e.g., Dallas v. State, 79 So. 690 (Fla. 1918) (stating that, when charged with the offense of "carnal intercourse with an unmarried female under the age of eighteen years, of previously chaste character," the prosecution must prove chastity beyond a reasonable doubt; even if the complainant is chaste in fact, a reputation of unchastity provides a defense).
55. The obvious exception to this trend was when the woman's status was that of wife
courts persist in scrutinizing the sexual behavior of the complainant as relevant not only to the defendant's belief in the plaintiff's consent, but also to the issue of consent itself, as well as to the complainant's motives and her credibility.56

Certain assumptions about the relevance of a woman's sexual behavior are necessarily implicit in this approach. If, in the context of sexual harassment, the plaintiff's prior sexual behavior is considered relevant to what conduct she actually did find welcome, this means that all of the plaintiff's sexual activities with others are considered legally probative of the issue of whether the defendant's conduct, in the workplace and on a given occasion, was wanted. Sexual acts are seen as essentially fungible for women, both as to the partner with whom they engage in them and as to the location in which they take place. This is the impression left by cases such as Richardson v. Great Plains Manufacturing,7 in which the court indulges in a far-ranging investigation of the plaintiff's "background" in considering the defendant's contention that there existed no factual controversy on the issue of unwelcomeness.

Richardson is also an example of the increasing attempts by defendants in sexual harassment actions to rely on psychiatric opinion evi-
dence about the plaintiff.\textsuperscript{58} Because the actual relevance of sexual history evidence has been sharply criticized in the context of rape, and evidentiary rules have been enacted to limit its admission, defendants in sexual harassment actions may sense that reliance on such evidence as outright proof of welcomeness may be considered inappropriate, unwise, or open to review on appeal. Nonetheless, they are aware of the undeniable adverse impact on credibility such evidence has historically produced. Similarly, judges are undoubtedly attuned to this general disapprobation of the use of sexual history evidence in criminal rape trials, but may also persist in viewing such evidence as highly probative of the issue of welcomeness.

The ensuing attempts to have such evidence admitted indirectly through expert psychiatric testimony mirrors a similar trend in rape law. Increasingly, defendants in rape prosecutions have been seeking and receiving disclosure of the psychiatric records of complainants.\textsuperscript{59} This has held true despite the fact that defendants, through this mechanism, are requesting much of the same evidence for largely the same purposes as was the case when it was introduced directly.

In either area of the law, this view is premised on a belief, which has proven difficult to dislodge, that charges of sexual misconduct are easily and frequently fabricated by women who seek to exact revenge or assuage their consciences. The illogicality of believing simultaneously that a woman’s character reveals her to be so sexually indiscriminate that she must have welcomed the defendant’s advances, and yet so ashamed of her own enjoyment of them that she would go to the

\textsuperscript{58} Sometimes, this evidence is offered to show that the plaintiff is oversensitive, and therefore that her injuries are unreasonable. Attempts to order psychiatric examinations of plaintiffs have met with mixed success. See, e.g., Vinson v. Superior Court, 740 P.2d 404 (Cal. 1987) (stating that, by commencing action for intentional infliction of emotional distress arising from sexual harassment, the plaintiff put her own mental state in issue; defendants may require plaintiff to undergo psychiatric examination to determine the existence and extent of plaintiff’s injury); Robinson v. Jacksonville Shipyards, 118 F.R.D. 525, 531 (M.D. Fla. 1988) (noting that an allegation that the defendant’s actions affected the psychological well-being of plaintiff and would have similarly affected a reasonable person “is not informed by evidence which might be obtained by a mental examination”); Bridges v. Eastman Kodak Co., 850 F. Supp. 216, 222-23 (S.D.N.Y. 1994) (stating that an allegation of mental anguish included in a Title VII claim does not automatically put plaintiff’s mental state in issue; defendants may depose plaintiffs’ psychologists and obtain their medical histories; questions about sexual history are unrelated to issue of mental anguish, and thus are not permitted).

\textsuperscript{59} See, e.g., People v. Stanaway, 521 N.W.2d 557 (Mich. 1994).
trouble of bringing a legal claim to assert that she did not, is unexplained.

D. Appearance and Conduct of the Plaintiff at Work

Sexual history evidence falls along a continuum that scrutinizes every aspect of a woman’s existence so as to determine its sexual meaning. These sexual meanings are in turn understood to indicate how much credibility to accord a woman’s claim that she has been injured in a sexual way. At one end of this spectrum are the actual sexual relationships of the plaintiff, real or imagined. At the other end are what she wears, how she talks, and the company she keeps. Evidence of actual sexual behavior is more damaging, but also more difficult to get admitted, than evidence of speech or dress.

The remarks of the Supreme Court in Meritor with regard to the relevance of provocative speech and dress have drawn sharp criticism from many commentators. Lower courts, however, appear for the most part to have embraced this directive with some vigor. In fact, most decisions subsequent to Meritor contain no explicit indication that the balancing of probity and prejudice envisioned by the Court was ever carried out. Instead, the courts automatically scrutinize the appearance and demeanor of the plaintiff at work to determine whether the conduct complained of was welcomed by her. Thus in Reed v. Shepard, the Seventh Circuit noted, as part of its conclusion that the plaintiff had enjoyed participating in the “objectively repulsive” behavior that pervaded her workplace, that she had been “instructed to suspend the exhibitionistic habit she had of not wearing a bra on the days she wore only a t-shirt to work.”


61. See, e.g., Weinsheimer v. Rockwell Int’l Corp., 754 F. Supp. 1559, 1563 (M.D. Fla. 1990) (inaccurately describing the decision in Meritor as containing “explicit instructions for the trial court to consider . . . evidence of that plaintiff’s provocative dress and expressed public fantasies”); Jones v. Wesco Investments, 846 F.2d 1154, 1155 n.4 (8th Cir. 1988) (stating that “[a] court must consider any provocative speech or dress of the plaintiff . . . .”) (emphasis added).

62. See, e.g., Jones, 846 F.2d at 1155 n.4 (observing from trial record that plaintiff wore non-provocative clothing).

63. 939 F.2d 484 (7th Cir. 1991).

64. Id. at 487.
Courts will consider the statements and conduct of the plaintiff in the workplace as relevant to the issue of unwelcomeness. On its face, such an approach seems logical. The obvious way for a plaintiff to show that certain conduct was unwelcome to her is to provide evidence that she either expressly stated that she found it offensive or harassing, or acted in a manner that conveyed that message. However, courts have also been willing to consider the entire history of the plaintiff's conduct on the job, and not merely her reaction to the incidents that form the basis of her suit, as potentially providing evidence that the alleged harassment was actually welcomed by her.

In particular, some courts have found relevant to the issue of unwelcomeness the plaintiff's use of crude and vulgar language, as well as her participation in, or initiation of, sexually oriented conversations, jokes, or gift giving. In most of these cases, the courts have recognized that the workplace in question is permeated by sexual speech and/or conduct, and has been since before the plaintiff's arrival. However, if the plaintiff contributes to this atmosphere, this may prompt a finding that she did not find such working conditions unwelcome.

Some courts have determined that the mere fact that a plaintiff is shown to have behaved in a sexual manner at work does not bar a finding that the alleged harasser's conduct was unwelcome. Nonetheless, such evidence is treated as clearly relevant to the issue of unwelcomeness. Some cases have accommodated these concepts by stating that a plaintiff who has participated in sexually explicit

65. See, e.g., Gan v. Kepro Circuit Sys., 28 Fair Empl. Prac. Cas. (BNA) 639 (E.D. Mo. 1982) (finding that plaintiff failed to prove evidence of intolerable working conditions because plaintiff used crude and vulgar language and asked colleagues about their sex lives and discussed her own); Richardson v. Great Plains Mfg., No. 93-1028-PFK, 1994 WL 324553 (D. Kan. June 30, 1994) (examining whether the conduct was unwelcome by noting that plaintiff told dirty jokes, used obscene language, and boasted of her sexual efforts); Spencer v. General Elec. Co., 894 F.2d 651 (4th Cir. 1990) (noting that plaintiff volunteered intimate details about herself and her past); Weinsheimer v. Rockwell Int'l Corp., 754 F. Supp. 1559 (M.D. Fla. 1990) (finding that plaintiff did not prove unwelcomeness because plaintiff participated in the pervasive sexual innuendo and vulgar storytelling); Loftin-Boggs v. City of Meridian, Miss., 633 F. Supp. 1323 (S.D. Miss. 1986) (finding that plaintiff did not make known conduct was offensive because plaintiff participated in and initiated crude language and storytelling, made jokes about the rumors circulating that she was having an affair with a supervisor, and expressed her displeasure with the behavior of other employees by using sexually explicit gestures and foul epithets).

conversations must make it clear to her colleagues that she will no longer participate in such behavior and will hereafter consider it unwelcome.\textsuperscript{67} Such an approach, however, presumes that the plaintiff has in fact changed her mind about whether the conduct is welcome and has not merely decided to change her behavior, since her acquiescence to the conduct has not improved her working conditions. Moreover, this approach implicitly finds relevant the knowledge of the plaintiff’s colleagues that the conduct was unwelcome to her, and whether her behavior adequately communicated that fact. It is not enough that the plaintiff’s behavior changes; it is also required that she publicly repent.

The decision of the Seventh Circuit in \textit{Reed v. Shepard}\textsuperscript{68} is an example of a case in which the plaintiff’s behavior was considered determinative of the issue of welcomeness. The plaintiff was employed as a civilian jailer in the Vandenburgh County Jail. She alleged sex discrimination in working conditions, pay, and benefits, as well as sexual harassment, contrary to Title VII. The district court appeared to accept the plaintiff’s testimony that she was handcuffed to various structures, subjected to suggestive remarks and lewd jokes, punched in the kidneys, and maced. As well, her head was forcibly placed in coworkers’ laps, an electric cattle prod was inserted between her legs and, while she was handcuffed to the toilet, her head was pushed underwater.

The Seventh Circuit found:

\begin{quote}
By any objective standard, the behavior of the male deputies and jailers toward Reed revealed at trial was, to say the least, repulsive. But apparently not to Reed.

Reed not only experienced this depravity with amazing resilience, but she also relished reciprocating in kind.\textsuperscript{69}
\end{quote}

This conclusion was based on the testimony of other employees of the department that Reed “had one of the foulest mouths in the department,” participated in the giving of suggestive gifts, enjoyed showing male officers the abdominal scars from her hysterectomy, and initiated many of the sexual jokes and innuendos.\textsuperscript{70}

\textsuperscript{67.} \textit{Weinsheimer}, 754 F. Supp. at 1564 n.12; \textit{Loftin-Boggs}, 633 F. Supp. at 1327 n.8.

\textsuperscript{68.} 939 F.2d 484 (7th Cir. 1991).

\textsuperscript{69.} \textit{Reed}, 939 F.2d at 486.

\textsuperscript{70.} \textit{Reed}, 939 F.2d at 487.
Thus, general evidence of speech or conduct by the plaintiff that is sexual in nature can provide the basis for concluding that her testimony—that she found specific acts of her coworkers unwelcome—is not credible. The connection between the two is implicit: a woman who would participate in sexual conversations at work is a woman who could not really have objected to the sexual attentions of her fellow employees. The defendant has shown that the plaintiff could not have been injured by his sexualization of her since she was already sexually defined.

E. Knowledge by the Harasser That His Conduct Is Unwelcome

Many courts have adopted the definition of unwelcomeness found in the Eleventh Circuit decision in Henson v. City of Dundee, in which the court noted that the conduct complained of must be "... unwelcome in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive." However, the cases are not consistent as to the relevance, if any, of the harasser’s lack of knowledge that the conduct was unwelcome to the plaintiff. Most decisions appear to assume that all that is necessary to satisfy this component of the prima facie case is that the conduct be subjectively undesirable in the mind of the employee. This issue is often not explicitly discussed, since frequently the plaintiff has at some point made known to the harasser or to her employer her objection to the conduct in question.

In a few of the cases that have considered the issue, however, the courts suggest that a lack of knowledge on the part of the defendant that his conduct was unwelcome is relevant to the issue of welcomeness. For example, in Mitchell v. Hutchings, the court granted in part the plaintiffs’ motions to quash deposition subpoenas of persons with whom the defendants believed the plaintiffs to have had sexual relationships. The

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71. 682 F.2d 897, 903 (11th Cir. 1982).
72. Id. at 903. See, e.g., Wyerick v. Bayou Steel, 887 F.2d 1271, 1274 (5th Cir. 1989); Hall v. Gus Constr. Co., 842 F.2d 1010, 1014 (8th Cir. 1988); Robinson v. Jacksonville Shipyards, 118 F.R.D. 525, 528 (M.D. Fla. 1988); Lynch v. Des Moines, 454 N.W.2d 827, 834 (Iowa 1990).
73. See, e.g., Burns v. McGregor Elec. Indus., 989 F.2d 959, 962 (8th Cir. 1993) (stating that "the threshold for determining whether conduct is unwelcome is whether it was uninvited and offensive").
court rejected most of the defendants’ arguments as to the relevance of this evidence, holding that the plaintiffs’ sexual activity outside the workplace was not relevant to their susceptibility to harm from sexual harassment.\textsuperscript{75} However, the court permitted the defendants to depose a coworker who was alleged to have been held down by other coworkers while one of the plaintiffs fondled him. The judge noted:

\begin{quote}
Evidence relating to the work environment where the alleged sexual harassment took place is obviously relevant, if such conduct was known to defendant Hutchings. This evidence can establish the context of the relationship between plaintiffs and Hutchings and may have a bearing on what conduct Hutchings thought was welcome.\textsuperscript{76}
\end{quote}

In Canada, the law of sexual harassment is modeled closely on the leading American cases.\textsuperscript{77} Thus, the Canadian plaintiff is also required to prove that she found the conduct of her supervisor or coworker unwelcome. Moreover, knowledge by the defendant that his conduct was unwelcome has been incorporated into the definition of unwelcomeness by many decision makers.\textsuperscript{78} The plaintiff must prove that the defendant knew that his conduct was unwelcome; the legislation of the various jurisdictions and the reported decisions are divided over whether constructive knowledge is sufficient.\textsuperscript{79}

The cases that express concern about the defendant’s level of knowledge, either directly or through the imposition of communication requirements on the plaintiff,\textsuperscript{80} are, consciously or not, drawing a

\begin{itemize}
\item \textsuperscript{75} Mitchell, 116 F.R.D. at 484–85.
\item \textsuperscript{76} Mitchell, 116 F.R.D. at 484.
\item \textsuperscript{77} Janzen v. Platy Enterprises, (1989) 1 S.C.R. 1252, (citing Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Meritor Savings v. Vinson, 106 S. Ct. 2399 (1986)).
\item \textsuperscript{78} Since the majority of Canadian sexual harassment claims are adjudicated by arbitrators or administrative tribunals and not by the courts, earlier decisions are not binding on subsequent ones.
\item \textsuperscript{79} See, e.g., Re Ottawa Bd. of Educ. and Employees’ Union (1989) 4 L.A.C.(4th) 171, 180–81 (Bendel) (declining to apply constructive knowledge standard found in Ontario human rights legislation in the context of employee termination grievance; arbitrator notes that test is whether employee had actual knowledge that his advances were unwelcome); Zarankin v. Johnstone (1984) 5 C.H.R.R. D/2274, D/2281 (B.C. Bd.), aff’d, (1985) 6 C.H.R.R. D/2651 (B.C.S.C.) (stating that no reasonable basis existed on which employer could have concluded that employee enjoyed his conduct; employer knew or should have known that it was one-sided).
\item \textsuperscript{80} See infra notes 84–109 and accompanying text.
\end{itemize}
parallel between the sexual harassment claim and the criminal offense of rape. Where non-consent is an element of the offense of rape, the mens rea of the defendant with respect to that element is in issue. Therefore, the accused can argue that he believed that the victim was consenting. If this assertion is accepted, it negates the mens rea with respect to an essential element of the offense, and the accused must be acquitted. While the sexual intercourse may have been unwanted by the woman, it is not considered rape because the defendant was unaware of her lack of consent.

In *Mitchell v. Hutchings*, a sexual harassment case, the court implicitly recognizes a defense of mistaken belief in welcomeness. When such an approach is accepted in the sexual harassment context, the defendant can assert that, given his understanding of whom the plaintiffs were, he believed that his conduct at work would be welcomed by them. This means that the dress, appearance, and sexual history of the plaintiff known to the defendant become relevant to the question of whether she was sexually harassed whenever the defendant thinks such matters are relevant. Also relevant is any other external factor that influences his attitudes about women, including information about the way women are that is culled from pornography, mass media or other men. Such an approach would permit sexist stereotypes to bar a claim whose very purpose is to redress attacks on women’s equality in the workplace.

It is of course possible to impose a reasonableness requirement on the defendant; his belief that the plaintiff welcomed the advances must then be a reasonable one in order for him to rely on it in court. Analogous provisions exist in the criminal rape laws of many

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81. In fact, the difference between Canada and the United States in the relevance accorded to the defendant’s knowledge of unwelcomeness in the sexual harassment context mirrors the difference in emphasis on the defendant’s knowledge of non-consent in criminal rape law. Some U.S. jurisdictions, typically those with both force and non-consent requirements, have no honest belief defense for rape. See, e.g., State v. Reed, 479 A.2d 1291, 1296 (Me. 1984). Those that do require that the mistaken belief be a reasonable one. See, e.g., People v. Williams, 14 Cal. Rptr. 2d 441 (1992) (en banc). By contrast, prior to recent untested amendments to the Criminal Code of Canada, R.S.C. 1985, c. C-46, which require the accused to show that he took reasonable steps to ascertain the presence of consent, all that was required in Canada for an acquittal was that the belief in consent be honestly held. R. v. Pappajohn, 2 S.C.R. 120 (S.C.C. 1980).


83. Id.
jurisdictions. Yet the futility of this approach, in either context, is clear; the courts have themselves provided troubling indications of what sort of evidence they consider to be potentially probative of the issue of welcomeness or consent.

F. Resistance

In order to prove the element of force in the offense of rape, the prosecution at common law was required to show that the plaintiff offered her “utmost resistance” to the defendant's actions. While this “utmost resistance” requirement was gradually weakened by judicial interpretation and legislative amendment, the presence or absence of resistance is still often considered relevant to the issue of force. What the prosecution must prove is sometimes described as the application by the defendant of force sufficient to overcome resistance. Purportedly, the failure of the complainant to resist is not determinative; she is not required to offer resistance that would be futile. In practice, however, the presence or absence of reasonable resistance is routinely scrutinized by judges in considering whether sufficient force has been proven.

The resistance requirement is related not only to the element of

86. See, e.g., People v. Barnes, 721 P.2d 110 (Cal. 1986) (en banc); People v. Iniguez, 872 P.2d 1183 (Cal. 1994) (en banc) (discussing the historical evolution of the resistance requirement in California).
88. Futility is usually measured against the force the defendant was capable of applying, given his size, his authority over the complainant, or his possession of weapons. See, e.g., Commonwealth v. Berkowitz, 609 A.2d 1338, 1344 (Pa. Super. Ct. 1992), aff'd in part, rev'd in part 641 A.2d 1161 (Pa. 1994). However, it is occasionally judged according to the force actually applied by the defendant. In other words, if the victim is frozen with fear such that the defendant needs to use very little force, the court may be more likely to say that the victim could have stopped his advances. The latter approach favors the physically intimidating defendant. See, e.g., State v. Lima, 624 P.2d 1374 (Haw. Ct. App. 1981), rev'd, 643 P.2d 536 (Haw. 1982).
force in criminal rape law, but also to the question of non-consent. In
general, courts are reluctant to accept that, while there may be a logical
relationship between resistance and non-consent, the converse is not
necessarily true. Therefore, the onus is on the complainant to show that
she resisted in some tangible and overt way, either verbally or non-
verbally, such that either the defendant, or the court as reasonable
bystander, is convinced that she did not want to have sexual inter-
course. Simply put, silence⁸⁹ means consent.⁹⁰ Thus the victim who
does not do anything, or who does not, in the court’s view, do enough
to avoid the intercourse, is deemed not to have been forced and there-
fore to have consented. The relationship between the three elements has
been summarized as follows: “The force necessary to support a convic-
tion for rape . . . need only be such as to establish lack of consent and
to induce the victim to submit without additional resistance.”⁹¹

As noted above, the unwelcomeness requirement functions as a
non-consent standard for sexual harassment.⁹² Not surprisingly, there-
fore, some courts have looked for evidence of resistance as proof of
unwelcomeness. In Kouri v. Liberian Services,⁹³ the trial judge held the
plaintiff responsible for clearly communicating to the alleged harasser
that his conduct was unwelcome.⁹⁴ The plaintiff testified that, while she
and her supervisor initially enjoyed a close and friendly relationship, he
would not leave her alone. He personally escorted her to and from the
bathroom, instructed her not to speak to male coworkers, and walked

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⁸⁹. “Silence” here refers to a state in which the victim neither says nor does anything to
affirmatively indicate her lack of consent.

State v. Bright, 890 P.2d 487, 490–91 (Wash. App. 1995); but see, e.g., People v.
Iniguez, 872 P.2d 1183 (Cal. 1994) (en banc).

⁹¹. Berkowitz, 641 A.2d at 1163 (quoting Commonwealth v. Rhodes, 510 A.2d 1217
(1986)).

⁹². This is not to say that the content of the two concepts is identical. The Supreme
Court in Meitar explicitly distinguishes the two; the trial judge’s contingent finding
of “voluntariness” was interpreted by the court to mean that there was no force
sufficiently proximate to penetration to permit a finding of non-consent in criminal
law terms. The Court, in effect, says that the criminal rape law approach is too
restrictive to meet the goals of anti-discrimination law. By this distinction, the court
appears to envision an unwelcomeness standard that considers simply whether the
alleged sexual harassment was wanted by the plaintiff.

F.2d 146 (4th Cir. 1992), cert. denied, Kouri v. Liberian Serv., 173 S. Ct. 189

⁹⁴. Id.
her to her car every evening. He sent her cards, stood close to her, and often rubbed her back. Whenever she was absent for illness, he showed up at her home uninvited and implored her to return to work. On one of these visits he hugged her so hard that he broke two of the stitches in her back.\textsuperscript{95}

The plaintiff testified that, after she complained to higher management, the defendant became hostile toward her. This hostility culminated in the defendant accusing the plaintiff of having an affair with a black employee and "describing in great detail what white Louisiana boys used to do to black men caught messing around with their women."\textsuperscript{96}

The court found that the harassment was not unwelcome. In making this finding, the court principally relied on the fact that the plaintiff did not make a sufficiently clear and serious demand to the defendant that he stop harassing her. The court noted:

She indicated that she continually asked him not to touch her and that she attempted to avoid his hugs, yet it seems certain that her requests were not delivered with any sense of urgency, sincerity or force. In essence, she was sending out mixed signals.\textsuperscript{97}

In \textit{Kouri}, the court suggests that a plaintiff cannot be heard to claim that a supervisor's behavior is unwelcome unless she can show that she did her best to avoid it. Evidence of "non-resistance" is evidence that the conduct was not unwelcome. The reasoning in \textit{Kouri} in effect imposes a reasonable resistance requirement on the plaintiff in a sexual harassment case. Specifically, the plaintiff is required to show that she either took all reasonable steps to put an end to the harassment, or that her failure to do so would not have made any difference.

Most cases have not been so explicit in their consideration of resistance. Nonetheless, there is widespread acceptance that the reaction of the plaintiff at the time of the harassment is crucial to the determination of unwelcomeness.\textsuperscript{98} In general, courts look for evidence that the

\textsuperscript{95} \textit{Kouri}, 55 Fair Empl. Prac. Cas. (BNA) at 126–27.

\textsuperscript{96} \textit{Kouri}, 55 Fair Empl. Prac. Cas. (BNA) at 128.

\textsuperscript{97} \textit{Kouri}, 55 Fair Empl. Prac. Cas. (BNA) at 129.

plaintiff indicated, at the time the harassment took place, that it was unwelcome to her. Perhaps she expressed her displeasure to the harasser or complained to higher management shortly thereafter. Where the court is not satisfied that such verbal evidence exists, the plaintiff's conduct assumes a certain prominence. The idea is that a woman who really finds sexual advances or conversation unwelcome will vociferously object from the outset and will continue to complain if the behavior is repeated. In many cases, however, this is a wholly unrealistic paradigm of the logical response to unwanted environmental sexual harassment. Such cases often describe the plaintiff's working environment as permeated with sexual innuendo, banter and horseplay. It is entirely reasonable in such a situation to try to endure this atmosphere as long as possible, since it appears endemic or integral to the workplace as a whole.

If a plaintiff adopts such a tactic, however, she may find that it is rarely possible to avoid being drawn into the workplace behavior in some way. In *Spencer v. General Electric*, the court noted that it was well known in the office that the plaintiff and a male coworker objected to the sexual behavior that permeated the working environment. As a result, they were treated as "outcasts" by their fellow employees and by their supervisor. Ostracism for refusal to participate in sexual behavior at work may itself become a form of harassment. Coworkers may, for example, exaggerate the hiding of sexually explicit materials from the plaintiff and tease her for her delicate sensibilities or prudishness.

It is therefore hardly surprising that plaintiffs may resign themselves to joining in. This may mean weathering the comments and advances good-naturedly, or it may mean more active participation. Such participation may actually be perceived by the plaintiff as a form


100. *See Estrich*, *supra* note 28, at 847 (noting that "what the powerless must tolerate because of their need becomes what the law defines as acceptable conduct").


of resistance, a way of fighting fire with fire.\textsuperscript{104} That these actions are misplaced, since the result is typically a bigger fire, does not detract from their purpose as tools of resistance.\textsuperscript{105}

In Reed v. Shepard,\textsuperscript{106} the plaintiff was asked why she tolerated behavior that she characterized in her lawsuit as harassing and abusive. She responded:

Because it was real [sic] important to me to be accepted. It was important for me to be a police officer and if that was the only way that I could be accepted, I would just put up with it and kept [sic] my mouth shut. I had supervisors that would participate in this and you had a chain of command to go through in order to file a complaint. One thing you don’t do as a police officer, you don’t snitch out [sic] another police officer. You could get hurt.\textsuperscript{107}

Agreeing with the trial judge’s rejection of this explanation, the Seventh Circuit noted that the conclusion that Reed welcomed “the sexual hijinx[sic]” of her coworkers was strongly supported by the evidence.\textsuperscript{108} The Seventh Circuit referred to the evidence of three other women employed as civilian jailers or deputy sheriffs who testified that the male employees did not behave that way around women who asked them not to. The Seventh Circuit held that the district court was justified in concluding that “... language and sexually explicit jokes were used around plaintiff because of her personality rather than her sex.”\textsuperscript{109}

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\textsuperscript{104} Carr v. Allison Gas Turbine Div., General Motors Corp., 32 F.3d 1007 (7th Cir. 1994).

\textsuperscript{105} Participation in the sexualized environment as a form of resistance should not be confused with confrontation of the harasser. This tactic of fighting fire with water has proven effective in many cases. See generally, Martha J. Langelan, Back Off: How to Confront and Stop Sexual Harassment and Harassers (1993).

\textsuperscript{106} 939 F.2d 484 (7th Cir. 1991).

\textsuperscript{107} Reed, 939 F.2d at 492 (quoting Tr. at 675).

\textsuperscript{108} Reed, 939 F.2d at 492.

\textsuperscript{109} Reed, 939 F.2d at 491–92 (quoting from unpublished opinion of district court Judge Gene E. Brooks, dated May 25, 1990, p.28). This argument is akin to that made by defendants in the early quid pro quo cases: the plaintiff had not suffered discrimination based on sex because she was the only woman in the office to have been propositioned. This supposedly made her injury personal, rather than group based. This argument was rejected on the ground that, absent the plaintiff’s group affiliation, the harassment would not have occurred. Such an approach should be uniformly rejected in the hostile environment context for the same reason.
\end{flushleft}
Note that the plaintiff in this context is provided with one acceptable response: she must ask her coworkers to discontinue their behavior. The presumption of welcomeness means that the defendant coworkers bear no responsibility not to harass her in the first place. In order to prove the element of unwelcomeness, the plaintiff must show that she resisted, particularly since the resistance of other women apparently proved effective. No consideration is given to the idea that the coworkers may have chosen to concentrate their harassment on the plaintiff because of her obvious and visible desire to fit in and her ensuing tolerance of their behavior. Presumably, the male sheriffs could afford to accede to the requests of other women to be left alone; after all, they had Reed.

One might argue that the failure to require active objection perpetuates the notion that women are incapable of advancing their own interests at work. This concern, however, overlooks the very real potential for retaliation by both management and coworkers. The plaintiff’s fear may be not a sign of weakness, but rather a realistic appraisal of what lies ahead. Where coworkers are the harassers, the plaintiff’s desire to belong and to respect the unwritten rules associated with a particular profession may prevent her from objecting. The attempt of the plaintiff in Reed to meet the informal demands of being a police officer is hardly unique to her gender. Male jailers experiencing similar physical harassment because of their race or “rookie” status would likely feel similar pressure.

Ultimately, it is always the employee’s responsibility to vindicate her right to equality at work. She must complain to management and, if unsuccessful, take the further step of initiating legal proceedings. The plaintiff should not be penalized for her assessment of when and how she should take action.

It is also significant that behavior that, earlier in the judgment, was termed objectively “repulsive,” is now described as amounting to sexual “hijinx.” The plaintiff’s welcoming personality has transformed what would otherwise be harassment into sex. This mutability between sexual violence and sex is similarly a fundamental underpinning of the law of rape. The type of person the plaintiff is defines her as open to further advances because her personality indicates to her coworkers what she would find welcome. In short, the plaintiff in Reed is given the status of “welcome” mat, upon which her male coworkers are free to wipe their feet.
In a criminal rape trial, it has historically been crucial to the complainant’s credibility that she show that she reported the rape to someone soon after it happened. In many jurisdictions, the doctrine of recent or fresh complaint attained the status of an evidentiary rule.110 The credence to be given to the woman’s complaint varied inversely with the amount of time that had elapsed since the assault was alleged to have taken place. This rule was based on the assumption that any woman who was actually raped would be so distraught and outraged at her violation that she would report it to the authorities or at least to someone close to her.111 Thus recent complaint was seen as probative of whether sexual intercourse actually took place and, if so, whether it was consensual.

In recent years, those who have studied and worked with rape victims have challenged the validity of this rule. They point to the many reasons that a woman would not want to report a rape, particularly if it was committed by someone whom she knew and trusted.112 Ironically, perhaps the most important of these is the distrust with which such women are viewed by the legal system. Research reveals that it is common for women to deny that they have been raped, either to avoid self-identifying with the image of the “rape victim,” or because they are unaware that the acts that took place fall under the legal definition of rape.113

The sexist underpinnings of the recent complaint rule have been recognized in several jurisdictions.114 Yet these same jurisdictions have

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113. Susan Brownmiller, Against Our Will: Men, Women and Rape 361–68 (1975); Schafran, supra note 112, at 1014–17 (detailing various studies).

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retained the rule, ironically because ". . . admission of evidence of the complaint is appropriate in order to avoid the risk that the jury will reach an improper conclusion on the basis of a factually erroneous inference to the contrary." 115 Thus, evidence of a prompt complaint is admissible in the prosecution's case in chief as a sort of anticipatory corroborative rebuttal. 116 The courts appear divided over whether the defendant may make use of the complainant's failure to make a prompt report. 117

The prompt complaint concept reappears in the law of sexual harassment. Although there is no formal requirement that the plaintiff complain to higher management immediately after the events occur, both the presence and the absence of such a complaint are considered relevant, not merely to the issue of employer liability, but also to the questions of whether the events took place at all and, if so, whether they were welcomed by the plaintiff. 118 Not surprisingly, reliance on this factor is most pronounced in cases where the plaintiffs testify that they were subjected to unwanted sexual intercourse.

For example, in Price v. Automotive Controls Corp., 119 the plaintiff claimed that her foreman pressured her to have sex with him and at times accompanied his propositions with threats that, if she did not succumb, she would be transferred or fired. 120 After two years of this pressure, she began a sexual relationship with him that included approximately twelve instances of intercourse over a three-year period, and which ended at her insistence. She further testified to being raped by him in his office some eight months after the termination of the relationship. The foreman testified that the relationship was consensual. 121

116. One commentator, testifying before a judicial committee on the subject, described the anticipatory nature of fresh complaint evidence as akin to "telling the boy not to put beans in his ear, when he never thought of doing so . . . ." Leigh Bienien, quoted in Russell M. Coombs, Reforming New Jersey Evidence Law on Fresh Complaint of Rape, 25 Rutgers L.J. 699, 707 (1994).
120. Id.
The district court found for the defendant, holding that the relationship was a welcome and consensual one. The court relied in part on testimony of other women at the plant that the defendant had engaged in sexual relationships with them, but that the relationships were entirely consensual. The court also relied on the evidence of several other employees who had been unsuccessfully propositioned by the defendant, none of whom had viewed the advances as tied to their job status. As to the allegation of rape, the court relied on the combination of the adverse impact on the plaintiff's credibility produced by the finding that the relationship was consensual, and the fact that "Ms. Price did not tell anybody of this alleged incident until over a year later." The court declined to find that the rape had occurred.

III. Discussion

The comparisons made above show that, in some cases, sexual harassment claims receive treatment similar to that of traditional criminal complaints of rape. Of course, it should be acknowledged that there are many decisions that exhibit none of the attributes discussed above, and that reject attempts by defendants to inject these same sorts of considerations into the inquiry. While it is important not to overstate the case, it must be recognized that the Title VII hostile environment claim, as presently structured, permits the sort of approaches used in the cases discussed above. In order to decide how to best avoid this result, the flaws in the central premises of this reasoning must be identified and addressed.

A. Rape Law Reforms

The most obvious solution is to make the same kind of changes to the law of sexual harassment that have been made to rape laws in the last twenty years. These reforms include elimination of the recent complaint and resistance requirements and limitations on the scope of the mistaken belief defense. While such initiatives in the area of

124. See supra part II.G.
125. See supra part II.E.
126. See supra part II.E.
sexual harassment should not be opposed, they are ultimately of limited utility. The probative value accorded to such evidence is a product of judicial reasoning, not of statutory provisions or procedural rules. In the absence of explicit legislative direction as to the lack of value of such evidence, it is up to judges to recognize its irrelevancy.\footnote{127}

This point is highlighted by the recent decision of the Court of Appeal of California in \textit{Catchpole v. Brannon}.\footnote{128} The court of appeal granted the plaintiff a new trial on her sexual harassment claim on the ground that the trial judge, Superior Court Judge John E. Buffington, was biased against the plaintiff because of her gender.\footnote{129} The plaintiff's claim was based in part on her allegation that the former assistant manager of the fast-food outlet where she worked forced her to perform acts of oral sex at his home. The defendant asked the plaintiff to come to his home to discuss her problems with coworkers.\footnote{130}

The court of appeal found that a strong impression of gender bias was created both by the trial judge's repeated expressions of impatience, in which he conveyed the sense that such cases were a misuse of the judicial system, and by his use of sexist stereotypes in assessing the appellant's credibility.\footnote{131} In particular, the trial judge asked the plaintiff a series of questions suggesting that the plaintiff was either consenting or at fault for going to the manager's home late at night and for not resisting his conduct more forcefully. The court of appeal called this "an unrealistic and gender-biased standard of reasonableness."\footnote{132}

Appeals on the ground of judicial bias are rare; successful appeals are even more unusual. Appellate courts accord considerable deference to trial judges' assessments of witness credibility. The real problem with the trial decision in \textit{Catchpole} is not the lack of detailed evidentiary guidelines, but the interpretation placed on the plaintiff's actions by Judge Buffington.

The continued reliance of courts on sexual behavior evidence is also seriously flawed. Evidence of the plaintiff's sexual relationships with other men is not probative of the sort of attention she might welcome from the defendant. Critics of the use of sexual behavior evidence in

\begin{footnotesize}
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\item \footnote{127. Estrich, \textit{supra} note 28, at 814–15.}
\item \footnote{128. 42 Cal. Rptr. 2d 440 (Cal. Ct. App. 1995).}
\item \footnote{129. \textit{Catchpole}, 42 Cal. Rptr. 2d at 454.}
\item \footnote{130. \textit{Catchpole}, 42 Cal. Rptr. 2d at 442.}
\item \footnote{131. \textit{Catchpole}, 42 Cal. Rptr. 2d at 446.}
\item \footnote{132. \textit{Catchpole}, 42 Cal. Rptr. 2d at 449–51.}
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rape law have amply demonstrated its lack of probative value and undeniable, if logically inexplicable, prejudicial effect.\textsuperscript{133} It has been suggested that the evidentiary shield rules used to limit admissibility of a complainant’s sexual history in rape cases be extended to cover sexual harassment suits.\textsuperscript{134} While this may provide some assistance to complainants, such legislation typically does not reach the prior sexual conduct of the complainant with the defendant. Moreover, the provisions are difficult to apply in the hostile environment setting. Evidentiary shield rules were enacted in part to counter the myth that a woman who had consented to sexual intercourse in the past was more likely to have consented to it with the defendant. Evidence of prior sexual intercourse was thus deemed inadmissible. However, the sexual conduct implicated in a hostile environment sexual harassment claim may be entirely verbal or visual. In these cases, it is unclear what corresponding behavior of the plaintiff should be ruled inadmissible.

The final difficulty with evidentiary shield rules is their limitation to proceedings in which the woman harassed is a party. In particular, such rules are of little assistance in wrongful dismissal suits launched by employees terminated for sexual harassment. In one such case, the female employee whose complaints prompted the termination sought an order prohibiting discovery of her sexual history with other employees.\textsuperscript{135} The court declined to grant the order despite the existence under state law of evidentiary shield rules for sexual harassment claims.\textsuperscript{136}

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At its most basic, the welcomeness requirement is problematic because it presumes that women actually have a choice about the sort of environment in which they work. When women must point to some act of resistance or objection to prove that the conduct of their coworker or supervisor was unwelcome, the structure of the claim assumes that compliance is not a necessary condition of the harassment. Consider the analogous situation of the woman in a quid pro quo harassment context who acquiesces to her supervisor’s demands. The law is clear that this type of participation, or lack of resistance, does not bar a claim. Yet in cases where no explicit or implicit threats or promises are made, courts sometimes conclude that no woman would ever acquiesce unwillingly, since there is nothing to be lost by resisting.

This rationale is the same as that used to justify retention of a resistance requirement in rape law. Such an approach ignores the coercive and intimidating power inherent in the acts of sexual penetration or sexual harassment themselves as they operate within societal constructions of gender roles. More simply, this assumption is belied by the dramatic way in which the working environments of those who complain about sexual harassment are often altered. A more fruitful line of inquiry is why so many men feel so little hesitation to participate in the creation of a sexually hostile working environment for their female coworkers. Consideration of this question might lead one to conclude that it is because they feel they have very little to lose by imposing this additional condition of work upon women.

B. Original Intent of the Unwelcomeness Requirement

The unwelcomeness requirement comes from the EEOC Guidelines’ definition of sexual harassment. The EEOC has defended the inclusion of this element in the prima facie case on the ground that the same behavior can amount to harassment or to enjoyable sexual activity, depending on the attitudes of those involved in it. The relevant

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139. 29 C.F.R. § 1604.11(a) (1981); see supra note 8 and accompanying text.
140. Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae at 13, Meriton Savings Bank v. Vinson, 477 U.S. 57 (1986) No. 84-1979 [hereinafter EEOC Brief]. The need for this requirement appears rooted in the fear of false claims. The EEOC claimed that the requirement was designed to “ensure that sexual harassment charges do not become a tool by which one party to
distinction, then, is between a mutual, consensual, intimate, or dating relationship between co-workers, and unwanted sexual attentions in the office. It is undeniable that coworkers often become romantically involved. Assuming that they occupy the same rung on the office ladder (or work on different ladders of the same company), the consensual and mutual sexual activities in which they engage should not form the basis for sexual harassment claims brought by one against the other.¹⁴¹

But how did this self-evident notion become the often difficult hurdle of "unwelcomeness?" The answer lies in part in the parallels between the sexual harassment claim and the criminal offense of rape, premised on shared assumptions about the nature of women and of male-female interaction. It also lies in part in the judicial gloss placed on the unwelcomeness requirement, that the conduct be unwelcome in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive. It is possible to interpret the two halves of this definition as saying the same thing: conduct is unwelcome if the employee does not want it. Yet it is hardly surprising that the trial judge in *Burns v. McGregor Electronic Industries*¹⁴² viewed this definition as describing a disjunctive test. For many judges, the question of what sort of behavior by a woman should be considered an invitation to, or solicitation of, sexual conduct, prompts a very different response than the question of whether the behavior was wanted by the woman. Under the first standard, the court can feel justified in considering whether the plaintiff "asked for it" by her speech, comportment, or appearance.

Instead, courts should recognize the humble and self-evident origins of the unwelcomeness requirement and treat its meaning as straightforward: propositions, contact and comments that are not wanted are unwelcome. The unwelcomeness requirement is not about what the defendant thought the plaintiff wanted or about what the court thinks the plaintiff deserved. It is a simple mechanism for

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¹⁴¹ The assumption that they occupy the same rung is important because it can be questioned whether persons whose employment relationship is hierarchical can ever have a truly equal sexual relationship. Even if the answer is yes, consensual relationships in such a context merit some scrutiny in order to identify possible exploitation of the less powerful person.

¹⁴² 989 F.2d 959 (8th Cir. 1993).
recognizing that consensual sexual relationships between employees do exist, and that they alone do not support Title VII claims.

It is therefore incongruous that courts are so often willing to extend the definition of unwelcomeness to situations that look nothing like consensual sexual behavior. In cases such as Reed v. Shepard and the district court decisions in Burns, the courts’ conclusion is not that the plaintiff has brought a false complaint after her consensual relationship has ended. Instead, the courts find that the plaintiffs wanted to be called sexually derogatory names, physically assaulted, repeatedly propositioned, and wanted to work in environments festooned with sexually explicit photos and graffiti. As noted above, this result is sometimes reached by acknowledging that the plaintiff did not really enjoy this behavior, but that it was nonetheless solicited by her. If “unwelcome” is properly defined as “unwanted,” as argued earlier, it is doubtful whether the element of welcomeness has any application in cases where the harassing conduct is something other than sexual intercourse or related acts.

A possible solution was proposed by Judge Hill of the Eleventh Circuit in Sparks v. Pilot Freight Carriers. The plaintiff billing clerk alleged that the manager of the terminal in which she worked asked her questions about her personal life, such as whether she had a boyfriend and whether she could become pregnant. After she refused his request to come over to her house with a bottle of wine, he called out over the public address system as she was leaving the office that this was her last chance. This incident was followed by other threatening remarks. The district court granted summary judgment in favor of the defendant on both the plaintiff’s quid pro quo claim and on her hostile environment claim. On appeal, the majority of the circuit court reversed, finding that the plaintiff had raised the requisite genuine issues of material fact with respect to each claim.

143. 939 F.2d 484 (7th Cir. 1991).
144. The first (originally unpublished) district court decision is appended to the district court’s reported decision on remand, 807 F. Supp. 506 (N.D. Iowa 1992).
145. Reed, 939 F.2d at 486, 492; Burns, 989 F.2d at 508, 514.
146. See supra note 142 and accompanying text.
147. 830 F.2d 1554 (11th Cir. 1987).
148. Sparks, 830 F.2d at 1556.
149. Sparks, 830 F.2d at 1565.
Judge Hill concurred in the decision to reverse on the quid pro quo claim. However, he dissented from the decision of the majority to reverse the grant of summary judgment on the hostile environment claims. In his view, hostile environment claims required a different standard of employer liability because the employer had less reason to know of "biases woven into the environment." Judge Hill then went on to offer another justification for treating hostile environment cases as a distinct category of Title VII claims:

... [T]he standard the court chooses must recognize that racial and gender discrimination differ. In both instances we find patently offensive types of conduct which cannot be justified and which the law demands be rectified. And yet in cases of gender discrimination we find a second and more subtle strain of conduct which may or may not be offensive given the relationship between the parties at a given time.

... I would propose the following two-step test for analyzing hostile environment situations. First, it must be determined whether or not the allegedly discriminatory behavior was ambiguously or patently offensive. Where the conduct was patently offensive and the offending individual was the plaintiff's supervisor, the inquiry may end: with or without notification of the wrong, the employer may be held liable.

However, where it is found that the supervisor's behavior was ambiguous, i.e., less than overtly offensive, a second finding must be made as to whether the plaintiff, by some objective action at the time of the allegedly offensive conduct, displayed objection to the conduct of the supervisor.

In a footnote, the majority rejects Judge Hill's distinction as unnecessary and unhelpful, "considering that most complaints of sexual harassment are based on actions which, although they may be permissible in some settings, are inappropriate in the workplace." As the cases discussed above indicate, however, a good deal of the conduct

150. Sparks, 830 F.2d at 1566.
151. Sparks, 830 F.2d at 1566.
152. Sparks, 830 F.2d at 1566–67.
153. Sparks, 830 F.2d at 1561 n.13.
ultimately considered welcome is equally inappropriate outside the workplace, even in the context of an otherwise mutual intimate relationship. Judge Hill's test can fairly be rejected as unworkable, but the premise on which it is based should not be so easily dismissed.

C. Racial Harassment

The hostile environment sexual harassment claim was based on similar Title VII claims arising from racially hostile work environments. In these first hostile environment cases, the concept of welcomeness is not mentioned. Rather, the courts require proof of sufficiently severe race-based harassment, and of the appropriate precursors for employer liability. As the development of the hostile environment sexual harassment claim began to outpace that of the analogous claim for racial harassment, courts began relying on the jurisprudence developed in sexual harassment cases in their adjudication of cases of racial harassment. Yet, even in cases where the courts apply an identical test for racial harassment claims, the element of unwelcomeness is generally ignored.

In *Davis v. Monsanto Chemical Co.*, the Eleventh Circuit specifically rejected the use of identical tests for racial and sexual hostile environment cases. Rather, it reaffirmed the basic two-part test for racial harassment claims, focusing on whether there was proof of repeated racial slurs that would adversely affect the reasonable employee's ability to do the job, and proof of employer tolerance or condonation. Even the criticism of this decision has failed to address

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154. See Cariddi v. Kansas City Chiefs Football Club, 568 F.2d 87 (8th Cir. 1977); Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972); EEOC v. Murphy Motor Freight Lines, 488 F. Supp. 381 (D. Minn. 1980).

155. See *Murphy Motor Freight Lines*, 488 F. Supp. at 384–86 (stating that harassment must be more than isolated, casual, or sporadic; the employer is liable if management knew or should have known of the harassment and did not take affirmative remedial steps).

156. See, e.g., *Walker v. Ford Motor Co.*, 684 F.2d 1355 (11th Cir. 1982) (following *Henson v. City of Dundee* (holding that harassment must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment).


158. 858 F.2d 345 (6th Cir. 1988).

159. *Id.*

160. *Davis*, 858 F.2d at 348 & n.1, 349 (6th Cir. 1988). This two-step test actually includes four of the five elements generally required for the plaintiff's prima facie
the disparity regarding the unwelcomeness element.161

In one racial harassment case, an argument akin to that of welcomeness through participation was advanced.162 The black male plaintiff in Vaughn v. Pool Offshore Co. was employed on an offshore oil-rig.163 He complained that he was constructively discharged by reason of a racially hostile work environment arising from pranks and comments made on the rig. The Fifth Circuit affirmed the trial judge's finding that the work environment was not polluted with racial harassment.164 While the employees did use terms such as "nigger," "coon" and "black boy" when referring to the plaintiff, the court found that "Vaughn joined in similar opprobriums which, insofar as the record reflects, were bandied back and forth without apparent hostility or racial animus. Indeed, the relations between Vaughn and the other Pool employees, aside from the crude excesses of the platform atmosphere, were friendly and cordial."165 The court similarly found that, while the plaintiff never participated in the physical pranks, these activities were a form of hazing to which all employees were equally subjected at some point.166

Unfortunately, the court in Vaughn does not explain whether the "similar opprobriums" employed by the plaintiff were racial in nature or...
whether they were made in response to the slurs of others. Thus, the
decision can be read as saying that the harassment was not racial in
nature, that the plaintiff was not really bothered by it, or that it was
not sufficiently severe or pervasive, in addition to being interpreted as
barring relief because of the plaintiff’s own participation. Ultimately,
the thrust of the court’s reasoning on this point is that if the plaintiff
participated in the racial comments, he must not have minded them
very much.

This decision is interesting because it shows that the same sort of
“welcomeness” argument that is advanced in sexual harassment cases
may, on certain facts, be available in the racial harassment context as
well. Yet, the courts never consider the plaintiff’s actions in a racial
harassment case in terms of whether or not he or she “welcomed” the
harassment. The plaintiff’s participation is just one factor considered
when deciding whether the harassment was based on race, or whether it
was sufficiently pervasive to meet the Title VII threshold.\textsuperscript{167}

\textbf{D. Rethinking Unwelcomeness}

In considering whether a similar approach should be taken in
sexual harassment cases, the first question that must be asked is whether
an unwelcomeness requirement should be used at all. In some sense, the
answer must be yes, given the self-evident proposition that coworkers
do sometimes engage in consensual sexual activities. However, this
concept should not form part of the plaintiff’s prima facie case. The
idea of having the plaintiff in all cases prove that the defendant’s con-
duct is unwanted is an inappropriate echo of criminal rape law. Even if
one accepts the validity of the presumption of consent in criminal rape
law, the justifications offered for its existence in that context are wholly
inapplicable to sexual harassment actions. These are civil claims, and the
allocation of the burden of proof does not carry with it the same kinds
of normative implications present in defining offenses for criminal law
purposes. Title VII employment discrimination suits are not intent-
based claims.\textsuperscript{168} There is no unfairness or potential constitutional in-
fringement inherent in placing the burden of showing welcomeness on
the defendant.

\textsuperscript{167} For a similar approach in the sexual harassment context, see Carr v. Allison Gas
Turbine Division, General Motors Corp., 32 F.3d 1007 (7th Cir. 1994).
Similarly, the argument that removing the non-consent element of the rape offense presumptively criminalizes all sexual behavior finds no analog in the sexual harassment context. The vast majority of the behavior plaintiffs complain about in hostile environment cases cannot plausibly be described as falling within the category of behavior that Judge Hill in Sparks sees as "ambiguously . . . offensive" or, in other words, as potentially part of a consensual intimate relationship. Simply as a matter of probabilities, it is far more likely that a woman does not want sexual attentions from a given male coworker than that she does.

The idea of welcomeness is wholly inapplicable in cases where the conduct is not specifically solicited. To argue that welcomeness is presumed and that unwelcomeness must be proven is to assume that sexual comments or physical touching are wanted by women at work. In the case where the defendant has taken no steps to ascertain whether his attentions might be welcome, or where his initial overtures are explicitly sexual, there is no room for the operation of "welcomeness," even as a defense.

If unwelcomeness is presumed and the defendant, in the appropriate circumstances, is given the opportunity to show "welcomeness," the next issue is whether the same factors currently invoked as relevant to this standard should continue to be utilized. As discussed earlier, reliance on recent complaint, resistance, and past sexual behavior evidence should be abandoned as not logically probative of the issue of whether the plaintiff affirmatively desired the sexual behavior initiated by the defendant. Similarly, the defendant's mistaken belief in welcomeness should be considered irrelevant. This leaves the defendant with the argument that the plaintiff wanted to participate in the events of which she now complains.

Testimony in support of this assertion will of necessity include reference to the statements and conduct of the plaintiff. However, there are significant problems with the manner in which the courts scrutinize the behavior and speech of the plaintiff at work in order to determine the existence of such participation. Courts tend to view everything that

169. Sparks, 830 F.2d at 1566.
170. Of course, the same can be said for the criminal offense of rape.
171. Again, the same can be said for rape.
172. The same critique holds true for rape.
173. See supra part III.A.
happened in a given workplace as a whole. From an analytical perspective, the plaintiff's prima facie case should focus on the basis of the complaint: the behavior of the defendant, including the meaning of this behavior and its severity. Whether the plaintiff's own actions indicate that the conduct was welcome should be considered at a later stage.

Similarly, while the evidence of third parties may shed light on factual disputes and issues of credibility, how other employees felt about the defendant's behavior and the appropriateness of the plaintiff's reaction to it is of minimal relevance. Such witnesses typically have an interest in preserving their positions within the company. Some may also find it psychologically necessary to deny their own experiences of workplace harassment. The judge should not allow these witnesses to sit as a de facto jury. In this way, instead of concluding at the outset that sexual horseplay was rampant in the workplace, such that the stage is set for a finding that there is no real perpetrator and no real victim, the court can effectively focus on the specifics of the plaintiff's claim and the evidence tendered by her in support of it.

Perhaps the most significant problem is that the courts tend to treat all conduct or speech that can possibly be viewed as sexual in nature, regardless of its source or context, as evidence that the defendant's conduct was not unwelcome. Instances of such behavior on the part of the plaintiff are lined up against those of the defendant, and it is only if the plaintiff can show a marked disparity that it will be determined that the harassment was unwelcome.

The Seventh Circuit decision in Reed v. Shepard is an example of such an approach. There, the court relied on the plaintiff's frequent use of obscene language, her exhibitionism, and her participation in suggestive gift giving as evidence that she welcomed being handcuffed, maced, beaten, and having her head pushed underwater. The court repeatedly described the plaintiff as "reveling in" the sexual horseplay, although most of the testimony of colleagues appeared to focus on the plaintiff's frequent use of sexual language and humor. Indeed, the district court's holding, affirmed by the circuit court, was expressed in

174. Reed, 939 F.2d at 487.
175. Reed, 939 F.2d at 487, 491.
those terms: “The Court finds that language and sexually explicit jokes were used around plaintiff because of her personality. . .” 177

Some appellate decisions do address the failure of trial courts to give more than superficial attention to the content of, and impetus for, the various statements and behaviors that are alleged by the parties to contribute to a sexualized work environment. In Wyerick v. Bayou Steel Corp., 178 the plaintiff was employed on the night shift as a crane operator. During one of her shifts, she reported to the first aid station with complaints of chest pain and breathing difficulties. The first aid attendant administered an electrocardiogram (EKG), which required that the plaintiff remove her shirt. At a company meeting held a few weeks later, the plaintiff complained about the quality of medical care she had received. Following the meeting, she was subjected to various crude comments by coworkers and supervisors, both in person and over the company radio, about the EKG procedure. Specifically, one employee said that he was going to become a gynecologist so that he could massage the plaintiff’s breasts, while a supervisor opined that the emergency medical technician had a “hard-on” while performing the EKG. Numerous such remarks were made, sometimes as often as two or three times per day. 179

Nonetheless, the district court judge granted the defendant’s motion for summary judgment, stating:

[A]ccording to the papers that I have, I don’t find any genuine issue of material fact on the issue of sexual harassment inasmuch as any harassment—any harassment out there was directed to both the males and the females, and the plaintiff participated in it and admitted that she used similar types of language to these men. 180

The Fifth Circuit reversed. While agreeing that the radio transmitters were frequently used by employees for social discussions of a sexual nature, and that work terminology was often charged with sexual connotations, the court noted that the plaintiff’s participation was limited to three retorts made in response to the insults and comments of

177. Reed, 939 F.2d at 491–92 (emphasis added).
178. 887 F.2d 1271 (5th Cir. 1989).
179. Wyerick, 887 F.2d at 1271.
180. Wyerick, 887 F.2d at 1273.
Moreover, the gravamen of the plaintiff's lawsuit was the specific comments, jokes, and gestures related to her EKG.\(^1\)

The Seventh Circuit decision in *Carr v. Allison Gas Turbine Div., General Motors Corp.*\(^2\) directly confronts the problem of plaintiff participation in a workplace permeated with sexual speech and behavior. There, the plaintiff was a drill operator in the gas turbine division. Her male coworkers were unhappy with the presence of a woman in the shop and made their displeasure known with comments such as, "I won’t work with any cunt."\(^3\) They continuously referred to her as "whore," "cunt," and "split tail" and defaced her work area and equipment with sexual signs, photos, and graffiti.\(^4\) The men hung pictures of nude women around the shop and stripped to their underwear in front of her when changing.\(^5\) One coworker exhibited his penis to Carr on two occasions; another threw a burning cigarette at her.\(^6\) This harassment continued over a period of five years despite the plaintiff's complaints to her supervisor.

While the district court judge rejected the suggestion that the conduct was mere "shop talk," and instead found it offensive and harassing, he concluded that it was not actionable since it had been "invited."\(^7\) The district court judge relied on the testimony of a female welder who stated that Carr was vulgar and unladylike because she used "the F word" and told dirty jokes.\(^8\) He concluded that the plaintiff's use of terms such as "fuck head" and "dick head," placement of her hand on the thigh of a young male coworker, and willingness to point out the clitoris in a pornographic photo when asked to do so by coworkers, meant that she "... was just as responsible for any hostile

\(^{181}\) *Wyerick*, 887 F.2d at 1273 n.4. Specifically, the plaintiff told an individual who had joked about her weight and appearance for over three months that he had never had a good woman, and that he "wouldn't know what a good woman would be." She also called one coworker a "motherfucker" and another a "whoremongler" [sic] in response to insults of a similar kind which they had directed at her.

\(^{182}\) *Wyerick*, 887 F.2d at 1273.

\(^{183}\) 32 F.3d 1007 (7th Cir. 1994).

\(^{184}\) *Carr*, 32 F.3d at 1009.

\(^{185}\) *Carr*, 32 F.3d at 1009.

\(^{186}\) *Carr*, 32 F.3d at 1009.

\(^{187}\) *Carr*, 32 F.3d at 1009–10. The activities described are an abbreviated version of the harassment reported by Carr. The decision refers to numerous other instances of similar behavior.

\(^{188}\) *Carr*, 32 F.3d at 1010.

\(^{189}\) *Carr*, 32 F.3d at 1010.
sexual environment that consequently arose.”

Thus, “the tinners’ conduct, to the extent it may have constituted sexual harassment, was not unwelcome.”

On appeal Judge Posner rejected this conclusion and stated for the majority:

Of course it was unwelcome. A plaintiff’s words, deeds and deportment can cast light on whether her coworkers’ treatment of her was unwelcome and should have been perceived as such by them and their supervisors, but we do not understand General Motors to be suggesting that Carr enjoyed or appeared to enjoy the campaign of harassment against her.

He distinguished the facts before him from those of Reed v. Shepard, noting that the plaintiff there had manifested an “enthusiastic receptiveness” to the sexual activities in her workplace, and stated:

What the judge found, rather, was that Carr had provoked the misconduct of her coworkers. Had she been ladylike, he thought, like the welder, they would have left her alone.

Even if we ignore the question why “unladylike” behavior should provoke not a vulgar response but a hostile, harassing response, and even if Carr’s testimony that she talked and acted as she did in an effort to be “one of the boys” is (despite its plausibility) discounted, her words and conduct cannot be compared to those of the men and used to justify their conduct and exonerate the employer. [citations omitted]. The asymmetry of positions must be considered. She was one woman; they were many men. Her use of terms like “fuck head” could not be deeply threatening, or her placing her hand on the thigh of one of her macho coworkers intimidating; and it was not she who brought the pornographic picture to the “anatomy lesson.” We have trouble imagining a situation in which male factory workers sexually harass a lone woman in self-defense as it were; yet that at root is General

190. Carr, 32 F3d at 1011.
191. Carr, 32 F3d at 1011.
192. Carr, 32 F3d at 1011 (citation omitted).
193. 939 F2d 484 (7th Cir. 1991).
Motors’ characterization of what happened here. It is incredible on the admitted facts.194

Judge Coffey, in dissent, was of the view that the facts as found were indistinguishable from those of Reed. In a footnote he noted that Carr’s explanation for why she tolerated the sexually explicit working environment—that she wanted to get along with her coworkers and to be accepted by them—was identical to that offered by Reed.195 Judge Coffey apparently took a similar view of the persuasiveness of Carr’s explanation as the court did in Reed, noting, “[i]f Carr’s allegations were true, I doubt she would have waited over three years to make them known.”196 He chose not to repeat the sexual language attributed to Carr, asserting, “I do not believe that quoting vulgar language contributes to the development of the body of law.”197

In one respect, Judge Coffey is correct: the facts in Carr are virtually indistinguishable from those of Reed. Both plaintiffs worked in male-dominated, sexually explicit environments, both endured significant periods of time in those environments before leaving, and both ascribed instances of their own participation in sexually explicit speech and conduct to their desire to be accepted by their coworkers. The only difference between the decisions is the depth at which the courts in each case scrutinized the factual setting of the complaint.

In Reed, the court focused on instances of sexual or profane behavior on the part of the plaintiff to reach a conclusion about her “personality,” and thus concluded that she must have welcomed the physical and sexual abuse she received.198 In Carr, the majority rejects this provocation defense in favor of a consideration of whether the plaintiff “enjoyed or appeared to enjoy” the specific instances of harassment that formed the basis of her complaint.199 The latter is a more appropriate method of determining unwelcomeness. Surely, if a plaintiff in her complaint based her hostile environment Title VII claim on a generalized assertion that her workplace was replete with sexual speech and behavior, she would be required to produce more detail as to the source and content of specific incidents which she found harassing. Courts

194. Carr, 32 F.3d at 1011.
195. Carr, 32 F.3d at 1013 n.1.
196. Carr, 32 F.3d at 1013 n.1.
197. Carr, 32 F.3d at 1015.
198. Reed, 939 F.2d at 491–92.
199. Carr, 32 F.3d at 1011.
must require such detail in analyzing the events recounted by both plaintiffs and defendants. The courts should focus on the specific acts complained of by the plaintiff and whether the evidence indicates that the plaintiff welcomed those behaviors in particular, not whether she "provoked" or "deserved" them.

The majority in Carr also recognizes the multiple hierarchies present in the workplace at issue. The court acknowledges and rejects the prevailing standards of "ladylike" behavior and acceptable "shop talk" in traditionally male jobs. The majority also goes beyond the obvious hierarchy of supervisor/subordinate to identify hierarchies of numbers, size, and gender itself. Blind adherence to "gender neutrality" ignores the fact that the same comment may have a very different meaning and effect depending on the person who says it.

The situation is analogous to racial harassment, where retorts by the targeted minority worker, even if racial in nature, cannot carry the same sting as those made by whites from their position of dominance. Courts are generally able to understand that an otherwise nonthreatening comment may become coercive when made within the context of a hierarchy. A boss's request for a date is not the same as that of a coworker. A raised fist is less threatening from a lone individual, or from a small one, than it is from a group of people or from a person with obvious physical strength. The assertion of dominance or sexual flexing of muscles that is an integral component of sexual harassment is affected by these hierarchies, as well as by the hierarchy of gender.

Courts, then, must consider the actual content of specific incidents of potentially sexually harassing behavior in the context of these hierarchies. Similarly, the behavior and demeanor of the plaintiff must also be viewed contextually and with precision. Too often, qualitatively different behavior on the part of the plaintiff has been equated with that of the defendant merely because they both involve sexuality or profanity. Moreover, courts have been slow to comprehend reasons apart from enjoyment that women might participate to a certain degree.

Conclusion

The prohibition of workplace sexual harassment, and its division into the quid pro quo and hostile environment categories, is the result
of judicial interpretation of Title VII's proscription of sex discrimination in employment. The inclusion in hostile environment claims of an unwelcomeness requirement in the plaintiff's prima facie case represents a further administrative and judicial gloss on this statutory guarantee. The content given to the unwelcomeness requirement is yet another layer of judicial definition and explanation. The result of this reasoning is that the plaintiff is presumed to have welcomed the harassment, and that the legal understanding of "unwelcomeness" is heavily infused with the doctrines that framed the traditional criminal law of rape. Such an approach persists in the sexual harassment area despite the sustained criticism of these ideas in the rape law context.

Relying on the Supreme Court's discussion of unwelcomeness in *Meritor Savings*, subsequent lower court decisions have proceeded from a presumption of welcomeness and scrutinized the plaintiff's sexual history, her appearance and conduct at work, and her failure to resist the harassment or to make a prompt complaint. Some Canadian tribunals have added the additional requirement that the complainant show that the defendant knew or ought to have known that his actions were unwelcome.

These considerations mirror the attitudes about women's sexual receptiveness and propensity for deception that feminists have found so hard to exorcise from the criminal law of rape. The reappearance of these attitudes in an action designed to redress sex inequality is particularly ironic and a testament to the ubiquitousness of sexism in law. The focus on the plaintiff and what she might have done to provoke or deserve the harassment obscures the way in which acquiescence is the exact response the harasser wishes to evoke. While reforms to the law of evidence regarding the irrelevance of sexual history and resistance may be useful, such solutions do not guarantee a shift in a court's attention to the actions of the defendant and his impact on the plaintiff's equality in her workplace.

There is no justification in a civil action for continuing to presume that a woman welcomes any and all sexual advances made by her co-workers. The element of unwelcomeness should be removed from the prima facie case, and the burden should be on the defendant to show that the plaintiff actually wanted the impugned conduct. An argument of welcomeness by the defendant should not be seriously entertained where the impugned conduct is outside the parameters of a potentially consensual relationship. Welcomeness would not be in issue, in other words, where the defendant's comments consist of sexual remarks or
slurs, physical interference on the job, pornographic photos or objects, or sexual contact not preceded by a mutual expression of interest. Welcomeness should only be invoked in the unusual case in which a hostile environment sexual harassment claim is based on sexual intercourse or related behavior and where the defendant can establish that the impugned conduct was mutual, consensual, and unaffected by workplace hierarchies.

Sexual conduct should not be considered welcome because the judge or the jury or the plaintiff’s coworkers think the plaintiff deserved it or should have liked it. The focus should remain on the defendant with the understanding that men have a duty not to harass the women with whom they work. As Judge Posner recognizes in Carr, "'welcome sexual harassment' is an oxymoron..." Under this approach, sexual history evidence must be considered wholly irrelevant, and evidence of the plaintiff’s conduct at work in relation to the incident in question considered with specificity and in the context of the operative workplace hierarchies. Nothing less will suffice to vindicate the equality guaranteed to women at work. 

202. Carr, 32 F.3d at 1008.