3-1-1994

By Invitation Only: The Proof of Welcomeness in Sexual Harassment Cases

Mary F. Radford
Emerging as one of the most complex and controversial legal issues of the decade, sexual harassment presents employers, employees, lawmakers, and judges alike with a myriad of questions regarding the appropriate model of proof by which such cases should be adjudged. Among the elements of any sexual harassment suit is the welcomeness element, which questions whether the plaintiff in any way consented to the conduct in question. Under the current scheme, the burden falls on the plaintiff to prove the unwelcomeness of the harassing conduct, thus creating a presumption of welcomeness as to the conduct alleged.

In this Article, Professor Mary Radford questions the validity of the current model of proof as to this element and proposes an alternative paradigm by which welcomeness rather than unwelcomeness should be proved in sexual harassment cases. After discussing the evolution of the welcomeness element from early Equal Employment Opportunity Commission pronouncements to the United States Supreme Court's decision in *Meritor Savings Bank v. Vinson* and subsequent decisions from the circuit courts of appeals, Professor Radford analyzes the element in light of current sociological and psychological studies of sexual harassment. Rather than eliminate the welcomeness element entirely, Professor Radford proposes two revisions to its current model of proof: (1) a shift of the burden of proving welcomeness to the defendant; and (2) a narrowing of the definition of the term to exclude extraneous factors and limit the scope of inquiry to interactions occurring solely between the plaintiff and defendant. Professor Radford concludes that, by shifting the focus of sexual harassment adjudication from the target to the aggressor, the revisions would more appropriately satisfy the aims of sexual harassment laws.

* Professor of Law, Georgia State University College of Law. J.D., Emory University School of Law (1981); B.A., Newcomb College of Tulane University (1974). Research support for this Article was provided by the Georgia State University College of Law and the University Research Enhancement Program. The author is grateful to Scott M. Kaye for his research assistance.
I. JUDICIAL AND AGENCY INTERPRETATIONS OF THE UNWELCOMENESS REQUIREMENT
   A. Sexual Harassment as a Violation of Title VII
   B. Meritor Savings Bank v. Vinson
   C. Post-Vinson Response by the EEOC
   D. Post-Vinson Cases from the Circuit Courts of Appeals

II. SOCIOLOGICAL AND PSYCHOLOGICAL FINDINGS ON SEXUAL HARASSMENT
   A. The Scope of the Sexual Harassment Problem
   B. Differences in the Perception of Sexual Harassment
   C. Targets’ Responses to Sexual Harassment

III. A PROPOSED PARADIGM FOR PROVING WELCOMENESS
   A. Shifting the Burden of Proving Welcomeness
   B. Narrowing the Definition of Welcomeness
      1. The “Neither Solicited Nor Invited” Component: Welcoming the Particular Conduct
      2. The “Offensiveness” Component: Welcoming Such Conduct in General
   C. “By Invitation Only”: Application of the Proposed Paradigm
      1. Quid Pro Quo Harassment: The Sexual Bargain
      2. Social Interactions in the Workplace
      3. Participation in Sexual Conduct
   D. Should a Welcomeness Inquiry Play Any Role in Sexual Harassment Cases?
   E. Other Potential Criticisms of the Proposed Paradigm
   F. Effects of the Proposed Paradigm

IV. CONCLUSION

Visualize a party given by your mother, a woman of above-average social skills and grace. The first guest to arrive at her party, a former classmate, is a person well-liked by your mother, a person your mother informed of the party in writing, an “invited” guest. Your mother’s friend brings with her another former classmate who happened to fly in that afternoon on an unexpected business trip. This classmate was not invited to the party, but your mother is pleased that she has come and consents immediately to her joining the assembled group. The next person to arrive, your brother, brings with him a date your mother finds both irritating and rude. Your mother is not pleased about your brother’s date, but, of course, will not turn her away. Thus, your brother’s date is a “tolerated” guest, but one your mother would not have chosen. The last to arrive is your mother’s own sister, whom your mother has refused to see for years due to the sister’s
constant drunkenness. The sister is inebriated this night, so your mother
does not allow her to join the party—in other words, this guest is “re-
jected.” Certainly, two of these guests, your brother’s date and your
mother’s sister, were not “welcome” guests from your mother’s perspective.
Your brother, however, might later claim: “Of course my date was a wel-
come guest. Mom let her in, didn’t she?” In light of these conflicting per-
spectives, if your mother ever had to prove in a court of law that she viewed
your brother’s date as “unwelcome,” would she be able to do so?

Sexual advances and conduct in the workplace appear in the same vari-
eties as these guests—some invited, some not invited but happily accepted,
some merely tolerated, and others actually rejected.1 In attempts to concep-
tualize an appropriate model of proof in sexual harassment cases, three
questions arise: (1) which conduct should be considered actionable as sex-
ual harassment; (2) from whose perspective should the character of the con-
duct be judged; and (3) who should have the burden of proving whether the
conduct was welcomed? This Article focuses on the current law concerning
the third question and suggests an alternative paradigm for proving the pres-
ence or absence of welcome in a sexual harassment case.

One of the most complex work-related issues faced by employers, em-
ployees, lawmakers, and judges in the last decade,2 sexual harassment im-
plies basic conflicts between the genders3 and exposes our individual and
societal neuroses about sexuality.4 Sexual harassment cases tend to be ridd-
led with stereotypical notions about the attitudes of each sex toward sexual

1. In one of the earliest sexual harassment cases to be decided by a circuit court of appeals, Judge MacKinnon, in a concurring opinion, referred to “the distinction between invited, unin-
vited-but-welcome, offensive-but-tolerated, and flatly rejected advances” as being one that is diffi-
cult to discern. Barnes v. Costle, 561 F.2d 983, 999 (D.C. Cir. 1977) (MacKinnon, J.,
concurring).

2. Since the Anita Hill-Clarence Thomas hearings, focus by employers on sexual harass-
ment has become much more pronounced. In 1992, a poll of 160 New York area executives listed
sexual harassment as the third most important employment issue, after benefits and job security.
In a similar poll taken in 1990, sexual harassment had been ranked in fourteenth place. Four
Interesting Facts about Sexual Harassment, PERSPECTIVES: A NEWSLETTER FOR AND ABOUT Wo-
MEN LAWYERS, Spring 1992, at 5.

3. Although some sexual harassment incidents involve harassment of an employee by a
person of the same gender, the vast majority of incidents involve harassment perpetrated by a
person of one gender (usually male) on a person of the other gender (usually female). See U.S.
MERIT SYSTEMS PROTECTION BOARD OFFICE OF MERIT SYSTEMS REVIEW AND STUDIES, SEXUAL
SYSTEMS PROTECTION BOARD STUDY].

4. One commentator likens the development of attitudes toward sexual harassment to the
development of attitudes toward rape and wife abuse—that is, as a form of victimization that has
recently been “redefined as a social rather than a personal problem.” Stephanie Riger, Gender
Dilemmas in Sexual Harassment Policies and Procedures, 46 AMERICAN PSYCHOLOGIST 497, 497
(1991). For an interesting discussion of the interaction between the law and current societal
norms about sexuality, see Martha Chamallas, Consent, Equality, and the Legal Control of Sexual
interaction, presumptions about what workers should expect in a "normal" working environment, and lingering doubts about holding an employer liable for actions that might have been characterized as mere "horseplay" a few years before.

A myriad of questions about the appropriate legal approach to sexual harassment remain unanswered, the most pressing of which include the following: If a bisexual employer harasses both male and female employees, do such actions constitute discrimination on the basis of sex? Are intimidating actions that are not related to sexual desires truly sexual harassment? At what point do actions become "sufficiently severe and pervasive" to constitute a hostile working environment? Should the standard for determining the severity of actions be a subjective or an objective one? Should the perspective be that of the reasonable man, the reasonable woman, or the reasonable person? When should an employer be deemed


7. In Meritor Savings Bank v. Vinson, 477 U.S. 57, 65-67 (1986), the Supreme Court, citing the Guidelines issued by the Equal Employment Opportunity Commission, described two categories of sexual harassment: quid pro quo harassment, in which the request for sexual favors is directly linked to an economic or other tangible job benefit; and "hostile environment" harassment, which creates a hostile or intimidating work environment or otherwise unreasonably interferes with the plaintiff's work performance. The Court confirmed that the latter type of sexual harassment is actionable only if it is "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." Id. at 67 (quoting Henson, 682 F.2d at 904). For discussions of hostile environment sexual harassment, see generally Dawn D. Bennett-Alexander, Hostile Environment Sexual Harassment: A Clearer View, 42 LAB. L.J. 131 (1991); Sharon T. Bradford, Relief for Hostile Work Environment Discrimination: Restoring Title VII's Remedial Powers, 99 YALE L.J. 1611 (1990); Nicol6 D. Rizzolo, A Right with Questionable Bite: The Future of "Abusive or Hostile Work Environment" Sexual Harassment as a Cause of Action for Women in a Gender-Based Society and Legal System, 23 NEW ENGL. L. REV. 263 (1988).

8. See, e.g., Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991).

9. For contrasting approaches to this issue, see id. at 879 (adopting a reasonable woman standard) and Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir. 1986) (applying a reasonable person standard), cert. denied, 481 U.S. 1041 (1987). See also Kathryn Abrams, GENDER DISCRIMINATION AND THE TRANSFORMATION OF WORKPLACE NORMS, 42 VAND. L. REV. 1183, 1183-1200 (1989) (rejecting a reasonable person standard, but noting the limits of a reasonable woman standard that is not based on a careful elaboration of the differences between men and women); Nancy S. Ehrenreich, Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law, 99 YALE L.J. 1177, 1231-34 (1990) (criticizing the reasonable person test as perpetuating an unequal status quo for women); Howard A. Simon, Ellison v. Brady: A "Reasonable Woman" Standard for Sexual Harassment, 17 EMPLOYEE REL. L.J. 71, 78-79 (1991) (arguing that the Ninth Circuit's adoption of the reasonable woman standard will likely result in increased sexual harassment complaints and employer liability); Steven H. Winterbauer, Sexual Harass-
to have received notice of a sexual harassment problem? Does sexual harassment fall more logically into the category of tortious activity, such as invasion of privacy and the intentional infliction of emotional distress, than of sex discrimination? Are there First Amendment ramifications to limiting sexual speech in the workplace? To add to the confusion surrounding these legal issues, a number of recent sociological and psychological studies report findings relating to perceptions about sexual harassment that directly conflict with the presumptions utilized in the current law.

The uncertainty engendered by unanswered legal questions and conflicting sociological findings frustrates our society as it struggles to deal with sexual harassment in a manner that respects the rights of plaintiffs, alleged harassers, and employers. Even more troubling, however, the very definition accorded to the term "sexual harassment" by the legal system reflects a core misunderstanding of the problem.

The Equal Employment Opportunity Commission (EEOC) Guidelines offer the following definition of sexual harassment:

*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.\textsuperscript{15}

By including the term “unwelcome” in the definition of sexual harassment, the EEOC Guidelines characterize unwelcomeness as an element of the plaintiff’s cause of action and place on the plaintiff the burden of proving the unwelcomeness of the conduct in question.\textsuperscript{16} In other words, unless the target of the sexual conduct is able to prove otherwise, the court must find that the conduct in question was welcome.

The stated rationale for the unwelcomeness element of the definition of sexual harassment is that it is difficult to distinguish harassing sexual conduct from conduct that occurs simply because “sexual attraction may often play a role in the day-to-day social exchange between employees.”\textsuperscript{17} Superficially, this rationale resembles that for including an “offensiveness” element in the definition of battery. A battery plaintiff is required to prove that the disputed contact was offensive because “in a crowded world, a certain amount of personal contact is inevitable, and must be accepted.”\textsuperscript{18} In other words, physical contact that is deemed “normal” in that it is likely to occur between persons in day-to-day life is not presumed to be actionable battery, just as, under the EEOC’s definition of sexual harassment, sexual contact in the workplace that is deemed to be a “normal” part of an employee’s daily life is not actionable sexual harassment.

Many courts have accepted, virtually without comment, the rationale for forcing a plaintiff to prove unwelcomeness in a sexual harassment case.\textsuperscript{19} Yet this rationale ignores an important distinction between sexual harassment and the physical contact that underlies torts such as assault and battery. While physical contact may be inevitable and normal in a crowded world, sexual advances in the workplace need not be an inevitable aspect of a gender-integrated work environment and will only be characterized as

\textsuperscript{15} EEOC Guidelines, supra note 14 (emphasis added). As noted supra in note 7, the Supreme Court derived two categories of sexual harassment from this definition: quid pro quo harassment and hostile environment harassment. See Policy Guidance on Current Issues of Sexual Harassment, EEOC Notice N-915-050, at 2-3 (March 19, 1990) [hereinafter EEOC Policy Guidance].

\textsuperscript{16} In Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982), the Eleventh Circuit stated that among the elements of her prima facie case, the plaintiff must show that she “was subject to unwelcome sexual harassment.” Id. at 903. As will be discussed in Part I infra at text accompanying notes 63-66, 85-94, this characterization of the prima facie case has been adopted by almost every other Circuit, and the Supreme Court of the United States has stated that the plaintiff has the burden of proving the unwelcomeness of the conduct.

\textsuperscript{17} EEOC Policy Guidance, supra note 15, at 7.

\textsuperscript{18} W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 9, at 42 (5th ed. 1984).

\textsuperscript{19} See infra text accompanying notes 85-94.
"normal" if machismo is used as the measuring standard of normalcy.\textsuperscript{20} Requiring the "target" of sexual conduct\textsuperscript{21} to prove that such conduct is unwelcome perpetuates the myth that most people are not offended by attention of a sexual nature in the workplace.\textsuperscript{22} As most targets of sexual harassment tend to be women, the perpetuation of this myth contradicts accepted sociological and psychological findings about women's attitudes toward sexual attention at work.\textsuperscript{23} An alternative scheme more reflective of these attitudes should therefore be considered.

This Article proposes one such alternative, a paradigm by which welcomeness rather than unwelcomeness should be proved in sexual harassment cases. A reallocation of the burden of proving welcomeness\textsuperscript{24} would provide a more consistent and realistic approach for the general law of harassment. First, the proposed paradigm for proving sexual harassment would more accurately reflect the realities of behavior that are demonstrated in sociological and psychological studies of workers' reactions to sexual attention in the workplace.\textsuperscript{25} Second, the method of proof in sexual harassment cases would be more consistent with the allocation of burdens in general Title VII law.\textsuperscript{26} Third, the definition of sexual harassment would more closely resemble the definitions of actionable racial and ethnic harassment, which do not require the target of the harassment to prove that the verbal or physical conduct was unwelcome.\textsuperscript{27}

In addition to shifting the burden so as to require an alleged harasser to prove that his conduct was welcome (that is, it was actively solicited or freely consented to), the proposed paradigm for proving welcomeness must also include a refined definition of that term.\textsuperscript{28} Under the refined definition, silence or a polite refusal in reaction to harassing conduct could not be recharacterized by the alleged harasser as signs of consent.\textsuperscript{29} Furthermore,

\textsuperscript{20} The author has purposely chosen not to refer to "male" attitudes toward sexual harassment and sexuality, but rather to use the term "machismo" because the latter term better expresses the exaggerated sense of aggression and arrogance that seems to pervade the conduct at issue in many of the sexual harassment cases described in this Article.

\textsuperscript{21} The term "target" will be used throughout this Article instead of the more commonly used term "victim" in an attempt to help diffuse the perennial stereotype of women as victims.

\textsuperscript{22} As noted, the requirement of proving "offensiveness" in a battery claim is based on the presumption that most of the physical contact which occurs in the everyday world is not offensive. The requirement of proving welcomeness would seem to have a similar theoretical basis.

\textsuperscript{23} See infra text accompanying notes 147-48.

\textsuperscript{24} Discussion of this reallocation of the burden of proving welcomeness appears infra notes 159-89 and accompanying text.

\textsuperscript{25} See infra notes 131-56 and accompanying text (discussing sociological and psychological studies).

\textsuperscript{26} See infra notes 181-86 and accompanying text.

\textsuperscript{27} See infra note 187 and accompanying text.

\textsuperscript{28} See infra notes 190-212 and accompanying text.

\textsuperscript{29} See infra text accompanying notes 200-01.
the only interactions to which the harasser could point in proving that his conduct was welcome would be the interactions between the harasser and the target. Finally, the target's failure to file a contemporaneous formal complaint would have no bearing on the welcomeness issue.

This Article examines in Part I the evolution of the unwelcomeness requirement, from early EEOC pronouncements to the Supreme Court's decision in *Meritor Savings Bank v. Vinson* and subsequent decisions from the circuit courts of appeals. Part II analyzes the unwelcomeness requirement in the context of current sociological and psychological studies of sexual harassment. Part III discusses the proposed paradigm and addresses the ramifications of its implementation, concluding with a discussion of why the welcomeness inquiry should not be eliminated completely.

I. JUDICIAL AND AGENCY INTERPRETATIONS OF THE UNWELCOMENESS REQUIREMENT

A. Sexual Harassment as a Violation of Title VII

Title VII of the Civil Rights Act of 1964 makes it an "unlawful employment practice" for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." There is little legislative history describing the scope of the prohibition against discrimination on the basis of sex because the term "sex" was added as a last-minute floor amendment in the House of Representatives. Early court decisions addressing whether sexual harassment should be treated as unlawful sex discrimination under Title VII determined that it should not.

31. See infra notes 85-130 and accompanying text.
34. *Vinson*, 477 U.S. at 63-64. It has been argued that "sex" was added as a ploy by southern male Congressmen in an unsuccessful attempt to scuttle the entire bill. See Kerri Weisel, Comment, *Title VII: Legal Protection Against Sexual Harassment*, 53 WASH. L. REV. 123, 123 n.1 (1977).
SEXUAL HARASSMENT

In 1976 with the case of *Williams v. Saxbe*, however, courts began to recognize sexual harassment claims as violative of Title VII. In 1980, the EEOC issued a set of Guidelines which stated unequivocally that "[h]arassment on the basis of sex is a violation of... title VII." The Guidelines defined this harassment to include "unwelcome sexual advances, requests for sexual favors, or physical conduct of a sexual nature." The Guidelines spoke of two forms of sexual harassment: harassment to which an employee must submit as a condition for receiving certain benefits and harassment that "has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment." These forms of harassment have since been referred to as "quid pro quo" harassment and "hostile working environment" harassment.

In 1982, in *Henson v. City of Dundee*, the Court of Appeals for the Eleventh Circuit interpreted the EEOC Guidelines when it listed "unwelcome sexual harassment" as the second of five elements that "the plaintiff must allege and prove... in order to establish her claim" of sexual harassment. The *Henson* court defined "unwelcomeness," stating that the "conduct must be unwelcome in the sense that the employee did not solicit or

---

37. For a discussion of the *Williams* case and other early cases recognizing sexual harassment as a violation of Title VII, see Vhay, supra note 35, at 334-38. For a discussion of tort theories and constitutional theories for bringing sexual harassment claims, see CHARLES A. SULLIVAN ET AL., EMPLOYMENT DISCRIMINATION 356-57 nn.4-5 (1988).
38. The EEOC, which was created by the Civil Rights Act of 1964, has the authority to promulgate regulations designed to aid in the enforcement of Title VII. 42 U.S.C. §§ 2000e-4, 2000e-12(a) (1988).
41. *EEOC Guidelines*, supra note 14, § 1604.11(a)(1)-(2).
42. *Id.* § 1604.11(a)(3).
44. 682 F.2d 897 (11th Cir. 1982).
45. *Id.* at 903. According to the *Henson* court, the plaintiff establishes a prima facie claim by proving that: (1) she belonged to a group protected by Title VII; (2) she was subject to unwelcome sexual harassment; (3) the harassment was based on sex; (4) the harassment affected a term, condition, or privilege of employment; and (5) the employer knew or should have known of the harassment and failed to take prompt remedial action (respondeat superior). *Id.* at 903-05.
incite it, and in the sense that the employee regarded the conduct as undesirable or offensive.46

B. Meritor Savings Bank v. Vinson

In 1986, the Supreme Court of the United States discussed "unwelcomeness" in Meritor Savings Bank v. Vinson,47 the first case in which the Court addressed sexual harassment issues. In that case, Mechelle Vinson charged "hostile work environment" sexual harassment48 against the bank for which she had worked for several years.49 Vinson admitted that she had carried on a sexual affair with a bank vice president during that time.50 She claimed, however, that she initially submitted to the affair because she feared losing her job.51 She also alleged that the vice president subsequently subjected her to repeated public humiliation of a sexual nature and even raped her on more than one occasion.52 The bank and the vice president denied all of these allegations.53 The district court determined

46. Id. at 903. Some circuit courts of appeals that have adopted this definition have (perhaps unwittingly) changed the verb "incite" to the verb "invite" when they articulated the definition. See infra text accompanying note 90.


48. For descriptions of the term "hostile work environment," see supra note 7.

In October 1993, the Supreme Court of the United States handed down a decision in Harris v. Forklift Systems, Inc., 114 S. Ct. 367 (1993). In this case, the Court looked again at the definition of "hostile work environment" within the context of a Title VII sexual harassment case, holding that the conduct in question need not cause actual psychological injury to the target in order to be actionable. Id. at *4. The Court reiterated the definition it laid down in Vinson—that is, that the conduct be "so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin." Id. at *3. The Court enumerated factors that should be examined when determining the "hostile nature of the environment." These factors include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." The Harris Court pointed out, however, that "no single factor is required." Id. at *4. The Court did not address the welcomeness issue.

49. Vinson, 477 U.S. at 60.

50. Id. at 59-60.

51. Id. at 60.

52. Id.

53. Id. at 61.
that, even if the sexual conduct occurred, Vinson engaged in a "voluntary" relationship such that the conduct did not constitute sexual harassment.\textsuperscript{54}

Filing an \textit{amicus curiae} brief, the EEOC argued that the district court's conclusion that Vinson was not a victim of sexual harassment should be sustained.\textsuperscript{55} The EEOC based its position on the district court's finding that the sexual relationship was "voluntary."\textsuperscript{56} From this, the EEOC concluded that the relationship was "consensual" and thus the vice president's "advances (if any) were not unwelcome."\textsuperscript{57} The EEOC distinguished racial harassment and sexual harassment, stating that "[w]hereas racial slurs are intrinsically offensive and presumptively unwelcome, sexual advances and innuendo are ambiguous: depending on their context, they may be intended by the initiator, and perceived by the recipient, as denigrating or complimentary, as threatening or welcome, as malevolent or innocuous."\textsuperscript{58} The EEOC emphasized that "[s]exual attraction is a fact of life" that "may often play a role in the day-to-day social exchange between employees in the workplace."\textsuperscript{59} The EEOC further argued that Title VII rules must be carefully crafted so as not to "intrude on 'purely personal, social relationship[s].' "\textsuperscript{60}

The Supreme Court found, as the Eleventh Circuit had, that the case should be remanded because the district court's findings had been based on erroneous views of the law.\textsuperscript{61} The Vinson Court stated that the district court mistakenly focused on the fact that Vinson's sexual relationship with the vice president was "voluntary."\textsuperscript{62} The Court wrote that, instead of voluntariness, "[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.' . . . The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were

\begin{itemize}
\item \textsuperscript{54} Id.
\item \textsuperscript{56} Id.
\item \textsuperscript{57} Id.
\item \textsuperscript{58} Id. at E-5.
\item \textsuperscript{59} Id.
\item \textsuperscript{60} Id. (quoting Preamble to Interim Guidelines on Sex Discrimination, 45 Fed. Reg. 25024 (1980)). This language later appeared in the \textit{EEOC Policy Guidance, supra} note 15, which was issued by the EEOC after the Vinson case was decided. For a discussion of the \textit{EEOC Policy Guidance}, see infra notes 71-84 and accompanying text.
\item \textsuperscript{61} Meritor Savings Bank v. Vinson, 477 U.S. 57, 67-69 (1986). The Supreme Court stated first that a claim for hostile environment sexual harassment could lie even absent a tangible economic effect on the complaining party's employment. \textit{Id.} at 68. Quoting the Henson case, the Court added that a hostile working environment claim was not actionable unless the conduct was "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.' " \textit{Id.} at 67 (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).
\item \textsuperscript{62} \textit{Id.} at 68.
\end{itemize}
unwelcome, not whether her actual participation in sexual intercourse was voluntary.” The Court acknowledged that “the question whether the particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact.” The Court indicated that evidence of “a complainant’s sexually provocative speech or dress” is “obviously relevant” in such determinations. As the Court further noted, the “EEOC Guidelines emphasize that the trier of fact must determine the existence of sexual harassment in light of ‘the record as a whole’ and ‘the totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.’” After determining that the job of the district court was to decide whether the introduction of evidence of this type resulted in such a potential for unfair prejudice as to outweigh its relevance, the Court concluded that “there is no per se rule against” the admissibility of such evidence.

The Vinson Court did not address directly the allocation of the burden of proving that the conduct in question was unwelcome or welcome. In fact, when discussing the issue of voluntariness, the Court used terminology indicating that it was discussing a proffered defense to the sexual harassment claim rather than an element of the claim that must be proved as part of the prima facie case of the complaining party. When discussing welcomeness itself, however, the Court indicated that there was an actual affirmative requirement that the plaintiff prove at trial that she had shown “by her conduct . . . that the alleged sexual advances were unwelcome.”

---

63. *Id.* This statement by the Court is virtually a verbatim adoption of a statement made by the EEOC in its *amicus curiae* brief, which argued that “[t]he gravamen of any hostile environment claim must be that the alleged sexual advances are ‘unwelcome.’” *EEOC Brief, supra* note 55, at E-5. The EEOC cited its own Guidelines as authority for this statement. *Id.*

64. *Vinson, 477 U.S.* at 68.

65. *Id.* at 69.

66. *Id.* (quoting *EEOC Guidelines, supra* note 14). In its brief, the EEOC pointed out that the district court had not mentioned Ms. Vinson’s dress or conduct, but that the court of appeals had inferred that the district court judge may have based his findings on testimony about Ms. Vinson’s dress and personal fantasies. *EEOC Brief, supra* note 55, at E-6. The EEOC emphasized that the district court’s findings were based on other things, such as the fact that Ms. Vinson had never reported the alleged rapes, even to her family or friends. *Id.*


68. *Id.*

69. But the fact that sex-related conduct was ‘voluntary,’ in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit . . . . While “voluntariness” in the sense of consent is not a defense to such a claim, it does not follow that a complainant’s sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome. To the contrary, such evidence is obviously relevant.

*Id.* at 68-69.

70. *Id.* at 68.
C. Post-Vinson Response by the EEOC

In the eighteen months following the release of the Vinson opinion, the EEOC drafted a "guidance memorandum" ("EEOC Policy Guidance") designed to define sexual harassment and employer liability "in light of recent cases."71 The memorandum devotes substantial attention to "[determining [w]hether [s]exual [c]onduct [i]s [u]nwelcome."72 This section of the EEOC Policy Guidance begins by repeating the original definition of sexual harassment—"unwelcome . . . verbal or physical conduct of a sexual nature"73—then quotes the Henson definition of "unwelcome conduct" as that which the complaining party "did not solicit or incite . . . [and] the employee regarded the conduct as undesirable or offensive."74 In the guise of guidance to its field officers, the EEOC provides in the Policy Guidance a set of "pointers" for targets of sexual harassment. The EEOC Policy Guidance states that "victims are well-advised to assert their right to a workplace free from sexual harassment. This may stop the harassment before it becomes more serious."75 According to the EEOC Policy Guidance, a contemporaneous complaint is not a necessary element to a sexual harassment claim, but it may provide "persuasive evidence that the sexual harassment in fact occurred as alleged" particularly if "there is some indication of welcomeness or when the credibility of the parties is at issue."76 Importantly, the EEOC Policy Guidance insists that if a complaint was not made, "the investigation must ascertain why."77

The EEOC Policy Guidance contains a lengthy discussion on how to determine whether the target's conduct was "consistent, or inconsistent, with her assertion that the sexual conduct [was] unwelcome."78 Citing primarily district court cases and EEOC decisions, the memorandum requires that targets of sexual harassment bear an affirmative burden "to communi-

71. Policy Guidance on Current Issues of Sexual Harassment, EEOC Notice No. 915-035 was issued on October 25, 1988 and was replaced on March 19, 1990 with a Notice of the same name. EEOC Policy Guidance, supra note 15. The latter document (which contained no changes from the original Notice in the portions relevant to this Article) is cited herein.

In 1993, the EEOC issued proposed Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability, 58 Fed. Reg. 51266 (1993) (to be codified at 29 C.F.R. § 1609) (proposed Oct. 1, 1993). These proposed Guidelines, which deal with harassment based on gender—other than sexual harassment, are discussed infra text accompanying note 187.

72. EEOC Policy Guidance, supra note 15, at 1.
73. Id. at 7 (quoting EEOC Guidelines, supra note 14).
74. Id. (quoting Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982)). As was noted, supra text accompanying note 45, the Henson court considered unwelcomeness as a prong of the complaining party's prima facie case.
75. Id.
76. Id.
77. Id. at 8.
78. Id. at 9-11.
cate that the conduct is unwelcome."79 While noting that acquiescence alone may not in and of itself prove welcomeness, the EEOC points out that a court should not look at "subjective, uncommunicated feelings" when determining unwelcomeness, but rather the Policy Guidance advises the courts to look to "objective evidence" that the target actually conveyed that the conduct was unwelcome.80 Similarly, the EEOC sends a conflicting message by stating that the "occasional use of sexually explicit language does not necessarily negate a claim that sexual conduct was unwelcome," while devoting considerable discussion to those cases in which the plaintiff's claim was barred because she acted "in a sexually aggressive manner, using sexually oriented language, or soliciting sexual conduct."81

The EEOC Policy Guidance addresses specifically the situation in which "an employee first willingly participates in conduct of a sexual nature but then ceases to participate and claims that any continued sexual conduct has created a hostile work environment."82 In this case, the target "must clearly notify the alleged harasser that his conduct is no longer welcome."83 In addition, the memorandum points out that a complaining party who uses offensive language or tells crude jokes in a "consensual" setting may still bring a charge of sexual harassment so long as she told the alleged harasser to leave her alone.84

Despite the somewhat confusing "defense" language in Vinson, the combination of the Vinson opinion and the EEOC Policy Guidance clearly indicates that the Supreme Court and the EEOC believe that the target of sexual advances or conduct may not successfully bring an action for sexual harassment unless she can prove that she clearly indicated to the alleged

79. Id. at 7.
80. Id. at 9 n.10 (citing Ukarish v. Magnesium Electron, 33 EPD Para. 34,087 (D.N.J. 1983), in which the complaining party had written in her diary that she did not welcome the sexual verbiage, but had "made no objection and indeed appeared to join in 'as one of the boys.'"). This footnote also cites Sardigal v. St. Louis Nat. Stockyards Co., 41 EPD Para. 36,613 (S.D. Ill. 1986), in which the plaintiff lost her case because she had visited the alleged harasser in the hospital and allowed him to come into her home at night. Perhaps eager to repeat its faith in the district court's opinion in Vinson, the EEOC also points out in this footnote that the district court had found that Vinson had twice refused to be transferred to an office away from the alleged harasser.
82. EEOC Policy Evidence, supra note 15, at 9-10.
83. Id. at 10 (citing Loftin-Boggs v. City of Meridian, 633 F. Supp. 1323 (S.D. Miss. 1986), aff'd without opinion, 824 F.2d 971 (5th Cir. 1987); Commission Decision 84-1, CCH Employment Practices Guide ¶ 6839). Loftin-Boggs involved plaintiffs who initially participated in using crude language and telling vulgar jokes and were later barred from bringing sexual harassment claims on the grounds that they had given the impression that the conduct was welcome. Loftin-Boggs, 633 F. Supp. at 1324-25.
84. EEOC Policy Guidance supra note 15, at 10-11.
harasser the unwelcomeness of his conduct. Post-Vinson cases decided by the courts of appeals indicate that a majority of these courts have adopted this approach.

D. Post-Vinson Cases from the Circuit Courts of Appeals

In the years following Vinson, the unwelcomeness element of a sexual harassment claim was cited by judges in eleven of the thirteen circuit courts of appeals.85 Of these, seven circuits86 expressly adopted some or all of the

85. These circuits are the First Circuit, see Chamberlin v. 101 Realty, Inc., 915 F.2d 777, 782-83 (1st Cir. 1990); see also Lipsett v. University of Puerto Rico, 864 F.2d 881, 898 (1st Cir. 1988) (using unwelcomeness as part of the definition of sexual harassment in a claim under Title IX of the Education Amendments Act of 1972, § 901 et seq., 20 U.S.C.A. § 1681 et seq.); the Second Circuit, see Carrero v. New York City Hous. Auth., 890 F.2d 569, 578 (2d Cir. 1989); the Fourth Circuit, see Paroline v. Unisys Corp., 789 F.2d 100, 105 (4th Cir. 1989), vacated in part on reh’g, 900 F.2d 27 (4th Cir. 1990); Swentek v. USAir, Inc., 830 F.2d 552, 557 (4th Cir. 1987); the Fifth Circuit, see Collins v. Baptist Memorial Geriatric Ctr., 937 F.2d 190, 195 (5th Cir. 1991), cert. denied, 112 S. Ct. 968 (1992); Waltman v. International Paper Co., 875 F.2d 468, 477 (5th Cir. 1989); Jones v. Flagship Int’l, 793 F.2d 714, 719 (5th Cir. 1986); see also Wyerick v. Bayou Steel Corp., 887 F.2d 1271, 1274 (5th Cir. 1989) (using the same analysis for a case brought under the Louisiana state-law counterpart to Title VII); the Sixth Circuit, see Yates v. Avco Corp., 819 F.2d 630, 634 (6th Cir. 1987); Rabidou v. Osceola Ref. Co., 805 F.2d 611, 619 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987); the Seventh Circuit, see Brooms v. Regal Tube Co., 881 F.2d 412, 418 (7th Cir. 1989); Scott v. Sears, Roebuck & Co., 798 F.2d 210, 213 (7th Cir. 1986); see also Daniels v. Essex Group, Inc., 937 F.2d 1264, 1271 (7th Cir. 1991) (involving a racial harassment case in which the court stated that it was not going to adopt a “multifactor test [such as the Henson test] that has the potential for a mechanical application which overlooks or under-emphasizes the most important feature of the harassment inquiry” but instead would evaluate harassment claims “against both the objective and subjective standard”); the Eighth Circuit, see Burns v. McGregor Elecs. Indus., Inc., 989 F.2d 959, 962 (8th Cir. 1993); Hall v. Gus Constr. Co., Inc., 842 F.2d 1010, 1013 (8th Cir. 1988); Moylan v. Maries County, 792 F.2d 746, 749 (8th Cir. 1986); the Ninth Circuit, see Ellison v. Brady, 924 F.2d 872, 875 (9th Cir. 1991); EEOC v. Hacienda Hotel, 881 F.2d 1504, 1515 (9th Cir. 1989); Jordan v. Clark, 847 F.2d 1368, 1373 (9th Cir. 1988), cert. denied sub nom. Jordan v. Hodel, 488 U.S. 1006 (1989); the Tenth Circuit, see Baker v. Weyerhauser Co., 903 F.2d 1342, 1345 (10th Cir. 1990); Hicks v. Gates Rubber Co., 833 F.2d 1406, 1411 (10th Cir. 1987); the Eleventh Circuit, see Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 1557 (11th Cir. 1987)); and the Federal Circuit Court of Appeals, see Carosella v. United States Postal Serv., 816 F.2d 638, 639 (Fed. Cir. 1987). No sexual harassment cases that list the elements of the claim have been decided by the Court of Appeals for the District of Columbia Circuit since Vinson.

86. These include courts of appeals for the First Circuit, see Chamberlin, 915 F.2d at 782-83; Fourth Circuit, see Paroline, 879 F.2d at 105; Swentek, 830 F.2d at 557; Fifth Circuit, see Collins, 937 F.2d at 193; Waltman, 875 F.2d at 477; Jones v. Flagship Int’l, 793 F.2d at 719; Sixth Circuit, see Yates, 819 F.2d at 634; Eighth Circuit, see Burns, 989 F.2d at 962; Hall, 842 F.2d at 1013; Moylan, 792 F.2d at 749; Ninth Circuit, see Hacienda Hotel, 881 F.2d at 1515 (adopting a three-part test, rather than the Henson five-part test, requiring the plaintiff to show that “1) she was subjected to sexual factors, requests for sexual favors, or other verbal or physical conduct of a sexual nature, (2) that this conduct was unwelcome, and (3) that the conduct was sufficiently severe or pervasive to alter the conditions of the victim’s employment and create a hostile working environment”); Jordan v. Clark, 847 F.2d at 1373 (same); Ellison, 924 F.2d at 875 (same); and Eleventh Circuit, see Sparks, 830 F.2d at 1557.
prima facie case requirements set out in *Henson*, including the requirement that the plaintiff prove unwelcomeness. Additionally, two circuits adopted the *Henson* definition of “unwelcome” conduct—that is, conduct that the plaintiff did not “solicit or incite” and that the plaintiff regarded as “undesirable or offensive.” Two other circuits adopted virtually the same definition, although these courts substituted the word “invite” for “incite.”

Similarly, one circuit described unwelcomed conduct as conduct that was “not solicited and not desired.” Another circuit focused on trial court findings that the alleged harasser’s conduct was “neither invited nor encouraged” and “never welcomed.” One circuit examined sexual harassment claims after *Vinson* but used a framework that differs from the *Henson* framework and did not include the EEOC unwelcomeness requirement.

Courts that have cited the unwelcomeness requirement generally agree that unwelcomeness is a question of fact. These courts also concede that

---

87. For a discussion of these requirements, see supra text accompanying notes 44-46.
88. The Court of Appeals for the Second Circuit, without citing *Henson*, has also adopted the requirement that the plaintiff prove the conduct was unwelcome. *Carrero*, 890 F.2d at 578.
89. *Henson* v. City of Dundee, 682 F.2d 847, 903 (11th Cir. 1982); see also *Waltman*, 875 F.2d at 477; *Jones v. Flagship Int'l*, 793 F.2d at 719; *Sparks*, 830 F.2d at 1557.
90. See *Chamberlin*, 915 F.2d at 784; *Hall*, 842 F.2d at 1014; *Moylan*, 792 F.2d at 749. For a description of the Eighth Circuit's most recent discussion of how “unwelcome” should be defined, see infra text accompanying notes 114-20.
91. *Yates v. Avco Corp.*, 819 F.2d 630, 633 (6th Cir. 1987). The Court of Appeals for the Federal Circuit has decided only one sexual harassment case since *Vinson*. In that case, the court of appeals merely quoted the EEOC definition without comment as to the unwelcomeness feature. *Carosella v. United States Postal Serv.*, 816 F.2d 638, 640 (Fed. Cir. 1987). However, the Court did make note of the Postal Service's 1980 sexual harassment policy, which referred to actions such as “unsolicited verbal comments . . . [and other conduct] which are unwelcome to the recipient.” *id.* at 639 (emphasis added).
92. *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1411 (10th Cir. 1987).
94. See *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1483 (3d Cir. 1990). The *Andrews* court listed the following five requirements for proving a hostile work environment claim: “(1) the employees suffered intentional discrimination because of their sex; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the plaintiff; (4) the discrimination would detrimentally affect a reasonable person of the same sex in that position; and (5) the existence of respondeat superior liability.” *id.*; see also *Drinkwater v. Union Carbide Corp.*, 904 F.2d 853 (3d Cir. 1990) (involving a claim that the sexual relationship between another employee and the supervisor created a hostile working environment for the plaintiff). In *Drinkwater*, the court initially noted that “EEOC guidelines are accorded deference in harassment discrimination cases,” 904 F.2d at 859 n.10, and cited *Henson* and *Vinson* in its list of background cases, *id.* at 839 n.11, but then went on to adopt the *Andrews* test, *id.* at 860.
95. For example, in *Wyerick v. Bayou Steel Corp.*, 887 F.2d 1271, 1275 (5th Cir. 1989), the Court of Appeals for the Fifth Circuit reversed a grant of summary judgment in favor of the defendant, finding that “[t]he intensely factual inquiry anticipated by the Court in *Meritor* requires the issue of unwelcomeness to go to the trier of fact in this case.” Similarly, in *Moylan v. Maries County*, 792 F.2d 746, 749 (8th Cir. 1986), the Eighth Circuit noted that “[w]hether the activities complained of were unwelcome is usually disputed, as in the present case” and emphasized that the question of “[w]hether the conduct is unwelcome is a fact question.” *id.*
this determination is not easy to make.  Like many factual inquiries in which the parties’ accounts of the relevant occurrences are likely to disagree, plaintiffs alleging sexual harassment often describe the facts quite differently than do the alleged harassers. For example, the Fourth Circuit pointed out in one case that “[t]he facts in this case are much in dispute. In fact, they are wildly at variance.” An example of this “wild variance” in the parties’ different versions of the facts appeared in Vinson, in which the bank employee denied that he ever touched Vinson in a sexual manner, after she claimed they had had sexual relations at least forty or fifty times.

Several of the post-Vinson cases focused on the plaintiff’s conduct in the workplace when determining unwelcomeness. In some cases, courts found that the plaintiff’s conduct quite obviously communicated the unwelcomeness of the sexual advance. These included such extreme conduct by the plaintiff as the following: the plaintiff showed her pursuer a notice of sexual harassment charges she had filed against another employee; the plaintiff threw coffee on her pursuer, screamed, and ran away; the plaintiff hit her taunter, cursed him, and left in tears. In a First Circuit case, the plaintiff reacted in a less dramatic manner, simply ignoring sexual comments, quickly changing the subject, or silently withdrawing her hands from her supervisor’s grasp. Although the plaintiff’s response was mild rather than aggressive and pointed, the court found that the “evidence that the

96. The Vinson court stated that “the question whether the particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact.” Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68 (1986).

97. See Swentek v. USAir, Inc., 830 F.2d 552, 554 (4th Cir. 1987). In this case, the plaintiff alleged numerous incidents of harassment by a USAir pilot, including his reaching under her skirt and grabbing her genitals, making numerous obscene comments, and dropping his trousers. The pilot denied most of these allegations and an eyewitness claimed that the pants-dropping incident was merely an attempt by the pilot to tuck in his shirt. Id. at 555.

In Paroline v. Unisys, 879 F.2d 100 (4th Cir. 1979), vacated in part on reh’g, 900 F.2d 27 (4th Cir. 1990), the Fourth Circuit judge began his description of the case by stating that “[n]ot surprisingly, the parties present different versions of the events that prompted Paroline’s lawsuit.” Id. at 102. In Jordan v. Clark, 847 F.2d 1368 (9th Cir. 1988), cert. denied sub nom. Jordan v. Hodel, 488 U.S. 1006 (1989), the Ninth Circuit stated unabashedly that the district court had dealt with the parties’ varying versions of the events by “split[ting] the difference” and finding that the parties “were more probably than not engaged in flirtatious conversation and conduct which could, and probably did, leave each of them with the impression that he or she had been the recipient of a sexual advance.” Id. at 1375.

98. Vinson, 477 U.S. at 60-61.

99. Carrero v. New York City Hous. Auth., 890 F.2d 569, 573 (2d Cir. 1989). In this case, the court found that the facts “clearly demonstrate that [the pursuer’s] conduct was unsolicited and unwelcome . . . .” Id. at 578.

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


employee consistently demonstrated her unalterable resistance to all sexual
advances is enough to establish unwelcomeness."103

In other cases, however, courts found the target's response to be am-
biguous and thus not adequate to prove her assertion that the sexual conduct
was unwelcome. For example, in Dockter v. Rudolf Wolff Futures, Inc.,104
the Court of Appeals for the Seventh Circuit would not recognize the plain-
tiff's mild reaction to her superior's sexual advances as a clear communica-
tion of unwelcomeness. The court noted that, when the superior made
sexual overtures to the plaintiff, "[a]lthough the Plaintiff rejected these ef-
forts, her initial rejections were neither unpleasant nor unambiguous, and
gave [the superior] no reason to believe that his moves were unwel-
come."105 The court went on to point out that, "[a]fter one misguided act,
in which [the superior] briefly fondled Plaintiff's breast and was reprim-
danded by her for doing so, he accepted his defeat and terminated all such
conduct."106 The court in this case seemed to require nothing less than a
clear and adamant "no" on the plaintiff's part before believing that her com-
munication of unwelcomeness was unambiguous.

Some post-Vinson decisions exhibit courts' reluctance to find un-
welcomeness if the target initially participated in the workplace interactions
that she later tried to characterize as harassment. For example, in Reed v.
Shepard,107 the Seventh Circuit Court of Appeals found the plaintiff's "en-
thusiastic receptiveness to sexually suggestive jokes and activities" fatal to
her claim of unwelcomeness.108 The court did not accept the plaintiff's
explanation that, as a new young police officer, she felt that taking part in
the conduct was the only way she could be accepted.109

In Swentek v. USAir, Inc.,110 the Court of Appeals for the Fourth Cir-
cuit focused on the plaintiff's workplace conduct but characterized the un-

103. Id. at 784 (citing Lipsett v. University of Puerto Rico, 864 F.2d 881, 898 (1st Cir. 1988)).
104. 913 F.2d 456 (7th Cir. 1990).
105. Id. at 459 (quoting Dockter v. Rudolf Wolff Futures, Inc., 684 F. Supp. 532, 533 (N.D.
Ill. 1988)).
106. Id. at 459 (quoting Dockter, 684 F. Supp. at 533). According to the testimony of the
plaintiff, the boss had taken the plaintiff to a restaurant on the premise that they would be meeting
clients (who never showed up) and had tried to kiss her there and had been rejected. She asked
him to take her home. At her apartment door, he again attempted to kiss her and this time fondled
her breast. Id. at 460.
107. 939 F.2d 484 (7th Cir. 1991).
108. Id. at 491.
109. Id. at 492. In Wyerick v. Bayou Steel Corp., 887 F.2d 1271 (5th Cir. 1989), a woman
who had been subjected to numerous sexual comments responded three times in a similar vein.
Id. at 1273. The district court granted summary judgment for the defendant, stating that these
responses precluded the plaintiff from claiming that the comments were unwelcome. Id. The
Court of Appeals for the Fifth Circuit reversed, finding that there remained a genuine issue of fact
as to whether the unwelcomeness showing had been made. Id. at 1275.
110. 830 F.2d 552 (4th Cir. 1987).
welcomeness question as one bearing directly on the plaintiff's interactions with the alleged harasser, as opposed to the plaintiff's past actions in the business setting. In this case, the plaintiff had told the harasser to leave her alone. Nonetheless, the trial court found that, because the plaintiff was known to use foul language and make sexual remarks, she was the type of person who generally welcomed such comments. The court of appeals reversed, holding that the plaintiff's past conduct failed to preclude a finding of unwelcomeness, particularly in light of the plaintiff having specifically told the harasser that his conduct was not welcome to her.

In an even more pointed decision, Burns v. McGregor Electronics Industries, Inc., the Court of Appeals for the Eighth Circuit refused to allow the plaintiff's non-work activity of posing nude for magazine photographs to negate her claim that her fellow employees' conduct toward her was unwelcome. In this case, the plaintiff was subject to taunting comments by her co-workers both before and after they discovered that she had posed nude for photographs which were published in a biker magazine. The district court found that, although the plaintiff did not solicit or invite the harassing comments, they would not be "offensive" to her because she had posed for the magazine photographs. The district court stated that the element of "unwelcomeness" requires a showing of both unwelcomeness and offensiveness. The district court justified its judgment for the defendant by stating that the plaintiff's outside conduct indicated that she would not have been offended if someone to whom she was attracted had spoken to her of the pictures. The court of appeals stated that for the district court "to find that the conduct was unwelcome but not offensive was internally inconsistent as a matter of law." The court of appeals also rejected the district court's justification as "unsupported in law" and went on to note that "this rationale would allow a complete stranger to pursue sexual behavior at work that a female worker would accept from her husband or boyfriend. The standard would allow a male employee to kiss or fondle a female worker at the workplace." The court did indicate, how-

111. Id. at 557.
112. Id.
113. Id.
116. Id. at 508.
117. Id.
118. Burns, 989 F.2d at 962.
119. Id. at 963.
ever, that the nude photographs could be considered as evidence when examining the totality of events that had ensued. The court went on to point out that, in this case, they were not dealing with a woman who had told sexual stories, engaged in sexual gestures, initiated sexual talk, or solicited sexual encounters from co-workers.\textsuperscript{120}

The Court of Appeals for the First Circuit, in \textit{Lipsett v. University of Puerto Rico},\textsuperscript{121} added a new dimension to the factual inquiry of unwelcomeness by pointing out that the Supreme Court in \textit{Vinson} had failed to determine from whose perspective the issue of unwelcomeness would be determined. The \textit{Lipsett} court noted that perspective is "particularly important because often a determination of sexual harassment turns on whether it is found that the plaintiff misconstrued or overreacted to what the defendant claims were innocent or invited overtures."\textsuperscript{122} The court concluded that the factfinder must keep both the target's and the alleged harasser's perspectives in mind when determining whether the conduct was welcome.\textsuperscript{123}

As noted above,\textsuperscript{124} the EEOC Guidance indicates that the finding of unwelcomeness will be strengthened by evidence of a contemporaneous complaint by the target of the harassment. The courts of appeals, however, have not relied on the existence of a complaint in their determinations of whether the trial court properly found conduct to be welcome or unwelcome. Instead, the existence of a complaint is most often important in de-

\textsuperscript{120} \textit{Id.} at 963. The court of appeals did not think it necessary to remand the case for another "factual" finding on the unwelcomeness issue, but rather held that, because the district court had specifically found the conduct to be uninvited and had found that the conduct was objectively so severe and pervasive as to alter the working conditions of "a hypothetical reasonable woman," actionable sexual harassment had indeed occurred. \textit{Id.} at 964. The court of appeals did remand the case to the district court with directions to compute the plaintiff's economic damages and enter a judgement in her favor. \textit{Id.} at 962.

\textsuperscript{121} 864 F.2d 881 (1st Cir. 1988).

\textsuperscript{122} \textit{Id.} at 898.

\textsuperscript{123} \textit{Id.} at 898. The court also felt that men and women must share the responsibility for eradicating sexual harassment. As the court stated:

The man must be sensitive to signals from the woman that his comments are unwelcome, and the woman, conversely, must take responsibility for making those signals clear. In some instances, a woman may have the responsibility for telling the man directly that his comments or conduct is unwelcome. In other instances, however, a woman's consistent failure to respond to suggestive comments or gestures may be sufficient to communicate that the man's conduct is unwelcome.

\textit{Id.} The issue of perspective has received much more attention in those cases that debate whether to apply the standard of a "reasonable person" or a "reasonable woman" in determining whether the conduct was so severe and pervasive as to alter the conditions of one's employment. \textit{See, e.g.}, Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991); Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir. 1986), \textit{cert. denied}, 481 U.S. 1041 (1987).

\textsuperscript{124} \textit{See supra} text accompanying notes 75-77.
determining whether the employer received actual notice of the harassment.\textsuperscript{125} Even so, the fact that a target did not complain formally casts doubt in some cases on the credibility of her testimony.\textsuperscript{126} In \textit{Chamberlin v. 101 Realty, Inc.},\textsuperscript{127} the Court of Appeals for the First Circuit indicated that the plaintiff's burden of proving the unwelcomeness issue would be helped by evidence of "more emphatic means of communicating the unwelcomeness of the supervisor's sexual advances, as by registering a complaint" but recognized that such action "may prompt the termination of her employment, especially when the sexual overtures are made by the owner of the firm."\textsuperscript{128} This unfortunate possibility was realized in \textit{Lipsett v. University of Puerto Rico},\textsuperscript{129} in which complaints by two female residents to the supervising physicians resulted in their being put on probation and one even being advised to seek the help of a psychiatrist.\textsuperscript{130}

The interaction of the EEOC Guidelines and Policy Guidance, the Supreme Court's decision in \textit{Vinson}, and the post-\textit{Vinson} cases from the circuit courts of appeals provide us with a relatively clear picture of the parameters of the welcomeness inquiry. First of all, despite some contrary language in \textit{Vinson}, the burden is clearly one of requiring the plaintiff to prove that the sexual conduct or advance was unwelcome. All circuits except one follow this approach. The generally accepted definition of "unwel- come" conduct is conduct that the plaintiff did not solicit, invite, or incite and that was offensive or undesirable to the plaintiff. The question of whether the conduct was unwelcome is a question of fact. Although one circuit court stated that the issue of unwelcomeness must be examined from both the plaintiff's and the alleged harasser's perspectives, the evidence most successful in showing unwelcomeness is evidence of affirmative, repeated, and sometimes even physical rebuffs by the plaintiff of the alleged harasser's advances. One circuit court indicated that mild, pleasant responses that may be construed by the alleged harasser as ambiguous dictate against a finding that the conduct was unwelcome. Courts are likely to admit evidence that may negate the claim of unwelcomeness such as evidence of the plaintiff's speech or conduct or activities both in and outside the workplace, although some circuits have attempted to limit the inquiry to

\begin{itemize}
\item \textsuperscript{125} \textit{See}, e.g., \textit{Waltman v. International Paper Co.}, 875 F.2d 468, 478 (5th Cir. 1989); \textit{Hicks v. Gates Rubber Co.}, 833 F.2d 1406, 1417-18 (10th Cir. 1987); \textit{Yates v. Avco Corp.}, 819 F.2d 630, 633 (6th Cir. 1987).
\item \textsuperscript{126} \textit{See}, e.g., \textit{Dockter v. Rudolf Wolff Futures, Inc.}, 913 F.2d 456, 459 (7th Cir. 1990); \textit{Jordan v. Clark}, 847 F.2d 1368, 1375 (9th Cir. 1988), \textit{cert. denied sub nom. Jordan v. Hodel}, 488 U.S. 1006 (1989).
\item \textsuperscript{127} 915 F.2d 777 (1st Cir. 1990).
\item \textsuperscript{128} \textit{Id.} at 784.
\item \textsuperscript{129} 864 F.2d 881 (1st Cir. 1988).
\item \textsuperscript{130} \textit{Id.} at 907.
\end{itemize}
a plaintiff’s conduct within the workplace. Evidence that the plaintiff enthusiastically participated in the workplace sexual activity is likely to discount the plaintiff’s claim that the conduct was not welcome. Finally, the filing of a contemporaneous complaint by the plaintiff is compelling evidence of unwelcomeness. Conversely, the failure to file a complaint, while not completely fatal to the plaintiff’s claim, may raise suspicion as to whether the conduct was unwelcome.

II. SOCIOLOGICAL AND PSYCHOLOGICAL FINDINGS ON SEXUAL HARASSMENT

Before examining the viability of shifting the burden of proving welcomeness and narrowing its definition, some attention should be given to findings outside the traditional arena of legal theory. The number of sociological and psychological studies on sexual harassment issues has risen dramatically during the past five years. The studies discussed in this section are among those with findings that bear directly or indirectly on the issue of welcomeness.

A. The Scope of the Sexual Harassment Problem

Recent studies make it difficult, if not impossible, to dispute one thing about sexual harassment—it is a widespread, costly problem in the American workplace. In 1980, the federal government undertook what remains to date the most extensive study of sexual harassment in the workplace. The United States Merit Systems Protection Board published the findings of this study in 1981.\footnote{Merit Systems Protection Board Study, supra note 3.} The Board updated the study ("Merit Systems Protection Board Study") in 1987 and issued an amended Report in 1988.\footnote{U.S. Merit Systems Protection Board, Sexual Harassment In The Federal Government: An Update (1988) [hereinafter Updated Merit Systems Protection Board Study].} The original study gained much attention due to its “conservative” estimate that sexual harassment cost the federal government nearly $189 million in turnover and lost productivity between May 1978 and May 1980.\footnote{Merit Systems Protection Board Study, supra note 3, at 99.} The updated study estimated the cost to the federal government between May 1985 and May 1987 as $267 million, “in addition to the personal cost and anguish many of the victims had to bear.”\footnote{Updated Merit Systems Protection Board Study, supra note 132, at 4. Other studies have shown that “[s]exual harassment is costing the nation millions of dollars a year in law suits and reduced productivity.” National Council for Research on Women, Sexual Harassment: Research and Resources 10 (1992) [hereinafter Research and Resources].}

The Merit Systems Protection Board Study assimilated the answers given by approximately 19,500 civilian employees of the Executive Branch
of the federal government.\textsuperscript{135} The Study characterized the incidence of sexual harassment in the federal workforce as "widespread—forty-two percent of all female employees and fifteen percent of all male employees reported being sexually harassed."\textsuperscript{136} Other studies have consistently reported that at least fifty percent of working women have experienced or will experience sexual harassment at some point during their working lives.\textsuperscript{137} The studies indicate that more women than men are the targets of sexual harassment, but that men are not immune from this workplace problem.\textsuperscript{138}

B. \textit{Differences in the Perception of Sexual Harassment}

Most of the current studies indicate the existence of significant gender differences in the perception of sexual harassment. Women tend to interpret a broader range of behaviors as constituting sexual harassment than do men.\textsuperscript{139} At least one researcher postulates that, consequently, "men may file fewer sexual harassment complaints than women, even if they have identical experiences at work" and, hence, "men may be more likely than women to initiate sexual behaviors at work that lead to complaints of harassment, since they are less likely to view such behaviors as unacceptable."\textsuperscript{140}

Even more importantly within the context of the welcomeness issue, a 1989 study found a "tendency among men to see promiscuous, seductive, and generally 'sexy' behavior—where women see or intend to project only

\begin{itemize}
\item \textsuperscript{135} The original questionnaire was mailed out to 23,000 male and female civilian employees; the response rate was about 85%. The Study noted that this response rate "was considerably higher than usually expected on mail surveys." \textit{Merit Systems Protection Board Study}, \textit{supra} note 3, at 2.
\item \textsuperscript{136} \textit{Id.} at 3. The Updated Merit Protection Board Study reported that in 1987, the incidence of sexual harassment was 42% among federal female workers and 14% among male workers. \textit{Updated Merit Systems Protection Board Study}, \textit{supra} note 132, at 2.
\item \textsuperscript{138} \textit{See, e.g., Updated Merit Systems Protection Boards Study, supra} note 132, at 2; Alison M. Konrad & Barbara A. Gutek, \textit{Impact of Work Experiences on Attitudes toward Sexual Harassment}, 31 \textit{Admin. Sci. Q.} 422, 435-37 (1986).
\item \textsuperscript{140} Konrad & Gutek, \textit{supra} note 138, at 422.
\end{itemize}
This study consisted of three different scenarios. In the first scenario, 98 previously unacquainted undergraduate students were told to engage, in male-female pairs, in short "getting acquainted" conversations while 109 other students observed. In the second scenario, 75 male and 88 female undergraduates observed a videotape of a male and female co-worker interacting on a business matter. In the third scenario, 98 male undergraduates and 102 female undergraduates viewed a videotape involving an interchange between a male professor and a female student. The participants in all three scenarios then responded to questionnaires designed to elicit their characterization of the type of behavior they had observed. The authors of the study found "clear and consistent" results in all three scenarios showing that "men, especially when observing women's behaviors, were more likely to perceive sexual motives or intentions (flirtatiousness, promiscuity, seductiveness, sexiness) than women." The authors concluded:

When women at work or school attempt to create a pleasant social environment by behaving in a warm, friendly, and outgoing manner, their behavior may be (mis)interpreted by their male colleagues as a sign of sexual interest or availability... Some of the more common forms of sexual harassment, such as repeated requests for dates, staring or ogling, unnecessary touching, and sexual innuendos, may result when men act on their (mis)perceptions of women's behaviors. Recall that men are more likely to view such behaviors as normal and less likely to label them sexual harassment. Other studies emphasize that the majority of women generally do not like ("welcome") sexual encounters in the workplace. One researcher reports that sixty-seven percent of the males who responded to her survey said they would be "flattered" if they were propositioned by a woman at work, while only seventeen percent of the women responded that they would consider a proposition by a male flattering.

142. Id. at 267.
143. Id. at 270.
144. Id. at 272.
145. Id. at 274.
146. Id. at 265-66.
147. GUTK, supra note 137, at 95-96; Susan Littler-Bishop et 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); Beth E. Schneider, Consciousness About Sexual Harassment Among Heterosexual and Lesbian Women Workers, 38 J. SOC. ISSUES 75, 94 (1982).
148. GUTK, supra note 137, at 96.
C. Targets' Responses to Sexual Harassment

Recent psychological and sociological studies have focused increasingly on the formal and informal reactions of targets of sexually harassing behavior. These studies generally agree that targets are reluctant to lodge formal complaints against their harassers. One study, indicating that only five percent of the targets filed a formal complaint, explains that "victims are just as likely to change jobs as a result of sexual harassment as they were to take formal action." Researchers propose a variety of possible reasons for this reluctance, including a fear of reprisal and blame, concerns about loss of privacy, or the belief that nothing would be done in response to the complaint. One researcher notes a fourth reason for women's hesitancy to file a complaint: concern for the harasser. This researcher explains: "Women are aware of the gravity of making a formal, public complaint; women won't do that lightly. If there is a reasonable excuse for a man's behavior, women are very forgiving." In addition, as typically occurs when a superior harasses a subordinate, the livelihood of the target depends upon the harasser, thus causing the target not only to refrain from filing a formal complaint, but also to seek to maintain a friendly rapport with the harasser. One study indicates that the most common reaction of both men and women targets of sexual harassment is what is termed the "passive" response of ignoring the behavior or ignoring the harasser. According to this study, other commonly invoked behaviors include telling the harasser to stop the behavior and making a joke of the behavior. A few respondents also indicated that their response was to go along with the harassing behavior.

149. Id. at 71-73; MERIT SYSTEMS PROTECTION BOARD STUDY, supra note 3, at 71 (stating that only 3% of women and 2% of men filed formal complaints); UPDATED MERIT SYSTEMS PROTECTION BOARD STUDY, supra note 132, at 27 (reporting that 5% of men and women took formal action when harassed); see also Jan Salisbury et al., Counseling Victims of Sexual Harassment, 23 PSYCHOTHERAPY 316, 319-20 (1986) (describing the negative physical and mental symptoms of women who took formal action compared to those who did not).

150. UPDATED MERIT SYSTEMS PROTECTION BOARD STUDY, supra note 132, at 27.

151. GUTEK, supra note 137, at 71-73; UPDATED MERIT SYSTEMS PROTECTION BOARD STUDY, supra note 132, at 27.

152. RESEARCH AND RESOURCES, supra note 134, at 12 (quoting conversation with Barbara Gutek).

153. See id. at 12-13.

154. UPDATED MERIT SYSTEMS PROTECTION BOARD STUDY, supra note 132, at 24. The Study reported that 52% of women targets and 42% of male targets ignored the behavior or did nothing, while 43% of women targets and 31% of male targets avoided the harasser. Id.

155. Id. The Study showed that 44% of women targets and 25% of men targets told the harasser to stop the behavior, while 20% of both men and women targets reported that they had made a joke of the behavior. Id.

156. Id. The study indicated that 4% of women and 7% of men went along with the behavior. Id.
In short, sociological and psychological studies are virtually unanimous in their finding that sexual harassment is widespread in the American workplace. Although women are the more likely victims of sexual harassment, men too are reporting its occurrence. When asked whether sexual conduct in the workplace is generally "welcomed" by them, most women responded that it is not.

A majority of the studies indicate that there are gender differences in the perception of what behavior qualifies as "harassment," which may lead to differing determinations as to whether behavior would be welcomed by the target. Studies show that both male and female targets do not tend to react to harassment by filing a formal complaint. The most common reactions take the form of avoidance behavior or passive toleration. Researchers posit that targets are reluctant to report the harassment because they fear retaliation, further denigration, blame, and loss of privacy. Researchers also point out that targets hesitate to report harassment because of their own risk of loss of privacy and, finally, because they do not want to hurt the harasser unless it is absolutely necessary.

III. A PROPOSED PARADIGM FOR PROVING WELDOMENESS

A comparison of recent court decisions and EEOC pronouncements with the findings of recent sociological and psychological studies reveals some troubling discrepancies. For example, although studies indicate that women view sexual conduct in the workplace as generally "unwelcome," the law presumes that it is welcome and requires the target to prove otherwise. Additionally, although some lip service is given by the courts to examining whether the conduct was unwelcome from the perspective of both the target and the harasser, more aggressive and even physical rebuffs (in other words, behavior that is more typical of men than women) are generally the only behaviors that are unquestioned as evidence of unwelcomeness. Milder and more passive behaviors (those typically associated with women) are likely to be viewed by courts as "ambiguous" and thus not always positive evidence on the issue of unwelcomeness. The EEOC Guidance relies strongly on whether the target filed a formal complaint after the harassment, despite studies which indicate that most targets do not respond in this way and despite theories that the target's risks (or, at least, the target's perceptions of risks) when filing a complaint outweigh any perceived advantages. Finally, some recent cases indicate that a sexual harassment trial is likely to focus on the target's conduct, both in and outside the workplace, rather than on the conduct of the alleged harasser.157

157. See supra text accompanying notes 107-20.
The gap between the legal approach to the welcomeness issue and the "reality" reflected in current sociological and psychological studies cannot be ignored. The current paradigm for proving unwelcomeness unfairly burdens the targets of sexual harassment in ways that may confirm the soundness of the decision of many targets never to file a complaint at all. The gap can be narrowed by a simple manipulation of the paradigm, a manipulation that not only is more consistent with general Title VII models of proof but also brings sexual harassment cases in line with their counterparts in racial and national origin harassment.

The suggested paradigm is one which presumes that sexual conduct is unwelcome unless proved welcome. The paradigm also would limit the proof of welcomeness so that only objective evidence of an invitation or consent given directly to the alleged harasser would suffice. In other words, the proposed paradigm would do two things. First, it would shift the welcomeness inquiry to the status of an "affirmative defense" by the alleged harasser rather than its current status as an element of the plaintiff's prima facie case. Second, it would refine the definition of "welcomeness," thus narrowing the scope of the inquiry to one that allows the admission only of evidence which makes a positive showing that the target affirmatively solicited, invited, or consented to the conduct and that bears directly on interactions between the alleged harasser and the target. Designed to reflect sociologically and psychologically verified actualities about sexual harassment, the proposed paradigm should clarify the boundaries within which those who choose to engage in sexual conduct within the workplace may operate. Hence, without eliminating sexual interaction from the workplace, the proposed paradigm should limit its scope to those who choose freely and affirmatively to take part in it.

A. Shifting the Burden of Proving Welcomeness

Under the suggested paradigm for examining sexual harassment cases, welcomeness would be characterized as an affirmative defense rather than as an element of the plaintiff's prima facie case. Once the plaintiff has proved the sexual bargain (in a quid pro quo case), or that the actions of the harasser were so severe and pervasive as to alter the terms and condi-

158. See infra text accompanying notes 181-87.

159. This approach has also been suggested by several commentators. See Ann C. Juliano, Did She Ask for It?: The "Unwelcome" Requirement in Sexual Harassment Cases, 77 CORNELL L. REV. 1558, 1574-75 (1992); Anne C. Levy, Sexual Harassment Cases in the 1990s: "Backlashing" the "Backlash" Through Title VII, 56 ALB. L. REV. 1, 33-35 (1992); Vhay, supra note 35, at 345-46.

160. For a definition of quid pro quo harassment, see supra note 7.
tions of her employment (in a hostile environment case\textsuperscript{161}), the harasser will be found to have committed actionable sexual harassment\textsuperscript{162} unless the harasser can prove that the conduct was welcomed.

For several reasons, shifting the burden of proving\textsuperscript{163} welcomeness to the person who perpetrated the sexual conduct puts that burden where it rightly belongs. First, the burden-shifting overturns the presumption that most workers welcome sexual conduct and instead presumes that most workers do not.\textsuperscript{164} The latter presumption coincides not only with the findings of current psychological and sociological research\textsuperscript{165} but also with common sense. One need not be trained in law or psychology to understand that most people (male or female) do not "welcome" conduct that is humiliating, severely distracting, and potentially harmful to their ability to perform successfully at their jobs.\textsuperscript{166} The law of racial and ethnic harassment recognizes this conclusion.\textsuperscript{167} In these cases, courts focus on the severity and pervasiveness of the harasser's conduct because the conduct itself is presumptively unwelcome.\textsuperscript{168} As noted above, the psychological and sociological studies support the same presumption for sexual conduct in the workplace.\textsuperscript{169}

The burden-shifting justifiably requires the proof of a positive action, an action that may be verified in advance by objective evidence. The current paradigm requires the far more difficult proof of a negative—in simple terms, a proof similar to your mother trying to prove that she did not "welcome" your brother's date, a guest whom she admitted and tolerated. Some courts find that the plaintiff's passive silence, either during or after the sex-

\textsuperscript{161} There are a number of interesting articles that deal with the standard to be used in making this showing. See, e.g., supra note 7 and articles cited therein. The standard is not the subject of this Article and thus will not be discussed herein.

\textsuperscript{162} The issue of employer liability for the harasser's actions will not be discussed in this Article. For discussion of this issue, see Sperry, supra note 10.

\textsuperscript{163} It should be emphasized that the burden suggested here is not merely one of "articulating" that the conduct was welcomed, but actually one of proving the welcomeness. In Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981), the Supreme Court provided that, in a Title VII case, after the plaintiff establishes her prima facie case, the burden shifts to the defendant, but it is only the relatively easy burden of articulating a legitimate, nondiscriminatory reason for the conduct in question. Id. at 253 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).

\textsuperscript{164} It should be kept in mind that the burden still remains on the plaintiffs to show that the actions had a negative effect on their working conditions.

\textsuperscript{165} See supra text accompanying notes 131-56 (describing psychological and sociological studies).

\textsuperscript{166} In the words of Professor Levy, "It is difficult to imagine, after a full understanding of both covert and overt harassment, that any person could welcome being debased, debilitated, or stereotyped in a negative manner." Levy, supra note 159, at 34.

\textsuperscript{167} See infra text accompanying note 187.

\textsuperscript{168} Id.

\textsuperscript{169} For cases addressing this issue, see supra notes 107-20.
ual activity, discredits the target's allegation that the harasser's conduct was not welcome. The courts' approach of placing the burden of proving unwelcomeness on the target arguably creates an unfounded but necessary new element to the plaintiff's case: those seeking to win sexual harassment actions must show that they either confronted the harasser or complained about the conduct soon after it occurred. Consequently, an informed target would now know that her chances of success in a sexual harassment suit are directly dependent upon whether she either confronts her harasser directly or subsequently files a complaint. In fact, a target who had just read the most recent releases from the circuit courts of appeals would realize that her best chances for success lay in her physically repelling her pursuer in some manner, such as hitting him or slapping him in the face! This additional burden of confrontation or complaint is in complete conflict with studies which indicate that most male and female targets neither confront their harassers nor file a subsequent complaint. This burden not only harshly ignores the real fears of many targets that either action could result in retaliation or discharge, it ignores the fact that most targets of sexual harassment are women to whom the concept of physically striking another individual is quite likely to be alien.

It has been said, in the context of a sexual harassment case, that Title VII was not "designed to bring about a magical transformation in the social mores of American workers." Yet it would be naive to assume that sexual harassment will be curbed if there is not some change in the conduct of American workers, if not in their "mores." The current case law and EEOC Guidance, when viewed in light of findings about targets' reactions to sexual harassment, suggest that the change be made by the targets rather than by those who engage in sexual conduct by allowing harassers to proceed under the presumption that their actions are normal and welcome.

170. See, e.g., Dockter v. Rudolf Wolff Futures, Inc., 913 F.2d 456 (7th Cir. 1990), discussed supra notes 104-06.

171. Having found that the plaintiff's rebuffs of her boss's attentions were "neither unpleasant nor unambiguous," in Dockter, the Seventh Circuit noted also that the plaintiff had not complained of her boss's actions to anyone at the management level. 913 F.2d at 459-60. One study indicates that a complainant's chances of success in a sexual harassment lawsuit are dependent upon three factors: (1) whether the behavior involved sexual assault, unwanted physical contact, or threatening sexual propositions; (2) whether there were witnesses; (3) and whether a complaint was filed with management. See David E. Terpstra & Douglas D. Baker, Outcomes of Sexual Harassment Charges, 31 AcAD. OF MGMrT. 1185, 192-93 (1988).

172. See supra text accompanying notes 99-106.

173. See supra text accompanying notes 149-56.

174. Id.

175. Id.


177. Id. at 430.
until told otherwise. These same cases and Guidance would put the burden of a change in conduct on the targets by forcing them either to confront the harasser or complain formally, both actions in which they have heretofore been fearful or otherwise reluctant to engage.178

In general terms, logic and social policy dictate that if existing problems cannot be alleviated without someone changing his or her behavior, the person causing the problem should be the one who is forced to change.179 Shifting the burden of proof would do just that. In particular, if a potential harasser is alerted to the possibility that he or she will have to defend conduct as solicited or invited or consented to by the target, that person is far more likely to take seriously a target’s responses. In other words, a polite “no” will suffice to ward off the informed harasser and silence will not be so quickly perceived as “welcoming.” Even in cases in which the target’s responses may be characterized as ambiguous,180 the informed harasser will know that he or she bears the burden of proving that the target’s responses were clearly affirmative and inviting.

Third, the shifting of the burden of proof will bring the sexual harassment model of proof in line with other Title VII models.181 In McDonnell Douglas Corp. v. Green,182 the Supreme Court set out the model of proof for Title VII cases. The prima facie case laid out in McDonnell Douglas, a simple four-pronged test,183 contains no requirement of showing motive or intent. Plaintiffs must prove that they are members of one of the five “protected” classes listed in Title VII (race, sex, national origin, color, reli-

178. The Court of Appeals for the First Circuit takes a somewhat milder approach to this issue, requiring both parties to make changes in their behavior and responses: “The man must be sensitive to signals from the women that his comments are unwelcome, and the woman, conversely, must take responsibility for making those signals clear.” Lipsett v. University of Puerto Rico, 864 F.2d 881, 898 (1st Cir. 1988). But query whether it is the target or the harasser who is truly being asked to change behavior by this court.

179. For example, several years ago, statistics showing a growing number of deaths caused by “drunk drivers” received national attention. A nationwide campaign, taking the forms of education, advertising, and stricter legal ramifications, focused on changing attitudes toward the wisdom of driving a car while inebriated. See John R. Ashmead, Note, Putting a Cork on Social Host Liability: D’Amico v. Christie, 55 BROOKLYN L. REV. 995, 995 (1989); Mary H. Seminara, Note, When the Party’s Over: McGuiggan v. New England Telphone & Telegraph Co. and the Emergence of a Social Host Liability Standard in Massachusetts, 68 B.U. L. REV. 193, 193 (1988). In other words, the solution of the problem centered around changing the behavior of those causing the problem (that is, the drunk drivers themselves and the people who did not stop them from getting behind the wheel of a car).


181. The validity of the welcomeness requirement as a component of sexual harassment cases has also been questioned on the grounds that it has no basis in either Title VII or case law precedent. See Juliano, supra note 159, at 1574-75; Vhay, supra note 35, at 344.


183. Id. at 802.
tion),\textsuperscript{184} that they are basically qualified for the jobs in question, that they applied for the jobs and were rejected, and that the jobs remained open.\textsuperscript{185} As one commentator has noted, the plaintiffs are not required at this point to rebut potential defenses of the defendant even before they are raised.\textsuperscript{186} Also, shifting the burden of proof would bring sexual harassment cases more in line with racial and national origin harassment cases, in which the unwelcomeness showing is generally not necessary.\textsuperscript{187}


\textsuperscript{185} McDonnell Douglas, 411 U.S. at 802-04.

\textsuperscript{186} Vhay, supra note 35, at 344. In Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981), the Court clarified that once the prima facie case has been made, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its actions. Id. at 253. Professor Vhay likens the welcomeness requirement to this later stage in the framework, finding it "most analogous to a justification for the defendant's act." Vhay, supra note 35, at 344. The Civil Rights Act of 1991 provides a somewhat analogous model to the suggested paradigm with the model for proving "mixed motive" cases. Mixed motive cases are cases in which the plaintiff has proved a discriminatory motive for an employment action and the defendant has proved a nondiscriminatory motive for the same action. In these cases, the plaintiff need only show that a prohibited factor such as race or sex "was a motivating factor for any employment practice" in order to prove a Title VII violation. Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(m) (1991). The defendant may then mitigate damages by showing that it would have made the "same decision" even if the discriminatory factor had not been considered.

\textsuperscript{187} See Vhay, supra note 35, at 344. In its amicus curiae brief in the Vinson case, the EEOC noted as follows:

Whereas racial slurs are intrinsically offensive and presumptively unwelcome, sexual advances and innuendos are ambiguous: depending on their context, they may be intended by the initiator, and perceived by the recipient, as denigrating or complimentary, as threatening or welcome, as malevolent or innocuous.

\textit{EEOC Brief, supra note 55, at E-5.} Arguing against the theory that the welcomeness requirement is necessary in sexual harassment cases because they, by their very nature, involve ambiguous circumstances, Professor Vhay says that the "unwelcomeness test is at root the product of an outdated stereotype" about women using legal action to abuse lovers who have spurned them. Vhay, supra note 35, at 344.

In fact, most of the racial and national origin harassment cases have focused on whether the taunts were so severe and pervasive as to constitute harassment, rather than on whether they were welcome. \textit{See, e.g., Erebia v. Chrysler Plastic Prod. Corp., 772 F.2d 1250, 1254-56 (6th Cir. 1985), cert. denied, 475 U.S. 1015 (1986) (collecting cases); see also, Daniels v. Essex Group, Inc., 937 F.2d 1264, 1274 (7th Cir. 1991) (examining the effect of a mention of the Ku Klux Klan on a black worker and noting that "[p]lainly, any black would find this graffiti threatening"); Davis v. Monsanto Chem. Co., 858 F.2d 345, 348 n.1 (6th Cir. 1988) (justifying a different treatment of racial harassment as opposed to sexual harassment by pointing to the different level of constitutional scrutiny that is applied in race discrimination as opposed to sex discrimination cases), cert. denied, 490 U.S. 1110 (1989).}

In October 1993, the EEOC issued proposed \textit{Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability}, 58 Fed. Reg. 51266 (1993) (to be codified at 29 C.F.R. § 1609) (proposed Oct. 1, 1993). These Guidelines were designed to deal with all types of harassment except sexual harassment. \textit{Id. at 51266-67.} The EEOC noted that "[s]exual harassment continues to be addressed in separate guidelines because it raises issues about human interaction that are to some extent unique in comparison to other harassment and, thus, may warrant separate emphasis." \textit{Id. at 51267.} The proposed Guidelines contain no discussion of the welcomeness concept. The term "unwelcome" does not appear in the definition of harassment on the basis of race, religion, gender, national origin, age, or disability. \textit{Id. at 51268.}
Finally, shifting the burden of proof, as opposed to the complete elimination of the welcomeness element, will protect those few workers who truly may be the objects of the abusive use of sexuality by an alleged target. A person who clearly invites a sex-for-benefits bargain or who instigates or solicits other types of sexual conduct will not be protected unless and until he or she makes clear to the other participant that the conduct is no longer welcome. Similarly, retention of the welcomeness element will allow those workers who choose to engage in consensual sexual conduct to do so—albeit with caution. The workplace will not become completely devoid of sex; however, the workplace will be a place where the privacy and free choice of others not to be the targets of sexual advances take precedence over a worker’s right to engage in sexual conduct.

B. Narrowing the Definition of Welcomeness

Shifting the burden of proof alone is not sufficient to address the many problems raised by the current paradigm for proving sexual harassment cases. Besides placing the burden on the target to confront or complain, the current paradigm has other frailties that stem from the broad definition of welcomeness. The current paradigm requires a target monitor her every activity (including speech, dress, and even “personal fantasies”) for fear that she might unwittingly be sending “welcomeness signals” to her harasser. Additionally, the current paradigm allows the fact finders at trial to invade private sectors of the target’s life, interactions that have no relevance to her interactions with the alleged harasser. Finally, the current paradigm discourages the target from engaging in visible activity at work with one person unless she is willing to tolerate that conduct with anyone and everyone. Consequently, the suggested approach to redefining the paradigm

188. This type of harassment is instead defined as “verbal or physical conduct that denigrates or shows hostility or aversion toward an individual because of his/her race, color, religion, gender, national origin, age, or disability, or that of his/her relatives, friends or associates” and that creates a hostile environment. Id. at 51629. The proposed guidelines point out that “gender” harassment is harassment that is “non-sexual in nature.” Id. at 51268 n.1. The proposed guidelines also contain no discussion as to whether the target filed a timely complaint after the conduct occurred.

189. Compare Downes v. Federal Aviation Admin., 775 F.2d 288, 293 (noting that “the aim of the U.S. government as employer should be to free its workplace of offensive sexual remarks entirely”) with Ellison v. Brady, 924 F.2d 872, 880, n.13 (9th Cir. 1991) (noting that “Title VII’s prohibition on sex discrimination in employment does not require a totally desexualized work place”).


191. For example, in Burns v. McGregor Elec. Indus., 989 F.2d 959 (8th Cir. 1993) the district court found the alleged harasser’s actions were not unwelcome because the plaintiff “would not have been offended if someone she was attracted to did or said the same thing.” Id. at 963.
must include not only a shifting of the burden of proof but a narrowing of the definition of "welcomeness."

Under the current paradigm, the term "unwelcome" requires the target to show: (1) that the conduct was neither "solicited nor invited/incited;" 192 and (2) that the target found the conduct offensive. In other words, using this definition, courts must determine whether the target solicited the particular conduct at issue and whether the target would generally welcome such conduct.

1. The "Neither Solicited Nor Invited" Component: Welcoming the Particular Conduct

The first component of the current unwelcomeness definition states that conduct is "welcomed" only when it is solicited or incited or invited by the target. Were this definition in fact respected by the courts, it might be a suitable one. Unfortunately, as noted above, 193 some post-Vinson cases and the EEOC Guidance have turned this component around to require a target to monitor her every move and choice of clothing, both at work and outside work, to guard against sending out what could be perceived by a harasser as an invitation. The Supreme Court in Vinson had noted that a target's dress and speech were relevant evidence on the welcomeness issue. 194 In addition, some of the more recent court decisions seem to grant credibility to the claim that conduct was "unwelcome" only if the target's rebuffs were blatant or even physical rather than polite and pleasant. 195 Finally, courts have focused on whether the plaintiff participated at any time and with anyone in any of the sexually oriented activities about which she later complained. 196

The current definition of "welcomeness," at least as interpreted by some courts, perpetuates the old stereotype of a woman saying "no" when she really means "yes." As these courts view the matter, anything short of a direct verbal or physical "no" in reality means "yes." 197 Without discussing the issue of perspective, these courts seem to justify a harasser's interpretation of timidity or silence or ambiguous statements to mean that his ad-

192. See supra text accompanying notes 85-93.
193. See supra text accompanying notes 107-20.
195. See supra text accompanying notes 99-106.
196. See, e.g., Reed v. Shepard, 939 F.2d 484, 491 (7th Cir. 1991) (emphasizing the plaintiff's "enthusiastic receptiveness to sexually suggestive jokes and activities"); Wyerick v. Bayou Steel Corp., 887 F.2d 1271, 1274-75 (5th Cir. 1989) (reversing the district court's summary judgment that the plaintiff had "welcomed" the activity because she responded in kind with three sexual comments).
197. See supra text accompanying notes 99-106.
vances were not unwelcome. The suggested alteration of the definition would first reverse this approach so that anything other than "yes" must be interpreted to mean "no."
In other words, a harasser would prove "welcomeness" only if he can show by objective evidence that the target affirmatively and freely solicited or consented to his advances.

The "affirmative" aspect of the proposed definition would require that the harasser show by objective evidence that the target solicited or consented to his advances. Hence, in most circumstances, the following actions (or, for some, "non-actions") would not be affirmative evidence of solicitation or consent: silence; a polite "no;" evasive behavior; laughing, smiling, or otherwise attempting to make light of the advance; backing away or withdrawing one's hands but not physically leaving the harasser's presence; maintaining eye contact; changing the subject; accepting a kiss on the cheek or a quick hug; the failure to complain. Furthermore, a target's dress would never in and of itself be sufficient evidence of solicitation or consent. Finally, if there were any ambiguity about the target's actions, these ambiguities would be construed against the harasser's claim of welcomeness.

For purposes of proving welcomeness, the new definition would include only actions directed to the alleged harasser by the target, as opposed to her interactions with co-workers or anyone outside the workplace. Therefore, if the target accepts a kiss every morning from one co-worker, this is not affirmative evidence that she welcomes or solicits a kiss from the harasser. If the target engages in sexually oriented banter with one co-worker (while this circumstance is somewhat more troublesome), harassers should not be allowed to take this behavior alone as permission to do the same, particularly if their attempts are met with any evasive or passive nonresponsiveness. If the target lives in a commune and shares sexual relations with twenty other people, such evidence also is irrelevant for purposes of determining whether she solicits or consents to advances by the harasser. As noted by the Court of Appeals for the Fourth Circuit in a pre-Vinson opinion, "A person's private and consensual sexual activities do not consti-

---

198. The First Circuit has taken some steps toward remedying this perspective problem, noting that the factfinder must keep "both the man's and the woman's perspective in mind." Lipsett v. University of Puerto Rico, 864 F.2d 881, 898 (1st Cir. 1988).


200. For excellent discussions of the imposition on a plaintiff's privacy brought about by the current scope of the unwelcomeness inquiry, see Susan Estrich, Sex at Work, 43 STANFORD L. REV. 813 (1991); Juliano, supra note 159, at 1590-92.
stitute a waiver of his or her legal protections against unwelcome and unsolicited sexual harassment.”

Under the proposed paradigm, in contrast to the EEOC directive, the lack of a formal complaint would be irrelevant to the question of welcome- ness. While the presence or absence of a complaint may be probative when deciding whether an employer had notice of harassing conduct, the narrow focus on direct interactions between the target and the harasser would preclude the lack of a filed complaint from being used to prove welcomeness.

2. The “Offensiveness” Component: Welcoming Such Conduct in General

The “offensiveness” component of the current definition of unwelcomen ness overlaps the first component but has been dealt with separately by the courts of appeals of two circuits. This component focuses not on the target’s interactions with the harasser, but rather on whether the target’s actions, dress, or lifestyle indicate to the factfinder that she is the kind of person who would generally “welcome” sexual behavior or conduct. For example, the district court in Burns v. McGregor Electronics Industries, Inc. was so distracted by the target’s non-work activity of posing nude for a magazine that it refused to find that the unwelcomeness requirement had been met even after it found that the harasser’s particular advances toward the target were “unwelcome.”

The court of appeals for the Eighth Circuit reversed, pointing out that the plaintiff had not posed in suggestive ways at work and that “[h]er private life, regardless how reprehensible the trier of fact might find it to be, did not provide lawful acquiescence to unwanted sexual advances at her work place by her employer.”

In Swentek v. USAir, Inc., the Court of Appeals for the Fourth Circuit made a similar distinction. In that case, the evidence presented at trial included evidence that the plaintiff “was a foul-mouthed individual who often talked about sex.” The trial court concluded that the plaintiff had not met the unwelcomen ess requirement, even though she had specifically told her harasser to leave her alone, because “she was the kind of person who could not be offended by such comments and therefore wel-

204. See supra notes 110-20 and accompanying text.
205. 955 F.2d 559, 565 (8th Cir. 1992).
206. Burns, 989 F.2d 959, 963 (8th Cir. 1993).
207. 830 F.2d 552 (4th Cir. 1987).
208. Id. at 557.
209. Id. at 556.
comed them generally." The court of appeals reversed, pointing out that it was the trial judge's responsibility to "determine whether [the] plaintiff welcomed the particular conduct in question from the alleged harasser," not whether she was generally the kind of person who would "welcome" such conduct.

The offensiveness component is not a necessary component of the suggested definition of welcomeness. The newly narrowed definition would focus the inquiry on the target's interactions with her harasser; her lifestyle or habits or general mode of speech would be irrelevant to the welcomeness inquiry.

C. "By Invitation Only:" Application of the Proposed Paradigm

The application of the proposed paradigm is perhaps best explained by illustrating its use in a number of typical sexual harassment situations. Obviously, the effect of having uninvited guests show up at a party is much less harmful than the effect of unwelcome sexual harassment, but the use of the analogy of your mother's party may be helpful in clarifying how the proposed paradigm is to be used.

1. Quid Pro Quo Harassment: The Sexual Bargain

As noted above, quid pro quo sexual harassment is said to occur when a superior conditions a tangible job benefit on the receipt of sexual favors. Under the proposed paradigm, the only circumstances under which such an offer is defensible is if the target actively and affirmatively solicited the offer or freely consented to it.

210. Id. at 557.
211. Id.
212. The degree to which the target found the behavior "offensive" is still relevant in hostile work environment cases but is encompassed by the requirement that the plaintiff prove the harassment was sufficiently severe and pervasive to alter his or her conditions of employment. See supra note 7. In Burns v. McGregor Elecs. Indus., Inc., 989 F.2d 959 (8th Cir. 1993), the court of appeals noted that the district court had found that the harasser's actions were "sufficiently severe to alter the conditions of employment and create an abusive work environment." Id. at 962. This finding, coupled with the finding that the plaintiff had rebuffed the advances made by her harasser, were together sufficient to establish actionable harassment. Id. Any independent finding that the behavior was not "offensive" to the target was logically inconsistent with these two findings.
213. See supra note 7.
214. The aspect of "freely given" consent is designed primarily for situations in which the target is a subordinate from whom sexual conduct is being solicited by a superior. For a discussion of the concept of "freely given" consent, see Shaney, supra note 199, at 1225-28; Juliano, supra note 159, at 1575. In this circumstance, the Vinson Court made it clear that actions which may ostensibly appear to be "voluntary" are not necessarily actions that are "welcome." See supra text accompanying notes 62-64; Shaney, supra note 199, at 1125-28.
The solicitation or invitation must be shown by objective evidence in order for the alleged harasser to carry the burden of his defense. The invitation or consent must be freely given, in that it must not be coerced nor the product of fraud or misrepresentation. Suppose a guest shows up at your mother's party with a written invitation in hand. While the guest has strong evidence that he or she was invited, there is still a possibility that the invitation was procured by fraud—perhaps stolen from a neighbor's mailbox. Similarly, your mother's sister may have procured the invitation from your mother on the promise that she had straightened out and would appear sober at the party. When she shows up drunk, your mother sees that the representations were false. Hence, this guest cannot successfully claim to be "welcome" if she bears the burden of showing not only that she was invited, but also that the invitation was freely given.

The typical quid pro quo scenario involves the risky approach of the superior, who wants to use job benefits as a bargaining tool for sexual conduct, making the "offer" and hoping that it will be accepted. An affirmative, freely given, objectively provable consent would carry his burden of proving welcomeness. On the other hand, if he offers and is rebuffed, he may still be liable for creating a hostile environment even if he does not withdraw any job benefits due to the refusal. In that case, he has no affirmative defense for his audacity in making an offer that was not solicited.

The unsolicited offer by a superior can be likened to the situation in which some of your mother's invited guests (her classmate, your brother) brought with them guests who had not received an invitation but who hoped that they would still be welcomed. In each case, the guest ran the risk that she would not be welcomed by your mother. (For example, what if the party was a carefully planned dinner for eight and there were not enough places or plates for the additional person?) The first "uninvited guest"—your mother's classmate—may have felt that she knew your mother well.

215. By "objective" evidence, this author is referring to evidence of actions or words that clearly solicit sexual interaction. In other words, superiors who make advances without being asked to do so or who are relying only on their own subjective impressions of things like "the way she looked at me" or "the number of times she smiled at me" would not be able to prove that they were invited to enter into the sexual interaction under the proposed paradigm.

216. See supra note 214.

217. For example, the superior may flirt with a subordinate, make comments about her body or about how nice it would be to have sex with her. He also makes clear to the subordinate that she will be favored over her peers (for a raise, promotion, etc.) if she consents to a sexual relationship with him.

218. If the subordinate, described supra note 217, refuses to sleep with the superior, he may still give her a raise. However, the mere fact that she is not required to sleep with him in order to get the raise may not mitigate the hostile nature of the working environment he has created for her by his offers.
enough to run that risk. Supervisors should be advised, however, that they should not consider themselves in that position. Even if they have found their subordinate to be playful and pleasant and even a bit flirtatious, the consequences of risking an unsolicited sex-for-benefits offer should be viewed always to outweigh any possible positive outcome.

2. Social Interactions in the Workplace

Far more complex issues arise in the context of social interactions between co-workers, rather than between superiors and subordinates. When do these actions rise to the level of sexual harassment? The suggested paradigm will shed some light on these problems.

In the analogy of your mother’s party, recall that your brother brought with him an uninvited date whom your mother was unhappy to see. Under the current paradigm, your brother may claim that the date was welcome because your mother did not actively refuse her entry and politely tolerated her presence. Under the suggested paradigm, however, your mother’s inaction and tolerance would not constitute affirmative evidence that your mother welcomed this guest.

The analogy of your mother’s party can also be used to illustrate the concept of a limited invitation or limited welcomeness. When your mother invited the guests to her party, she invited them for dinner and cocktails. It seems obvious that a guest would not be justified in demanding to spend the night at your mother’s house on the theory that he or she was invited to the party. The same rule should hold for limited invitation social contacts among co-workers.

In Ellison v. Brady, Kerry Ellison met Sterling Gray during her initial training as a revenue agent. Gray invited her to lunch one day and she accepted. Soon thereafter, when Gray began pestering Ellison and lingering around her desk, she began to evade him and avoid being alone in the office with him. When he asked her for drinks or for lunch, she declined. Gray’s attentions became more intense and eventually Ellison complained to her supervisor.

When Ellison accepted Gray’s initial request for a lunch date, she was not in turn inviting him to enter into a social relationship with her. Under

219. In other words, a worker who solicits or invites sexual bantering with a co-worker has not issued a blanket invitation for all types of sexual activity with him, but rather an invitation that is limited to sexual bantering.
220. 924 F.2d 872 (9th Cir. 1991).
221. Id. at 873.
222. In fact, Gray even stopped by his house to pick up his son’s forgotten lunch and gave Ellison a tour of his house. Id.
223. Id. at 873-74.
224. Id. at 874.
the current paradigm that focuses on the conduct of the target, however, it could be argued that Ellison's initial acceptance of the lunch invitation would dictate against later claims by her that subsequent social interaction with Gray was unwelcome. Ellison's subsequent evasive responses and polite refusals of social invitations might not themselves serve as adequate evidence that she communicated her unwillingness to enter into a relationship with him because courts may not recognize the concept of limited welcomeness.\textsuperscript{225}

Under the proposed paradigm, Gray would be required to show that his social/sexual conduct toward Ellison was welcomed by her. Gray could not offer an acceptable defense of his continual pestering of Ms. Ellison because he had not received an invitation from her consenting to these interactions. Hence, Gray could be found liable for actions beyond the time when Ellison began to avoid him as he would not be able to prove that the continued conduct was welcomed. He could not use her initial acceptance of a luncheon invitation as evidence of a blanket invitation to become involved with her.\textsuperscript{226}

In \textit{Dockter v. Rudolf Wolff Futures, Inc.},\textsuperscript{227} the court failed to view Dockter's agreement to have dinner with her boss as a limited invitation.\textsuperscript{228} Dockter agreed to accompany her boss to dinner for the purpose of meeting clients, but the clients never arrived.\textsuperscript{229} During the dinner, her boss grabbed her and attempted to kiss her several times, so she asked him to take her home.\textsuperscript{230} At her apartment door, her boss attempted to kiss her again and this time he also fondled her breast.\textsuperscript{231} The court's description of these events indicated its belief that Dockter's "initial rejections were neither unpleasant nor unambiguous" and it was not until her boss fondled her breast—referred to by the court as "one misguided act"—and she sharply reprimanded him that the court found a sign of unwelcomeness. Under the suggested paradigm, Dockter's boss would have no proof that he ever received an invitation to fondle Dockter or attempt to kiss her; her agreement to have dinner with him and clients would be evidence of nothing more than that she consented to go to a business dinner. The court's view of Dockter's conduct is sadly reminiscent of the "she asked for it" theory ap-

\textsuperscript{225} In \textit{Ellison}, this was not an issue because Ellison eventually became much more forceful in her refusals and even asked a male friend to tell Gray that she was not interested in him and he should leave her alone. \textit{Id.}

\textsuperscript{226} Of course, the issue of whether the conduct is sufficiently severe and pervasive as to alter the conditions of Ellison's employment is a separate issue and may dictate against a finding of liability. \textit{See supra} notes 7, 10 and articles cited therein.

\textsuperscript{227} 913 F.2d 456 (7th Cir. 1990)

\textsuperscript{228} \textit{Id.} at 458-59.

\textsuperscript{229} \textit{Id.} at 460.

\textsuperscript{230} \textit{Id.}

\textsuperscript{231} \textit{Id.}
plied when a woman who is wearing a short skirt or no bra is raped. As Professor Susan Estrich points out, it is supremely ironic that "[a] doctor may be required, by tort law, to secure affirmative and informed assent before he lays his hands on a woman; but a boss may freely touch any woman subordinate, until and unless she expresses, through her conduct, her nonassent." The proposed paradigm seeks to hold both supervisors and co-workers to a higher standard of conduct.

Another troublesome consequence of social interaction among co-workers occurs when one co-worker willingly enters into a social or sexual relationship with another but then decides not to continue the relationship. In this situation, the person who wants the relationship to stop should bear responsibility for communicating that message clearly. Suppose that your mother sends out written invitations to the party but then becomes ill and decides to postpone the event. Clearly, your mother has an obligation to inform the invitees that the party has been postponed. On the other hand, an invitee who shows up on the original date (not having received the notice) has no right to demand entry just because she holds an invitation in her hand. Under both the current paradigm and the suggested paradigm, a person who initially engages in the relationship has the duty to notify the other party affirmatively when she wants the relationship to end. Unlike the current paradigm, however, under the suggested paradigm, if a court has equally compelling evidence for and against an effective communication of notice, the issue must be decided against the person who has the burden of proving welcomeness—that is, against the alleged harasser.

3. Participation in Sexual Conduct

Perhaps the most difficult "welcomeness" cases are those in which the target is found to have participated to some degree in sexual bantering, joking, or other such conduct. Particularly in jobs that are male-dominated, some women have chosen to join in the horseplay in order to be accepted by their peers. The proposed paradigm may not resolve all the troubling issues in these cases, but it will at least offer some guidance for courts dealing with these issues.

One prominent theme of the proposed definition of welcomeness is that the factfinder should focus only on direct interactions between the tar-

232. Estrich, supra note 200, at 828.
233. See supra text accompanying notes 82-83 (noting EEOC's discussion of the rule).
234. See, e.g., Reed v. Shepard, 939 F.2d 484 (7th Cir. 1991), in which a female rookie "civilian jailor" gave the following explanation as to why she tolerated and even joined in the office sexual bantering and sexually oriented practical jokes: "Because it was real important to me to be accepted. It was important for me to be a police officer and if that was the only way I could be accepted, I would just put up with it and kept [sic] my mouth shut." Id. at 492 (alteration in original).
get and the alleged harasser. As previously noted, non-work activities that do not involve the harasser, as well as generalized choices such as the target's attire, are irrelevant to the proposed welcomeness inquiry. In addition, the target's interactions with other workers would not be relevant. In other words, an alleged harasser who attempted to kiss a co-worker may not claim that she welcomed it because she kissed another co-worker—nor may he claim that she welcomed his sexual banter because she welcomed it with another co-worker—any more than one of your mother's neighbors can expect to be welcomed at the party just because the other neighbors were invited.

The factfinder also should focus on whether a target's participation was only a limited invitation to the alleged harasser. As noted above, an invitation to your mother's party is not an invitation to spend the night, nor is the use of a few four-letter words or sexual remarks an invitation to sexual propositions or outrageous sexual conduct.\(^{235}\)

\section*{D. Should a Welcomeness Inquiry Play Any Role in Sexual Harassment Cases?}

The suggestion of a new paradigm for the sexual harassment welcomeness inquiry must be examined in light of current scholarship which contends that there is no place in sexual harassment cases for a welcomeness inquiry. In her landmark article, \textit{Sex at Work},\(^{236}\) Professor Susan Estrich makes a compelling argument for the complete deletion of the welcomeness inquiry.\(^{237}\) Professor Estrich describes three “serious problems” raised by the welcomeness requirement.\(^{238}\) She argues first that the welcomeness requirement places no burden on the harasser to refrain from harassing behavior until the target, who is often “less powerful and economically dependent,” expresses unwelcomeness.\(^{239}\) Second, she points out that the emphasis on the target’s conduct may result in “a polite ‘no’” not being a sufficient expression of unwelcomeness.\(^{240}\) Third, and, in her words, “most pernicious of all,” is the potential for loss of privacy by the target in a trial that may have to focus on her dress, her speech, and even her non-work sexual activities.\(^{241}\)

---

235. For example, in Wyerick v. Bayou Steel Corp., 887 F.2d 1271 (5th Cir. 1989), the court found that the plaintiff's three sexual remarks were "limited replies to an onslaught of sexual remarks and gestures" and thus the district court could not grant summary judgment against her on the ground that she welcomed the conduct. \textit{Id.} at 1275.
237. \textit{Id.} at 826-34.
238. \textit{Id.} at 828.
239. \textit{Id.}
240. \textit{Id.}
241. \textit{Id.}
Professor Estrich likens this shifting of focus from the harasser to the target to the consequences of the consent standard in rape cases.\textsuperscript{242} She argues further that the welcomeness requirement is "unnecessary even as a means to protect what some would consider legitimate, consensual sex in the workplace."\textsuperscript{243} She maintains that the requirement is not necessary in quid pro quo cases in that it is virtually impossible to believe that a bargain on the order of, "You sleep with me and I'll get you a promotion" could ever be considered "welcome."\textsuperscript{244} In hostile environment cases, Professor Estrich argues that the unwelcomeness showing is fundamentally inconsistent with the other requirements of a claim.\textsuperscript{245} Pointing out that there is a requirement in hostile environment cases that the conduct be viewed as offensive from an "objective viewpoint," she finds the welcomeness requirement to be:

gratuitous when the environment is not proven objectively to be hostile, because an unwelcome environment which is not objectively hostile does not give rise to liability in any event. It is gratuitously punitive if the environment is found objectively hostile, for in that case the employer can nonetheless escape the burden of addressing the issue, by portraying this particular woman as so base as to be unworthy of respect or decency, and by arguing that she thus welcomed, through her conduct, an environment which a "reasonable" woman would have perceived as hostile.\textsuperscript{246}

Finally, Professor Estrich notes that in a system which already contains "serious disincentives" for filing sexual harassment complaints (including loss of privacy and potential retaliation), any theory that adds another disincentive should "be supported by a strong justification."\textsuperscript{247} In Professor Estrich's view, "the unwelcomeness inquiry certainly is not."\textsuperscript{248}

As Professor Estrich persuasively suggests, a strong argument may be made that the welcomeness inquiry plays no credible role in some sexual harassment cases. In a blatant quid pro quo case, this author agrees with Professor Estrich that it is difficult to fathom that having benefits such as

\begin{itemize}
  \item \textsuperscript{242} Id. at 827.
  \item \textsuperscript{243} Id.
  \item \textsuperscript{244} Id. at 831. Professor Estrich also proffers what she terms the "more radical response" against the welcomeness requirement, which is that "there is no such thing as truly ‘welcome’ sex between a male boss and a female employee who needs her job." Id. She points out, however, that one need not adopt this radical response in order to understand the other reasons why welcomeness is an unnecessary component of sexual harassment cases. Id.
  \item \textsuperscript{245} Id. at 833.
  \item \textsuperscript{246} Id.
  \item \textsuperscript{247} Id. at 833-34.
  \item \textsuperscript{248} Id. at 834. Criticisms of the welcomeness inquiry also appear in Juliano, supra note 159, at 1574-82; Levy, supra note 159, at 33-35; Shaney, supra note 199, at 1125-28; Vhay, supra note 35, at 344-46.
\end{itemize}
promotion or salary conditioned on sexual activity is ever truly welcomed. The "radical response" that supervisor-subordinate sexual interaction is never consensual,\(^{249}\) however, may oversimplify a quite complicated issue. More dangerous, even, is the potential that such an approach will stereotype those women who choose to engage in "sex at work" as perennial victims, a stereotype that serves to reinforce widespread notions of women (who typically are the subordinates) as weak and unable to control their own destinies.\(^{250}\) Rather than eliminating the welcomeness inquiry entirely, the result of empowering people who work to make enforceable choices about the use of their own bodies could perhaps be better achieved by narrowing the inquiry and shifting the burden of proving welcomeness to the person who claims to have perceived it, as the proposed paradigm would suggest.

Another argument against entirely eliminating the welcomeness inquiry is that most sexual harassment cases are not clear cases of quid pro quo, sex-for-benefits bargains. Many cases involve workplaces in which sex remains a part of the subculture. The goal of sexual harassment law in general is not to eliminate the sexual undercurrent at work, an undercurrent that may be beneficial or at least nonoffensive to many individuals of both genders, but rather to hold those who would force it on others responsible for their actions. The key to holding these persons responsible is to clarify the situations in which their sexual activities will be deemed appropriate and hold them liable for their activities in all other situations. In legal terms, this goal may be achieved by shifting the burden of proving welcomeness to the alleged harasser and narrowing the definition of welcomeness to mean only overt, objectively provable, noncoerced solicitation or consent that is directly given by the target to the alleged harasser.

The shifting of the burden of proof combined with the narrowing of the definition of welcomeness is admittedly a more moderate approach than that of eliminating the welcomeness inquiry completely. Those who argue for the elimination of the welcomeness requirement often argue for the elimination of sexuality from the workplace.\(^{251}\) The suggested paradigm is one that is designed not to eliminate sexuality from the workplace but to relegate it to its appropriate place. The work of many scholars in the sexual

\(^{249}\) For a discussion of this response, see supra note 244.

\(^{250}\) In addition, an elimination of the welcomeness element might imply the extremist notion that women never welcome sexual attention or interaction at work and thus must be protected from all advances made by their colleagues. This implication is based on stereotyped notions about women and men. This implication also resembles too strongly the type of attitude that engendered many early state laws designed to "protect" women from the harsh consequences of entering the workplace. For a discussion of this protectionist legislation, see Wendy Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. Rev. L. & Soc. Change 325, 333-35 (1984-85).

\(^{251}\) See, e.g., Estrich, supra note 200, at 860.
harassment area is instigated by and grounded in solid evidence of the harmful effects on women of sexuality in the workplace. Sexual conduct ranging from solicitation to sexually oriented language to exposure to pornography has been found to contribute to low self-esteem among women and to perpetuate stereotypes that revolve around women not belonging in the workplace. Consequently, sexuality in the workplace can be used and abused by men to retain their dominance in the workplace and to hinder women from achieving equality. In light of these findings, it is tempting to promote the concept of a sexuality-free environment at work. Elimination of sexual interaction in the workplace, however, is not only unrealistic but, for many females as well as males, may not be completely attractive.

It probably goes without saying that sexuality is an integral part of human interaction. Sexuality at work in and of itself consequently is not a "bad thing." Sexuality becomes harmful when it is used to hurt people physically, to denigrate or humiliate people, to deny them their equal opportunity in employment, or otherwise to make an environment hostile or uncomfortable. Conversely, an undercurrent of appropriate sexuality in the workplace may serve a variety of positive goals. For example, some workers may be stimulated to work harder for or be kinder to or otherwise react favorably to a person for whom they feel some attraction. A certain degree of emotional intimacy among co-workers may result from shared sexual feelings. Everyday conversation may be more laced with humor and good-natured teasing when sexuality is a part of it.

Despite these potentially positive aspects, sexuality has often been used as a weapon against women, both physically and psychologically. The physical exertion of sexuality ranges from rape and sexual assault to situations in which the male uses his greater strength to pressure a woman into an uncomfortable physical position, such as coming up behind her, brushing

252. See, e.g., Abrams, supra note 9, at 1204-09; Estrich, supra note 200, at 858-61; Levy, supra note 159, at 42-49.

253. See Abrams, supra note 9, at 1204-09; Levy, supra note 159, at 42-49. For a general discussion of the effects of sex stereotyping on women in the workplace, see Mary F. Radford, Sex Stereotyping and the Promotion of Women to Positions of Power, 41 HASTINGS L.J. 471, 486-503 (1990).

254. See Abrams, supra note 9, at 1204-09; Levy, supra note 159, at 42-49.

255. Professor Estrich, although she would condone a rule that would prohibit sexual relations in the workplace, agrees also that "[m]en and women could, of course, violate the rule." Estrich, supra note 200, at 860. She finds the rule justified, however, because "the power to complain, once in the hands of the less powerful, might well 'chill' sexual relations by evening the balance of power between the two." Id.

256. As will be developed in a later article, this author is not nearly as optimistic about the appropriateness of sexuality in a school rather than a work environment, particularly when the interactions are between teachers and students.
SEXUAL HARASSMENT

up against her, or locking her, even briefly, in his arms. As a psychological weapon, sexuality is at times even more insidious in that it is more difficult to recognize and, consequently, to defend against. Some men play on women's sexual needs by giving attention or affection only when the woman responds as "a woman should" (that is, in a humble and obedient manner). Other men prey on women's insecurities about their physical features, exaggerating what they deem to be faults and constantly emphasizing that a woman's worth is directly dependent upon her features. Some men with a word can make a woman self-conscious about the length of her skirt or the color of her stockings. Men can exert a subtle influence by their own free use of sexual remarks and innuendo coupled with either a deliberate disapproval of or an overly erotic reaction to women who do the same thing. Sometimes the greatest power play is the one in which our male-dominated society takes advantage of a woman's guilt about having any sexual feelings at all.

The game of sexuality is not really the problem. The problem for women is that the game is played by men's rules. For example, one of the most harmful ways in which sexuality affects women in the workplace results from the double standard with which it is applied. A man who sleeps with his secretary may be admired by his cohorts for his "luck" while a woman who sleeps with her boss may be derogatorily referred to as someone who can not succeed in any other way. A man who flirts with many women may be viewed as cute or funny or mildly irritating, while a woman who flirts with many men may be viewed as a tease or, worse still, "fair game." A man can slap a male co-worker on the rear end after the company softball game and have his conduct viewed as normal; if a woman does the same thing, some male may try to turn the encounter into a sexual one. For many men, sexuality is a source of power; for many women, it is a source of humiliation and pain.

One way to deal with the harm caused by power-oriented sexual conduct is to attempt to eliminate sexuality completely from the workplace. Another possibility is to disarm those who would abuse it by holding them liable for not determining in advance whether their conduct is acceptable to the person toward whom they direct it. The attempted elimination of sexuality from the workplace would probably fail (absent draconian techniques such as the firing of anyone who uses a sexually exploitive word). The drawing of legal boundaries, on the other hand, is not only practical, but helpful in reworking our cultural stereotype of women as the perpetual victims of sexuality.

257. Estrich, supra note 200, at 860.
E. Other Potential Criticisms of the Proposed Paradigm

The proposed paradigm may well incite criticisms not only from those who claim that it does not go far enough but also from those who claim that it goes too far. The latter type of arguments may proceed upon several lines. First, it may be argued that the proposed paradigm is not fair to accused harassers and their employers because they may now be found liable for actions that had heretofore been acceptable (e.g., for sexual teasing of a co-worker who had accepted that same type of behavior from other co-workers). A prospective, rather than retroactive, application of the new paradigm may allay many of these concerns. The new paradigm is not proposed to snare unsuspecting employees and make examples of them, but rather to draw a bright line that may be communicated by employers to employees. Upon receiving this communication, employees will know that, from that point on, they must curtail their sexual interactions until they have positive evidence that such actions are welcomed by the persons at whom they are aimed.

The second line of attack may come from those who remain concerned about the filing of frivolous suits by alleged targets who really are just seeking revenge on employers for some perceived unfairness. In response, it should be noted that the proposed paradigm does not eliminate the requirement that the factfinder determine the credibility of both the alleged target and the alleged harasser. It has been noted that "such a credibility judgment is usually unavoidable because sexual advances are not likely to be made in front of witnesses." The difficulties inherent in this credibility determination, including the danger that some plaintiffs will be lying, are not resolved by the proposed paradigm. Some easing of these difficulties may be offered, however, by the clear requirement of the proposed paradigm that the alleged harasser not proceed without objective indications of welcomeness. The murkiness involved in current cases is often the result of the requirement that the plaintiff prove a negative—that is, prove that she did not welcome certain conduct. This requirement asks factfinders to delve into the recesses of the target's psyche and attempt to reenact her state of mind at the time the actions were taking place, as well as to determine whether her own actions were consistent with that state of mind. The proposed paradigm simplifies the factfinding phase to the extent that it directs factfinders to look for the same type of objectively provable evidence that a potential harasser should seek before he begins or continues his sexual advances.

258. See supra text accompanying notes 236-55.
239. For a discussion of the factfinding difficulties associated with sexual harassment cases, see supra text accompanying notes 95-130.
260. SULLIVAN, ET AL., supra note 37, at 360.
Those concerned with the potential for frivolous sexual harassment claims may also argue that requiring the harasser to prove the welcomeness of his conduct is tantamount to assuming him “guilty until proven innocent.” This argument ignores the basis of a Title VII claim. Title VII is not a criminal statute. Title VII is designed to prohibit employers from engaging in unlawful employment practices.261 A finding of sexual harassment is not aimed at punishing the alleged harasser, but instead at discouraging employers from discriminating against employees on the basis of gender.262 The proposed paradigm would again give employers clear guidance as to how to instruct their employees to treat other employees.263

Finally, some may argue that requiring an employee to ascertain for sure that his conduct is welcome before proceeding further would take the “romance” and spontaneity out of personal interactions. The proposed paradigm is designed to affect employee interactions at work, not in the social realm. Persons at work logically expect that their actions will be subject to certain restrictions.264 Many of these restrictions are designed to maintain a working environment that will increase the productivity of all the workers.265 To the degree the proposed paradigm places restrictions on an employee’s ability to engage in “romantic activities” at work, it does so to protect the rights of all employees to work without distractions. As noted above,266 the proposed paradigm is not designed to eliminate “romance” and sexuality completely from the workplace, but rather to define limits that respect the rights of all workers to reach their greatest potential without unnecessary and unwelcomed interference from others.

F. Effects of the Proposed Paradigm

Shifting the burden of proof and narrowing the definition of the term “welcome” may serve as an impetus for adjusting the behaviors and attitudes that feed sexual stereotypes. Under the current paradigm of sexual

261. See supra text accompanying notes 32-37.
262. It is true, of course, that an employee who is responsible for his employer’s liability for sexual harassment may well lose his job. The interests of an employee who engages in questionable sexual activity at work, however, must be balanced against the interests of those employees who are victimized by this behavior through no fault of their own.
263. For a discussion of when an employer is liable for the sexual misconduct of an employee, see Sperry, supra note 10, at 942-51.
264. For example, persons working in a grade school might expect to curtail their use of obscene language. Persons who work close to flammable chemicals might expect to be prohibited from smoking and required to wear protective clothing. Persons who work in restaurants might be expected not to criticize the food in front of the customers.
265. Id. For example, an assembly-line worker might expect to be required to be at work on time to avoid disruption of the work of the others on the line. A receptionist might well be expected to be available during busy office hours even if those hours coincide with traditional meal times.
266. See supra text accompanying notes 251-56.
harassment law, when a female worker dresses to go to work in the morning, she should consider not only the appropriateness of her attire on a professional level, but also whether her skirt is too short, her high heels too high, or her sandals too revealing. Under the current paradigm, when the worker interacts with her colleagues and supervisors, she should refrain from making sexual remarks in even a joking manner. She should not touch any of her colleagues, nor allow any of them to touch her. Under the current paradigm, when the worker goes home at night, she should still be aware that her outside activities could be used at some later time to show that she would welcome sexual interplay at work or at least not be offended by it. In other words, under the current paradigm, the vulnerable worker should always be on the defensive, must always consider herself a potential victim, and must therefore be on her guard lest she later has to prove that she did not incite or invite the actions of her harasser. Under the current paradigm of sexual harassment law, if the worker encounters sexually abusive behavior at work, she has several options: she can remain silent, she can scream and hit the aggressor, she can politely but firmly tell the aggressor to leave her alone, she can file a formal complaint, she can make a joke of the behavior, or she can reciprocate in kind. None of these options is without risk, whether it be the risk of vulnerability to continued harassment, of physical or professional retaliation, of damage to a professional relationship that may be otherwise valuable, of being ignored by the persons to whom she complains, or of a later finding that she welcomed the behavior because she did not run away from it. In the long run, the target’s choice of which option to pursue will significantly affect her chances of bringing a successful action for sexual harassment. As should be fairly obvious, the current paradigm continues to make sexual harassment the worker’s problem and to base her chances of success on her own willingness to accept certain risks. In addition to that, the current paradigm allows courts to inquire into not only those actions that the target takes or does not take in direct response to the harassment, but also her interactions with other co-workers and even with people outside work.

Under the paradigm suggested in this Article, the target of sexual harassment still has the same options when confronted by harassing behavior. The dramatic difference is that her chances of a successful suit no longer depend on her reluctance or willingness to respond or her interactions with people other than the harasser. If the target remains silent, makes a joke, mildly but pleasantly refuses, or reciprocates with a biting comment that may include a sexual innuendo, these responses do not jeopardize her claim that she was subjected to actionable sexual harassment. Furthermore, if she chooses not to file a complaint immediately out of fear of retaliation or loss of privacy or even of hurting her harasser, she will not later be told that she
forfeited her right to say she did not welcome the harassment. If she flirts with one co-worker during a coffee break, she will not later be told by a court that the evidence shows that she welcomed sexual conduct by a different co-worker. If she engages in sexual banter with one co-worker, she will not later be found to have solicited such banter from all her other colleagues. If she chooses to engage in spouse-swapping or stripping or selling sex or simply having more than one sex partner outside work, she will not later be told that her non-work activities are relevant to whether she invited sexual advances while on the job. Her right to privacy will be protected. The only circumstance under which her conduct, as opposed to the conduct of the harasser, will be scrutinized is if she freely, actively, and directly solicited or affirmatively consented to the sexual conduct of the alleged harasser.

A reallocation of the burden of proof and a narrowed definition of the term “welcomeness,” if properly communicated by employers and respected by the courts, could contribute to a transformation in behavior and attitudes in the workplace. If the suggested paradigm is adopted by the courts and employers do an adequate job of educating their workers, two other consequences should ensue. First, potential harassers will know that they may later be called upon to give evidence of affirmative acts on the part of their targets which prove that the harasser’s conduct was welcomed. Potential harassers will learn that they will not be able to suggest that silence or pleasant refusals were actually mere masks of consent by the target. They will know that the fact that they (mis)interpreted a short skirt, an interchange of jokes between two other parties, or even knowledge about a target’s outside sexual activities as an invitation or consent will never in itself be adequate to show welcomeness.

The second additional consequence of adopting the proposed paradigm—a consequence that probably will occur much more slowly—is that potential targets of sexual harassment will learn that they do have control over their lives at work. They will learn that they can report incidents of sexual harassment without fear that their private lives will be exposed or that their every move at work will be scrutinized. They will learn not to

267. This effect could occur despite Judge Newblatt’s admonition that Title VII is not meant to have the effect of transforming the workplace:

Indeed, it cannot be seriously disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to—nor can—change this. It must never be forgotten that Title VII is the federal court mainstay in the struggle for equal employment opportunity for the female workers of America. But it is quite different to claim that Title VII was designed to bring about a magical transformation in the social mores of American workers.

blame themselves because they will find that the system does not blame them when their mode of attire or speech happens to spark egregious behavior from an observer. They will learn that they can engage in sexually oriented interactions with chosen individuals without being told they have invited the rest of the office to seduce them. For women as well as men, sexual activity will be a chosen activity; any activity that they do not solicit or to which they do not consent will not be considered consensual sex but rather actionable harassment.

IV. Conclusion

As the simple description of your mother’s party indicates, the process of distinguishing welcome from unwelcome sexual conduct is not a tremendously difficult one. What has been rather astounding to date is that the Supreme Court, the EEOC, and some lower federal courts have allowed themselves to be guided by stereotypes about social interaction rather than by realities that are readily observable. Currently, a plaintiff in a sexual harassment case bears the burden of proving a negative—that the conduct to which she was subjected was not welcomed by her. The rationale for this approach is that, because sexual interplay in the workplace is often ambiguous, the legal system should include protections against those who “innocently” engage in sexual conduct.

The proposed paradigm provides that same protection, in that it gives an alleged harasser the chance to prove his “innocence.” More importantly, however, the proposed paradigm helps to shift the focus of sexual harassment cases from the target of the harassment to the aggressor. Under the proposed approach, the notion that “she asked for it” must be positively proved—it will not be assumed. Furthermore, the scope of her “asking” will be limited to interactions between the target and the aggressor. A target’s choices as to dress, lifestyle, or interactions with other workers will not be deemed a waiver of her right not to be harassed. The new paradigm does not attempt to eliminate workplace sexuality entirely; instead it bestows on all workers an enforceable right to accept or reject it.

The suggested paradigm is not designed to banish sexuality from the workplace but rather to keep it in its place. The overriding goal is to allow workers to choose when and if they want to engage in sexual conduct in the workplace, be it an affair with a superior or merely sexually oriented bantering. Any sexual interplay that is not chosen by workers becomes grounds for a cause of action, the investigation of which will not result in further incrimination of the target.