

# Not Quite Rights: How the Unwelcomeness Element in Sexual Harassment Law Undermines Title VII’s Transformative Potential

Grace S. Ho<sup>†</sup>

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<sup>†</sup> Attorney, Jenner & Block, LLP, Chicago, IL. University of California, Berkeley, School of Law, J.D. 2007. The author is grateful to Professor Catherine Albiston, Assistant Professor of Law at Berkeley, for her guidance and patience; to the interview participants for their thoughtful discussions; and to the editorial team of the *Yale Journal of Law and Feminism*.

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## INTRODUCTION

When particular social groups attempt to challenge social norms through legal reform, they generate transformative law.<sup>1</sup> Transformative law, according to legal scholar Linda Hamilton Krieger, emerges when a reformist group seeks to harness the power of law to advance its program of normative and institutional change.<sup>2</sup> If transformative laws are to impact social norms in a substantive way, however, the reformist influences underlying the laws must predominate throughout the process of implementation. If legal changes intended to displace pre-existing norms, social meanings, and institutional practices serve to subtly reassert these pre-existing norms in a formalized legal regime, their transformative potential is undermined.<sup>3</sup> Krieger describes the resulting socio-legal capture of legal reforms as the antithesis of transformative law.

The Civil Rights Act of 1964<sup>4</sup> (“the Act”) is a paradigmatic example of transformative law. Enacted against the backdrop of legalized racism,<sup>5</sup> Title VII of the Act (“Title VII”) was intended to prohibit workplace discrimination on the basis of race, color, national origin, religion, or sex.<sup>6</sup> Title VII has also

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1. Linda Hamilton Krieger, *Afterword: Socio-Legal Backlash*, 21 BERKELEY J. EMP. & LAB. L. 476, 491-92 (2000).

2. *Id.* at 491-92.

3. *Id.* at 492.

4. 42 U.S.C. §§ 2000e (2000).

5. *See, e.g.*, Emmanuel O. Iheukwumere & Philip Aka, *Title VII, Affirmative Action, and the March Toward Color-Blind Jurisprudence*, 11 TEMP. POL. & CIV. RTS. L. REV. 1, 5-6 (2001).

6. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2000). Since the inclusion of “sex” as a protected category in Title VII resulted from Representative Howard Smith’s attempt to undermine the Act’s chances of passing through Congress, legislative history regarding the intended scope or impact of “sex” as a protected group is sparse—at least when the bill was first passed in 1964. Consequently, much of the doctrine of sexual harassment has relied on judicial opinions and Equal Employment Opportunity Commission (EEOC) guidelines for emergence, development, and application. WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 14-15 (3d ed. 2002); *see also* *Barnes v. Costle*, 561 F.2d 983, 986-87 (D.C. Cir. 1977) (noting that the legislative history of Title VII fails to define the scope of the prohibition on sex discrimination because the prohibition was included as an attempt to block passage of the original bill).

come to stand for the prohibition of sexual harassment in the workplace—either in the form of quid pro quo sexual advances or the creation of hostile work environments.<sup>7</sup> As established in *Henson v. City of Dundee*<sup>8</sup> and *Meritor Savings Bank v. Vinson*,<sup>9</sup> the sexual harassment plaintiff must make an initial prima facie showing in which she demonstrates that: (1) she belongs to a protected group; (2) she was subjected to unwelcome sexual harassment; (3) the harassment was based on sex; (4) the harassment affected a term, condition, or privilege of employment or constituted a hostile work environment; and (5) the defendant/employer knew or should have known of the harassment and failed to remedy the problem.<sup>10</sup>

This Article focuses on the second requirement—specifically, the requirement that the plaintiff demonstrate that the conduct was “unwelcome.” I argue that the unwelcomeness requirement enshrines into law a troubling form of reasoning: Since women generally welcome sexual behavior, it is most efficient to require the exceptional woman who does not welcome such behavior to make her difference known.<sup>11</sup>

There is a significant body of academic scholarship analyzing the effects of the unwelcomeness requirement. Legal scholars argue that the requirement places an unfair focus on the victim: how she acted and dressed, and whether she invited the harassment.<sup>12</sup> These scholars offer a range of solutions in remedy. Susan Estrich and Niloofar Nejat-Bina call for the abolition of the element.<sup>13</sup> Henry L. Chambers argues that the only role that exists for the unwelcomeness element is as an evidentiary issue related to damages.<sup>14</sup> Joan Weiner proposes a “humane” way of implementing the unwelcomeness

7. These theories were only recognized in the 1970s. Quid pro quo harassment consists of: Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, [or] (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual. . . .

EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a)(1)(2) (2008).

A hostile work environment is created when “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.” 29 C.F.R. § 1604.11(a)(3) (2008).

8. 682 F.2d 897 (11th Cir. 1982).

9. 477 U.S. 57 (1986).

10. *Id.*; *Henson*, 682 F.2d at 903-05.

11. This paper focuses on sexual harassment doctrine as it has developed, not as it should have developed. Sexual harassment case law arose in response to complaints involving males harassing females. Consequently, heterosexist male–female power dynamics shaped the formative years of sexual harassment doctrine. Thus, the paper addresses the structure of sexual harassment in the terminology of male and female heterosexual power and sex dynamics..

12. See, e.g., Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 825-26 (1991).

13. Estrich, *supra* note 12; Niloofar Nejat-Bina, *Employers as Vigilant Chaperones Armed with Dating Waivers: The Intersection of Unwelcomeness and Employer Liability in Hostile Work Environment Sexual Harassment Law*, 20 BERKELEY J. EMP. & LAB. L. 325 (1999).

14. Henry L. Chambers, Jr., *(Un)welcome Conduct and the Sexually Hostile Environment*, 53 ALA. L. REV. 733, 786 (2002).

requirement through workplace policies.<sup>15</sup> Mary Radford suggests shifting the burden of proof to require the defendant to show welcomeness, rather than the current rule requiring the plaintiff to prove unwelcomeness.<sup>16</sup>

My approach is different. Like other writers, I analyze how the unwelcomeness requirement focuses attention and blame on the victim, and I propose solutions to this problem. But I also look at how the unwelcomeness pattern relates to the principles and potential of Title VII itself. Given its underlying premise that women generally welcome sexual advances, the unwelcomeness requirement undermines Title VII's transformative effect. The unwelcomeness requirement reinforces the sex-based assumptions that Title VII has the potential to eradicate. I reach this conclusion by examining how the unwelcomeness requirement affects the actual practice of sexual harassment law. Based on the findings from my interviews with defense and plaintiffs' lawyers who litigate sexual harassment cases, I argue that the unwelcomeness factor currently invites workers, employers, lawyers, and courts to internalize and replicate traditional understandings of gender relations at work. For example, plaintiffs' lawyers can only afford to take on clients who have a decent chance of winning. In deciding whether to take a case, plaintiffs' lawyers consider whether the employee's reactions to the harassment were pointed enough—whether the employee outwardly expressed that the conduct was unwelcome—to lead a court to find the unwelcomeness burden met. In addition, plaintiffs' lawyers must consider whether a potential client's personal history will allow the employer to paint her as the type of person who would not have found the alleged harassment unwelcome. Defense lawyers have also internalized these gender stereotypes. To defeat a plaintiff's claim, defense lawyers focus on the plaintiff's conduct and character, as opposed to looking exclusively at the appropriateness of the alleged harasser's behavior.

To realize the transformative potential of Title VII, several changes are needed. Specifically, I propose that (1) the federal agency enforcing the Act, the Equal Employment Opportunity Commission (EEOC), clarify in its guidelines<sup>17</sup> that certain reactions to alleged harassing behavior, such as silence, will satisfy the unwelcomeness element unless the alleged harasser can demonstrate that the conduct was affirmatively welcomed; and (2) both the EEOC and the courts shift the burden of proof away from the plaintiff, who currently must show that the conduct was unwelcome in order to establish a

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15. Joan S. Weiner, *Understanding Unwelcomeness in Sexual Harassment Law: Its History and a Proposal for Reform*, 72 NOTRE DAME L. REV. 621 (1997).

16. Mary F. Radford, *By Invitation Only: The Proof of Welcomeness in Sexual Harassment Cases*, 72 N.C. L. REV. 499 (1994).

17. The EEOC guidelines represent the "administrative interpretation of the Act by the enforcing agency" and although not controlling upon the courts, "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986) (discussing EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (2008)).

prima facie case, and place this burden on the defendant, who should be required to demonstrate that the conduct was in fact welcome.

Part I of this Article will discuss the development of sexual harassment law and the evolution of the unwelcomeness requirement. Part II examines academic scholarship on the unwelcomeness requirement. Part III describes and analyzes the interviews I conducted with twelve attorneys who practice sexual harassment law.<sup>18</sup> The attorneys represent defendants, plaintiffs, and the EEOC. These interviews illustrate how the current unwelcomeness requirement affects not only what claims prevail or how cases are litigated, but also what cases lawyers are willing to bring. Part IV provides a theoretical and practical justification for my proposal to shift the unwelcomeness burden and explores how the burden shift could actually be implemented.

## I. DEVELOPMENT OF SEXUAL HARASSMENT LAW AND THE UNWELCOMENESS ELEMENT

In articulating the elements of a prima facie harassment case, the Supreme Court has created two very different standards. In cases alleging harassment on the basis of race, color, national origin, or religion, plaintiffs do not need to demonstrate that the harassment was unwelcome in order to meet their initial burden. In contrast, “[t]he gravamen of any *sexual* harassment claim is that the alleged sexual advances were unwelcome.”<sup>19</sup> Most recently, the Supreme Court heightened the importance of a showing of unwelcomeness by outlining an affirmative defense for employers that made unwelcomeness important not only in the plaintiff’s prima facie case, but also in rebutting the employer’s affirmative defense.<sup>20</sup>

### A. *First Impressions of a Unique Form of Discrimination*

Courts initially had difficulty distinguishing workplace harassment from what they viewed as “normal” social interactions. Some of the first Title VII cases challenging harassment involved female plaintiffs alleging that they had been fired or mistreated for refusing their male superiors’ sexual advances. Courts, unable or unwilling to confront the imbalanced power dynamics

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18. I selected the lawyers whom I interviewed through a “snowball” approach. I contacted a few defense and plaintiffs’ attorneys, explained my project, and asked for more contacts. I then obtained interviews from the secondary contacts. The EEOC attorneys I spoke with were from the Chicago District Office. The in-person interviews lasted about forty-five minutes each. Although the small sample size necessarily means that the data is not statistically representative, the detailed exchanges allowed for a close examination of the strategies and approaches used by sexual harassment lawyers and for a deeper understanding of how the unwelcomeness requirement plays out in practice.

19. See, e.g., *Meritor*, 477 U.S. at 68 (emphasis added).

20. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 765 (1998); see also *Faragher v. City of Boca Raton*, 542 U.S. 775 (1998).

between men and women in the 1970s American workforce, tended to reject these claims by concluding that the adverse treatment occurred not "because of sex" within the meaning of the statute, but because of the plaintiff's refusal to engage in sexual affairs with the supervisor.

For example, in 1974, a district court in Washington, D.C. dismissed a plaintiff's sexual harassment claim when she argued that her position was eliminated after she refused to have sexual relations with her supervisor.<sup>21</sup> While citing a Seventh Circuit decision for the proposition that the intent behind Title VII was to "strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes,"<sup>22</sup> the district court found that the actions the plaintiff complained of "plainly fall wide of the mark set by the [Seventh Circuit]."<sup>23</sup> The court reached its conclusion by reinterpreting the substance of the plaintiff's complaint; instead of viewing her to be the subject of discriminatory treatment because she was a woman, the court saw her as receiving adverse treatment because she refused her supervisor's sexual advances.<sup>24</sup>

A year later, a district court in Arizona held that the verbal and sexual advances of a plaintiff's supervisor were "nothing more than a personal proclivity, peculiarity or mannerism," and an attempt at "satisfying a personal urge."<sup>25</sup> Relying in part on this mode of reasoning, a California district court affirmed summary judgment for the employer when a plaintiff asserted that her supervisor fired her after she rejected his sexual advances. The court explained that, since the "attraction of males to females and females to males is a natural sex phenomenon" playing at least a subtle part in most personnel decisions, courts should refrain from "delving into these matters short of specific factual allegations describing an employer policy which in its application imposes or permits a consistent, as distinguished from isolated, sex-based discrimination."<sup>26</sup>

In these cases, courts declined to recognize sexual harassment claims as actionable by reasoning that heterosexual attraction is a natural, blameless, and inevitable phenomenon. Viewing sexual harassment as an interpersonal, private issue, courts not only refused to find it actionable under Title VII, but they also warned of a resulting flood of litigation should Title VII be deemed to cover

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21. *Barnes v. Train*, 13 Fair Empl. Prac. Cas. (BNA) 123, 124 (D.D.C. Aug. 9, 1974), *rev'd sub nom. Barnes v. Costle*, 561 F. 2d 983 (D.C. Cir. 1977).

22. *Id.* at 124 (citing *Sprogis v. United Airlines*, 444 F.2d 1194, 1198 (7th Cir. 1971)).

23. *Id.*

24. *Id.*

25. *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975), *vacated*, 562 F.2d 55 (9th Cir. 1977).

26. *Miller v. Bank of Am.*, 418 F. Supp. 233, 236 (N.D. Cal. 1976), *rev'd*, 600 F.2d 211 (9th Cir. 1979).

it.<sup>27</sup> Consequently, these district courts refused to apply Title VII in a transformative capacity. Instead, courts entrenched the traditional norms of sex roles, in particular the social “fact” that heterosexual attraction naturally plays a role in employment decisions. The courts did not simply reflect this norm, they enforced it. Each decision bound or persuaded other courts to follow suit.

In 1977, things changed. The D.C. Circuit reversed the holding of the lower court in *Barnes v. Costle*,<sup>28</sup> and held that the firing of a plaintiff as a result of her refusal to engage in sexual relations with her supervisor constituted sexual harassment actionable under Title VII.<sup>29</sup> The appellate court relied on sociological studies revealing a tendency to assign women to less challenging positions; the legislative intent of the 1972 amendments to give the EEOC the authority to enforce its administrative findings and to increase the jurisdiction and reach of the agency;<sup>30</sup> and reports from the Senate Committee on Labor and Public Welfare and the House Committee on Education and Labor<sup>31</sup> recognizing that the plaintiff was propositioned only because she was a woman and subordinate to the alleged harasser. A supervisor’s attempt to condition employment benefits on sexual favors thus became a violation of Title VII. Within three years, two other circuits followed *Barnes* in recognizing what is now known as quid pro quo harassment.<sup>32</sup>

In 1980, the EEOC issued its first set of guidelines on sex-based harassment. The guidelines stated that harassment on the basis of sex violates Title VII and prohibited both quid pro quo harassment (the type of harassment involved in *Barnes*) and hostile work environment harassment.<sup>33</sup> The guidelines explicitly defined sexual harassment as “unwelcome sexual advances, requests

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27. See, e.g., *Corne*, 390 F. Supp. at 163 (“[A]n outgrowth of holding [verbal and sexual advances from a supervisor] actionable under Title VII would be a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another.”).

28. *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977).

29. *Id.* at 995.

30. The Equal Employment Opportunity Act of 1972 amended Title VII in various ways, including by granting the EEOC litigation authority and declaring that educational institutions as well as state and federal governments would be subject to Title VII. As a result of the 1972 amendments, the EEOC amended its guidelines to prohibit employers from imposing mandatory leaves of absence on pregnant women or terminating women because they become pregnant. Milestones in the History of the U.S. Equal Employment Opportunity Commission: 1972, <http://www.eeoc.gov/abouteeoc/35th/milestones/1972.html> (last visited Feb. 10, 2008).

31. The House Committee on Education and Labor declared that Title VII, eight years after passage, still had much to accomplish in order to elevate the status of women in employment. The Senate Committee on Labor and Public Welfare revealed a similar position on the need to eradicate sex discrimination. *Barnes*, 561 F.2d at 987, 990 (D.C. Cir. 1977).

32. *Miller v. Bank of Am.*, 600 F.2d 211, 212 n.1 (9th Cir. 1979) (citing *Barnes*, 561 F.2d at 989-92); *Tomkins v. Pub. Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1048 (3d Cir. 1977) (citing *Barnes*, 561 F.2d at 990).

33. See EEOC Guidelines on Discrimination Because of Sex, 45 Fed. Reg. 74, 676 (Nov. 10, 1980); see also *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (noting that the first case to recognize hostile work environment as a basis for liability under Title VII involved an employer who “created an offensive work environment for employees by giving discriminatory service to its Hispanic clientele”) (citing *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972)).

for sexual favors, and other verbal or physical conduct of a sexual nature” that have damaging effects on an employee.<sup>34</sup> Thus, the EEOC’s definition of sexual harassment formalized unwelcomeness as an element of sexual harassment law.

Courts gave the agency’s interpretations of Title VII a fair amount of deference.<sup>35</sup> Two years after the guidelines were issued, the Eleventh Circuit listed “unwelcome sexual harassment” as the second of five elements that “the plaintiff must allege and prove . . . in order to establish her claim.”<sup>36</sup> Although most courts of appeal followed the Eleventh Circuit and required unwelcomeness in establishing a prima facie case for sexual harassment, the Ninth and Third Circuits did not.<sup>37</sup>

### B. Meritor Installs the Unwelcomeness Element in the Prima Facie Case

In *Meritor Savings Bank v. Vinson*,<sup>38</sup> the Supreme Court’s first decision regarding sexual harassment under Title VII, the Court resolved the circuit split on whether unwelcomeness was an element of the prima facie case and defined the elements of a sexual harassment claim.<sup>39</sup> The plaintiff, Mechelle Vinson, engaged in sexual relations with her supervisor because she was afraid that she would lose her job if she refused. The district court concluded that no sexual harassment occurred because Vinson’s conduct was voluntary, rendering the relationship consensual and precluding the supervisor’s advances from being unwelcome. The Supreme Court held that it was error to focus on the “voluntariness” of Vinson’s participation in the claimed sexual incidents; the correct inquiry was whether Vinson “by her conduct indicated that the alleged sexual advances were unwelcome.”<sup>40</sup>

By deciding that a plaintiff needed to demonstrate that she did not invite, solicit, or provoke the conduct, the Court took for granted that a showing of sexual advances from a supervisor was insufficient to establish a prima facie case for sexual harassment. Indeed, the Court reversed the appellate court decision that testimony about a plaintiff’s “dress and personal fantasies . . . had no place in [the] litigation,”<sup>41</sup> and explicitly held that a plaintiff’s speech or dress is “obviously relevant”<sup>42</sup> in determining whether particular sexual advances were welcome. The guidance the Court provided in implementing the

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34. EEOC Guidelines, 45 Fed. Reg. at 676.

35. Weiner, *supra* note 15, at 626.

36. Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982).

37. Weiner, *supra* note 15, at 624 n.12.

38. 477 U.S. 57 (1986).

39. *Meritor* recognized both quid pro quo and hostile work environment theories of sexual harassment. *Id.*

40. *Meritor*, 477 U.S. at 68.

41. *Id.* at 68-69 (citing *Meritor Sav. Bank v. Vinson*, 753 F.2d 141, 146 n.36 (D.C. Cir. 1985)).

42. *Id.* at 69.



unwelcomeness analysis reflects and reiterates the notion underlying the unwelcomeness requirement itself: Women are assumed to welcome sexual advances through their manner of dress and speech. Thus, *Meritor* reasserted the normative presumption that sexual harassment at work is natural, non-regulable conduct through its implementation of the unwelcomeness requirement and the types of evidence relevant to proving it.

*Meritor*'s holding requires plaintiffs in sexual harassment cases to meet a higher burden than plaintiffs alleging other types of individual disparate treatment discrimination under Title VII. The sexual harassment plaintiff must show initially not only that she suffered discrimination, but also that she did not desire it. When an individual brings a disparate treatment claim on the basis of any protected category other than sex, for any issue other than sexual harassment, the plaintiff can establish a prima facie case without showing unwelcomeness. For instance, in a claim of race-based discrimination, the plaintiff is not required to establish that she found the race-based action unwelcome.<sup>43</sup> Indeed, the presumption that a person would find race-based disparate treatment unwelcome is so widely accepted that it would be laughable (and offensive) to suggest otherwise. Nonetheless, the presumption is not shared for sexual harassment plaintiffs, nor is it built into the legal framework of Title VII case law.

The degree to which the Court's apparently plaintiff-friendly holding in *Meritor* would undermine the ability of others to bring sexual harassment cases was not immediately apparent. Beyond noting that the plaintiff initially refused her supervisor's demand for sex, the Court did not detail any other ways that the plaintiff's conduct signaled the unwelcomeness of her supervisor's behavior. The supervisor's conduct in the case seemed to have been so egregious that the Court could not fathom how it could have been welcome: He fondled Vinson in front of other employees, followed her into the women's restroom, and forcibly raped her on several occasions.<sup>44</sup> Thus, the Court required the unwelcomeness inquiry without explaining how a showing of unwelcomeness could be made in a less egregious case.<sup>45</sup>

Lower court decisions after *Meritor* held plaintiffs to inconsistent standards of unwelcomeness. Courts tended to favor plaintiffs who resisted by extreme or hysterical conduct: plaintiffs who threw coffee on their harassers, screamed, and ran away;<sup>46</sup> plaintiffs who hit their harassers, cursed them, and ran away in

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43. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (holding that the plaintiff establishes a prima facie case for a failure to hire based on racial discrimination by showing "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications").

44. *Meritor*, 477 U.S. at 60.

45. *Id.*

46. *Brooms v. Regal Tube Co.*, 881 F.2d 412, 417 (7th Cir. 1989).

tears.<sup>47</sup> However, when plaintiffs reacted less dramatically, courts were less willing to recognize unwelcomeness.

The standards differed from circuit to circuit. The First Circuit did not require extreme conduct, finding that a plaintiff could demonstrate unwelcomeness by ignoring sexual comments, changing the subject, or withdrawing her hands from the harasser's grasp.<sup>48</sup> In Illinois, a district court found that a plaintiff failed to make a showing of unwelcomeness when her supervisor fondled her breast because the plaintiff's initial rejections were "neither unpleasant nor unambiguous," giving the harasser "no reason to believe that his moves were unwelcome."<sup>49</sup>

Even though the *Meritor* Court's analysis of unwelcomeness favored the plaintiff, its essential rule—requiring unwelcomeness—closed an avenue for realizing Title VII's transformative potential. By requiring a showing that the plaintiff's conduct alerted the alleged harasser that his actions were unwelcome, and by designating the plaintiff's dress and speech as valid places to look for such messages, the Court institutionalized a normative value suggesting that women tend to welcome sexual conduct from men. By making welcomeness the default, the Court gave legitimacy to the common defense strategy of scrutinizing the actions of the alleged victim—instead of evaluating the conduct of the alleged harasser.

### C. Ellerth and Faragher Introduce the Unwelcomeness Element to the Affirmative Defense

After *Meritor*, the unwelcomeness requirement underwent administrative, social, and judicial interpretations, all of which reinforced its staying power. In 1987, two years after *Meritor*, the EEOC attempted to clarify the unwelcomeness requirement. The agency stated that the conduct 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."<sup>50</sup> If unwelcomeness were at issue, the complaining party's claim would be "considerably strengthened if she made a contemporaneous complaint"<sup>51</sup> to the employer.

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47. *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 464 (7th Cir. 1990).

48. *Chamberlin v. 101 Realty Inc.*, 915 F.2d 777, 780 (1st Cir. 1990).

49. *Dockter v. Rudolf Wolff Futures, Inc.*, 684 F. Supp. 532, 533 (N.D. Ill. 1988), *aff'd* 913 F.2d 456 (7th Cir. 1990).

50. EEOC, Policy Guidance on Current Issues of Sexual Harassment, EEOC Notice No. 915-050, at 4 (Mar. 19, 1990). This policy guidance was initially issued by the EEOC on October 25, 1988, in EEOC Notice No. 915-035, but the 1988 and 1990 versions are substantively indistinguishable. *See Carpenter v. Austin*, EEOC Doc. 05900797, 1990 WL 1113003, at \*5 (E.E.O.C. Sept. 7, 1990).

51. EEOC, Policy Guidance on Current Issues in Sexual Harassment, EEOC Notice No. 915-050 (Mar. 19, 1990).

In 1998, the Supreme Court made the use of internal complaints a discrete analytic element of a showing of unwelcomeness in cases where the plaintiff alleges that a manager created a hostile work environment.<sup>52</sup> In two decisions issued on the same day, the Court defined how an employer can assert an affirmative defense when managers or supervisors sexually harass lower-level employees.<sup>53</sup> Both cases—*Burlington Industries v. Ellerth*<sup>54</sup> and *Faragher v. City of Boca Raton*<sup>55</sup>—involved sexual harassment claims by plaintiffs who did not suffer any tangible employment action as a result of the alleged sexual harassment by their supervisors. Both cases also involved plaintiffs who did not complain to their employers about the alleged harassment.

In spite of the Court's explicit understanding of the greater protective role the law should play in employee–manager harassment situations, the *Ellerth* and *Faragher* decisions reinforce the presumption that female employees welcome sexual conduct in the workplace. The *Ellerth* and *Faragher* affirmative defense contains two elements. The first element requires the employer to show by a preponderance of the evidence that it “exercised reasonable care to prevent and correct promptly any sexually harassing behavior.”<sup>56</sup> The second element requires the employer to show that the plaintiff “unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”<sup>57</sup> While the second element may gauge whether the employer had notice of the alleged harassment, its scrutiny rests on the plaintiff's conduct.

The affirmative defense is analyzed much like the unwelcomeness requirement and furthers the same presumption: If the plaintiff fails to complain or use the employer's corrective or preventive mechanisms, the conduct must have been welcome. In theory, the two elements work together to limit sexual harassment hostile work environment liability to cases where either (1) the employer failed to take reasonable care to prevent and correct sexual harassment, or (2) the employee used the employer's complaint system—or at

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52. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 806-07 (1998); see *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986).

53. *Ellerth*, 524 U.S. at 762-63; *Faragher*, 524 U.S. at 808. *But see Meritor*, 477 U.S. at 76 (Marshall, J., concurring) (arguing that “there is no justification for a special rule, to be applied *only* in ‘hostile environment’ cases, that sexual harassment does not create employer liability until the employee suffering the discrimination notifies other supervisors” on the premise that no distinction in agency exists between a supervisor's firing duties and duties to ensure a productive workplace).

54. 524 U.S. 742.

55. 524 U.S. 775.

56. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

57. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. The affirmative defense was designed to incorporate (1) common law agency principles of vicarious liability for harm caused by the misuse of supervisory authority; (2) the *Meritor* holding that an employer is not automatically liable for harassment by a supervisor; and (3) the policies of Title VII to encourage forethought by employers. *Faragher*, 524 U.S. at 803.

least did not “unreasonably fail” to use it.<sup>58</sup> If, however, the employer is found to have taken reasonable care to prevent and correct sexual harassment, and the employee “unreasonably failed” to avail herself of preventive or corrective opportunities, the employer is not liable. Thus, the affirmative defense strengthens the notion that women normally welcome sexual behavior in the workplace: With few exceptions, only when women take the step of complaining do courts recognize unlawful harassment.

Relatedly, the *Ellerth* Court privileged the creation of anti-harassment policies. Not only did the Court assert that “Title VII is designed to encourage” such policies,<sup>59</sup> but subsequent courts have found that employers satisfy the first element of the affirmative defense by distributing an adequate anti-harassment policy.<sup>60</sup> When the mere existence of a harassment policy or a grievance process is enough for employers to escape liability, the incentives for employers are obvious: Litigation-conscious employers will implement minimal complaint procedures while simultaneously working to discourage employee complaints of hostile work environments.<sup>61</sup> By writing and distributing policies that satisfy the first element of the affirmative defense, while dissuading employees from availing themselves of the policies and thereby making it easier to satisfy the second prong of the defense, employers maximize their insulation from scrutiny.<sup>62</sup> Employers can informally discourage internal complaints while officially adopting open-door policies. Moreover, courts have adopted few specific rules regarding the adequacy of the employer’s policies. The policy must specifically address sexual harassment, clearly identify those individuals designated to receive complaints, and permit a victim to file the complaint with an alternate person if the alleged harasser is the individual normally designated to receive complaints.<sup>63</sup> Thus, the loosely scrutinized affirmative defense allows an employer to direct attention away from its own environment and policies and towards the plaintiff’s conduct.

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58. The third possible combination, that the employer took no reasonable measures to prevent or correct sexual harassment and the plaintiff unreasonably failed to avail herself of the employer’s measures, seems unlikely to occur. Once a court finds that the employer failed to prove the first element of the affirmative defense, it would be hard to find that the plaintiff unreasonably failed to avail herself of measures that did not exist.

59. *Ellerth*, 524 U.S. at 764.

60. See, e.g., *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262 (4th Cir. 2001); *Shaw v. AutoZone, Inc.*, 180 F.3d 806 (7th Cir. 1999).

61. David Sherwin et al., *Don’t Train Your Employees and Cancel Your “1-800” Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 *FORDHAM L. REV.* 1265, 1294 (2001) (concluding that “employers attempting to limit their liability should exercise reasonable care, but not too much care because employers can be punished when employees feel comfortable enough to use the procedures.”).

62. *Id.*

63. Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form over Substance in Sexual Harassment Law*, 26 *HARV. WOMEN’S L.J.* 3, 15 (2003).

Empirical studies have found that sexual harassment policies proliferated in the wake of *Ellerth* and *Faragher*.<sup>64</sup> In 1998, a study conducted by the Society for Human Resources Management (SHRM) reported that, of the 617 companies surveyed, 72% did not have a written policy regarding sexual or romantic conduct in the workplace. Although 14% had an unwritten but understood norm in the workplace, 13% did not have a policy at all.<sup>65</sup> In 1999, less than one year after the *Ellerth* and *Faragher* decisions, 97% of employers responding to the SHRM survey reported having written policies against sexual harassment.<sup>66</sup> Of those with written policies, 93% included such elements as a definition of prohibited conduct and identification of a chain of communication for making complaints,<sup>67</sup> measures recommended by the EEOC.<sup>68</sup> A stated intention or mission to eradicate workplace harassment was included in 81%.<sup>69</sup>

The effectiveness of these sexual harassment policies has been difficult to measure. The existence of anti-harassment policies and procedures for complaints is not an automatic solution for sexual harassment at work. Establishing internal complaint and grievance procedures for sexual harassment is certainly preferable to not addressing the issue at all. However, the existence of formal policies does not mean that sexual harassment is adequately prevented. Employees who experience sexual harassment in the workplace may be deterred from complaining to their superiors for many reasons. Economically, employees may fear that, if they complain, they will suffer retaliation (including being fired, demoted, or looked over as a candidate for future promotion). As a practical matter, employees often do not want to disturb their work environment; they may fear that complaining will cause them to be ostracized at work, leading to either an uncomfortable or more hostile work environment—or both.<sup>70</sup> Employees often choose not to complain because to do so would require them to make a showing of their

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64. *Id.* at 13 (citing Peter Aronson, *Justices' Sex Harassment Decisions Spark Fears: Companies Review Policies to Avoid 'Ellerth' Liability*, NAT'L L.J., Nov. 9, 1988, at A1).

65. SOC'Y FOR HUMAN RESOURCES MGMT., SEXUAL HARASSMENT SURVEY (1999) [hereinafter SHRM SURVEY]; see Susan M. Heathfield, *What's Love Got To Do with Office Romance? Tips About Dating, Sex, and Romance at Work*, ABOUT.COM, <http://humanresources.about.com/cs/workrelationships/a/workromance.htm> (last visited Feb. 7, 2008).

66. Grossman, *supra* note 63, at 19 (citing SHRM SURVEY, *supra* note 65, at 6).

67. *Id.* (citing SHRM SURVEY, *supra* note 65, at 7).

68. EEOC, Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, EEOC Notice No. 915.002 (June 18, 1999). The EEOC's 1999 enforcement guidance recommends that anti-harassment complaint procedures include an assurance that employees who come forward will not face retaliation; an assurance that the employer will protect the confidentiality of harassment complaints to the extent possible; a prompt, thorough, and impartial investigation process; and an assurance that an employer will take prompt and thorough action when it determines harassment has occurred. *Id.*

69. *Id.*

70. Anna Maria Marshall, *Idle Rights: Employees' Rights Consciousness and the Construction of Sexual Harassment Policies*, 39 LAW & SOC'Y REV. 83, 111 (2005).

disempowerment.<sup>71</sup> Employees usually know if formal complaints will be productive—that is, if the person or persons in charge of investigating complaints will be fair.<sup>72</sup> Some employees may feel extremely uncomfortable discussing sexual issues with investigators who work at their own company.<sup>73</sup> Moreover, some employees may resist complaining in an attempt to ignore the harasser; employees may attempt to ignore the conduct out of fear,<sup>74</sup> or a belief that silence will thwart the harasser's attempt to obtain a distressed reaction from them.<sup>75</sup> Empirical studies have documented that many of these fears are well-founded.<sup>76</sup> Thus, although a complaint to the employer is often required to prevail in legal proceedings, social pressures may render use of the employer's complaint procedures too costly.<sup>77</sup> Employees may find it preferable to sidestep complaints to the employer, by going first to the courtroom. But *Ellerth* and *Faragher*'s affirmative defense discourages this choice.

While *Ellerth* and *Faragher* did not focus explicitly on “unwelcomeness,” the second element of the affirmative defense—asking whether the plaintiff used any of the employer's preventive or corrective measures—functions as an unwelcomeness test. Using internal complaint processes is another way of putting the employer on notice that the behavior at issue is not welcome. In addition, the defendant's burden in the affirmative defense is to show that the employee failed to make the employer aware that the conduct was unwelcome. Thus, the scrutiny is once again on the employee and her response to the alleged harassment, rather than on whether the employer was aware of the alleged harassment or the extent to which the employer attempted to put an end to the harassment. In this way, *Ellerth* and *Faragher* exemplify the Court's interpretation of a potentially transformative law in a manner consistent with traditional understandings of gender.

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71. Beth A. Quinn, *The Paradox of Complaining: Law, Humor, and Harassment in the Everyday Work World*, 25 LAW & SOC. INQUIRY 1151, 1173.

72. See Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC'Y REV. 497, 506 (1993).

73. Marshall, *supra* note 70, at 87-88, 101-02; see also Linda Hamilton Krieger, *Employer Liability for Sexual Harassment—Normative, Descriptive, and Doctrinal Interactions: A Reply to Professors Beiner and Bisom-Rapp*, 24 U. ARK. LITTLE ROCK L. REV. 169, 177-80 (2001) (discussing models used to describe victim responses, such as an assertiveness continuum).

74. Marshall, *supra* note 70, at 112-14.

75. Quinn, *supra* note 71, at 1163.

76. See, e.g., Jan Salisbury et al., *Counseling Victims of Sexual Harassment*, 23 PSYCHOTHERAPY 316, 320 (1986) (noting, based on clinical observations of victims over a three-year period, that sexual harassment complainants face psychological abuse, lower performance evaluations, and withdrawal of social support); David E. Terpstra & Susan E. Cook, *Complainant Characteristics and Reported Behaviors and Consequences Associated with Formal Sexual Harassment Charges*, 38 PERSONNEL PSYCHOL. 559 (1985) (reporting that a majority of women who filed sexual harassment complaints were ultimately dismissed from their jobs).

77. Similar social pressures may constrain the willingness of witnesses to cooperate, resulting in the suppression of evidence needed for successful prosecution of a theoretically viable claim. Krieger, *supra* note 1, at 484-85.

## II. THE LITERATURE: HOW ACADEMICS VIEW THE UNWELCOMENESS REQUIREMENT

Legal scholars critical of the unwelcomeness element have proposed three principle reforms. In this section, I summarize some of the leading approaches. Susan Estrich, Henry L. Chambers, Jr., and Niloofar Nejat-Bina call for the abolishment of the element completely.<sup>78</sup> Joan Weiner proposes a “humane” way of implementing the unwelcomeness requirement through workplace policies.<sup>79</sup> Mary Radford argues that the burden of proof be shifted from requiring the plaintiff to prove unwelcomeness to requiring the defendant to show welcomeness.<sup>80</sup>

### A. *Abolish the Unwelcomeness Factor*

Susan Estrich argues for the elimination of the unwelcomeness requirement. She is particularly critical of the symbolic significance of the rule and its likely punitive effects on the plaintiff. Specifically, Estrich argues that the unwelcomeness requirement serves no useful function in sexual harassment claims. In a hostile work environment sexual harassment case, courts will only find liability if the environment is objectively hostile. Where it is not hostile, showing unwelcomeness does not advance the case. Where it is hostile, requiring unwelcomeness punishes the victim by targeting the legal inquiry at her behavior, dress, and personal history. The woman in a sexual harassment case effectively goes on trial, and her experience as a victim of sexual harassment may be lost in the scrutiny of her own conduct.<sup>81</sup>

Henry L. Chambers, Jr. also believes that the unwelcomeness requirement should be eliminated, because unwelcomeness has become obsolete through the evolution of the types of behavior protected under sexual harassment law. Unlike Estrich, Chambers finds the unwelcomeness requirement to be a reasonable “concession to the notion that Title VII does not ban all sex-related activity in the workplace.”<sup>82</sup> But, Chambers argues that as courts broadened the conduct that may support a sexual harassment claim to include all types of gender-based conduct, the justification on which the unwelcomeness requirement rests has faded. For example, the Seventh Circuit recognizes violent harassment that is not sexual as potential support for a sex harassment claim.<sup>83</sup> Because courts no longer limit sexual harassment claims to situations

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78. Chambers, *supra* note 14; Estrich, *supra* note 12; Nejat-Bina, *supra* note 3.

79. Weiner, *supra* note 15.

80. Mary F. Radford, *supra* note 16.

81. Estrich, *supra* note 12, at 815, 827.

82. Chambers, *supra* note 14, at 734.

83. *Id.* at 733, 739 n.19 (discussing *Smith v. Sheahan*, 189 F.3d 529, 532-35 (7th Cir. 1999)). Professor Chambers thinks it is appropriate to ask the plaintiff to make a showing of unwelcomeness at the damages stage. *Id.*

where sexual activity is at issue, Chambers argues that the unwelcomeness requirement may yield results inconsistent with the vision of Title VII.

A third argument for eliminating the unwelcomeness requirement in hostile work environment claims is its redundancy in the wake of *Ellerth* and *Faragher*.<sup>84</sup> Niloofar Nejat-Bina posits that the affirmative defense scheme established in the two Supreme Court cases effectively requires a showing of unwelcomeness by giving the employer the opportunity to rebut the prima facie case by demonstrating that the plaintiff unreasonably failed to communicate that the conduct was unwelcome.<sup>85</sup> While Nejat-Bina opposes the unwelcomeness requirement for its importation of sexist norms into the law and its punitive effect on the plaintiff, she argues that it is duplicated in the affirmative defense and therefore should not be required in the prima facie showing.<sup>86</sup>

### *B. Administer the Unwelcomeness Element Humanely in the Workplace*

Joan Weiner proposes a model sexual harassment policy for employers<sup>87</sup> based on the assumption that the unwelcomeness requirement is likely to stay in place. Her goal is for employers to make the unwelcomeness requirement meaningful, rather than punitive.<sup>88</sup> Weiner hopes that her proposed model will aid employers in promoting informal conflict resolution without unfairly punishing employees.<sup>89</sup> Weiner's model policy focuses on the potential harasser by having him take into account how actions that seem harmless to one group may be hurtful or offensive in workplaces over-represented by one gender. In such an environment, the potential harasser is responsible for considering the potentially isolating or intimidating effects of his actions on the under-represented gender.<sup>90</sup>

Although this provision places a burden on the potential harasser to understand the effects of his speech or conduct, it limits that burden to situations where one gender is overrepresented. Accordingly, the provision implies that the speaker does not bear the burden of determining whether the audience finds his speech or conduct offensive if his gender is equally represented, or underrepresented, in the workplace. Weiner's model also accepts statistical representation as a proxy for substantive equality between the sexes.

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84. Nejat-Bina, *supra* note 13, at 347.

85. *Id.* at 347, 349, 351.

86. *Id.*

87. Weiner, *supra* note 15, at 649-50.

88. *Id.* at 622.

89. *Id.* at 649.

90. *Id.*



There are two problems with using numerical representation of males and females in the workplace as the basis for adopting a particular sexual harassment policy. First, such a distinction furthers the notion that women are not disempowered in the workplace if they are present in reasonable proportion to men. This formalistic proxy ignores other measures of equality such as compensation, benefits, job assignments, and opportunities for promotion. Second, Weiner's approach could encourage paternalistic gender relations at work. Her proposed policy instructs the speaker to act on behalf of those who are considered not strong enough to complain, get the joke, or welcome the attention. By carving out specific employment contexts as spaces where the male speaker must act differently, the provision implies that, with the exception of women working in a firm dominated by men, women generally appreciate sexual comments or advances.

There are other problems with Weiner's proposed policy. The model policy effectively incorporates the unwelcomeness element, emphasizing the importance of confrontation and self-assessment on the victim's part. Weiner's policy instructs the person who feels harassed to explain her reaction to the alleged harasser. If she finds that too uncomfortable, she is to speak with a supervisor or designated equal employment opportunity officer. The person who feels harassed should also assess her own behavior for signs that she has signaled sexual interest in the alleged harasser.<sup>91</sup> The goal of administering the unwelcomeness law humanely through workplace sexual harassment policy could succeed if employers required that the alleged harasser show that the complaining employee welcomed the conduct. Short of a provision like this, the employer policy will continue to recreate the entrenched assumptions that are part and parcel of the unwelcomeness factor.

### *C. Shift the Burden of Proof to Defendant to Prove Welcomeness*

Before *Ellerth* and *Faragher*, Mary Radford called for reversing the unwelcomeness burden. Her proposal would shift the presumption that sexual advances are welcome at work to a presumption that they are unwelcome.<sup>92</sup> Once the plaintiff proves the other necessary elements of a prima facie case for sexual harassment, actionable sexual harassment would be found unless the harasser proves that the conduct complained of was welcome.<sup>93</sup> Radford argues that this paradigm would better respond to empirical findings that women view sexual conduct in the workplace as generally unwelcome.<sup>94</sup> Moreover, burden-

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91. *Id.* at 650.

92. Radford, *supra* note 16, at 505.

93. *Id.* at 525-26.

94. *Id.* at 522 n.147, 524 (citing BARBARA GUTEK, SEX AND THE WORKPLACE: THE IMPACT OF SEXUAL HARASSMENT ON MEN, WOMEN AND ORGANIZATIONS 95-96 (1985); Susan Littler-Bishop et

shifting would not leave defendants in an insupportable position, especially in the instances where they may be targets of excessive sexual harassment claims, because the burden could be met by objective evidence. Radford predicts that this change would encourage clear communication between those employees pursuing consensual relations at work. Additionally, Radford notes that the burden shift would allow women who express their lack of consent with a polite “no” or who express their resistance through silence to be better protected because these reactions would likely not satisfy the defendant’s burden of proving welcomeness.<sup>95</sup>

### III. INSIGHTS FROM TWELVE PRACTITIONERS

Although scholars critiquing the unwelcomeness requirement have proposed numerous potential reforms, unwelcomeness remains an entrenched element of sexual harassment jurisprudence. To examine the role of the unwelcomeness standard in current sexual harassment law, I interviewed practitioners in the employment discrimination field.<sup>96</sup> My goal was to investigate their views on possible changes to sexual harassment doctrine. Specifically, I explored their reactions to the possibility of completely eliminating the unwelcomeness requirement and their reactions to the proposal to switch the burden of showing unwelcomeness from the plaintiff to the defendant. I wanted to understand how the proposed changes would affect the types of lawsuits litigators choose to bring and the ways in which gender is constructed through sexual harassment litigation.

Due to the small sample size in a focused geographic region, I do not argue that my interview subjects are representative of any particular group. The main benefit of the interview data is the real-world perspective offered by actual lawyers working in the field of employment discrimination law. I interviewed twelve lawyers who practice employment law in Chicago. Four attorneys represent only defendants, four represent only plaintiffs, and four represent the EEOC in employment discrimination suits. All twelve practitioners have worked on at least three sexual harassment cases in the past five years. The interviews were face-to-face interactions consisting of open-ended questions and lasting approximately forty-five minutes each. I asked each respondent to discuss what reforms they would make to sexual harassment law. After this discussion, I presented two proposals: (1) eliminate the unwelcomeness requirement; or alternatively, (2) shift the burden of the unwelcomeness requirement to the defendant to prove welcomeness. The basic interview

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al., *Sexual Harassment in the Workplace as a Function of Initiator’s Status: The Case of Airline Personnel*, 38 J. SOC. ISSUES 137, 147 (1982).

95. *Id.* at 526, 528.

96. Interviews with Employment Law Practitioners in Chicago, Ill. (Feb. 2006) (transcripts on file with author).

questions are attached at the end of this Article.<sup>97</sup> Some of my questions were only directed towards the plaintiff and EEOC attorneys: Because these lawyers play a gatekeeper role in determining which cases are actually brought to court, I asked them to explain how they decide whether to represent an employee complaining of sexual harassment.

When asked to identify desired reforms for sexual harassment law, respondents identified practices reflecting the stereotypical assumption that women welcome sexual conduct that they would want to change, but they did not propose directly changing the unwelcomeness requirement. Indeed, lawyers on both the defense and plaintiffs' sides seemed to take it for granted that the victims of sexual harassment bear the responsibility for proving that the alleged attention is unwanted. Regardless of how the lawyers came to adopt this presumption, the fact that all of my interview subjects agreed on this point demonstrates the extent to which the unwelcomeness perspective has been accepted and internalized. The unwelcomeness requirement has become a conventional understanding that permeates sexual harassment law to such an extent that it has become naturalized, or taken for granted.<sup>98</sup>

#### *A. The Respondents' Proposed Changes*

Changes proposed by the practitioners, which I discuss below, include (1) adjusting the *Ellerth* and *Faragher* affirmative defense so that an employee's use of the internal complaint system does not play such a large role in the analysis; (2) not allowing discovery regarding intimate details of a plaintiff's personal life; and (3) implementing a more consistent standard to determine whether alleged conduct was "severe or pervasive." Again, none of the lawyers I interviewed suggested changing the unwelcomeness requirement.

##### *1. Decrease Importance of Reporting and Complaining*

When asked what they would change about the litigation of sexual harassment cases if they could change anything, six respondents (from both the plaintiff and defense bars) said they wanted to change the importance of reporting and complaining. All of the lawyers who raised this point said they understood the employer's need for a chance to respond to alleged harassment, but expressed concern about the impracticability of the requirement. According to these lawyers, women's legitimate fear of retaliation for complaining within the company should cause courts to place less importance on reporting and

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97. See *infra* Appendix I.

98. For a discussion of how a "naturalized" concept becomes hegemonic, see JOHN & JEAN COMAROFF, *ETHNOGRAPHY AND THE HISTORICAL IMAGINATION* 29 (1992). The Comaroffs argue that when conventional understandings are so pervasive that they are internalized and naturalized, they become hegemonic and taken for granted.

complaining. In the opinion of these six respondents, failure to report should not defeat a plaintiff's entire claim under the second prong of the *Ellerth* and *Faragher* affirmative defense.

When asked if they considered the reporting element to be related to requiring a plaintiff to show unwelcomeness, the respondents all said that unwelcomeness was a separate analysis that could be strengthened if the plaintiff did complain. Lawyers representing plaintiffs and the government reported that they rarely encounter difficulty proving the unwelcomeness of the conduct. An EEOC attorney said, "If the complaining party says it was unwelcome, it was unwelcome."<sup>99</sup> At the same time, the plaintiffs' attorneys said that they consider whether the complaining party formally reported the conduct to her employer when evaluating the strength or value of a particular case. In the interviews, the complaint inquiry and the unwelcomeness requirement were seen as separate but somewhat overlapping circles: If an employee complained, she had contributed to her showing of unwelcomeness; similarly, if she had yelled at the alleged harasser for the unwelcome conduct, she might have ameliorated her obligation to complain. The shared normative justification for both of these elements, however, was not considered or questioned. Although seven respondents—two EEOC attorneys, and all of the plaintiff attorneys—expressed pragmatic concerns regarding the difficulties of using the employer's complaint mechanisms, none questioned the norm that the victim should bear the burden of filing an internal complaint or demonstrating unwelcomeness.

## 2. *Stop Prying into the Plaintiff's Personal Life During Discovery*

All of the EEOC and plaintiffs' attorneys expressed concern that, in spite of case law establishing that there is no place for a plaintiff's personal life in the analysis,<sup>100</sup> the unwelcomeness element of a prima facie case for sexual harassment opens the floodgates for defense attorneys to turn the process of discovery into a process of humiliation for the complaining party. One respondent recalled a class action lawsuit in which a judge allowed defense attorneys to depose each of the husbands of the plaintiffs for the purposes of determining fidelity issues. Another involved a hostile environment and more than a hundred female class members. In that case, defense attorneys deposed all the class members with questions ranging from whether the women had ever

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99. Interview with Employment Law Practitioner in Chicago, Ill. (Feb. 2006) (transcripts on file with author).

100. See, e.g., *Burns v. McGregor Elec. Indus.*, 989 F.2d 959 (8th Cir. 1993) (declaring that a woman's life and sexual behavior outside the workplace has no relevance to whether she welcomes sexual harassment from her boss, and reversing a district court ruling that a woman who posed nude for a biker magazine could not be offended by sexual advances at work).

had sex with any of the employees at the company, to whether they had ever used the word “fuck” at work or ever asked out a co-worker.<sup>101</sup>

The plaintiffs’ and EEOC attorneys argued that these inquiries are not only irrelevant, but also punitive; their intrusiveness may deter legitimate plaintiffs from bringing cases. According to the interview subjects, depositions routinely focus on matters that are unrelated to the facts of the case. In addition to largely irrelevant questions regarding plaintiffs’ personal and sexual lives, plaintiffs often face tedious and exhausting questions regarding their entire education and employment history. An EEOC attorney surmised that the tactic is designed to make the process more unpleasant for class members. The more unpleasant the experience, the greater the likelihood that other class members will not appear for depositions, thereby limiting the amount of evidence that can be collected against the employer.

Attorneys who represent employers did not characterize the process of asking plaintiffs personal background questions as a strategy intended to humiliate or discourage plaintiffs. Instead, they emphasized that discovery allows all relevant evidence to be gathered.<sup>102</sup> According to one lawyer, employers need a liberal discovery process to uncover evidence about a plaintiff’s “seedy” background that may call into question whether the conduct she experienced was unwelcome. Examples of potentially relevant “seediness,” according to this attorney, included past relations with other employees and a history of bringing sexual harassment suits. Other defense attorneys justified the intrusive discovery process as an appropriate way to discourage frivolous complaints, such that potentially ill-motivated plaintiffs do not assume, as one lawyer put it, that “making a sexual harassment complaint will be a breeze.”

In sum, the lawyers I interviewed varied in their views of whether questions about the plaintiffs’ personal lives help to reveal whether the alleged harassment was truly unwelcome. In general, plaintiffs’ and EEOC attorneys find such inquiries problematic; defense attorneys do not. None articulated concern about the underlying fact that the *plaintiffs* must prove the unwelcomeness element.

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101. A related point that was raised in the interviews, which is not directly relevant to this Article, was a concern about the questioning that plaintiffs are subjected to once they seek anything beyond standard pain and suffering damages. Their entire medical, emotional, and sexual histories become open to discovery as the defense tries to establish that the complained-of behavior was not the true cause of the distress for which the plaintiff seeks compensation. *See, e.g.,* McClelland v. Montgomery Ward & Co., No. 95C23, 1995 WL 571324 (N.D. Ill. Sept. 25, 1995) (denying two plaintiffs’ motions to exclude evidence of their childhood and adolescent sexual, physical, mental, and emotional parental abuse on the grounds that Federal Rule of Evidence 412 is inapplicable where the evidence is not used to show sexual behavior or predisposition, but to show that plaintiffs’ suffering stemmed from abuse rather than sexual harassment at work).

102. For good cause, courts may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at trial if the discovery request appears reasonably calculated to lead to the discovery of admissible evidence. FED. R. CIV. P. 26(b). *But cf.* FED. R. CIV. P. 26(c) (allowing a court to authorize a protective order to protect a party from “annoyance, embarrassment, oppression, or undue burden” in the discovery process).

### 3. *Change Severe or Pervasive Standard*

Six of the plaintiff-side and EEOC lawyers I interviewed believed the courts require an unnecessarily high level of “severe or pervasive” harassment for conduct to rise to the level of an actionable hostile work environment claim. All of the plaintiffs’ attorneys and two EEOC attorneys believed that Title VII would be better served if fewer hostile work environment cases were dismissed at summary judgment so that a jury could decide whether the facts established an actionable environment. According to one lawyer, recent decisions indicate that, even in situations where someone is faced with graffiti and sexually explicit material day after day, the court will find that the materials are not directed at the individual and thus not severe. Another lawyer suggested that there is a general presumption in the legal community that courts tend to reject hostile work environment claims based on verbal conduct by dismissing them as sexual banter or horseplay; actionable harassment usually requires unwelcome physical contact. Indeed, the Seventh Circuit has held that the hostile work environment that is actionable is that which is “hellish.”<sup>103</sup>

The defense attorneys interviewed did not take issue with the severe or pervasive standard, believing that the standard preserves a separation of unacceptable behavior from regular interpersonal dynamics of the workplace. If anything, these lawyers felt that more cases should be decided on summary judgment, conserving both time and money, and allowing the parties to move forward with their respective lives. One defense attorney observed that the severe or pervasive standard served the purpose of preserving an employer’s autonomy by allowing employers to manage their environments as they saw fit, rather than micro-manage every social situation in the workplace. This attorney believed that employers should not be liable for the day-to-day actions of their employees, especially when no tangible employment action is involved, unless the behavior is notorious. Two expressed displeasure with what they perceived to be the arbitrary way sexual harassment claims seem to be handled by the EEOC—launching into detailed document requests and interviews for the most bare-boned complaints in some cases and dismissing others before the employer even responds. One attorney said that, for every meritorious sexual

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103. *Perry v. Harris Chernin, Inc.*, 126 F.3d 1010, 1013 (7th Cir. 1997) (citing *Baskerville v. Culligan Int’l Co.*, 50 F.3d 428, 430 (7th Cir. 1995)); *see also Whittaker v. N. Ill. Univ.*, 424 F.3d 640, 644 (7th Cir. 2005) (affirming summary judgment for the defendant where the plaintiff alleged her supervisor asked her out repeatedly despite refusals and referred to her as a “bitch,” “fucking lazy bitch,” “goddam whore,” “fucking slut,” and “stupid cunt” because most of the derogatory statements were made outside her presence and the propositions were simply questionable instances of non-severe misconduct); *Harvill v. Westward Commc’ns*, 311 F. Supp. 2d 573 (E.D. Tex. 2004) (holding that a male co-worker’s alleged conduct, which included attempting to grab ahold of and kiss a female employee on the cheek, brushing up against her breasts and body, patting her on her behind, shooting rubber bands at her and aiming for her breasts, and telling her he had heard she was “good in bed,” was not, if proven, so severe and pervasive as to alter the terms and conditions of her employment, and thus not actionable under Title VII).

harassment claim that was filed, twenty more were concocted “to play the lottery.”

In short, there is a very wide gap in how the severe or pervasive standard is perceived between the plaintiff-side and defense-side lawyers. The plaintiffs’ and EEOC attorneys I interviewed were concerned that the standard is too burdensome on plaintiffs. The defense attorneys believed it prevented frivolous cases from absorbing needless time and energy.

### *B. Responses to Proposed Changes to the Unwelcomeness Element*

I asked the lawyers to react to two ideas: eliminating the unwelcomeness element from the prima facie case, and shifting the burden of proving unwelcomeness from the plaintiff to the defendant.

#### *1. Eliminating the Unwelcomeness Element*

When asked specifically whether eliminating the unwelcomeness element from the prima facie case would be a good idea, seven of the respondents said no. Four were defense attorneys, two were EEOC attorneys, and one was a plaintiff’s attorney. They reasoned that disposing of the unwelcomeness element would broaden application of sexual harassment law to situations for which it was never intended. For example, the lawyers were concerned that eliminating the unwelcomeness requirement would allow consensual sexual conduct to be recognized as unlawful harassment. In addition, four lawyers expressed concern that such a shift would lead to a workplace where “natural,” “healthy” interaction between men and women would no longer be allowed. One lawyer suggested that employees in consensual relationships gone awry would be more likely to succeed in sexual harassment claims if not required to prove unwelcomeness. The lawyers also expressed concerns about the effect the change would have on employers: Several of the lawyers predicted that, if unwelcomeness were eliminated as an element of the prima facie case, employers would prohibit a good deal of workplace social conduct in order to protect against litigation.<sup>104</sup>

The other five attorneys I interviewed viewed the proposal to eliminate the unwelcomeness element as a promising way to cure the problem of overly-invasive discovery. Nonetheless, one lawyer worried that, should unwelcomeness really become irrelevant to the prima facie case, the severe or pervasive standard in hostile work environment cases would be raised to a new level of “hellishness.” None of the respondents—neither those supporting the

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104. For a discussion cautioning against a sanitized workplace where employers must reach over broadly to shield themselves from liability, at the expense of employee’s sexual autonomy and free expression, see Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061 (2003).

removal of the unwelcomeness standard nor those objecting—actually thought the change would come to pass. They predicted too much institutional resistance in the judicial system and the defense bar, as well as a lack of popular support.

## 2. *Burden Shifting*

All of the plaintiffs' attorneys and three EEOC attorneys responded positively when I proposed the idea of a burden shift. One attorney said it made sense for sexual harassment to be analyzed under the doctrine of tort law because, assuming the plaintiff can demonstrate the other elements of the prima facie case, the law should understand the conduct as one that does not normally occur unless the employer has been negligent. Then, the employer could succeed only by presenting evidence that the conduct in question was welcome. Another attorney supported the idea of shifting the burden because, the lawyer said, a plaintiff required to prove unwelcomeness has the difficult burden of proving "that something didn't happen." A few of the lawyers interviewed also stressed that much sexual harassment occurs when no witnesses are present, and shifting the burden would incentivize the harasser to pay attention to how the co-worker responded. While a few of the lawyers I interviewed said a burden shift would not address the intrusive inquisitions into plaintiffs' personal lives during discovery, these attorneys felt that it could nonetheless improve the prevention of sexual harassment itself.

Many of the five attorneys who disapproved of the burden shift said such a change would violate the American legal norm that a person is presumed innocent until proven guilty. Reallocating the burden of proof, these lawyers suggested, would insinuate that the alleged harasser is guilty before the full merits of the case are aired. They worried that shifting the burden would place an even greater stigma on the accused at an earlier stage than under the current framework. These same lawyers also expressed concern that a burden shift would lead to perverse incentives. Employees might file sexual harassment charges frivolously, hoping that the employer would be quicker to settle than under the current system. In response, employers might overreact and eradicate all socializing from the workplace, making work an isolating experience.

As with the proposal to remove the unwelcomeness element from the prima facie case, none of the lawyers I interviewed believed that there was any likelihood that the burden of proving unwelcomeness would be shifted from the plaintiff to the defendant. Most of the lawyers guessed that the courts and EEOC were unlikely to change precedent, and that it would be difficult to mobilize congressional action. One of the attorneys said that "people just don't get excited about burden shifts."



*C. The Presumption that Women Welcome Sexual Advances at Work*

In sum, lawyers who practice employment discrimination law have come to accept the notion that the plaintiff bears the burden of showing unwelcomeness. When I asked my interview subjects to identify procedural as well as substantive reforms to sexual harassment law, they suggested a variety of changes, but none of them related to the unwelcomeness element. Nonetheless, my interviews demonstrated that the unwelcomeness inquiry shapes how plaintiffs' and EEOC attorneys select cases.

*1. Entrenchment by Plaintiff Attorneys at the Screening Stage*

Plaintiffs' attorneys serve as unofficial triers of fact when they screen potential clients, probing the strength of the case and whether the alleged behavior comes across as unwelcome, before deciding whether to take the case. The plaintiffs' attorneys I interviewed said that they carefully screen prospective clients because they cannot afford to handle cases that are unlikely to prevail. All four said that they make note of the clothing worn by prospective clients during the consultation, though no one said a prospective client would be turned away based on dress alone. Whether the prospective plaintiff wears low-cut shirts or tight skirts affects the attorneys' calculation of how likely the case is to prevail. One of the lawyers said she tried to gauge how a jury might respond to the woman, and whether she would come across as credible. Even if dressed differently for court, the lawyer worried that the defense would be able to call co-workers who would testify to the woman's normal style. As mentioned above, attorneys also consider whether the prospective client has made a formal internal complaint regarding the alleged harassment in deciding whether to take a case.

These considerations mirror the standards established by courts to determine if the plaintiff has satisfied the unwelcomeness element of the prima facie case or defeated the second element of the defendant's affirmative defense. This practice is understandable because plaintiffs' attorneys can only afford to take cases that are likely to succeed in court. However, such screening only entrenches the assumption underlying the unwelcomeness requirement: that women welcome sexual behavior at work.

*2. Enforcement by the EEOC Attorneys at the Screening Stage*

At the EEOC, the attorneys are further removed from the prospective client than the plaintiffs' attorneys I interviewed. Before EEOC attorneys consider a case, EEOC investigators have already vetted the merits of the case. As a result, the EEOC attorneys see only a fraction of the sexual harassment claims filed

with the agency; just six percent of the total number of cases filed are reviewed by the attorneys.<sup>105</sup> Consequently, the cases that do reach the agency's legal department are already strong. These plaintiffs generally have no trouble establishing a prima facie case, including the unwelcomeness element. Thus, EEOC attorneys do not usually evaluate a plaintiff's ability to demonstrate the unwelcomeness of the conduct in deciding whether to take on a case. The result: EEOC lawyers do not seem to consider the possibility that the unwelcomeness requirement disqualifies otherwise valid sexual harassment claims. From their perspective, the unwelcomeness element does not undermine the transformative potential of Title VII; there is no problem with the current framework.

Plaintiff and EEOC attorneys fight to enforce Title VII for a living, but the economic and procedural constraints facing these attorneys limit the law's transformative potential. It is understandable that a plaintiff's lawyer must choose cases likely to succeed, and that an EEOC attorney only interacts with those cases approved by investigators. But each time a prospective plaintiff is turned away because of a short skirt or a tight blouse, the same stereotype is reinforced: Women (especially those who wear short skirts) welcome sexual conduct at work and bear the burden of proving otherwise. When the unwelcomeness standard is accepted instead of questioned, Title VII does not live up to its transformative potential.

#### CONCLUSION: SHIFTING THE BURDEN TO DESTABILIZE HEGEMONIC GENDER CONSTRUCTIONS

As long as courts and practitioners do not question the unwelcomeness requirement, Title VII's transformative potential cannot be fulfilled. As a result, I propose that the burden of proving the unwelcomeness element be shifted to the defendant to show that the alleged harassment was welcome.<sup>106</sup> For quid pro quo sexual harassment cases, to the extent that unwelcomeness is an issue, the defendant should bear the burden of demonstrating that the employee welcomed the conduct. For hostile work environment cases, where the unwelcomeness requirement in the prima facie case and the affirmative

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105. See *infra* Appendix 2. Enforcement Data for FY 2006-FY 2007 provided in an e-mail from John P. Rowe, District Director, Chicago District Office, EEOC, to author (Nov. 6, 2007, 02:28:00 CST) (on file with author); Enforcement Data for FY 2001-FY 2005 provided in an e-mail from Calvin E. Loving, Jr., Director, Systems Development and Operations Division, EEOC, to author (Mar. 21, 2006, 13:42:10 EST) (on file with author); Litigation Data for FY 2001-FY 2005 provided in an e-mail from Jeffrey C. Bannon, Assistant General Counsel for Technology, EEOC, to author (Mar. 27, 2006, 10:14:38 EST) (on file with author). For enforcement data reflecting sexual harassment charges filed with the EEOC and with state and local Fair Employment Practice agencies, see Sexual Harassment Charges, EEOC & FEPAs Combined: FY 1997-FY 2007, Feb. 26, 2008, <http://www.eeoc.gov/stats/harass.html>.

106. This suggestion is also made by Radford. See Radford, *supra* note 16.

defense are functionally redundant,<sup>107</sup> the prima facie case should no longer include an unwelcomeness requirement. Instead, the employer should be able to rebut the prima facie case by demonstrating that the employee welcomed the alleged harassment.

### A. *Justification*

As discussed throughout this Article, the unwelcomeness requirement assumes that women generally welcome sexual conduct in the workplace, and that it is their burden to prove otherwise. Since this presumption is both empirically inaccurate and detrimental to the goals of Title VII, shifting the burden of proving unwelcomeness from the plaintiff to the defendant is not only fair but also just.<sup>108</sup> I address four possible ways that this reform would help Title VII achieve its transformative potential. Some of these ideas were suggested by the practitioners whom I interviewed.

First, while the burden shift would not automatically result in the exclusion of inappropriate discovery into a complaining party's personal history, it would provide a more focused inquiry than the current standard. Once the question centers upon whether the defendant had reason to believe his conduct was welcome, the relevant inquiry becomes how the plaintiff behaved toward the defendant—not toward other, unrelated parties in the past. Though a defendant could still argue that he thought the complaining party welcomed his behavior because of her reputed promiscuity, this argument becomes harder to make once the burden is shifted. In order to succeed, the defendant would have to show that he was aware of the plaintiff's past sexual conduct at the time of the alleged harassment. Even then, knowledge of the plaintiff's past would not be enough to prove that the plaintiff welcomed his attention. The defendant would need more.

Second, shifting the burden would also allow more cases to satisfy the prima facie case and defeat an affirmative defense. A plaintiff would have one less element to prove at the outset. In addition, her dress, walk, and manner of talking would be less important—both during an attorney consultation and in front of a court. Nor could the defendant in a case successfully challenge the plaintiff's prima facie case by claiming that the plaintiff did not clearly convey that the defendant's behavior was unwelcome. For example, silence from the plaintiff—which some courts have found insufficient to establish

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107. See Nejat-Bina, *supra* note 13.

108. Although some of the attorneys worried that shifting the burden would violate the norm of innocent until proven guilty, the presumption of innocence in favor of the accused lies at the foundation of the administration of our criminal law, not our civil law. See *Coffin v. U.S.*, 156 U.S. 432, 453 (1895). Here the issue is welcomeness—not guilt—and the plaintiff is the harassed employee, not the State. The plaintiff's resources fall far short of the State's resources in a criminal case. The presumption of innocence is inapplicable here.

“unwelcomeness”<sup>109</sup>—would be difficult to interpret as an expression of welcomeness. Nor should avoidance or joking back, by themselves, indicate the plaintiff’s welcoming attitude toward the conduct. Instead, more emphasis should be placed on the alleged harasser’s conduct and his response to the plaintiff’s reactions. In other words, the burden shift would lead to a narrower inquiry: Only if the defendant succeeded in showing that the plaintiff affirmatively welcomed the conduct could he prevail over the sexual harassment claim.

Finally, in the long-term, shifting the burden could lead to a new understanding of sexual harassment. Women would no longer be presumed to welcome sexual conduct in the workplace. One possible result is a lower bar for the severe or pervasive standard in actionable hostile work environment claims. That is, courts might be less likely to dismiss cases involving derogatory slurs, sexual jokes, grabs, and propositions written off as horseplay, boorishness, or questionable misconduct. It could take fewer slurs or grabs to add up to “severe or pervasive” because each incident would be seen as more serious.

### *B. Implementation*

Since reallocating the burden of proving unwelcomeness would help to realize the transformative potential of Title VII, the question becomes one of practicality. Ideally, Congress would amend Title VII. But even without legislative action, other actors can play an important role.

Even though courts would not be able to shift the burden to the defendant to prove welcomeness without formally overruling part of *Meritor*, courts could achieve a functional burden shift by considering the unwelcomeness element satisfied as a matter of law as soon as a complaint of sexual harassment is made. The defendant would have the opportunity to rebut the showing of unwelcomeness by using evidence of the plaintiff’s welcoming words and acts. Alternatively, courts could implement the burden shift by analyzing the evidence of “unwelcomeness” differently. Rather than focusing on whether the plaintiff made a formal complaint or explicitly rejected the alleged harasser, courts could recognize silence or joking responses as possible displays of unwelcomeness. This more liberal construction of unwelcomeness would have the same practical effect as switching the burden. It would require the alleged

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109. See, e.g., *Hocevar v. Purdue, Frederick Co.*, 223 F.3d 721, 723-25 (8th Cir. 2000) (affirming summary judgment for employer because plaintiff sales employee failed to establish that alleged sexual advances by managers were unwelcome, even though plaintiff testified that her fear was the reason she did not report the harassing conduct until it had continued for three years); *Sauers v. Salt Lake City*, 1 F.3d 1122, 1124, 1126 (10th Cir. 1993) (noting that plaintiff did not find the employer’s conduct “unwelcome sexual harassment,” but rather found it “degrading and disgusting,” and affirming—despite jury finding for plaintiff—district court judgment that plaintiff failed to show that alleged harassment was unwelcome).

harasser to come forward with evidence affirmatively showing that the plaintiff welcomed the conduct.<sup>110</sup>

In addition, the EEOC should revise the definition of “unwelcomeness” in its guidelines and bring test cases to generate case law that will preserve the burden shift. The EEOC should issue a new interpretive rule clarifying the definition of “unwelcome” sexual harassment. Currently, the EEOC guidelines define sexual harassment as:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.<sup>111</sup>

The new rule must make clear that these types of advances, requests, and conduct are presumed to be “unwelcome” unless the alleged harasser can demonstrate that the behavior in question was affirmatively welcome.

While courts are not bound by an administrative agency’s regulations, they do seek guidance from them.<sup>112</sup> Such a change in EEOC policy would have wide effects, even if courts do not follow suit. First and foremost, the EEOC could follow its own interpretive rules at the administrative enforcement stage.<sup>113</sup> While some employers might simply avoid the EEOC and try to prevail in court, it is hard to imagine all employers doing so. Compared to going to court, administrative adjudication through the EEOC is less time consuming<sup>114</sup> and less open to public scrutiny.<sup>115</sup> Thus, employers who pay

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110. Broad legal construction is another way in which legislation designed to benefit the disadvantaged can be expanded. See Nicholas Pedriana & Robin Stryker, *The Strength of a Weak Agency: Enforcement of Title VII of the 1964 Civil Rights Act and the Expansion of State Capacity, 1965-1971*, 110 AM. J. SOC. 709 (2004), for an examination of how social movements helped to make a broader interpretation of Title VII possible in the courts.

111. EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (2008).

112. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986) (citing *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976)).

113. Under EEOC procedures, once the employer is notified that the charge has been filed, the EEOC may take one of several actions. First, it may assign the charge for priority investigation if the initial facts appear to support a violation of law. If the evidence is less strong, the EEOC may assign the charge for follow-up investigation to determine whether it is likely that a violation occurred. As part of the investigative process, the EEOC may make written requests for information, interview people, review documents, and visit the site where the alleged discrimination occurred. Additionally, the EEOC may dismiss the charge if, in the agency’s best judgment, further investigation will not establish a violation of the law. EEOC, EEOC Charge Processing Procedures, available at [http://www.eeoc.gov/charge/overview\\_charge\\_processing.html](http://www.eeoc.gov/charge/overview_charge_processing.html) (last visited Apr. 11, 2008).

114. From 2001 to 2005, between sixty-four percent and sixty-nine percent of discrimination charges filed with the EEOC were resolved in 180 days or less. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, FY 2005 PERFORMANCE AND ACCOUNTABILITY REPORT (2005), [http://www.eeoc.gov/abouteeoc/plan/par/2005/achieving\\_results.html](http://www.eeoc.gov/abouteeoc/plan/par/2005/achieving_results.html) (last visited Apr. 11, 2008).

attention to EEOC guidelines would be encouraged to reformulate their sexual harassment policies to withstand scrutiny under the clarified EEOC standards. Over time, employees as well as employers would no longer presume that the plaintiffs in sexual harassment cases welcomed the alleged behavior. The hegemonic view of gender roles, as enforced by sexual harassment jurisprudence, would slowly erode. Sexual harassment law under Title VII would come closer to fulfilling its transformative potential.

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115. Sections 706(b) and 709(e) of Title VII prohibit the disclosure of Title VII charge files to third parties prior to the institution of a proceeding under Title VII involving such information. EEOC, *Summary of Exemptions*, in FREEDOM OF INFORMATION ACT REFERENCE GUIDE (2008), <http://www.eeoc.gov/foia/hb-11.html> (last visited Apr. 11, 2008).

APPENDIX 1: OUTLINE OF INTERVIEW QUESTIONS<sup>116</sup>

## I. Professional Background

A. Identify profession and length of time in current position.

B. Identify specialties and motivations for specializing in sexual harassment.

## II. Professional Practice

A. How many times have you litigated a sexual harassment suit in the past ten years [if practicing for fewer than ten years, use number of years in practice]?

1. Discuss—success rate; receptiveness by trier of fact to different theories.

2. What would you like to change about the way the court analyzes sexual harassment cases, and why?

B. [If plaintiff/government attorney] Have you reviewed sexual harassment complaints and found that even though you may believe the complainant's account, you recommended not going forward because you felt that the claim would not succeed in court?

1. [If yes] Please describe a few examples.

a. What caused you to feel that the trier of fact would not find in favor of the complainant?

b. What caused you to believe the complainant's story?

2. [If no] Please explain.

a. Do you take all cases where you believe the complainant is telling the truth?

b. What are the standards by which you measure whether the complainant is telling the truth?

i. How do they compare with standards recognized by the court?

ii. If your standards are different from those of the court, how do you go about convincing the trier of fact to find for your client?

## III. Thoughts Regarding Shifting the Burden of Proof

A. What would you change about the litigation of sexual harassment cases if you could change anything?

B. [Explain the idea of a burden shift.] What do you think about the proposed change?

C. Assuming the change took effect, how would you frame cases differently?

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<sup>116</sup> The interviews were not limited to these questions. The questions listed here were often used as a launching point for follow-up questions and more in-depth discussions.

D. Assuming the change took effect, would it affect the types of lawsuits you bring?

1. [If yes] How?
2. [If no] Why not?

E. Assuming the change took effect, do you think it would affect the courts' efficacy in enforcing Title VII?

1. [If yes] How?
2. [If no] Why not?

F. What challenges (e.g., legal, social, political) do you think this change would face if it were proposed?

IV. Other thoughts and comments, pertinent to the topic but not specifically addressed, that may have arisen?



## APPENDIX 2: DISPOSITION OF SEXUAL HARASSMENT CHARGES

**Disposition of Sexual Harassment Charges Filed with the EEOC  
(Fiscal Years 2001-2007)**

	2001	2002	2003	2004	2005	2006	2007	2001-07 Average
Charges Received	9,383	8,941	8,172	8,100	7,759	10,815	11,498	9,238
Administrative Closure	23%	21%	21%	20%	16%	21%	20%	20%
Settlement with Benefits	9%	12%	12%	13%	10%	12%	12%	11%
Withdrawal with Benefits	5%	6%	6%	6%	6%	7%	6%	6%
No Reasonable Cause	50%	50%	51%	50%	41%	46%	42%	47%
Reasonable Cause Found	13%	11%	11%	9%	4%	8%	7%	9%
Reasonable Cause Found and Conciliation Failure	9%	8%	8%	7%	3%	6%	5%	6%
Reasonable Cause Found and Conciliation Success	4%	3%	3%	2%	1%	2%	2%	3%
Reasonable Cause Found, Conciliation Failure, and Lawsuit Filed	1%	1.4%	1.5%	1.3%	1.4%	1%	0.7%	1.2%
Lawsuit Resolved	.80%	1%	1.5%	1.3%	1.2%	1%	0.7%	1.1%

Note: This total accounts for all charges filed with the EEOC, not just those filed with the Chicago district office. Each percentage figure measures the relevant disposition as a percentage of all charges filed. All possible methods of resolving cases are not listed, nor does the EEOC resolve all charges filed with the agency within the fiscal year, so the percentages reported do not necessarily add up to 100 percent.

