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## The Unwelcome Requirement in Sexual Harassment: Choosing a Perspective and Incorporating the Effect of Supervisor-Subordinate Relations

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THE UNWELCOME REQUIREMENT IN SEXUAL  
HARASSMENT: CHOOSING A PERSPECTIVE AND  
INCORPORATING THE EFFECT OF SUPERVISOR-  
SUBORDINATE RELATIONS

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## INTRODUCTION

Sarah had been working with Andrew as her immediate supervisor for one year. Sarah was known around the office for making sexually explicit jokes with her coworkers, both male and female. She never made such jokes with Andrew or any other supervisor. One day, Andrew began directing sexually explicit jokes at Sarah, and he continued this conduct for several months. Although Sarah never laughed or verbally responded to Andrew's jokes, she sometimes smiled in response. Sarah never filed a complaint with human resources or spoke to anyone about her supervisor's new behavior. If she were to later file a complaint with the Equal Employment Opportunity Commission (EEOC) and then sue her employer because of Andrew's conduct under a hostile environment theory, most courts would require Sarah to prove that Andrew's conduct was "unwelcome."

In fiscal year 2012, 7,571 charges of sexual harassment were filed with the EEOC, and the EEOC found reasonable cause in 676 cases.<sup>1</sup> Despite the prevalence of sexual harassment claims, the federal courts of appeals still have vague and diverging standards on how Sarah would prove that Andrew's conduct was unwelcome. The unwelcome requirement has been subject to much criticism since the Supreme Court held in 1986 that a hostile environment claim is cognizable under Title VII of the Civil Rights Act of 1964 (Title VII).<sup>2</sup>

Courts can analyze whether conduct is unwelcome from multiple perspectives: (1) the subjective plaintiff—whether this particular plaintiff perceived the accused's<sup>3</sup> conduct as unwelcome; (2) the

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1. *Sexual Harassment Charges, FY 2010-FY 2013*, U.S. EQUAL EMP'T. OPPORTUNITY COMM'N, [hereinafter, *Sexual Harassment Charges*], [http://www.eeoc.gov/eeoc/statistics/enforcement/sexual\\_harassment\\_new.cfm](http://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm) (last visited Mar. 5, 2014).

2. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986).

3. Although the Supreme Court has not decided the issue, the courts of appeals are in almost complete agreement that under Title VII a supervisor or coworker may not be sued for sexual harassment in his individual capacity; the plaintiff has a claim under Title VII against only the employer. See Scott J. Connolly, Note, *Individual Liability of Supervisors for Sexual Harassment Under Title VII: Courts' Reliance on the Rules of Statutory Construction*, 42 B.C. L. REV. 421, 424-25 (2001). Because individuals who sexually harass in the workplace may not be personally liable under Title VII, this Note refers to the person accused of sexual

reasonable plaintiff—whether a reasonable person in the plaintiff’s position would perceive the accused’s conduct as unwelcome; (3) the subjective accused—whether this particular accused person knew that the plaintiff did not welcome<sup>4</sup> his<sup>5</sup> conduct; or (4) the reasonable accused—whether a reasonable person in the accused’s position would have known that the plaintiff did not welcome his conduct.

The Supreme Court has not been clear on which perspective courts should apply in the unwelcomeness inquiry, and the federal courts of appeals have consequently developed unclear and conflicting standards. This Note analyzes the unwelcome requirement from each of the above perspectives and concludes that the reasonable accused person perspective is most productive in eliminating sex-based discrimination from the workplace.

This Note then outlines research in social science on supervisor-subordinate relations and concludes from such research that it is unreasonable for a supervisor to believe that his subordinate welcomes severe or pervasive conduct that can reasonably be perceived as creating a hostile or abusive work environment. Accordingly, this Note advocates for the following framework when the alleged harasser was the plaintiff’s supervisor at the time of the harassment: The court should presume that the accused’s conduct was unwelcome and not require the plaintiff to prove unwelcomeness as part of her prima facie case. The defendant-employer may then have an affirmative defense that the plaintiff welcomed the accused’s conduct by unambiguously soliciting or inviting the behavior through verbal communication between the plaintiff and the accused. Courts should analyze such evidence from the perspective of the reasonable accused.

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harassment as the “accused” instead of as the “defendant.”

4. Conduct certainly exists that is neither unwelcome nor welcome; one can be confronted with conduct of another that one is ambivalent about. Nevertheless, for clarity’s sake, this Note assumes that when conduct is *not unwelcome*, it is *welcome*.

5. For simplicity, this Note assumes that the plaintiff is female and the accused is male. Though the number of sexual harassment claims by males is slowly increasing, the vast majority of plaintiffs are still female. *Sexual Harassment Charges*, *supra* note 1 (noting that only 17.8 percent of the charges submitted to the EEOC in 2012 were filed by males). This characterization, however, does not affect the analysis. The framework developed in this Note applies regardless of the sex of the plaintiff or accused. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (holding that same-sex sexual harassment is actionable under Title VII).

This Note proceeds in three parts. Part I describes the two theories under which an employee may bring a sexual harassment claim under Title VII, the elements of the hostile environment cause of action, and the purpose of the unwelcome requirement within the sexual harassment context. Part II recounts the inconsistent and sometimes vague tests that the courts of appeals have developed for determining whether the unwelcome requirement is satisfied. This Part also describes five criticisms of the requirement that this Note's proposed framework subsequently addresses.

Part III analyzes four different perspectives from which courts can view the unwelcome requirement and ultimately chooses the reasonable accused perspective as the most productive in serving the purposes of the unwelcome requirement and Title VII generally. This Part focuses on the substance of the requirement—how courts should analyze unwelcomeness in hostile environment cases. Part III also determines which party must bear the burden—the plaintiff or the defendant-employer—of proving welcomeness or unwelcomeness when the accused was the plaintiff's supervisor at the time of the alleged harassment. Applying research in supervisor-subordinate relations to the reasonable accused perspective of the unwelcome requirement informs this analysis and leads to an empirically grounded framework for courts to apply in supervisor-subordinate hostile environment cases.

This Note adds two new elements to current scholarship on the unwelcome requirement. First, this Note analyzes the four possible perspectives of the unwelcomeness inquiry in order to arrive at a perspective that is not redundant of any other element of the hostile environment claim and best serves the purposes of the requirement and Title VII generally. No work thus far has analyzed the requirement in such a manner. Second, this Note applies studies looking particularly at the relationship between supervisors and subordinates, not simply males and females, to the unwelcomeness perspective found to be the most productive. Only after analyzing all of the possible perspectives and applying data about supervisor-subordinate relations does this Note advocate for shifting the burden to the defendant-employer to prove welcomeness. Other commentators have recommended shifting the burden to the defendant, but this Note advocates for such a shift only in the

supervisor-subordinate context. The burden-shifting advocated for here is limited to contexts in which it is unreasonable—based on how people interact in the workplace—for the accused to believe that the plaintiff welcomed his conduct. No work thus far has advocated for a shift in the burden of proof for this element in only a particular class of cases.

It is important to return to this topic today, twenty-eight years after the Supreme Court held that hostile environment claims are cognizable under Title VIII, because the courts of appeals still have inconsistent standards for what a hostile environment plaintiff must prove, new data has emerged on supervisor-subordinate relations, and in two 2013 opinions the Supreme Court made it more difficult for employment discrimination plaintiffs to proceed to trial and recover damages. The Supreme Court recently held in *Vance v. Ball State University* that for purposes of an employer’s vicarious liability under Title VII, a “supervisor” is someone “empowered by the employer to take tangible employment actions against the victim,” not simply one who has the power to “direct another’s work.”<sup>6</sup> The Court also held in *University of Texas Southwestern Medical Center v. Nassar* that when the plaintiff alleges that her employer retaliated against her for complaining of discrimination, she must prove that the retaliation was the “but-for” cause of the adverse employment action taken against her, and not simply a motivating factor.<sup>7</sup> Because these recent decisions make it more difficult for employment discrimination plaintiffs to recover, now seems like an appropriate time to analyze what has been perceived as yet another roadblock most courts of appeals have placed on a plaintiff’s path to recovery for conduct creating a hostile work environment: the unwelcome requirement.

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6. 133 S. Ct. 2434, 2439, 2444 (2013). For the purposes of this Note, the term “supervisor”—when used to describe the recommended framework—refers to the broader notion of a supervisor, which includes one who has the ability to direct another’s daily activities.

7. 133 S. Ct. 2517, 2533 (2013).

I. HISTORY OF THE HOSTILE ENVIRONMENT CAUSE OF ACTION AND  
THE PURPOSE OF THE UNWELCOME REQUIREMENT

A. *The Hostile Environment Cause of Action Under Title VII*

Title VII prohibits employers from discriminating in certain contexts on the basis of race, color, religion, sex, or national origin.<sup>8</sup> Congress did not explicitly mention sexual harassment in Title VII. The EEOC, however, created guidelines for sexual harassment in 1980 stating that harassment based on sex is a violation of Title VII.<sup>9</sup> The EEOC guidelines are not binding on courts, but the Supreme Court finds them to “constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”<sup>10</sup> In 1986, the Supreme Court held in *Meritor Savings Bank, FSB v. Vinson* that a “hostile environment” claim is cognizable under Title VII.<sup>11</sup>

Plaintiffs can bring a claim of sexual harassment under two theories: quid pro quo and hostile work environment.<sup>12</sup> Under a quid pro quo theory, the plaintiff must show that the accused “explicitly or implicitly condition[ed] a job, a job benefit, or the absence of a job detriment, upon an employee’s acceptance of sexual conduct.”<sup>13</sup> Under a hostile environment theory, the plaintiff need not show economic harm resulting from the discrimination;<sup>14</sup> the plaintiff must show only that the accused’s conduct was severe or pervasive enough “to alter the conditions of [the victim’s] employment and create an abusive working environment.”<sup>15</sup> To do so, the plaintiff must establish the following elements: (1) she belongs to a protected

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8. 42 U.S.C. § 2000e (2006).

9. 29 C.F.R. § 1604.11 (1980).

10. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

11. 477 U.S. 57, 73 (1986).

12. *See id.* at 65 (describing hostile environment sexual harassment as “non quid pro quo” harassment). These two theories can also be found in the EEOC’s 1980 guidelines on sexual harassment. *See* 29 C.F.R. § 1604.11(a).

13. *Craig v. M & O Agencies, Inc.*, 496 F.3d 1047, 1054 (9th Cir. 2007) (quoting *Nichols v. Frank*, 42 F.3d 503, 511 (9th Cir. 1994)).

14. *Meritor*, 477 U.S. at 64.

15. *Id.* at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

class;<sup>16</sup> (2) the accused's conduct was based on sex; (3) the conduct was unwelcome; (4) the conduct was sufficiently severe or pervasive such that it altered the conditions of employment; (5) the conduct created a hostile or abusive work environment both objectively and subjectively; and (6) a basis exists for imputing liability to the employer.<sup>17</sup> The fifth element requires the plaintiff to show that a reasonable person would perceive the accused's conduct as creating a hostile or abusive work environment and the plaintiff subjectively perceived her work environment as hostile or abusive.<sup>18</sup>

Finally, the Supreme Court in *Meritor* stated that whether the alleged conduct was "unwelcome" constitutes "[t]he gravamen of any sexual harassment claim."<sup>19</sup> In reaching this conclusion, the Court relied partly on the EEOC's 1980 guidelines, which state that only "[u]nwelcoming sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment" under certain conditions.<sup>20</sup> The Court explained that "unwelcome" does not mean "voluntary;" rather, the unwelcomeness determination turns on whether the plaintiff "by her conduct indicated that the alleged sexual advances were unwelcome."<sup>21</sup>

In further explaining how courts should determine whether conduct is unwelcome, the Court stated that a plaintiff's "sexually provocative speech or dress" or "personal fantasies" are "obviously relevant" to the analysis.<sup>22</sup> Again, the Court relied on the EEOC guidelines, which state that the unwelcomeness analysis should

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16. Technically, Title VII does not protect only certain classes of people. Members of both majority and minority groups can state a claim for discrimination under Title VII based on its protected categories: race, color, religion, sex, and national origin. Despite this technicality, courts continue to list this element among those required to state a Title VII claim. EMPLOYMENT LAW 54-55 (Mark A. Rothstein & Lance Liebman eds., 7th ed. 2011).

17. See, e.g., *O'Rourke v. City of Providence*, 235 F.3d 713, 728 (1st Cir. 2001). The hostile environment elements are sometimes phrased differently depending on the circuit. See, e.g., *Woods v. Delta Beverage Grp., Inc.*, 274 F.3d 295, 298 (5th Cir. 2001) ("In order to establish a hostile working environment claim, a plaintiff must prove five elements: (1) the employee belonged to a protected class; (2) the employee 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.").

18. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993).

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

20. 29 C.F.R. § 1604.11(a).

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

22. *Id.* at 68-69 (internal quotation marks omitted).



depend on the totality of the circumstances, including “the nature of the sexual advances and the context in which the alleged incidents occurred;”<sup>23</sup> hence, the Court held that there is no per se rule against the admissibility of such evidence.<sup>24</sup> Any determination that the probative value of such evidence will be outweighed by the potential for unfair prejudice to the plaintiff should be made by the trial court.<sup>25</sup> Following this language, the vast majority of the courts of appeals require the plaintiff to prove, as part of her prima facie case, that the accused’s conduct was unwelcome before she can state a claim under Title VII for sexual harassment under a hostile environment theory.<sup>26</sup>

### *B. Purpose of the Unwelcome Requirement*

It makes at least intuitive sense why the Supreme Court would characterize unwelcomeness as the “gravamen” of any sexual harassment claim.<sup>27</sup> After all, courts are not in the business of awarding damages to plaintiffs who were confronted with conduct that they, in fact, welcomed. But there must be a reason for requiring plaintiffs to prove as part of their prima facie hostile environment claim that the accused’s conduct was unwelcome, because such a requirement is not imposed on plaintiffs in all suits.<sup>28</sup> Once the purpose of the requirement is clear, this Note proceeds to examine how courts should analyze unwelcomeness so as to best serve this purpose.

Susan Estrich, a staunch opponent of the unwelcome requirement, still recognizes that the requirement’s strongest justification is in assuring that “consensual workplace sex does not provide the basis for a civil action.”<sup>29</sup> The EEOC justifies the requirement in a

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23. 29 C.F.R. § 1604.11(b).

24. *Meritor*, 477 U.S. at 69.

25. *Id.*

26. *See infra* Part III.

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

28. For example, a wrongful death plaintiff need not prove that the defendant’s conduct, which resulted in the victim’s death, was unwelcome.

29. Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 831 (1991); *see also* Delaria v. Am. Gen. Fin., Inc., 998 F. Supp. 1050, 1058-59 (S.D. Iowa 1998) (“[T]he rule that the sexual or sex-based behavior at work is unwelcome ensures consensual work place sex does not provide the basis for a civil action.”); Janine Benedet, *Hostile Environment Sexual Harassment Claims*

similar manner.<sup>30</sup> The EEOC does not want the sexual harassment cause of action to “become a tool by which one party to a consensual relationship may punish the other.”<sup>31</sup> This is possible because “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.”<sup>32</sup>

From these excerpts, it may appear that the EEOC is worried about false claims being brought by those who actually did not subjectively experience a hostile or abusive work environment. From this perspective, the unwelcome requirement is a safeguard against such plaintiffs who are somehow able to prove the subjective hostile or abusive element of their claim, by requiring these plaintiffs to make clear to the harasser at the time the incident occurs that his conduct is unwelcome. Placing such a burden on plaintiffs decreases the probability that a plaintiff who has made a *prima facie* case for a hostile work environment was actually engaged in a consensual relationship at the time of the alleged harassment, and when the relationship went downhill, decided to sue her employer.

Viewing the unwelcome requirement in this way, however, renders it redundant. If the EEOC believed that every time plaintiffs met the subjective branch of the hostile or abusive element they actually did subjectively experience their environment as hostile or abusive, there would be no worry about plaintiffs bringing false claims to punish the other party for conduct they perceived as

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*and the Unwelcome Influence of Rape Law*, 3 MICH. J. GENDER & L. 125, 160-61 (1995) (“It is a simple mechanism for recognizing that consensual sexual relationships between employees do exist, and that they alone do not support Title VII claims.”); Catherine M. Maraist, *Faragher v. City of Boca Raton: An Analysis of the Subjective Perception Test Required by Harris v. Forklift Systems, Inc.*, 57 LA. L. REV. 1343, 1365 (1997) (“The ‘unwelcomeness’ requirement was included to protect both men and women who engage in consensual sexual relationships at work. If this protection is eliminated, then the sexual harassment claim could potentially exist in any relationship.”).

30. Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae at 13, *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (No. 84-1979).

31. *Id.* at 15; *see also* Maraist, *supra* note 29, at 1365 (“[T]he sexual harassment claim could become a retaliatory tool for the jilted lover or the fired employee. Co-employees who were not the targets of ‘harassing’ conduct could sue when they realize that other co-workers are recovering for offensive conduct (and not that they were harassed).”).

32. Brief for the United States, *supra* note 30.

“complimentary” or “innocuous.”<sup>33</sup> In such cases, the subjective hostile or abusive element would be sufficient to dismiss such claims.

If the unwelcome requirement is intended to ensure that “consensual workplace sex does not provide the basis for a civil action,”<sup>34</sup> then the worry is that the hostile environment cause of action may provide damages for conduct that was in fact consensual,<sup>35</sup> or welcome. The hostile environment cause of action should provide recovery only for those plaintiffs who can show that this particular encounter, or series of encounters, with the accused was not consensual.

This Note considers the purpose of the unwelcome requirement not as a means of testing whether the plaintiff *actually* subjectively perceived her environment as hostile or abusive, but as a means of ensuring that there is recovery only when the conduct was unwelcome. Courts can analyze unwelcomeness in a manner that serves this purpose of protecting consensual relationships while simultaneously not conflating it with the subjective hostile or abusive element.<sup>36</sup> Accordingly, courts should analyze unwelcomeness in a way that both avoids redundancy and protects consensual workplace relationships.<sup>37</sup> The plaintiff’s subjective perspective and the subjective accused and reasonable accused perspectives satisfy these two conditions.<sup>38</sup> As this note will demonstrate, because the reasonable accused perspective better serves one of Title VII’s goals of ridding the workplace of sex-based discrimination, courts should apply this perspective when analyzing unwelcomeness.<sup>39</sup>

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33. *See id.*

34. Estrich, *supra* note 29, at 831.

35. The term “consensual relationship,” as used in this Note, includes ones that involve dating or intimacy outside the workplace, as well as relationships in which certain conduct is accepted between friends.

36. *See infra* Part III.A.3-4.

37. *See* Henry L. Chambers, Jr., *(Un)welcome Conduct and the Sexually Hostile Environment*, 53 ALA. L. REV. 733, 760-62 (2002).

38. *See infra* Part III.A.1, III.A.3-4.

39. *See infra* Part III.A.5.

## II. THE SYSTEM AND ITS CRITICISMS

Part II of this Note describes the courts of appeals' current tests for analyzing unwelcomeness and common criticisms of the unwelcome requirement. After laying out the current state of affairs and the legitimate concerns associated with how courts implement the unwelcome requirement in Part II, Part III develops a framework for supervisor-subordinate hostile environment claims that responds to each of the criticisms outlined below.

### A. *Current Tests for Unwelcomeness*

Other than stating that courts should determine whether conduct is unwelcome by looking at whether the plaintiff "by her conduct indicated that the alleged sexual advances were unwelcome,"<sup>40</sup> the Supreme Court has not explicitly told lower courts from which perspective the analysis should take place.<sup>41</sup> One can analyze the unwelcome requirement from multiple perspectives. The court could ask whether the plaintiff subjectively perceived the accused's conduct as unwelcome, or whether a reasonable person in her position would perceive the conduct as unwelcome. The court could also ask whether this particular accused person knew that his conduct was unwelcome, or whether a reasonable person in his position would have known that the plaintiff did not welcome his conduct.<sup>42</sup> Due to the lack of direction from the Supreme Court, the courts of appeals have developed their own tests, most of which do not invoke a clear perspective.<sup>43</sup>

The Courts of Appeals for the Fifth and Eleventh Circuits require that the conduct "be unwelcome in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive."<sup>44</sup> The EEOC also adopted

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40. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 68 (1986).

41. The Supreme Court has not even explicitly said the unwelcome requirement should be part of the plaintiff's prima facie case.

42. *Chambers*, *supra* note 37, at 757 n.113.

43. *See id.*

44. *Henson v. City of Dundee*, 682 F.2d 897, 903 (11th Cir. 1982); *see also Jones v. Flagship Int'l*, 793 F.2d 714 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987).

this standard in its 1990 Guidelines on Sexual Harassment.<sup>45</sup> The latter part of this standard—“the employee regarded the conduct as undesirable or offensive”<sup>46</sup>—appears to invoke the plaintiff’s subjective perspective. The first part, however—“the employee did not solicit or incite it”<sup>47</sup>—appears to invoke the perspective of the accused, or a reasonable person in the accused’s position.

The First and Eighth Circuits have standards similar to the Fifth and Eleventh, except they replace “incite” with “invite.”<sup>48</sup> The First Circuit, however, recognizes that the Supreme Court has left the question of perspective open.<sup>49</sup> In *Lipsett v. University of Puerto Rico*, the First Circuit described a dilemma that both the plaintiff and the accused face: “the man may not realize that his comments are offensive, and the woman may be fearful of criticizing her supervisor.”<sup>50</sup> The First Circuit attempts to solve this problem by requiring the fact-finder to take both parties’ perspectives into account and by placing a burden on both parties—on the accused to pay attention to the plaintiff’s signals, and on the plaintiff to make clear that the accused’s conduct is unwelcome.<sup>51</sup> This court also recognizes, however, that in some cases a plaintiff’s “consistent failure to respond to suggestive comments or gestures may be sufficient to communicate that the man’s conduct is unwelcome.”<sup>52</sup> Although it may seem that the First Circuit analyzes unwelcomeness from both parties’ perspectives, this last comment of the *Lipsett* court demonstrates that its analysis really comes down to what the plaintiff “communicated” to the accused; that is, whether the accused, or a reasonable person in the accused’s position, knew or should have known that the plaintiff did not welcome his conduct.

The Seventh Circuit holds that if the plaintiff “demonstrates by word or deed that the ‘harassment’ is welcome ... it is not harass-

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45. U.S. EQUAL EMP’T OPPORTUNITY COMM’N, NOTICE NO. 915-50, POLICY GUIDANCE ON CURRENT ISSUES OF SEXUAL HARASSMENT (1990), available at <http://www.eeoc.gov/policy/docs/currentissues.html>.

46. *Id.*

47. *Id.*

48. *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 784 (1st Cir. 1990); *Moylan v. Maries Cnty.*, 792 F.2d 746, 749 (8th Cir. 1986).

49. *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 898 (1st Cir. 1988).

50. *Id.*

51. *Id.*

52. *Id.*

ment.”<sup>53</sup> This standard is similar to the *Meritor* standard, which requires courts to analyze whether the plaintiff “by her conduct indicated that the alleged sexual advances were unwelcome.”<sup>54</sup> A standard described in this manner is unhelpful because it is still unclear which perspective courts should analyze. The Seventh Circuit could mean that the plaintiff must demonstrate that the conduct is welcome either to a reasonable person or to this particular accused person. In addition, the Seventh Circuit provides no further guidance on what is required for the plaintiff to satisfy the *unwelcome* requirement, as opposed to simply stating that when the plaintiff demonstrates that conduct is *welcome*, it is not harassment.

The Second, Fourth, Tenth, Federal, and D.C. Circuits have adopted the unwelcome requirement, but have not been clear regarding the question of perspective.<sup>55</sup> The Sixth Circuit has defined unwelcomeness as conduct by the accused that was “not solicited and not desired,”<sup>56</sup> again leaving the question of perspective open. The Ninth Circuit, in contrast, has chosen the perspective of the subjective plaintiff.<sup>57</sup> It explains that because “whether one person welcomes another’s sexual proposition depends on the invitee’s individual circumstances and feelings,” welcomeness is “inherently subjective.”<sup>58</sup>

Finally, the Third Circuit has declined to impose the unwelcome requirement on plaintiffs<sup>59</sup> based on a different reading of the EEOC guidelines. The guidelines state that “[u]nwelcome sexual advances ... constitute sexual harassment.”<sup>60</sup> Other circuits read this statement as suggesting that the plaintiff must prove as part of her *prima facie* case that the accused’s conduct was unwelcome. In

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53. Carr v. Allison Gas Turbine Div., Gen. Motors Corp., 32 F.3d 1007, 1008-09 (7th Cir. 1994).

54. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 68 (1986).

55. Davis v. Coastal Int’l Sec., Inc., 275 F.3d 1119, 1122-23 (D.C. Cir. 2002); Baker v. Weyerhaeuser Co., 903 F.2d 1342, 1345 (10th Cir. 1990); Carrero v. N.Y.C. Hous. Auth., 890 F.2d 569, 578 (2d Cir. 1989); Swentek v. USAIR, Inc., 830 F.2d 552, 557 (4th Cir. 1987); Carosella v. U.S. Postal Serv., 816 F.2d 638, 640 (Fed. Cir. 1987).

56. Yates v. Avco Corp., 819 F.2d 630, 633 (6th Cir. 1987).

57. EEOC v. Prospect Airport Servs., Inc., 621 F.3d 991, 997-98 (9th Cir. 2010).

58. *Id.* Note, however, that the Ninth Circuit analyzes the unwelcome requirement from an objective perspective for purposes of determining an employer’s liability for failing to stop the unwelcome conduct. *Id.* at 998.

59. Andrews v. City of Phila., 895 F.2d 1469, 1482 (3d Cir. 1990).

60. 29 C.F.R. § 1604.11 (1980).

contrast, the Third Circuit reads this statement as a mere example of how sex-based harassment can violate Title VII.<sup>61</sup>

### *B. Criticism of the Unwelcome Requirement*

Academics have long criticized the unwelcome requirement and its application in the various circuits outlined above. This Section outlines the critiques to which this Note later responds with a framework for analyzing unwelcomeness in the supervisor-subordinate context.

#### *1. Presumptively Welcome vs. Presumptively Unwelcome*

Imposing the burden of proving unwelcomeness on the plaintiff, in addition to the hostile or abusive element, creates the default position that an accused's conduct, though objectively viewed as creating a hostile or abusive work environment, is *welcome* until proven otherwise by the plaintiff. Scholars often argue that such conduct should be presumptively *unwelcome*.<sup>62</sup> Because few people, if any, would welcome conduct that is the subject of sexual harassment claims, the burden should be placed on the employer to prove that the accused's conduct was *welcome*, instead of on the plaintiff to prove that it was *unwelcome*.<sup>63</sup> One critic draws a comparison between the expectation in a doctor-patient relationship and the expectation in a supervisor-subordinate relationship: "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."<sup>64</sup>

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61. *Andrews*, 895 F.2d at 1485 n.6. *But see Harassment*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/laws/types/harassment.cfm> (last visited Mar. 8, 2014) ("Harassment is unwelcome conduct that is based on ... sex.").

62. *See, e.g.*, B. Glenn George, *The Back Door: Legitimizing Sexual Harassment Claims*, 73 B.U. L. REV. 1, 30 (1993); L. Camille Hébert, *Sexual Harassment Is Gender Harassment*, 43 U. KAN. L. REV. 565, 587 (1995); Anne C. Levy, *Sexual Harassment Cases in the 1990s: "Backlashing" the "Backlash" Through Title VII*, 56 ALB. L. REV. 1, 34 (1992).

63. *See, e.g.*, J. Hoult Verkerke, *Notice Liability in Employment Discrimination Law*, 81 VA. L. REV. 273, 339 (1995).

64. Estrich, *supra* note 29, at 828.



Many who support shifting the burden of proving unwelcomeness from the plaintiff to the employer justify the shift by arguing that imposing the unwelcome requirement on plaintiffs invokes a false stereotype that people, largely women, welcome such conduct in the workplace.<sup>65</sup> Advocates of this view argue that the elements of a hostile environment claim should not be based on “men’s beliefs about women’s behavior”<sup>66</sup> and whether the plaintiff “‘asked for’ it.”<sup>67</sup> In advocating for a shift of the burden of proof to align more accurately with the realities of a workplace environment, one commentator points to studies indicating that women are more likely than men to perceive sexual conduct in the workplace as “threatening and insulting,” whereas men are more likely to view it as “flattering.”<sup>68</sup> Alternatively, critics argue that the default position rests on the unjustified assumption that people will use the sexual harassment cause of action as a way to exact some sort of punishment on their former partner.<sup>69</sup>

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65. See, e.g., Grace S. Ho, *Not Quite Rights: How the Unwelcomeness Element in Sexual Harassment Law Undermines Title VII’s Transformative Potential*, 20 YALE J.L. & FEMINISM 131, 134 (2008); Levy, *supra* note 62, at 34; Niloofar Nejat-Bina, *Employers as Vigilant Chaperones Armed with Dating Waivers: The Intersection of Unwelcomeness and Employer Liability in Hostile Work Environment Sexual Harassment Law*, 20 BERKELEY J. EMP. & LAB. L. 325, 349 (1999); Maria L. Ontiveros, *Fictionalizing Harassment—Disclosing the Truth*, 93 MICH. L. REV. 1373, 1393 (1995) (reviewing MICHAEL CRICHTON, *DISCLOSURE* (1994) and CELIA MORRIS, *BEARING WITNESS: SEXUAL HARASSMENT AND BEYOND—EVERYWOMAN’S STORY* (1994)).

66. Ann C. Juliano, Note, *Did She Ask for It?: The “Unwelcome” Requirement in Sexual Harassment Cases*, 77 CORNELL L. REV. 1558, 1588 (1992).

67. Margaret Moore Jackson, *Confronting “Unwelcomeness” from the Outside: Using Case Theory to Tell the Stories of Sexually-Harassed Women*, 14 CARDOZO J.L. & GENDER 61, 65 (2007).

68. Christina A. Bull, Comment, *The Implications of Admitting Evidence of a Sexual Harassment Plaintiff’s Speech and Dress in the Aftermath of Meritor Savings Bank v. Vinson*, 41 UCLA L. REV. 117, 119, 147 (1993); Hébert, *supra* note 62, at 578-79 (1995).

69. See, e.g., Michael D. Vhay, *The Harms of Asking: Towards a Comprehensive Treatment of Sexual Harassment*, 55 U. CHI. L. REV. 328, 344-45 (1988); see also *supra* note 29 and accompanying text. One critic describes the unwelcome requirement as arising out of an “unsubstantiated fear of spurned lovers’ suits amount[ing] to judicial resistance to the purposes of the discrimination laws.” Vhay, *supra*, at 345.



## 2. *Plaintiff's Conduct vs. Accused's Conduct*

Scholars also criticize the unwelcome requirement's focus on the plaintiff's conduct instead of the accused's conduct.<sup>70</sup> The requirement's opponents often analogize it to the consent standard in rape:<sup>71</sup> "If a victim drinks, wears tight clothes, or walks unaccompanied at a late hour, the rape is her own fault; indeed, it was not 'rape' at all. An employee wearing a short skirt and a snug sweater is similarly blameworthy when the boss makes passes, or worse."<sup>72</sup> One critic describes it as an attempt to blame the victim for the accused's conduct, just as criminal defendants attempt to avoid a rape conviction by shifting the focus to the victim's conduct.<sup>73</sup>

## 3. *Putting the Plaintiff on Trial*

A third criticism of the unwelcome requirement, which in part combines the first two above, stems from the Supreme Court's statement in *Meritor* that the plaintiff's "sexually provocative speech or dress" is "obviously relevant" to the unwelcomeness inquiry.<sup>74</sup> Some claim that the requirement puts the plaintiff on trial<sup>75</sup> by permitting information regarding her past and current sexual activity to be introduced for everyone to hear.<sup>76</sup> This practice thus discourages plaintiffs with a legitimate claim of a hostile work environment from bringing suit.<sup>77</sup> One scholar points to the "private

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70. See, e.g., Steven L. Wellborn, *Taking Discrimination Seriously: Oncale and the Fate of Exceptionalism in Sexual Harassment Law*, 7 WM. & MARY BILL RTS. J. 677, 694 (1999) ("First, as a part of the discrimination element, unwelcomeness focuses on the wrong party. Instead of focusing on the actions of the perpetrator to determine if they are the product of discrimination, it focuses on the reactions of the victim.")

71. See, e.g., Estrich, *supra* note 29, at 827, 830; Nejat-Bina, *supra* note 65, at 350; Miranda Oshige, *What's Sex Got to Do with It?*, 47 STAN. L. REV. 565, 581-82 (1995).

72. George, *supra* note 62, at 29.

73. Bull, *supra* note 68, at 119, 147.

74. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 69 (1986).

75. See, e.g., Hébert, *supra* note 62, at 579; Casey J. Wood, Note, "Inviting Sexual Harassment": *The Absurdity of the Welcomeness Requirement in Sexual Harassment Law*, 38 BRANDEIS L.J. 423, 428-29 (2000).

76. See, e.g., Oshige, *supra* note 71, at 577 ("The kind of evidence the Court has held as admissible to rebut the plaintiff's assertion of 'unwelcomeness' is every feminist's nightmare.")

77. See, e.g., *id.* at 581.

nature of sexual offense cases such as rape and sexual harassment” in advocating for a position that protects the victim “from further trauma and degradation” when the victim seeks recovery for the wrong committed.<sup>78</sup> To avoid the trauma of having her speech, dress, and the identity of her sexual partners<sup>79</sup> presented as evidence for the fact that she “welcomed” the accused’s conduct, a plaintiff who would otherwise have a legitimate claim for a hostile work environment does not seek recovery. In such cases, there are no repercussions for the accused’s actions.<sup>80</sup>

#### 4. Redundancy of the Unwelcome Requirement

A fourth criticism of the unwelcome requirement is its apparent redundancy. To state a claim for sexual harassment under a hostile environment theory, the plaintiff also must show that the accused’s conduct created a hostile or abusive work environment both subjectively and objectively.<sup>81</sup> Many commentators find a scenario in which someone welcomes objectively hostile or abusive conduct unrealistic.<sup>82</sup> They claim that “[o]nly a ‘hellish’ working environment meets the standards ... for [a] hostile work environment. Common sense and reasonable judgment will preclude any danger of a truly consensual relationship being labeled as ‘harassment.’”<sup>83</sup> Further, one scholar notes that courts take into account how the victim

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78. Wood, *supra* note 75, at 428.

79. See Estrich, *supra* note 29, at 828.

80. For various views on the effect the 1994 amendments of Federal Rule of Evidence 412, commonly known as the rape shield law, had on ameliorating the susceptibility of the unwelcome requirement to this objection, see generally Andrea A. Curcio, *Rule 412 Laid Bare: A Procedural Rule that Cannot Adequately Protect Sexual Harassment Plaintiffs from Embarrassing Exposure*, 67 U. CIN. L. REV. 125 (1998); Paul Nicholas Monnin, *Proving Welcomeness: The Admissibility of Evidence of Sexual History in Sexual Harassment Claims Under the 1994 Amendments to Federal Rule of Evidence 412*, 48 VAND. L. REV. 1155 (1995); Jacqueline H. Sloan, *Extending Rape Shield Protection to Sexual Harassment Actions: New Federal Rule of Evidence 412 Undermines Meritor Savings Bank v. Vinson*, 25 SW. U. L. REV. 363 (1996); Lauren M. Hilsheimer, Note, *But She Spoke in an Un-ladylike Fashion!: Parsing Through the Standards of Evidentiary Admissibility in Civil Lawsuits After the 1994 Amendments to the Rape Shield Law*, 70 OHIO ST. L.J. 661 (2009); Joan S. Weiner, Note, *Understanding Unwelcomeness in Sexual Harassment Law: Its History and a Proposal for Reform*, 72 NOTRE DAME L. REV. 621 (1997).

81. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993).

82. See, e.g., Oshige, *supra* note 71, at 577.

83. Wood, *supra* note 75, at 430.

perceived her environment in the hostile or abusive analysis, which necessarily involves considering whether she welcomed the conduct; this fact renders the unwelcome requirement redundant.<sup>84</sup>

### 5. *The Effect of a Power Differential*

A fifth objection to the unwelcome requirement arises when the accused has power over the plaintiff in the workplace. Some argue that in these cases the plaintiff does not feel comfortable conveying that the accused's conduct is unwelcome for fear of the potential repercussions.<sup>85</sup>

One scholar compares sexual harassment to rape in this context, stating that one of the reasons many states have shifted the burden of proving consent in rape to the defendant is because of the difficulty of proving lack of consent, "particularly [in] those [situations] in which the accused holds an advantage over his victim." This rationale is applicable in the sexual harassment context.<sup>86</sup> And when the plaintiff does not affirmatively object to the accused's conduct, the accused and courts can interpret this as the plaintiff welcoming or consenting to the conduct,<sup>87</sup> when really the plaintiff "is choosing the lesser of two evils: enduring harassment or suffering the consequences."<sup>88</sup> Moreover, one critic suggests that to

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84. Nejat-Bina, *supra* note 65, at 347; see also Maraist, *supra* note 29, at 1361-62 ("Although it was not expressed in *Harris*, the subjective prong also influences whether conduct will be perceived as 'unwelcome' or not... [T]he subjective perception of the offensiveness of the behavior can be seen to some extent as co-extensive with the requirement that the conduct was unwelcome.").

85. See, e.g., Hébert, *supra* note 62, at 587; Nejat-Bina, *supra* note 65, at 348-50 ("Those victims who are most intimidated and remain silent will have the most difficulty offering proof that they outwardly and objectively communicated their disapproval... They face tremendous pressure to keep their jobs and often fear being terminated or otherwise retaliated against for resisting a supervisor's sexual conduct."); Oshige, *supra* note 71, at 578-79 ("The woman therefore faces the dilemma of rejecting her boss convincingly enough to satisfy the court's demands while taking care not to be so forceful as to risk retribution... Women who rely on their paychecks to support themselves and their families cannot go to great lengths to communicate the unwelcomeness of discriminatory behavior."). One scholar even contends that "there is no such thing as truly 'welcome' sex between a male boss and a female employee who needs her job. And if there is, then the women who welcome it will not be bringing lawsuits in any event." Estrich, *supra* note 29, at 831.

86. Vhay, *supra* note 69, at 346.

87. Chambers, *supra* note 37, at 780; Juliano, *supra* note 66, at 1575.

88. Vhay, *supra* note 69, at 346.

the extent the Supreme Court views a “personal vendetta” against someone as a nondiscriminatory reason for termination,<sup>89</sup> stirring the pot by making clear one’s discomfort with her supervisor’s conduct can result in the loss of her job with no legal recourse.<sup>90</sup>

Some opponents of the requirement also argue that a plaintiff in a less powerful position than the accused may not only be unwilling to put her job at risk to ensure the accused knows that she does not welcome the conduct, but she may also be *unable* to communicate unwelcomeness because of the “debilitating effects of sexual harassment.”<sup>91</sup> Opponents challenge the idea that silence constitutes welcomeness. They argue that a court should view a plaintiff’s silence as indicative of a power differential between the two parties and inquire into why the plaintiff remained silent before equating silence with welcomeness.<sup>92</sup>

This Note most directly addresses the last two criticisms of the requirement, which actually assume two different perspectives of unwelcomeness. The objection that the requirement is redundant because of the hostile or abusive element requires assuming that courts view the unwelcome requirement from the *plaintiff’s* perspective. If viewed from the plaintiff’s perspective, the analysis entails whether the *plaintiff* welcomed the accused’s conduct, or whether a reasonable person in the *plaintiff’s* position would have welcomed the conduct. Because courts already analyze the hostile or abusive element from the plaintiff’s perspective, critics claim the unwelcome requirement is unnecessary because the hostile or abusive element does the same work.<sup>93</sup>

In contrast, the last objection that the requirement does not take into account a possible power differential between the plaintiff and the accused—that the plaintiff may be unwilling or unable to communicate unwelcomeness to a supervisor—requires assuming that courts view the unwelcome requirement from the *accused’s* perspective. Analyzing unwelcomeness from the accused’s perspective

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89. Chambers, *supra* note 37, at 780 (citing *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502 (1993) and *Jennings v. Tinley Park Cmty. Consol. Sch. Dist.*, 864 F.2d 1368 (7th Cir. 1988)).

90. *Id.*

91. Nejat-Bina, *supra* note 65, at 351.

92. Mary Jo Shaney, Note, *Perceptions of Harm: The Consent Defense in Sexual Harassment Cases*, 71 IOWA L. REV. 1109, 1119-20 (1986).

93. *See, e.g.*, Nejat-Bina, *supra* note 65, at 347.

entails asking whether the *accused* perceived the plaintiff as welcoming his conduct, or whether a reasonable person in the *accused's* position would have perceived the plaintiff as welcoming his conduct. Critics argue that it is unfair to require a subordinate to communicate to a supervisor that the supervisor's conduct is unwelcome when there could be legal repercussions, and the subordinate may even be unable to communicate such information.<sup>94</sup>

### III. RECOMMENDED FRAMEWORK FOR UNWELCOMENESS

The federal courts of appeals clearly have not decided on a consistent perspective from which to analyze unwelcomeness. Further, two of the most common objections to the unwelcome requirement assume two different perspectives.<sup>95</sup> Part III of this Note analyzes the various perspectives from which courts could analyze unwelcomeness and explains which perspectives satisfy two conditions: (1) the perspective does not render the requirement redundant of any other element, and (2) the perspective enables the unwelcome requirement to serve its purpose—to protect consensual workplace relationships in the sense of providing recovery for only nonconsensual acts. The plaintiff's subjective perspective and the subjective accused and reasonable accused perspectives satisfy these two important conditions; but the reasonable accused perspective most effectively furthers one of the goals of Title VII—to rid the workplace of sex-based discrimination. Consequently, this Note advocates for application of the reasonable accused perspective when analyzing unwelcomeness. Finally, this Note applies this particular conception of unwelcomeness to the supervisor-subordinate context and recommends a framework that responds to all five criticisms of the unwelcome requirement outlined above in the supervisor-subordinate context.

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94. *See id.* at 350-51.

95. *See supra* Part II.B.5.

### A. *Different Perspectives of the Unwelcome Requirement*

#### 1. *Plaintiff's Subjective Perspective*

One perspective from which to view the unwelcome requirement is the plaintiff's subjective perspective.<sup>96</sup> This entails deciding whether the plaintiff subjectively perceived the accused's conduct as unwelcome—whether Sarah perceived the sexually explicit jokes made by her supervisor, Andrew, as unwelcome. For this conception not to be redundant of the subjective hostile or abusive element, it must be possible for someone to actually welcome conduct that she subjectively perceives as creating a hostile or abusive work environment. This construction of the requirement draws much criticism because it is difficult to imagine a scenario in which the subjective hostile or abusive element can be met and the unwelcome requirement not be met.<sup>97</sup>

Nonetheless, it is certainly possible to imagine someone welcoming conduct that she perceives as causing her work environment to be hostile or abusive. It has been reported that “[u]p to 14% of American males and 11% of American females have engaged in some form of sadomasochistic (BDSM or SM) sexual behavior.”<sup>98</sup> BDSM is commonly defined as the “knowing use of psychological dominance and submission, and/or physical bondage, and/or pain, and/or related practices in a safe, legal, consensual manner in order for the participants to experience erotic arousal and/or personal growth.”<sup>99</sup> Other studies have reported lower numbers, such as 2.2 percent of men and 1.3 percent of women stating that they had engaged in BDSM activity in the previous year.<sup>100</sup> The Kinsey Institute New Report on Sex, published in 1990, stated that “5 percent to 10 percent of the U.S. population engages in sadomasochism

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96. Henry Chambers states that this perspective is appropriate if the focus of sexual harassment suits is harm to the plaintiff. Chambers, *supra* note 37, at 757.

97. See *supra* Part II.B.4.

98. Keely Kolmes et al., *Investigating Bias in Psychotherapy with BDSM Clients*, 50 J. HOMOSEXUALITY 301, 302 (2006) (citing SAMUEL S. JANUS & CYNTHIA L. JANUS, THE JANUS REPORT ON SEXUAL BEHAVIOR (1993)).

99. *Id.* (quoting JAY WISEMAN, SM 101: A REALISTIC INTRODUCTION 10 (2d ed. 1996)).

100. Juliet Richters et al., *Demographic and Psychosocial Features of Participants in Bondage and Discipline, “Sadomasochism” or Dominance and Submission (BDSM): Data from a National Survey*, 5 J. SEXUAL MED. 1660, 1662 (2008).

for sexual pleasure on at least an occasional basis,” and that “many more individuals prefer to play the masochist’s role than the sadist’s.”<sup>101</sup> Thus, at least a minority of individuals, although a small minority, welcome occasionally being physically or emotionally “abused” in their private sexual lives.

Additionally, many people engage in romantic relationships with coworkers, supervisors, or subordinates in their workplace. According to CareerBuilder.com’s annual survey of more than 4,000 workers nationwide in 2012, “[t]hirty-nine percent of workers said they have dated a co-worker at least once over the course of their career.”<sup>102</sup> Similarly, in a study cited by Business News Daily in July 2012, 57 percent of employees in thirty-two countries “acknowledged that romantic relationships do occasionally happen in the workplace.”<sup>103</sup>

Given the frequency of workplace relationships, as well as the fact that at least a small minority of individuals welcome conduct in their sexual relationships that is subjectively perceived as hostile or abusive, it is at least possible that someone engaged in a workplace relationship would welcome conduct *in the workplace* that both objectively and subjectively renders their work environment hostile or abusive. If Sarah and Andrew were dating, Sarah may welcome conduct that renders her interactions with Andrew hostile or abusive. The unwelcome requirement thus would not be redundant when viewed from the plaintiff’s subjective perspective because it is possible to imagine at least some cases in which the subjective hostile or abusive element is satisfied and the unwelcome requirement is not.<sup>104</sup>

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101. JUNE M. REINISCH & RUTH BEASLEY, *THE KINSEY INSTITUTE NEW REPORT ON SEX* 162-63 (Debra Kent ed., 1990).

102. *Three in Ten Workers Who Had Office Romances Married Their Co-Worker, Finds Annual CareerBuilder Valentine’s Day Survey*, CAREERBUILDER (Feb. 13, 2013), [http://www.careerbuilder.com/share/aboutus/pressreleasesdetail.aspx?sd=2/13/2013&siteid=cbpr&sc\\_cmp1=cb\\_pr40\\_&id=pr40&ed=12/31/2013](http://www.careerbuilder.com/share/aboutus/pressreleasesdetail.aspx?sd=2/13/2013&siteid=cbpr&sc_cmp1=cb_pr40_&id=pr40&ed=12/31/2013).

103. Ned Smith, *Where Office Romances Blossom Most*, BUSINESSNEWS DAILY (July 10, 2012, 10:32 AM), <http://www.businessnewsdaily.com/2819-workers-support-workplace-romance.html>.

104. Chambers provides the following example to demonstrate that hostile or abusive conduct may be unwelcome in another sense: “Assume that an employee makes a sexual advance toward a co-worker in a particularly inappropriate manner. The style of the advance, and hence the advance itself, may be offensive even if the sentiment underlying the advance, and therefore the advance itself, was arguably not unwelcome.” Chambers, *supra* note 37, at



This conception of the unwelcome requirement also furthers its purported goal of protecting consensual workplace relationships—providing recovery only for nonconsensual, unwelcome acts. Regardless of which perspective of the unwelcome requirement courts apply, the heart of the matter is exactly what this perspective would require the plaintiff to prove—whether she subjectively welcomed the accused’s conduct. As this Note later explains, however, the reasonable accused perspective satisfies this requirement while also serving to more effectively rid the workplace of sex-based discrimination.

## 2. Reasonable Plaintiff Perspective

Courts also could analyze the unwelcome requirement from the perspective of a reasonable plaintiff. This requires deciding whether a reasonable person in Sarah’s position could have perceived Andrew’s sexually explicit jokes as unwelcome. This conception, however, is redundant of the objective hostile or abusive element of the hostile environment claim. If it were reasonable for the plaintiff to experience a hostile or abusive environment when the accused conducted himself in a particular manner, then it also would be reasonable for her not to welcome such conduct. If it were reasonable for Sarah to perceive her work environment as hostile or abusive when Andrew made such jokes, it also would be reasonable for someone in Sarah’s position not to welcome Andrew’s jokes.

Moreover, the reasonable plaintiff standard does not further the goal of protecting consensual relationships. Although it would be reasonable for someone in Sarah’s position not to welcome Andrew’s jokes, it is still possible that Sarah herself welcomed them. If courts

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761. This example is unpersuasive because it is not the sentiment behind the conduct that forms the basis of a hostile environment claim, but rather the conduct that results. A plaintiff does not state a claim for sexual harassment if she has proof that someone had a particular thought that she found unwelcome, but that did not actually result in unwelcome conduct. Further, even if a plaintiff were to welcome a coworker or supervisor asking her out on a date, or if she were already dating someone in the workplace, this should not permit the accused to engage in any type of behavior in the workplace. If the unwelcome requirement is intended to protect consensual relationships in the workplace, it should aim to protect not just consensual relationships that *begin* in the workplace, but also to protect *consensual relationships in the workplace*—how two people have agreed to interact in the workplace, regardless of whether they engage in different behavior outside the workplace.



were to adopt the reasonable plaintiff conception of unwelcomeness, the unwelcome requirement would be satisfied when the conduct between the two parties was actually consensual, negating the requirement's purpose.

The reasonable plaintiff perspective of the unwelcome requirement does not satisfy either of the two conditions necessary for the requirement to be productive: it is redundant of the objective hostile or abusive element, and it would not protect consensual workplace relationships. Accordingly, courts should not analyze unwelcomeness from the perspective of the reasonable plaintiff.

### *3. Accused's Subjective Perspective*

Courts could also consider unwelcomeness from the accused's subjective perspective.<sup>105</sup> This requires asking whether Andrew subjectively knew that Sarah did not welcome his jokes. This conception is not redundant of any other element of the hostile environment cause of action because the unwelcome requirement would be the only element in which the *accused's* perspective is considered. It is quite easy to think of scenarios in which the accused believed his conduct toward the plaintiff was not unwelcome when the plaintiff subjectively, and reasonably, perceived his conduct as hostile or abusive—the accused could simply be incredibly obtuse.<sup>106</sup>

This conception of the requirement also would satisfy the purpose of ensuring that the hostile environment cause of action does not serve as the basis for recovery in a consensual relationship. This is true whether the accused's conduct is considered "severe" or "pervasive." If Sarah were required to ensure that Andrew knew she did not welcome his jokes before establishing a claim for a hostile work environment, any pervasive continuation of this conduct in response to such knowledge would clearly not be consensual. If, instead, Andrew were to commit what a court would consider one "severe" act and Sarah took steps immediately thereafter to ensure

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105. Chambers states that this perspective is relevant if the focus of sexual harassment suits is the accused's intent to harass. Chambers, *supra* note 37, at 757.

106. *See id.* at 759.

Andrew knew such conduct was unwelcome, then clearly Andrew's one severe act was not consensual.

The accused's subjective perspective of the unwelcome requirement satisfies both conditions: it is not redundant of any other element of the hostile environment cause of action, and it serves the purpose of the unwelcome requirement—to protect consensual workplace relationships. As explained in the next Section, the reasonable accused perspective also satisfies these two conditions.

#### *4. Reasonable Accused Perspective*

The last perspective from which courts could analyze unwelcomeness is that of a reasonable person in the accused's position. For this conception not to be redundant, it must be possible for someone to subjectively, and reasonably, perceive the accused's conduct as creating a hostile or abusive environment, while at the same time having a reasonable accused person *not* know that his conduct is unwelcome.

If Sarah had made sexually explicit jokes with Andrew in the past, or if the two were involved in an intimate relationship outside of the workplace in which Sarah welcomed hostile or abusive behavior from Andrew, he could reasonably think that Sarah would continue to welcome this type of behavior at work, when actually Sarah's preferences have changed and she provides no external indication of her discomfort. If Sarah were to laugh along with Andrew's jokes every day, but secretly is disturbed by them, or displays no sign indicating her position either way, Andrew could reasonably believe that Sarah welcomed his jokes. He could reasonably hold this view despite the fact that Sarah actually and reasonably perceives his actions as hostile or abusive. Accordingly, the reasonable accused perspective of the unwelcome requirement is not redundant of any other element of the hostile environment cause of action.

The reasonable accused perspective also furthers the unwelcome requirement's goal of protecting consensual workplace relationships, whether the accused's conduct is characterized as "severe" or "pervasive." If Sarah were required to communicate to Andrew such that a reasonable person in his position would know that she did not

welcome his jokes, any pervasive continuation of such jokes would clearly not be consensual. Similarly, if Andrew were to commit one act that a court would consider “severe,” and if Sarah immediately thereafter ensured that a reasonable person in Andrew’s position knew that such conduct was unwelcome, then clearly Andrew’s one severe act was not consensual.

This is only the case, however, if the court takes into account the accused’s knowledge of the plaintiff’s personal preferences in its determination of what a reasonable person in the accused’s position would know.<sup>107</sup> Applying the above example with Sarah and Andrew more generally, if the plaintiff was engaged in a romantic relationship with the accused and welcomed hostile or abusive conduct by habitually behaving in a certain way when the accused acted in such a manner, the accused would be reasonable in expecting that she would continue to welcome this behavior if the plaintiff said nothing to the contrary and continued to behave in her typical manner in response to his objectively hostile or abusive conduct. Making clear to a reasonable person in the accused’s position that his conduct is unwelcome would mean that the plaintiff must ensure that a reasonable person, with knowledge of her prior preferences, would know that she now does not welcome such conduct at work.

Analyzed in this manner, this conception of the unwelcome requirement is not redundant of any other element of the hostile environment cause of action, and it furthers the requirement’s purpose—to protect consensual relationships.

Although three of the four possible perspectives satisfy both conditions, the next Section favors the reasonable accused perspective because it best serves one of the goals of Title VII.

### *5. Choosing a Perspective*

The plaintiff’s subjective perspective and the subjective accused and reasonable accused perspectives of the unwelcome requirement satisfy two important conditions: they are not redundant of any other element of the hostile environment cause of action, and they serve the requirement’s purpose—to protect consensual relation-

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107. See Chambers, *supra* note 37, at 758 (“[T]he harasser [must] know that the conduct is unwelcome by the target before the conduct is deemed harassing and actionable.”).

ships. To decide which perspective courts should adopt, this Section explains which perspective best serves the goal of the Title VII sexual harassment claim.

The overarching goal of Title VII sexual harassment claims is to eliminate sex-based discrimination from the workplace.<sup>108</sup> One way to serve this goal, when choosing from various standards that all satisfy the same basic requirements, is to make it easier for plaintiffs to state claims for such discrimination. Certainly plaintiffs should not have such an easy time stating a sexual harassment claim that the conduct serving as the basis for damages includes conduct that was welcome—conduct that occurred in the course of a consensual relationship. But that is precisely the purpose of the unwelcome requirement—to ensure that the only conduct found to be sexual harassment is conduct that was not performed in the course of a consensual relationship.<sup>109</sup> This Note has already shown that the three remaining perspectives further the goal of maintaining consensual relationships in the workplace.

The easiest standard from the plaintiff's point of view would be the plaintiff's subjective perspective. In that case, the plaintiff would need to prove only that she subjectively perceived the accused's conduct as unwelcome. In contrast, it would be considerably more difficult to prove that the accused himself knew that his conduct was unwelcome, even more difficult than proving that a reasonable person in his position would have known that his conduct was unwelcome.

For example, imagine Sarah addressing Andrew's perspective in court. It would be easier to prove what Andrew should have known as opposed to what he actually knew, especially when Sarah has already presented sufficient evidence to prove that a reasonable person in her position would perceive Andrew's jokes as creating a hostile or abusive work environment.<sup>110</sup> Thus, of the three remain

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108. *E.g.*, Chambers, *supra* note 37, at 786; Margaret Moore Jackson, *A Different Voicing of Unwelcomeness: Relational Reasoning and Sexual Harassment*, 81 N.D. L. REV. 739, 744 (2005).

109. *See* Chambers, *supra* note 37, at 733.

110. When the plaintiff has a particular sensitivity about which the accused had knowledge, it may be easier for the plaintiff to prove that the accused had this particular knowledge. In this case, however, the objective element of the claim would not be satisfied. If the plaintiff is particularly sensitive, this means that a reasonable person would not view

ing perspectives, the subjective accused perspective would impose the greatest burden on the plaintiff.

Removing the most difficult standard for the plaintiff to satisfy, the subjective accused perspective, leaves the plaintiff's subjective perspective and the reasonable accused perspective. The plaintiff's subjective perspective would certainly be the easiest for the plaintiff to satisfy, but one must balance this value with another means of ridding the workplace of sex-based discrimination: applying the perspective that would require more dialogue about potentially harassing behavior at the time it occurs.

Imposing the burden on the plaintiff to make known to a reasonable person in the accused's position at the time of the potentially harassing conduct that his conduct is unwelcome is more likely to deter him from continuing to engage in such behavior than if the court imposed no such burden and the plaintiff could prevail on a hostile environment claim simply by remaining silent. Such a requirement would encourage victims of harassment to speak up against the harassment and may result in a more open and productive dialogue about how one should behave at work. If Sarah knew that to be successful on a hostile environment claim, she must let a reasonable person in Andrew's position know that she does not welcome his jokes, then he, and others in their office, may then refrain from telling such jokes to people they know find them unwelcome.

It would be easier for the plaintiff to prove the unwelcome requirement analyzed from the perspective of the reasonable accused than that of the subjective accused. Moreover, the reasonable accused perspective may result in more dialogue about proper workplace behavior than the plaintiff's subjective perspective, which may then result in less sex-based harassment. Accordingly, courts should analyze the unwelcome requirement from the reasonable accused perspective.<sup>111</sup>

The reasonable accused perspective is consistent with one aspect<sup>112</sup> of the Supreme Court's characterization of the requirement

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this conduct as creating a hostile or abusive work environment.

111. This is the perspective that the First Circuit may apply. *See supra* notes 48-52 and accompanying text.

112. *See infra* text accompanying notes 159-61.

in *Meritor*. The Court contrasted the question of “voluntariness” with the question of “unwelcomeness,” stating that “[t]he correct inquiry is whether [the plaintiff] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.”<sup>113</sup> One could interpret this passage as stating that the plaintiff must “indicate” that the accused’s conduct is unwelcome—that is, she must let the accused, or a reasonable person in the accused’s position, know that she perceives his conduct as unwelcome. Under this framework, the unwelcome requirement places the burden on the plaintiff to let a reasonable accused person know that she does not welcome his conduct.

The reasonable accused perspective is also consistent with courts’ emphasis on objectivity in hostile environment cases. Susan Estrich notes that “the subjective welcomeness inquiry, gravamen or not, is fundamentally at odds with all the other elements of the cause of action. A hostile environment, the courts have consistently held, must be based on objective criteria, evaluated from an ‘objective’ viewpoint.”<sup>114</sup>

This perspective also responds to those who believe that the unwelcome requirement, when viewed from the plaintiff’s subjective perspective, is redundant of the subjective hostile or abusive element. Those unconvinced by the notion that some people may welcome conduct that renders their work environment hostile or abusive<sup>115</sup> can look at the unwelcome requirement from the reasonable accused perspective as merely adding an additional requirement to the hostile or abusive analysis. Under that conception, the plaintiff must show that she subjectively and reasonably perceived, and that a reasonable person in the accused’s position would perceive, the accused’s conduct as hostile or abusive, or unwelcome.

Viewed in this way, “hostile or abusive” and “unwelcome” are equivalent because they yield the same results. The question whether a reasonable person in the accused’s position would think that the plaintiff *welcomes* the accused’s conduct is equivalent to asking

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113. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 68 (1986).

114. Estrich, *supra* note 29, at 833.

115. *See supra* Part II.B.4.

whether a reasonable person in the accused's position would view his conduct as causing a *hostile or abusive* environment for the plaintiff. This Note does not advocate for that conception of the unwelcome requirement. The position developed above maintains that it is possible for some people to welcome conduct that renders their environment hostile or abusive when they are engaged in a romantic relationship with the accused.<sup>116</sup> One need not, however, hold this Note's position in order to accept the reasonable accused perspective for the unwelcome requirement because—as required by both positions—it responds to the criticism that the requirement is redundant.

The above discussion of the requirement's various perspectives and the relationship between the chosen perspective and the requirement's purpose should remind courts of the importance of being clear in explaining which perspective they apply. When courts remain unclear about the standard for analyzing unwelcomeness, at best the element is redundant and therefore serves no purpose, and at worst the courts are not effectively furthering the requirement's goal of protecting consensual workplace relationships or Title VII's goal of ridding the workplace of sex-based discrimination. The Second, Fourth, Sixth, Seventh, Tenth, Federal, and D.C. Circuits, which have not been clear as to which perspective their jurisdiction applies, may not be consistently serving the purpose of the unwelcome requirement or the goals of Title VII.<sup>117</sup>

Part III of this Note has thus far focused on how courts should substantively analyze the unwelcome requirement. The rest of Part III focuses on which party should bear the burden of proving welcomeness or unwelcomeness when the accused was the plaintiff's supervisor at the time of the alleged harassment. When the accused was not the plaintiff's supervisor, as long as courts analyze unwelcomeness from the reasonable accused perspective, the requirement serves its purpose of protecting consensual relationships and should, at least arguably, remain a part of the plaintiff's *prima facie* case. The goal of this Note is not to provide an argument for maintaining the requirement in such cases, but merely to explain the most productive perspective from which to analyze the

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116. See *supra* Part III.A.1.

117. See *supra* notes 53, 55-56 and accompanying text.



requirement if it does remain a part of the plaintiff's prima facie case outside the supervisor-subordinate context.

In the next Section, this Note outlines social science research in the area of supervisor-subordinate relations. Applying such research to the reasonable accused perspective adopted above, this Note explains that it is unreasonable for a supervisor to believe that a subordinate welcomes severe or pervasive behavior that could reasonably be viewed as creating a hostile or abusive work environment without any solicitation of such conduct from the subordinate. Consequently, this Note advocates for a different unwelcomeness framework in the supervisor-subordinate context.

### *B. Research on Supervisor-Subordinate Relations*

Many employers have policies limiting employees' romantic relationships. Some of these employers acknowledge that one's power in the workplace may have an undue influence over another—a view commonly perceived as inherent in supervisor-subordinate,<sup>118</sup> professor-student, or physician-patient relationships<sup>119</sup>—and thus have special policies for supervisor-subordinate romantic relationships.<sup>120</sup> Many social science studies on how subordinates respond to alleged supervisor sexual harassment are consistent with our current intuitions: when subjected to sexual harassment, if the perpetrator is one's supervisor, the subordinate is less likely to make clear to the harasser that she does not welcome such conduct, when compared to similar conduct from a coworker or subordinate of the victim.<sup>121</sup> Furthermore, those in

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118. In a 2011 study that will be discussed momentarily, Jonathan Kunstman and Jon Maner begin the study by stating the following: "The notion that power and hierarchy set the stage for sexual harassment is a near truism." Jonathan W. Kunstman & Jon K. Maner, *Sexual Overperception: Power, Mating Motives, and Biases in Social Judgment*, 100 J. PERSONALITY & SOC. PSYCHOL. 282, 282 (2011).

119. See Lisa Black, *Power Imbalance Is Key to Most Policies on Sex*, CHI. TRIB. (Jan. 29, 1998), [http://articles.chicagotribune.com/1998-01-29/news/9801290112\\_1\\_sexual-harassment-student-and-professor-consensual](http://articles.chicagotribune.com/1998-01-29/news/9801290112_1_sexual-harassment-student-and-professor-consensual); see also CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN 1-2* (1979) ("Sexual harassment of women in employment is particularly clear when male superiors on the job coercively initiate unwanted sexual advances to women employees.").

120. See Patti A. Giuffre & Kirsten Dellinger, *Sexuality in the Workplace: Organizational Control, Sexual Harassment, and the Pursuit of Pleasure*, 25 ANN. REV. SOC. 73, 80, 84 (1999).

121. See MACKINNON, *supra* note 119, at 1-2.



positions of power are more likely to overperceive another's sexual interest in them.<sup>122</sup> Such research demonstrates the unreasonableness of requiring a plaintiff to prove unwelcomeness when the accused was her supervisor at the time of the alleged harassment.

In a series of studies published in 2011, Jonathan Kunstman and Jon Maner aimed to pinpoint a psychological process that "lead[s] people in positions of power to view others as objects of sexual interest."<sup>123</sup> They took sixty-six introductory psychology students and told one group of students (the power group) that they scored very well on a quiz that measured leadership ability and that they would make all decisions regarding the project they would complete with a partner, as well as the decision regarding the distribution of the reward received for completing the assignment.<sup>124</sup> Another group of students (the control group) was told that everyone would work as equals and that the reward would be split equally between them and their partners.<sup>125</sup>

At the end of the project, each partner completed a "word-stem completion task" that required the participants to fill in missing letters to make a complete word.<sup>126</sup> As an example, the participant would be given the string S \_ X and could fill in either I for "SIX," or E for "SEX."<sup>127</sup> Those in the power group completed the word-stems with more sexual words than those in the control group, even after a five-minute delay in which the participants completed another unrelated task requiring mental effort.<sup>128</sup> This result suggests that power leads one to have a higher degree of "sexual cognition" and "sexual motivation," consistent with Kunstman and Maner's hypothesis that "power activates a mating motive."<sup>129</sup>

In their second study, Kunstman and Maner took fifty-five introductory psychology students and also assigned them to a power

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122. See *infra* note 136 and accompanying text.

123. Kunstman & Maner, *supra* note 118, at 282.

124. *Id.* at 285.

125. *Id.* To ensure any differences in results were not caused by having received positive feedback, the control group also received positive feedback by being told that they had scored well on a test measuring creativity. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 285-86 ("[P]articipants in power responded with a slightly greater proportion of sexual words after a delay ... than when they responded immediately.").

129. *Id.* at 286.

group or control group, giving participants in both groups the same instructions as in the first study.<sup>130</sup> They asked the participants to watch a two-minute prerecorded video of their partner to assess first impressions.<sup>131</sup> Participants answered sexual interest questions that included whether they could see their partner as “having romantic or sexual feelings” for them or “wanting to ask [them] out on a date,” as well as general likability questions, such as whether they thought their partner would like them or would be interested in getting to know them.<sup>132</sup> The results showed that although there were no significant differences between the groups regarding general likability, those in the power group had enhanced expectations of sexual interest compared to those in the control group.<sup>133</sup> This suggests that the influence of power on one’s perception of another is “unique to sexual perception and [does] not generalize to broad perceptions of liking.”<sup>134</sup>

In a third study, Kunstman and Maner found that “power led participants to expect high levels of sexual interest from an opposite-sex partner but only when the partner was single[—] ... when the sexual goal was attainable.”<sup>135</sup> In a fourth study, they found that even when accounting for any actual sexual interest displayed in a face-to-face interaction between the partners, those in the power group still “overperceived” their partner’s sexual interest in them.<sup>136</sup> Just as in the first two studies, these over-perception effects were present only in relation to perception of sexual interest and not in relation to perceptions of general likeability.<sup>137</sup>

Kunstman and Maner’s work certainly suggests that a different standard should apply in sexual harassment cases when the alleged harasser was the plaintiff’s supervisor as opposed to the plaintiff’s coworker or subordinate—at least when the gender-based harassment is of a sexual nature. Assuming courts view the unwelcome

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130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 287.

135. *Id.* at 287-88.

136. *Id.* at 288-91.

137. *Id.* at 291.

requirement from the perspective of the reasonable accused, it is not reasonable for the plaintiff's supervisor to believe in these cases that the plaintiff welcomes his conduct unless she says otherwise, because he is likely "overperceiving" the plaintiff's sexual interest in him.

It also is unreasonable for a supervisor to believe that the plaintiff welcomes his conduct simply because she does not outwardly object to it. In a study published in 1995, James Gruber and Michael Smith interviewed women about their experiences with harassment in the workplace.<sup>138</sup> They found that in the case of sexual harassment, women were less willing to respond directly to the harasser if the harasser was a supervisor.<sup>139</sup> Of the female participants, 34.1 percent were willing to respond directly to a supervisor, compared with 49.1 percent to a coworker and 39.8 percent to a client or customer.<sup>140</sup> Gruber and Smith also found that the women were more likely to quit their job after the harassment when the harasser was a supervisor (12.5 percent), than when the harasser was a coworker (1.2 percent) or a client or customer (0.8 percent).<sup>141</sup>

Interestingly, other differences in work environments did not predict whether someone was more likely to quit, including "[d]ifferences in occupational status or sex composition, workplace sex composition, number of harassers, policies/procedures, or beliefs about harassment."<sup>142</sup> Even when the women did report responding to the supervisor harasser, their response was not as assertive as it was to someone without supervisory power.<sup>143</sup> This work suggests,

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138. James E. Gruber & Michael D. Smith, *Women's Responses to Sexual Harassment: A Multivariate Analysis*, 17 BASIC & APPLIED SOC. PSYCHOL. 543, 543 (1995).

139. *Id.* at 554.

140. *Id.*

141. *Id.*

142. *Id.* at 557.

143. *Id.* at 556. Gruber and Smith also noted that "[m]any women feel that being assertive is too risky." *Id.* at 547 (citing Mary Kay Biaggio et al., *Addressing Sexual Harassment: Strategies for Prevention and Change*, in IVORY POWER: SEXUAL HARASSMENT ON CAMPUS 213 (Michele A. Paludi ed., 1990)). They feel the risk is too great "even when being sexually assaulted." *Id.* (citing Beth E. Schneider, *Put Up and Shut Up: Workplace Sexual Assaults*, 5 GENDER & SOC'Y 533 (1991)); see also James E. Gruber & Lars Bjorn, *Women's Responses to Sexual Harassment: An Analysis of Sociocultural, Organizational, and Personal Resource Models*, 67 SOC. SCI. Q. 814, 821 (1986) ("Women who are harassed by their supervisors give more passive responses ... than those harassed by co-workers.").

again, that it is unreasonable for a supervisor to assume his subordinate welcomes his conduct unless she states otherwise.

Studies differ, however, as to the likelihood that victims of sexual harassment would make known their discomfort when the harasser is a supervisor. Numerous studies have found that if the harasser was the victim's supervisor or superior, the victim was less likely to report the harassment<sup>144</sup> and would "put up with sexual harassment from supervisors for long periods of time, perhaps fearful of the job-related consequences for refusing."<sup>145</sup> In contrast, a 1982 study "found that if the [harasser] ... was the [victim's] supervisor, the [victim] was *more* likely to report" the conduct.<sup>146</sup> This same study also found, however, that an assertive response had less effect on a harasser with a higher job status,<sup>147</sup> consistent with a study published in 1986.<sup>148</sup> Similarly, a 1997 study found that victims of a harasser who occupied an authoritative role in the workplace were more likely to report the conduct and discuss it with others.<sup>149</sup> This

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144. Barbara A. Gutek, *Responses to Sexual Harassment*, in GENDER ISSUES IN CONTEMPORARY SOCIETY 197 (Stuart Oskamp & Mark Costanzo eds., 1993); Kathy Hotelling, *Sexual Harassment: A Problem Shielded by Silence*, 69 J. COUNSELING & DEV. 497 (1991); Deborah Erdos Knapp et al., *Determinants of Target Responses to Sexual Harassment: A Conceptual Framework*, 22 ACAD. MGMT. REV. 687, 704 (1997) (citing Howard Gadlin, *Careful Maneuvers: Mediating Sexual Harassment*, 7 NEGOT. J. 139 (1991); 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 (1982)). *But see* Carol T. Kulik et al., *Responses to Sexual Harassment: The Effect of Perspective*, 9 J. MANAGERIAL ISSUES 37, 40 (1997) ("[V]ictims were more likely to report harassment when the harasser was a supervisor than when the harasser was a co-worker.") (citing Joy A. Livingston, *Responses to Sexual Harassment on the Job: Legal, Organizational, and Individual Actions*, 38 J. SOC. ISSUES 5 (1982)).

145. Knapp et al., *supra* note 144 (quoting R. A. Thacker, *Influences upon Propensity to Display Visible Defensive Responses to Hostile Environment Sexual Harassment* (paper presented at the annual meeting of the Academy of Management, Atlanta, Ga. (1993))); *see also* Sandy Welsh et al., *Legal Factors, Extra-Legal Factors, or Changes in the Law? Using Criminal Justice Research to Understand the Resolution of Sexual Harassment Complaints*, 49 SOC. PROBS. 605, 608 (2002) ("When the harasser is a supervisor and thereby acts as a representative of the corporation, the target of the harassment may believe she has less recourse than if the harasser is a co-worker.").

146. Knapp et al., *supra* note 144 (citing Livingston, *supra* note 144).

147. *Id.*

148. Kulik et al., *supra* note 144 (citing Donald E. Maypole, *Sexual Harassment of Social Workers at Work: Injustice Within?*, 31 SOC. WORK 29 (1986)).

149. Caroline C. Cochran et al., *Predictors of Responses to Unwanted Sexual Attention*, 21 PSYCHOL. WOMEN Q. 207, 218 (1997).

same study found, however, that such victims were “more likely to ignore, and less likely to confront, the harasser” himself.<sup>150</sup>

Although the studies analyzing how often victims affirmatively respond to harassment by supervisors, as compared with coworkers, are not all in agreement, many studies are consistent with the view that victims of sexual harassment by a supervisor are less likely to directly confront the supervisor. Further, Kunstman and Maner’s work demonstrating that those in power overperceive subordinates’ sexual interest in them also supports the unreasonableness of supervisors assuming their conduct is welcome unless the subordinate communicates to the contrary. Even absent a complete agreement in the research, the legitimate possibility of a subordinate hesitating to let her supervisor know that his conduct is unwelcome, and the subordinate’s reasonable fear of repercussions, place significant doubt in the possibility of a supervisor reasonably believing that his otherwise harassing behavior is welcome. It is not reasonable for a supervisor to believe that his subordinate welcomes hostile or abusive conduct, even if she gives no indication of her discomfort with, or objection to, such conduct.

### *C. Recommended Framework*

As argued above, the unwelcome requirement is most productive when analyzed from the perspective of the reasonable accused.<sup>151</sup> Research indicates that a subordinate is less likely to directly confront a harassing supervisor and that those in power are likely to overperceive their subordinates’ sexual interest in them. It is therefore unreasonable for a supervisor to believe, absent some solicitous behavior on the part of his subordinate, that she welcomes his severe or pervasive conduct that is reasonably perceived as creating a hostile or abusive work environment. Accordingly, the unwelcome requirement in the hostile environment cause of action should not place the burden on the plaintiff to prove unwelcomeness when the accused was the plaintiff’s supervisor at the time of the alleged harassment.

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150. *Id.*

151. *See supra* Part III.A.5.

Applying the reasonable accused perspective of unwelcomeness to the research in supervisor-subordinate relations, courts should use the following framework in hostile environment cases when the accused was the plaintiff's supervisor at the time of the alleged harassment. The court should presume that the accused's conduct was unwelcome and not require the plaintiff to prove unwelcomeness as part of her prima facie case.<sup>152</sup> The employer may have an affirmative defense by which it can show that the plaintiff welcomed the accused's conduct by unambiguously soliciting or inviting the conduct. Such evidence still should be analyzed from the perspective of the reasonable accused, the perspective that helps protect consensual workplace relationships and is most productive in ridding the workplace of sex-based discrimination.

The only evidence the employer may invoke in showing that the plaintiff unambiguously solicited or invited his conduct is the verbal communication between the accused and the plaintiff.<sup>153</sup> Silence on the part of the plaintiff in response to the accused's conduct, or communication or conduct between the plaintiff and a third party, is insufficient and irrelevant for this affirmative defense. The evidentiary limits for the employer's affirmative defense must be this strict because research indicates that it is unreasonable for a supervisor to believe that absent such evidence, his subordinate welcomes such conduct.<sup>154</sup>

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152. Cf. Susan Grover & Kimberly Piro, *Consider the Source: When the Harasser Is the Boss*, 79 *FORDHAM L. REV.* 499, 518-19 (2010) (proposing that courts consider whether the accused was the plaintiff's supervisor at the time of the alleged harassment in determining whether the conduct was sufficiently "severe or pervasive" to constitute harassment).

153. See George, *supra* note 62, at 30 ("[T]he defendant should not be allowed to raise the defense of unwelcomeness at all unless he can present evidence of specific words or gestures that reasonably encouraged or solicited *in kind* behavior."); Ho, *supra* note 65, at 158 ("Only if the defendant succeeded in showing that the plaintiff affirmatively welcomed the conduct could he prevail over the sexual harassment claim."); Mary F. Radford, *By Invitation Only: The Proof of Welcomeness in Sexual Harassment Cases*, 72 *N.C. L. REV.* 499, 525 (1994) ("The suggested paradigm ... would limit the proof of welcomeness so that only objective evidence of an invitation or consent given directly to the alleged harasser would suffice."); Deborah N. McFarland, Note, *Beyond Sex Discrimination: A Proposal for Federal Sexual Harassment Legislation*, 65 *FORDHAM L. REV.* 493, 541 (1996) ("General behavior of the victim, for example his or her mode of dress, would not be evidence that he or she welcomed the harasser's conduct. Instead, the defendant will have to point to conduct that was directed at or involved him or her.").

154. See *supra* Part III.B.

For the employer to succeed in its affirmative defense that the plaintiff welcomed the accused's conduct, the plaintiff must have instigated the accused's conduct through her *words*, and not through her conduct. If the employer cannot point to verbal communication from the plaintiff to the accused that demonstrates an unambiguous invitation or solicitation of the accused's conduct, the affirmative defense will fail and the jury must find that the plaintiff did not welcome the accused's conduct.

Because of the threat of the power differential between supervisors and subordinates, the burden of analyzing welcomeness should be placed in the employer's hands. This does not mean that if a supervisor and a subordinate desire a romantic relationship that the subordinate must be the one to initiate the relationship. Rather, it means that any conduct that rises to the level of being reasonably perceived as creating a hostile or abusive work environment must be solicited or invited by the subordinate. A supervisor can certainly initiate a romantic relationship with a subordinate without engaging in severe or pervasive behavior that a reasonable person would consider hostile or abusive.<sup>155</sup> He cannot, however, reasonably expect that his subordinate welcomes conduct that a reasonable person would consider hostile or abusive absent any solicitation or invitation on her part.

#### *D. Framework's Response to Five Common Criticisms of Unwelcomeness*

This framework for the unwelcome requirement responds to all five of the criticisms to the requirement, as outlined above,<sup>156</sup> when the accused was the plaintiff's supervisor at the time of the alleged harassment. First, this standard presumes that any severe or pervasive conduct based on sex that creates a hostile or abusive work environment, both subjectively and objectively, is unwelcome until the employer proves otherwise. This involves shifting the burden of the unwelcomeness analysis from the plaintiff to the

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155. This is especially true if Judge Richard Posner is correct in stating that sexual harassment claims are intended to protect women from behavior that can render their work environment "hellish." *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1995).

156. *See supra* Part II.B.



defendant-employer when the accused was the plaintiff's supervisor at the time of the alleged harassment. Instead of the plaintiff having the burden of proving unwelcomeness, the employer has an affirmative defense of proving welcomeness, which is a framework many critics of the unwelcome requirement recommend.<sup>157</sup>

Second, this conception of the unwelcome requirement takes away the fact-finder's focus from the plaintiff's conduct and refocuses it on whether the accused's conduct was severe or pervasive and created a hostile or abusive work environment. This framework responds to the critics who claim that in a hostile environment suit, the focus should not be on what the plaintiff did or did not do, but rather on what the accused did or did not do to the plaintiff.<sup>158</sup> Although the employer's affirmative defense enables the employer to admit evidence of the plaintiff's verbal communication to the accused, such evidence is limited to unambiguous solicitations of the accused's conduct.

Third, this framework for unwelcomeness responds to the criticism that the unwelcome requirement puts the plaintiff on trial<sup>159</sup> because the Supreme Court stated in *Meritor* that the plaintiff's "personal fantasies" or "sexually provocative speech or dress" are "obviously relevant" to the unwelcomeness inquiry.<sup>160</sup> Under this Note's framework, the plaintiff's "sexually provocative speech" is relevant only in the context of the accused's affirmative defense, and only if that speech unambiguously invites, or solicits, the accused's conduct. The plaintiff's sexually provocative dress or personal fantasies are inadmissible as a matter of law, unless invoked by the plaintiff in a verbal communication between the plaintiff and the accused. Consequently, this framework strays from the Supreme Court's holding in *Meritor* that "there is no *per se* rule against [the] admissibility" of the plaintiff's "dress and personal fantasies" in determining whether the accused's conduct was welcome.<sup>161</sup>

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157. See *supra* Part II.B.1.

158. See *supra* Part II.B.2.

159. See *supra* Part II.B.3.

160. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 68-69 (1986).

161. *Id.*



Fourth, this Note's framework responds to critics' claims that the unwelcome requirement is redundant.<sup>162</sup> When viewed from the perspective of the reasonable accused, the requirement is not redundant of any other element of the hostile environment cause of action, whether or not the accused was the plaintiff's supervisor.<sup>163</sup> Because this Note's conception of unwelcomeness applies the reasonable accused perspective, the unwelcomeness analysis fulfills its purpose of protecting consensual workplace relationships without being redundant of any other element of the hostile environment cause of action.

Finally, this Note's framework addresses the problem of requiring subordinates to inform their supervisors that their conduct is unwelcome, actions that could put their working conditions and even their job at risk.<sup>164</sup> When the accused was the plaintiff's supervisor at the time of the alleged harassment, the plaintiff does not have the burden of proving unwelcomeness. In such a case, the employer has the burden of establishing that the plaintiff unambiguously solicited or invited the accused's conduct.

#### CONCLUSION

This Note advocates for a new framework for the unwelcome requirement, a requirement that almost all of the federal courts of appeals have imposed on plaintiffs in hostile work environment cases under Title VII. When comparing the four different perspectives one can use to analyze unwelcomeness, the reasonable accused perspective best serves the goals of the unwelcome requirement and Title VII. Applying research in supervisor-subordinate relations to the reasonable accused perspective demonstrates the unreasonableness of a supervisor believing that a subordinate welcomes severe or pervasive conduct when a reasonable person would find that the supervisor's behavior created a hostile or abusive work environment. This Note advocates for an unwelcomeness framework in supervisor-subordinate cases that shifts the burden to the employer

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162. *See supra* Part II.B.4.

163. *See supra* Part III.A.4-5.

164. *See supra* Part II.B.5.

to prove that the plaintiff welcomed the supervisor's conduct and limits the evidence available to prove such an affirmative defense.

This Note does not argue that the unwelcome requirement should remain part of the plaintiff's prima facie case outside the supervisor-subordinate context. Instead, this Note argues that in such cases, the most productive use of the requirement is the reasonable accused perspective. Accordingly, courts and commentators should balance the productivity of the unwelcome requirement in protecting consensual workplace relationships against the potential harm caused by maintaining the requirement. Whatever the result, the standard should reflect how people actually interact in the workplace. Courts should impose requirements on individuals only when it is realistic for them to abide by such standards, and research regarding workplace interactions informs our discussion of what standard is fair to impose on hostile work environment victims in proving their claims.

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