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A DIFFERENT VOICING OF UNWELCOMENESS: RELATIONAL REASONING AND SEXUAL HARASSMENT

MARGARET MOORE JACKSON*

I. INDICATING CONDUCT WAS UNWELCOME—A DIVERGENCE OF EXPECTATION FROM REALITY

In workplace sexual harassment law, the notion that a claim must be based on “unwelcome” conduct has been elevated from an unremarkable, undefined term in the administrative guidelines¹ to the essence of a sexual harassment claim.² In pursuing such a claim under Title VII,³ an employee must formally prove that the complained-of conduct was unwelcome.⁴ The victim of the harassment can establish unwelcomeness by testifying that she⁵ did not want to be treated in the manner that she was treated at work.⁶ Yet, instead of inquiring whether the harasser’s conduct was appropriate for

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1. Discrimination Because of Sex Under Title VII of the Civil Rights Act of 1964, 45 Fed. Reg. 74677 (November 10, 1980) (to be codified at 29 C.F.R. § 1604.11 (1981)) (providing the Equal Employment Opportunity Commission (EEOC) guideline that harassing conduct was required to be “unwelcome”). Since first recognizing sexual harassment as actionable, courts have treated these Guidelines as a “working definition” of sexual harassment and required the complained-of conduct to be unwelcome. Henry L. Chambers, Jr., *(Un)welcome Conduct and the Sexually Hostile Environment*, 53 ALA. L. REV. 733, 745-46 (2002).

2. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986) (citing 29 C.F.R. § 1604.11(a) (1985)) (stating that “[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were ‘unwelcome.’”). Gravamen is defined as “[t]he part of a charge or an accusation that weighs most substantially against the accused.” AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 767 (4th ed. 2000). The word is derived from the Latin words “gravare” (to burden) and “gravis” (heavy). *Id.*

3. 42 U.S.C. §§ 2000e-2000e-4 (2000).

4. *Meritor*, 477 U.S. at 68-69.

5. Although men are also subject to sexual harassment at work, most often the employee being harassed is a woman and the harasser is a man. See Heather Antecol & Deborah Cobb-Clark, *The Changing Nature of Employment-Related Sexual Harassment: Evidence From the U.S. Federal Government, 1978-1994*, 57 INDUS. & LAB. REL. REV. 443, 443-45 (2004) (citing studies concluding that half of all women experience sexual harassment at some point during their working lives). Over 90 percent of reported cases involve men harassing women. DEBORAH L. RHODE, *SPEAKING OF SEX, THE DENIAL OF GENDER INEQUALITY* 97 (1997).

6. *Payton v. Receivables Outsourcing, Inc.*, 163 Ohio St. 3d 722, 2005 Ohio 4978, 840 N.E.2d 236, 241, at ¶¶ 9-10 (holding that plaintiff’s deposition testimony satisfies requirement of prima facie evidence of unwelcomeness on summary judgment motion).

workplace interactions,⁷ this element shifts the focus to the plaintiff's conduct. The finder of fact is asked to determine how the plaintiff really felt about the complained-of conduct, based on her behavior.⁸ By conducting this inquiry as to plaintiff's behavior, the legal system discounts the assertion of the plaintiff that she didn't want sexual attention at work, and instead examines her conduct for signs that she actually provoked or positively reinforced the advance.⁹ The questions being asked are disturbingly familiar—whether she asked for it and whether she enjoyed it.¹⁰

The woman facing sexual harassment at work must navigate a dilemma between moral obligations and self-interest.¹¹ She works to pursue not only income, but also dignity and self-respect.¹² Sexual harassment interferes with these pursuits, while creating a situation where her own conduct is loaded with sexual, economic, and ethical implications. The woman's decisions about whether to report the harassment and how to interact with the harasser may adversely impact the social status, reputation, income, and job security of both her and the harasser.¹³ Particularly when a legal claim is made, the manner in which the woman handles the conflict is assessed in the context of moral decision-making.¹⁴ Her participation in sexually-

7. Given the power dynamics and financial imperatives of work, some have questioned whether workplace sexual overtures can ever truly be welcome. Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 831 (1991) (responding to justifications of the unwelcomeness requirement by positing that "there is no such thing as truly 'welcome' sex between a male boss and a female employee who needs her job").

8. See *Meritor*, 477 U.S. at 68-69 (holding that "the correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome . . ." and discussing the admission of evidence as to "whether [plaintiff] found particular sexual advances unwelcome").

9. Louise F. Fitzgerald, *Who Says?, Legal and Psychological Constructions of Women's Resistance to Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 94, 95 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004) ("The critical inquiry rarely focuses on whether the conduct was *unwelcome*; rather, courts routinely scrutinize the woman's behavior for clues to whether the behavior was *welcome*.").

10. See Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 794 (1986) (discussing the notion that common law rules admitting evidence of rape victims' sexual history and conduct allowed defense attorneys to insinuate that the victim asked for or enjoyed the rape).

11. See RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 4, 14-17 (1999). Posner defines morality as "the set of duties to others," animals, and God, meant to inhibit our self-centered or emotionally-driven impulses to act. *Id.* at 4. Moral obligations are impacted in deciding whether it is always wrong to lie; whether infanticide, sex discrimination, prostitution, euthanasia, affirmative action, surrogate motherhood, or eating meat are immoral; and whether fairness requires compensation for an accidental injuries. *Id.* at 14-15.

12. Ronald Turner, *Title VII and the Inequality-Enhancing Effects of the Bisexual and Equal Opportunity Harasser Defenses*, 7 U. PA. J. LAB. & EMP. L. 341, 344 (2005).

13. Note, *Notice in Hostile Environment Discrimination Law*, 112 HARV. L. REV. 1977, 1986-87 (1999).

14. See CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 147 (Harvard Univ. Press 1993) (1982) (stating that "[i]n a world that extends through an elaborate network of relationships, the fact that someone is hurt affects

related activities, both at and away from work, become matters to be judged. If she “welcomed” the conduct, as the legal system interprets welcomeness, her efforts to obtain compensation are deemed unethical and unfair, and on that basis are precluded.¹⁵

Professor Gilligan delineated two distinct approaches that people use to identify and resolve moral dilemmas:¹⁶ one relying on an understanding of responsibilities and relationships to harmonize conflicting obligations (relational reasoning); the other relying upon a prioritization of rights and rules to determine fairness (rights-based reasoning).¹⁷ Gilligan and other feminists have argued that women tend to make decisions using the first system, dubbed the “ethic of care,” rather than the second system, which is known as the “ethic of rights.”¹⁸ Thus, a woman using the ethic of care will make choices based upon the way she perceives that she should in light of her relationships and responsibilities.¹⁹ Ethic of care decisions tend to differ from those that would be made by a person with an orientation toward an ethic of rights.²⁰

Decisions about how to handle the moral dilemmas raised by a sexually harassing situation in the workplace take on a special significance during the unwelcomeness inquiry. Legal analysis of whether conduct was unwelcome is guided by assumptions about how women ought to behave if they

everyone who is involved, complicating the morality of any decisions and removing the possibility of a clear or simple solution.”). The adversarial legal system virtually mandates an outcome that distinguishes winners from losers, those who are rewarded from those who are penalized. *Id.*

15. See Maria L. Oliveros, *Fictionalizing Harassment—Disclosing the Truth*, 93 MICH. L. REV. 1373, 1392-93 (1995) (stating that the EEOC’s proposed unwelcomeness requirement is meant to preclude parties to consensual relationships from punishing one another on the basis of false accusations, and to prevent abuse of sexual harassment claims by women who desire sex without being held responsible for it); *Hartsall v. Duplex Products, Inc.*, 123 F.3d 766, 774 n.7 (4th Cir. 1997) (“She cannot now cry ‘foul’ for conduct that was, at the time, not ‘unwelcome.’”).

16. See GILLIGAN, *supra* note 14, at xix, 147 (describing moral problems as “problems of human relations.”). Moral problems occur in situations involving conflicts where, no matter what the decision, someone either is not served or is hurt. *Id.* at 147.

17. *Id.* at 19, 105.

18. *Id.* at 2, 160-65; Robin L. West, *The Differences in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN’S L.J. 81, 83-89 (1987) [hereinafter, *Hedonic*]; Robin L. West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 4 (1988) [hereinafter, *Jurisprudence*].

19. GILLIGAN, *supra* note 14, at 105, 160.

20. *Id.* at 62-63. The hierarchical view of relationships typically articulated by men contrasts with the web of connections described by women, not only conveying different modes for structuring relationships, but also correlating with different ways of viewing morality and self, “different modes of action[,] and different ways of assessing the consequences of choice.” *Id.* at 62.

do not want to invite sexual conduct at work.²¹ In many instances, these expectations are at odds with the way in which women who report being sexually harassed in the workplace actually behave.²² An explanation for this incongruity is that legal precedents for interpreting unwelcomeness are founded in rights-based reasoning, such that they are uniquely ill-suited to interpret the behavior of women who navigate their lives using relational reasoning. This point provides an additional criticism of the much-beleaguered unwelcomeness requirement.²³

The use of generalized expectations and interpretations of behavior to derive meaning is not unique to sexual harassment law or to the legal system.²⁴ However, the purpose of laws designed to affect behavior is apt to be thwarted when such laws rely upon flawed behavioral models.²⁵ The statute underlying sexual harassment prohibitions was designed to eliminate discrimination in the workplace, including the unequal treatment of women.²⁶ Where the legal standards governing sexual harassment are based upon misguided behavioral expectations, the impact extends beyond substantial unfairness to plaintiffs and threatens the underlying goals of equal employment opportunity law.

21. See Fitzgerald, *supra* note 9, at 96 (criticizing unwelcomeness framework for supporting assumption that women who do not welcome sexual conduct universally behave in certain ways, regardless of context).

22. See, e.g., *id.* at 100-01 (noting that formal reporting of sexual harassment is considered strong legal evidence of unwelcomeness, despite numerous studies indicating that women are unlikely to formally report sexual harassment).

23. See, e.g., 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, 1167 n.49 (1995) (noting criticisms of the unwelcomeness requirement as an aberration of Title VII litigation reflecting bias grounded in sexual stereotypes and arguing that the burden should shift to the defendant to prove plaintiff wanted the sexual conduct at work); Steven L. Wellborn, *Taking Discrimination Seriously: Oncale and the Fare of Exceptionalism in Sexual Harassment Law*, 7 WM. & MARY BILL RTS. J. 677, 694-95 (1999) (describing the focus on the victim's conduct in establishing unwelcomeness as an anomaly in anti-discrimination law).

24. See Owen D. Jones & Timothy H. Goldsmith, *Law and Behavioral Biology*, 105 COLUM. L. REV. 405, 415 n.21 (2005) (quoting STEVEN PINKER, *THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE* 1 (2002)) (stating that “[e]veryone has a theory of human nature. Everyone has to anticipate the behavior of others, and that means we all need theories about what makes people tick. A tacit theory of human nature—that behavior is caused by thoughts and feelings—is embedded in the very way we think about people. We fill out this theory by introspecting on our own minds and assuming that our fellows are like ourselves, and by watching people’s behavior and filing away generalizations.”).

25. See *id.* at 415-16.

26. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (stating that Congress intended to remove “artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.”); *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1269, 1274 (W.D. Wash. 2001) (stating that the purpose of Title VII is to eliminate discrimination in employment and to provide women with equal treatment in the workplace).

Sexual harassment in employment has been recognized as a common experience for working women,²⁷ with negative effects for both the women and their employers.²⁸ The resulting costs to society are huge, measured in psychological, sociological, and financial terms.²⁹ Current law stumbles in its attempt to alleviate these harms, imposing rights-oriented assumptions upon the behavior of women.³⁰ Some women do not make decisions based upon their rights, but rather, upon the anticipated impact those decisions have upon their relationships. When a harassment victim negotiates moral dilemmas using relational reasoning, instead of following the expectations of a rights-based system of reasoning, her behavior is prone to being misconstrued and her claim that the sexual conduct was unwelcome is likely to be rejected. For women who use relational reasoning, the unwelcomeness requirement fails to accurately assess what it purports to measure—whether the subject of the sexual harassment solicited or invited the conduct. This divergence of expectation from reality inhibits efforts to eliminate sexual discrimination and harassment in the workplace.

The requirement that sexual harassment plaintiffs establish that the complained-of conduct was unwelcome has been harshly and repeatedly criticized as unfair to plaintiffs, and therefore, to women.³¹ However, the intersection between relational reasoning and the unwelcomeness requirement has not previously been explored. A structural bias in the law, disfavoring women, is revealed by examining how the analysis of unwelcomeness impacts persons who navigate their lives using an ethic of care.³²

27. See RHODE, *supra* note 5, at 99 (stating that over 50 percent of all women are subjected to harassment at work or school).

28. See Antecol & Cobb-Clark, *supra* note 5, at 443-45 (providing that sexual harassment results in turnover, absenteeism, decreased job satisfaction, reduced productivity, and negative health consequences for employees and significant financial costs for employers, even apart from any costs for legal defense of sexual harassment claims).

29. RHODE, *supra* note 5, at 101. Rhode references the economic and psychic injuries suffered by harassment victims, namely “job dismissals, transfers, coworker hostility, anxiety, depression, and other stress-related conditions.” *Id.* at 101. Sexual harassment also contributes to the perpetuation of sexist stereotyping and workplace gender segregation, and decreases employee productivity and longevity. *Id.*

30. Moreover, assumptions about the range of proper behavioral decisions by women (in the workplace) are embedded in the unwelcomeness inquiry. For instance, the United States Supreme Court has concluded that the clothing decisions of a woman are part of this analysis. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 69 (1986) (holding that evidence of a plaintiff’s “sexually provocative dress or speech” are “obviously relevant”). These and other assumptions are based on stereotypes that overlook or contradict the actual bases for decisions made by women. See Christina A. Bull, *The Implications of Admitting Evidence of a Sexual Harassment Plaintiff’s Speech and Dress in the Aftermath of Meritor Sav. Bank v. Vinson*, 41 UCLA L. REV. 117, 144-48 (1993).

31. See Fitzgerald, *supra* note 9, at 104.

32. See Berta Esperanza Hernandez-Truyol, *Out of the Shadows: Traversing the Imaginary of Sameness, Difference, and Relationalism—A Human Rights Proposal*, 17 WIS. WOMEN’S L.J.

When sexual harassment plaintiffs, the majority of whom are women, rely upon relational reasoning to resolve moral dilemmas, the rights-based unwelcomeness construct places them at a distinct disadvantage. Until this burden is removed, sexual harassment law cannot effectively achieve its goal of eliminating this type of discrimination in the workplace.

II. BURDENING THE SEXUAL HARASSMENT VICTIM

The requirement that plaintiff prove the conduct was unwelcome, like the prohibition against workplace sexual harassment, was not established through the enactment of any statute. Rather, it was developed through application of administrative guidelines and case law interpreting Title VII of the Civil Rights Act of 1964.³³

The actual language of Title VII broadly forbids sex-based discrimination by an employer against an employee.³⁴ The drafters apparently did not consider whether on-the-job harassment would constitute discrimination under Title VII.³⁵ The statute does not inquire as to whether the employee through her own conduct somehow welcomed the unequal treatment and does not require the employee to affirmatively demonstrate that the employer was not invited to discriminate.³⁶

111, 120 n.51 (2002) (quoting MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 2, 15(1999)) (noting that underlying structural bias in the law can be uncovered by analyzing how supposedly neutral rules or law actually impact and disadvantage women).

33. 42 U.S.C. §§ 2000e-2000e-4 (2000).

34. *See id.* An employer that fails to hire, refuses to hire, discharges, or otherwise discriminates against a person with respect to her "compensation, terms, conditions, or privileges of employment" because of that person's sex has committed an unlawful employment practice. *Id.* § 2000e-2(1). The wording of the statute prohibits actions that limit, segregate, or classify employees or applicants in ways that tend to deprive them of employment opportunities or otherwise adversely affect their status as employees because of sex, among other prohibited bases. *Id.* § 2000e-2(2). Job discrimination based upon race, color, religion, or national origin is prohibited as well. *Id.* § 2000e-2(1)-(2).

35. David Benjamin Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment*, 81 CORNELL L. REV. 66, 99 (1995).

The legislative history evidences no discussion of whether a person's terms, conditions, or privileges of employment included a right to be free from improper harassment. Rather, the congressional debates focused on discrimination in hiring and compensation and the racial segregation of workers common at that point in our nation's history.

Id.

36. The unwelcomeness requirement does not even have an approximate correlate in other areas of anti-discrimination law. Discrimination cannot be made legal by consent of the victim. *See Wellborn, supra* note 23, at 694-95 (noting that when the harasser's conduct is discriminatory but not unwelcome, the effect is to provide a defense of consent that is not available in any other type of discrimination action). Nor may equal employment rights be prospectively waived. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51-52 (1974); *Cole v. Burns Intern. Sec. Services*, 105 F.3d 1465, 1482 (D.C. Cir. 1997).

Judicial interpretation of Title VII developed two strains of illegal sex-based conduct: intentional actions or policies that treat women differently than men with respect to employment-related matters (“disparate treatment”) and ostensibly neutral practices that disadvantage one gender more than the other (“disparate impact”).³⁷ An employee asserting illegal discrimination under either theory need not demonstrate that the discrimination was unwelcome.

When workplace harassment began to be recognized as a form of actionable discrimination, sexual harassment was one of the last types to be established.³⁸ On-the-job harassment was first held to be actionable disparate treatment in a race discrimination case,³⁹ wherein the creation of a work environment that was hostile or abusive toward a protected class was found to constitute discrimination forbidden by Title VII.⁴⁰ Viable harassment claims also were recognized in the context of religious and national origin harassment.⁴¹ Whether the victim of the harassment had invited or

37. See Ramit Mizrahi, “Hostility to the Presence of Women”: Why Women Undermine Each Other in the Workplace and the Consequences for Title VII, 113 YALE L.J. 1579, 1580 (2004). Disparate treatment and disparate impact theories also apply to workplace discrimination based on race, color, religion, and national origin. *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 (1977); *Bryant v. Bell Atl. Md., Inc.*, 288 F.3d 124, 133 n.5 (4th Cir. 2002); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 80-81 (1977); *Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 92 (1973).

38. See Tory L. Lucas, *Disabling Complexity: The Americans with Disabilities Act of 1990 and Its Interaction with Other Federal Law*, 38 CREIGHTON L. REV. 871, 918 (2005) (citing *Haysman v. Food Lion, Inc.*, 893 F. Supp. 1092, 1106 (S.D. Ga. 1995) (holding that the ADA prohibits harassment on the basis of disability)). Disability-based harassment was recognized after sexual harassment, with disability discrimination itself not being established as illegal under federal law until passage of The Americans with Disabilities Act of 1990. *Id.*

39. Mizrahi, *supra* note 37, at 1580-81 (citing *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971)). “Hostile work environment claims initially emerged as a variation of disparate treatment, as courts established that workers could be subject to intentional discrimination even when their employers did not take tangible job actions against them.” *Id.* See Rhonda M. Reeves, *One of These Things is Not Like the Other: Analogizing Ageism to Racism in Employment Discrimination Cases*, 38 U. RICH. L. REV. 839, 889 (2004) (discussing hostile work environment); Oppenheimer, *supra* note 35, at 101 (stating that *Rogers* was the first reported appellate decision to address workplace harassment and in that decision the Fifth Circuit adopted the EEOC’s position that employers have a duty to prevent workplace harassment).

40. Mizrahi, *supra* note 37, at 1580-81 (citing *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971)). “The circuit court found that the employer had violated Title VII, despite the fact that no tangible job action was taken, because ‘the phrase terms, conditions, or privileges of employment’ in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.” *Id.* See Reeves, *supra* note 39, at 889 (stating that “[t]he court reasoned that employees should not be singled out by race to experience a different and less comfortable working environment than that experienced by workers of other races”).

41. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986) (citing *Compston v. Borden, Inc.*, 424 F. Supp. 157, 162-63 (S.D. Ohio 1976); *Cariddi v. Kansas City Chiefs Football Club*, 568 F.2d 87, 88 (8th Cir. 1977)).

solicited the conduct was not at issue, because racial, religious, and natural origin harassment were assumed to be inherently unwelcome.⁴²

Initial efforts to apply the prohibition against workplace harassment to sexual conduct were deemed not covered by Title VII.⁴³ Although by the mid-1970s, it was legally well-accepted that employees should not have to endure harassing behavior based upon their race or religion, sex-based harassment in the workplace was considered a natural⁴⁴ phenomenon involving mere personal proclivities,⁴⁵ which should not affect the employer⁴⁶ or the plaintiff's employment.⁴⁷

42. See Monnin, *supra* note 23, at 1167 n.49 (showing the presumption that harassment based on race, religion, and national origin is inherently unwelcome led to the much earlier development of hostile work environment theories for these forms of employment discrimination); Judith J. Johnson, *License to Harass Women: Requiring Hostile Environment Sexual Harassment to be "Severe or Pervasive" Discriminates Among "Terms and Conditions" of Employment*, 62 MD. L. REV. 85, 95 (2003) (showing that national origin guidelines did not require proof of unwelcomeness on the assumption that such harassment would always be unwelcome); Terry Morehead Dworkin & Ellen R. Peirce, *Is Religious Harassment "More Equal?"*, 26 SETON HALL L. REV. 44, 61-62 (1995) (providing that courts generally do not require plaintiffs to prove unwelcomeness in cases of harassment based on religion, race, or national origin). *But see, e.g.*, Jones v. Kroger, Inc., No. Civ.A. 504-543-JMH, 2005 WL 2807194, at *3 (E.D. Ky. Oct. 27, 2005); Campbell v. Univ. of Akron, No. 5:04 CV 2505, 2005 WL 2805854, at *15 (N.D. Ohio Oct. 26, 2005); Mosby v. State Farm Mut. Auto. Ins. Co., No. 3:04-0275, 2005 WL 2600420, at *15 (M.D. Tenn. Oct. 13, 2005) (incorporating the element of unwelcome conduct into more recent racial harassment cases).

43. See Oppenheimer, *supra* note 35, at 110-11 (describing cases in the early 1970s where federal courts rejected efforts to articulate sexual harassment claims as outside the scope of Title VII).

44. See Miller v. Bank of Am., 418 F. Supp. 233, 236. (N.D. Cal. 1976), *rev'd*, 600 F.2d 211 (9th Cir. 1979) (stating that "[i]t is conceivable, under plaintiff's theory, that flirtations of the smallest order would give rise to liability"). The Miller court continued by stating that "[t]he attraction of males to females and females to males is a natural sex phenomenon and it is probable that this attraction plays at least a subtle part in most personnel decisions. Such being the case, it would seem wise for the Courts to refrain from delving into these matters . . ." *Id.* See also Tomkins v. Pub. Serv. Elec. & Gas Co., 422 F. Supp. 553, 557 (D. N.J. 1976), *rev'd*, 568 F.2d 1044 (3d Cir. 1977). The Tomkins court explained:

This natural sexual attraction can be subtle. If the plaintiff's view were to prevail, no superior could, prudently, attempt to open a social dialogue with any subordinate of either sex. An invitation to dinner could become an invitation to a federal lawsuit if a once harmonious relationship turned sour at some later time. And if an inebriated approach by a supervisor to a subordinate at the office Christmas party could form the basis of a federal lawsuit for sex discrimination if a promotion or a raise is later denied to the subordinate, we would need 4,000 federal trial judges instead of some 400.

Id.

45. See Corne v. Bausch and Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975), *vacated*, 562 F.2d 55 (9th Cir. 1977) (stating that "[M]r. Price's conduct appears to be nothing more than a personal proclivity, peculiarity or mannerism. By his alleged sexual advances, Mr. Price was satisfying a personal urge").

46. See *id.* at 163-64 (refusing to recognize workplace sexual harassment because it would mean "a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another. The only sure way an employer could avoid such charges would be to have employees who were asexual").

As a result of efforts to heighten awareness of the harmful aspects of sexual harassment,⁴⁸ eventually courts began to hold that conditioning the benefits of employment upon acquiescence to sexual demands violated Title VII.⁴⁹ Unlike harassment based upon race or other protected characteristics, workplace sexual harassment was recognized only where the employee suffered the loss of a tangible job benefit.⁵⁰ By the end of the 1970s, four appellate court circuits had recognized this conduct as “quid pro quo” sexual harassment.⁵¹ However, the elements of a claim were not clearly delineated and unwelcome conduct was not highlighted as a particularly important aspect.⁵²

47. *Barnes v. Train*, No. 1828-73, 1974 WL 10628, at *1, (D. D.C. Aug. 9, 1974), *rev'd sub nom.* *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977). The first *Barnes* court stated that [t]he substance of plaintiff's complaint is that she was discriminated against, not because she was a woman, but because she refused to engage in a sexual affair with her supervisor. This is a controversy underpinned by the subtleties of an inharmonious personal relationship. Regardless of how inexcusable the conduct of plaintiff's supervisor might have been, it does not evidence an arbitrary barrier to continued employment based on plaintiff's sex.

Id.

48. See generally CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979) (discussing sexual harassment and credited with aiding in the establishment of workplace sex harassment as a cause of action under Title VII). See also Rebecca K. Lee, *Pink, White, and Blue: Class Assumptions in the Judicial Interpretations of Title VII Hostile Environment Sex Harassment*, 70 BROOK. L. REV. 677, 711-12 (2005) (citing MacKinnon's work); Jennifer Ann Drobac, *Sex and the Workplace: "Consenting" Adolescents and a Conflict of Laws*, 79 WASH. L. REV. 471, 503-04 (2004) (providing that MacKinnon articulated the social harm of workplace sexual harassment); Robert A. Kearney, *The Unintended Hostile Environment: Mapping the Limits of Sexual Harassment Law*, 25 BERKELEY J. EMP. & LAB. L. 87, 87 (2004) (stating that sexual harassment scholarship “began largely in the academic library of” MacKinnon).

49. See, e.g., *Williams v. Saxbe*, 413 F. Supp. 654, 659-61 (D. D.C. 1976) (holding that discharge in retaliation for refusal to submit to sexual demands violates Title VII).

50. Because these situations involve the granting or withholding of job benefits depending on the employee's response to sexual overtures, this theory of harassment is known as “quid pro quo,” Latin for “something for something.” BLACK'S LAW DICTIONARY 1282 (8th ed. 2004); see also Martin J. Katz, *Reconsidering Attraction in Sexual Harassment*, 79 IND. L. J. 101, 115-16 (2004) (“Quid pro quo harassment occurs when a supervisor (or someone else in a position of power) makes an unwelcome request to engage in sexual relations with the target, and where the request is accompanied by an express or implied threat.”).

51. Oppenheimer, *supra* note 35, at 112. The District of Columbia, Third, Fourth, and Ninth Circuits accepted claims involving sexual demands of supervisors by late 1979. *Id.*

52. Of the four appellate opinions that first recognized sexual harassment as actionable, only the D.C. Circuit's addressed unwelcomeness, and these remarks did not establish it as part of plaintiff's prima facie case. See, e.g., *Barnes v. Costle*, 561 F.2d 983, 999 (D.C. Cir. 1977). (MacKinnon, J., concurring). Judge MacKinnon stated:

Where sexual advances are involved, it must be candidly recognized at the outset that, even when directed from a supervisor who would be difficult to refuse, the advances themselves might be welcome. It cannot be presumed as a matter of law that the employee is subjected to unfavorable treatment because of the advances. Once it is established, however, that the employee has no interest in the proposal, then the

Next, the Equal Employment Opportunity Commission (EEOC) established Guidelines on Discrimination Because of Sex.⁵³ The Guidelines not only recognized sexual quid pro quo harassment, but also hostile environment harassment,⁵⁴ stating that sexual harassment includes “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature”⁵⁵ The Guidelines specify that these types of behaviors constitute sexual harassment “when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.”⁵⁶ The requirement that the conduct be “unwelcome” was not explained or emphasized as a particularly significant component of the claim. Justification for the use of the term “unwelcome” in the definition of sex-based harassment, which was not required for other types of employment discrimination claims,⁵⁷ was based upon the assertion that sometimes people seek or invite sexual conduct in the workplace.⁵⁸

Finally, based in part on the articulation of sexual harassment in the Guidelines,⁵⁹ the analysis of hostile environment racial harassment as workplace discrimination was appropriated successfully into the sexual harass-

employee may suffer from the continuation of advances. And the eventual damage to her job for failing to accede, if that is a result, is undeniably harmful.

Id. This comment connected the requirement that conduct be unwelcome with the presumption that only unwelcome advances could cause harm. *See also* Chambers, *supra* note 1, at 733 (stating that the requirement that sexual harassment be based on unwelcome conduct “rests on the notion that welcome conduct does not cause sexual harassment harm”).

53. 45 Fed. Reg. 74677 (Nov. 10, 1980) (codified at 29 C.F.R. § 1604.11 (1981)).

54. *See* Linda Kelly Hill, *The Feminist Misspeak of Sexual Harassment*, 57 FLA. L. REV. 133, 186 (2005) (stating that Professor Catharine MacKinnon first delineated the quid pro quo/hostile environment harassment distinction).

55. 45 Fed. Reg. 74677 (November 10, 1980) (codified at 29 C.F.R. § 1604.11 (1981)).

56. *Id.*

57. *See* Monnin, *supra* note 23, at 1167 n.49; Johnson, *supra* note 42, at 95; Dworkin & Peirce, *supra* note 42, at 61-62.

58. Janine Benedet, *Hostile Environment Sexual Harassment Claims and the Unwelcome Influence of Rape Law*, 3 MICH. J. GENDER & L. 125, 159 (1995) (mentioning that the EEOC defended inclusion of unwelcomeness in prima facie cases by arguing that the same conduct may constitute either harassment or enjoyable sexual activity).

59. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66-67 (1986) (“Since the Guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.”).

ment context.⁶⁰ The element of unwelcome conduct was recited along with the Guidelines, but was not analyzed or defined in the early cases recognizing the claim.⁶¹ Eventually, the Supreme Court also held that hostile work environment sexual harassment constitutes actionable discrimination under Title VII.⁶² The disparate treatment theory was recognized as encompassing both quid pro quo and hostile environment harassment claims.⁶³

Where Title VII was never amended to specifically include sexual harassment as a form of sex discrimination, case law developed a definition by building on the EEOC Guidelines.⁶⁴ The requirement of “unwelcome”

60. See Mizrahi, *supra* note 37, at 1581 n.9 (discussing the first case to recognize hostile work environment sexual harassment claim). That case was *Bundy v. Jackson*, 641 F.2d 934, 943-44 (D.C. Cir. 1981), where the employer was held to have discriminated based on sex in violation of Title VII by creating or condoning a “substantially discriminatory work environment, regardless of whether the complaining employees lost any tangible job benefits.” *Id.* See also Oppenheimer, *supra* note 35, at 120-21 (discussing *Bundy* and Title VII). *Bundy* and other subsequent opinions noted the parallels between racial and sexual harassment. See Mizrahi, *supra* note 37, at 1581 (discussing hostile environment sexual harassment as similar to racial harassment as a barrier to workplace equality). Not all commentators are sanguine about the analytical connection between racial and sexual harassment analysis. See Reaves, *supra* note 39, at 890 n.236 (quoting Camille Hebert, *Analogizing Race and Sex in Workplace Harassment Claims*, 58 OHIO ST. L.J. 819, 820 (1997)). “[F]or some courts, the use of analogies between racial and sexual harassment, rather than causing them to recognize the seriousness of sexual harassment, may in fact have caused them to take claims of racial harassment less seriously.” *Id.*

61. Neither *Rogers* nor *Bundy* considered whether the conduct at issue in those cases was unwelcome. *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971); *Bundy v. Jackson*, 641 F.2d 934, 942-43 (D.C. Cir. 1981).

62. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 73 (1986).

63. See *id.* at 64-65, 73 (recognizing hostile environment sexual harassment in addition to quid pro quo sexual harassment). Some believe that the distinction between the two types of sexual harassment claims has now been eliminated. See *Mosher v. Dollar Tree Stores, Inc.*, 240 F.3d 662, 666 (2001) (citing *Ellerth* and *Faragher* for the proposition that the Supreme Court has abandoned the distinction between quid pro quo and hostile environment harassment, instead categorizing cases as either involving a tangible employment action taken by a supervisor or not). This lack of distinction focuses the inquiry on whether or not an employer will be held vicariously liable for the actions of supervisory employees, rather than upon whether or not harassment has occurred in a legal sense. See *Chambers*, *supra* note 1, at 740 (stating that the sole difference is that quid pro quo harassment causes a tangible job detriment while hostile work environment does not). Other courts continue to observe the distinction between quid pro quo and hostile environment harassment. See *Bolin v. Okla. Conference of the United Methodist Church*, 397 F. Supp. 2d 1293, 1301 (N.D. Okla. 2005) (discussing types of workplace sexual harassment). The *Bolin* court stated that “[w]orkplace sexual harassment may take either of two forms: (1) ‘hostile work environment’ harassment, which consists of offensive gender-based conduct that is severe or pervasive; or (2) ‘quid pro quo’ harassment, which occurs when submission to sexual conduct is made a condition of concrete employment benefits.” *Id.* See also *Ferrell v. Harvard Indus., Inc.*, No. CIV.A. 00-2707, 2001 WL 1301461, at *4, *6 (E.D. Pa. Oct. 21, 2001) (discussing distinction between quid pro quo and hostile work environment claims).

64. Francis Achampong, *The Evolution of Same-Sex Sexual Harassment Law: A Critical Examination of the Latest Developments in Workplace Sexual Harassment Litigation*, 73 ST. JOHN’S L. REV. 701, 714-15 (1999). Achampong wrote that:

Courts have incorporated the EEOC’s definition of sexual harassment in fashioning the elements of a prima facie case in both types of sexual harassment. In quid pro quo

conduct became a well-established component of a plaintiff's prima facie case, but without a clear definition of what "unwelcome" meant or how it should be proved.⁶⁵ The Eleventh Circuit Court of Appeals addressed the issue in 1982, discussing unwelcomeness in a sentence that continues to be relied upon: "In order to constitute harassment, this conduct must be unwelcome in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive."⁶⁶ The Supreme Court added that the inquiry should focus on whether "her conduct indicated that the alleged sexual advances were unwelcome," not whether any participation by her in the sexual conduct was voluntary.⁶⁷ The Court made clear that the unwelcomeness element could not be rebutted by a showing of consent and that consent is no defense to a sexual harassment claim itself.⁶⁸ The existence or absence of unwelcome conduct requires an examination of the totality of the circumstances.⁶⁹ However, the courts tend to concentrate on the woman's conduct and its interpretation, rather than other specific components of the circumstances.⁷⁰

sexual harassment, the plaintiff must establish that he was a member of a protected group, that the unwelcome sexual conduct was based on sex, that employment conditions were affected by the victim's response, and that the employer was liable. In hostile environment sexual harassment, the victim must establish membership in a protected group, unwelcome sexual conduct based on sex, and an effect on employment conditions.

Id.

65. See *Henson v. City of Dundee*, 682 F.2d 897, 903-05 (11th Cir. 1982) (citing the Guidelines in enunciating the elements of hostile environment sexual harassment). These elements have been refined over time, but without clarifying the unwelcome conduct requirement. See, e.g., Amanda Jarrells Mullins & Richard A. Bales, *Employer Liability for Emotional Distress Arising From Investigation of a Title VII Harassment Complaint*, 23 QUNNIPIAC L. REV. 1027, 1030 (2005) (setting forth four elements required to prevail on Title VII hostile work environment claims, based on recent Supreme Court cases).

66. *Henson*, 682 F.2d at 903. This prescription was left undisturbed by the *Meritor* Court and remains frequently cited and quoted. See, e.g., *Bales v. Wal-Mart Stores, Inc.*, 143 F.3d 1103, 1108 (8th Cir. 1998); *Kruger v. Securitas Sec. Servs. USA, Inc.*, No. 5:04-CV-91, 2005 WL 2417658, *4 (W.D. Mich. Sept. 30, 2005); *Fisher v. San Pedro Peninsula Hosp.*, 214 Cal. App. 3d 590, 608, (Cal. Dist. Ct. App. 2, 1989) (adopting requirements for a prima facie claim of environmental sexual harassment set out in *Henson*).

67. See *Meritor*, 477 U.S. at 69 (describing the relevant inquiry as "determining whether [plaintiff] found particular sexual advances unwelcome"). There continues to be confusion as to whether the conduct must have been perceived as unwelcome from the perspective of the plaintiff or from the perspective of the harasser. See L. Camille Hebert, *The Disparate Impact of Sexual Harassment: Does Motive Matter?*, 53 U. KAN. L. REV. 341, 375-77 (2005) (noting the confusion as to whether perceived conduct is determined from the plaintiff's or the harasser's perspective).

68. *Meritor*, 477 U.S. at 68-69. See *Drobac*, *supra* note 48, at 490 (explaining that "acquiescence to sex is not consent [that refutes a claim of sexual harassment] The plaintiff must prove only that she somehow indicated that the sexual behavior was unwelcome.").

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

70. *Fitzgerald*, *supra* note 9, at 103-04 (noting that despite the totality of the circumstances standard, "courts too often focus mainly on the woman's behavior, interpreting it in a particular way and ignoring other, equally or more likely, meanings").

Beyond these rather broad holdings, a cohesive definition of unwelcome conduct has not developed.⁷¹ Five Supreme Court sexual harassment cases have been decided since *Meritor Savings Bank v. Vinson*,⁷² but none of them further refined the analysis of when conduct is unwelcome.⁷³ States have generally followed the lead of federal courts, ultimately enacting similar sexual harassment prohibitions and referring to federal case law in interpreting them.⁷⁴ Without exception, establishing unwelcome conduct is a required element of a plaintiff's prima facie case.⁷⁵

Although the lack of clear guidance for determining when conduct is unwelcome has resulted in inconsistent case law, certain principles have been established for interpreting whether a plaintiff's behavior welcomed the complained-of conduct. These principles, which are described below in Part IV, anticipate particular rights-based behaviors from victims of harassment to validate claims that sexual conduct was unwelcome to them. Behavior that falls outside of these rules or requires an understanding of the plaintiff's context tends to be considered welcoming. Thus, when a harassment victim negotiates moral dilemmas using relational reasoning, instead of conforming to rights-based expectations, her behavior is prone to being misconstrued. As a result, her assertion of unwelcome conduct is likely to be rejected, defeating her sexual harassment claim.

71. See Chambers, *supra* note 1, at 751 ("Though courts seem to have a general sense of what the unwelcomeness inquiry entails, they have been spare in enunciating unwelcomeness principles."); Fitzgerald, *supra* note 9, at 95 ("This seemingly obvious and innocuous descriptor has, unfortunately, turned out to be neither.").

72. 477 U.S. 57 (1986).

73. See Faragher v. City of Boca Raton, 524 U.S. 775, 787-88 (1998) (establishing standards for vicarious liability); Burlington Indus. v. Ellerth, 524 U.S. 742, 755-65 (1998) (discussing vicarious liability); Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 82 (1998) (holding that same-sex harassment is actionable under Title VII); Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993) (holding that harassing behavior must be both subjectively and objectively offensive, and that courts must consider the totality of the circumstances in making this determination); Pa. State Police v. Suders, 542 U.S. 129, 152 (2004) (holding that constructive discharge may violate Title VII and that the *Ellerth/Faragher* affirmative defenses are still available where there is no underlying official act).

74. See, e.g., Weyerick v. Bayou Steel Corp., 887 F.2d 1271, 1274 (5th Cir. 1989) (stating that because the Louisiana anti-discrimination statute is similar to Title VII, Louisiana state courts consult the federal statute to interpret their close questions); Falczynski v. Amoco Oil Co., 533 N.W.2d 226, 230 n.2 (Iowa 1995) (discussing similarities between Iowa code and federal law); Opp. v. Source One Mgmt., Inc., 591 N.W.2d 101, 105 (N.D. 1989) (stating that because NDHRA provisions parallel Title VII, North Dakota courts will look to federal interpretations of Title VII for guidance when such interpretations are helpful and sensible to follow).

75. Drobac, *supra* note 48, at 490 (stating that "[e]very state FEPS that similarly prohibits sex discrimination and sexual harassment also makes 'unwelcomeness' an element of the prima facie case").

III. RELATIONAL REASONING—DECISIONS GROUNDED IN CONNECTION AND INCLUSION

Relational feminist theory recognizes a distinction between persons who make moral choices by identifying and prioritizing abstract rights and those who make choices by emphasizing connections with and responsibilities to others.⁷⁶ Professor Gilligan's well-known work, *In a Different Voice*, critiqued the ostensibly gender-neutral models used to assess the development of moral identity and judgment, concluding that they were based on male-centered values and perspectives.⁷⁷

Her work distinguished relational reasoning, which attempts to "harmonize the concerns" of everyone involved in a dilemma, from rights-oriented reasoning, which analyzes situations by prioritizing abstract rights.⁷⁸ When there are conflicts between people, relational reasoners rely upon the specific nature of the relationships to guide a resolution.⁷⁹ Rights-based thinkers apply formalistic rules to the situation, without considering context.⁸⁰ This theory recognizes two distinct ways of approaching moral problems: "Whereas the logic of justice celebrates qualities like autonomy, equality, universalizability, and rights, the ethic of care celebrates the somewhat opposite qualities of connectedness, responsiveness to need, contextualization, and duty."⁸¹

Reliance on the ethic of care is associated with women, because while a percentage of both sexes was found to use combinations of relational and rights-oriented reasoning, the persons who were identified as using solely relational reasoning were all women.⁸² Gilligan's study indicated that females more often place significance on relational issues and the specific context of the decision to be made, while males more often rely upon ab-

76. GILLIGAN, *supra* note 14, at 1; West, *Hedonic*, *supra* note 18, at 83-89; West, *Jurisprudence*, *supra* note 18, at 4.

77. See GILLIGAN, *supra* note 14, at 21-22.

78. See Pamela S. Karlan & Daniel R. Ortiz, *In a Diffident Voice: Relational Feminism, Abortion Rights, and The Feminist Legal Agenda*, 87 NW. U. L. REV. 858, 866 (1993) (discussing an example in Gilligan's study). To depict the difference, Gilligan describes the different manner in which a boy and a girl responded when asked to resolve the same moral quandary: should a man without money to buy a drug necessary to save his wife's life steal to obtain it? *Id.* The boy in the study views the situation in terms of a conflict between the right to life and the right to property, one of which is superior. *Id.* He observes that the question seems like a math problem with people. *Id.* The girl in the study instead attempts to address a lack of human connection in the hypothetical by suggesting alternative solutions, which avoid elevating one person's rights at the expense of the other's. *Id.*

79. *Id.* at 867.

80. *Id.*

81. *Id.* at 886.

82. *Id.* at 869-70 (citing Carol Gilligan, *Moral Orientation and Moral Development*, in WOMEN AND MORAL THEORY 19, 25 (Eva Feder Kittay & Diana T. Meyers eds., 1987)).

stract notions of autonomy and individual rights.⁸³ She and other scholars have theorized that men tend to focus on “abstract analysis, formal rights, and competitive structures,” while women tend to emphasize “social context, caring relationships, and cooperative interaction.”⁸⁴ Gilligan noted that “morality is seen by these women as arising from the experience of connection and conceived as a problem of inclusion rather than one of balancing claims.”⁸⁵

The genesis of the relational emphasis more often found among women is sometimes attributed to women’s traditional roles as mothers and caregivers, which are thought to establish deep emotional and physical connections with others.⁸⁶ These responsibilities to others are believed to coincide with the development of social support networks, which in turn enhance the perceived value of fulfilling such responsibilities and in maintaining the support received from others.⁸⁷ Women arrive at the ethic of care after moving through two prior stages of development: the concern for survival/selfishness and the focus on goodness/responsibility.⁸⁸ At the third and final stage, the ethic of care is reached by incorporating the self as among the interconnected persons that one should avoid harming, dismantling the notion that caring for the self connotes selfishness.⁸⁹

Moral decision-making based upon care, connection, and context is attributed to the “feminine voice,” but persons of either sex can function with these so-called “feminine” qualities.⁹⁰ Gilligan argues that, for both genders, the optimal integration of principles and context when making public and professional decisions “is inhibited by a mix of psychological and cultural forces.”⁹¹ Thus, both genders suppress and reject relational

83. GILLIGAN, *supra* note 14, at 21-22.

84. RHODE, *supra* note 5, at 37.

85. GILLIGAN, *supra* note 14, at 160.

86. *See, e.g.*, Phoebe A. Morgan, *Risking Relationships: Understanding the Litigation Chances of Sexually Harassed Women*, 33 LAW & SOC’Y REV. 67, 70-71 (1999); West, *Hedonic*, *supra* note 18, at 140; West, *Jurisprudence*, *supra* note 18, at 3.

87. Morgan, *supra* note 86, at 71.

88. GILLIGAN, *supra* note 14, at 64-85, 128-50.

89. GILLIGAN, *supra* note 14, at 128-50, 138.

90. *See* Gretchen R. Reeve & Christina Maslach, *Use of Social Support: Gender and Personality Differences*, 44 SEX ROLES 437, 439 (2001) (explaining that although sex and gender are highly correlated, persons of both sexes are understood to potentially have both masculine and feminine qualities). One author argues that in a way, police officers who decide not to arrest a domestic violence perpetrator because he is married to the victim are using relational reasoning that considers the context of the situation. *See* Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151, 2160-61 (1995) (noting that court officials use the “female voice” by considering relationships, caretaking, and responsibility when deciding whether crimes should be prosecuted and what the penalty should be).

91. Peggy Cooper Davis & Carol Gilligan, *A Woman Decides: Justice O’Connor and Due Process Rights of Choice*, 32 MCGEORGE L. REV. 895, 896 n.8 (2001). Davis and Gilligan argue

reasoning as they grow toward adulthood, but women are believed to do so to a lesser degree.⁹² Gilligan's examination of these concepts is a bedrock of relational feminist theory, "one of the most prominent and widely accepted varieties of feminist theory."⁹³

IV. EXPECTING RIGHTS-BASED DECISION-MAKING FROM RELATIONAL REASONERS

According to relational feminist theory, women are more likely than men to rely exclusively upon relational reasoning.⁹⁴ Women are also more likely to encounter sexual harassment at work.⁹⁵ The unwelcomeness requirement disadvantages those sexual harassment plaintiffs who resolve problems . . . using the ethic of care (i.e., women) by failing to recognize their behavior as evidence of unwelcomeness.

Despite the lip service given to context,⁹⁶ sexual harassment law developed certain formalistic rules to guide interpretation of whether allegedly harassing conduct was welcome or unwelcome.⁹⁷ As discussed

that a strength of Justice O'Connor was her ability to use a combination of rule-based and context-based reasoning when making legal decisions. *Id.* at 896. Others have faulted Justice O'Connor's reliance on case-specific context as reflecting inconsistency and a "role as straddler extraordinaire . . ." See, e.g., Patricia J. Williams, *Grim Fairy Tales*, THE NATION, March 28, 2005, available at <http://www.thenation.com/doc/20050328/williams>. Some argue that "rights-based" and "care-based" ethics are so oppositional to one another that they cannot be integrated. Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1383 (1986).

92. Davis & Gilligan, *supra* note 91, at 898.

93. Karlan & Ortiz, *supra* note 78, at 858. The authors cite to a large body of scholarly work developing and building on relational feminist ideas. *Id.* at 859 n.6. Relational feminism also has its critics. *Id.* at 858-59 n.4, 860 n.10. Some critics assert that the impact of factors such as race, class, age, ethnicity, sexual orientation, power, and social status are overlooked by gender difference theorists. See RHODE, *supra* note 5, at 38 (citing various authors writing on factors such as race, class, age, or ethnicity).

94. See *supra* Part III (discussing relational reasoning).

95. See Stephanie Riger, *Gender Dilemmas in Sexual Harassment Policies and Procedures*, AMERICAN PSYCHOLOGIST, May 1991, at 497 (stating that workplace sexual harassment "is a hazard faced much more frequently by women than men").

96. See *Merit Sav. Bank v. Vinson*, 477 U.S. 57, 69 (1986) (noting that the totality of the circumstances must be examined); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 20 (1993) (examining the totality of circumstances approach).

97. Until Title VII was amended by the Civil Rights Act of 1991 to provide for a right to a jury trial, judges were making findings of fact in sexual harassment cases. See 42 U.S.C. § 1981a (2000). Judges, who by necessity are also lawyers, are more likely to employ a rights-based reasoning and to expect it in others. Law school is believed to establish and/or reaffirm the justice orientation over an ethic of care. Susan Daicoff, *Making Law Therapeutic for Lawyers: Therapeutic Jurisprudence, Preventative Law, and the Psychology of Lawyers*, 5 PSCYHOL. PUB. POL'Y & L. 811, 832 (1999). Legal problem solving and decision-making are taught as rule-based activities, distinct from relational reasoning. Janeen Kerper, *Creative Problem Solving vs. the Case Method: A Marvelous Adventure in which Winnie-the-Pooh Meets Mrs. Palsgraf*, 34 CAL. W. L. REV. 351, 353, 355 (1998). Studies indicate that most male law students and male lawyers favor a rights or justice-based orientation in making moral decisions. Daicoff, *supra* note 97, at 831-33.

below, these rules reinforce assumptions about how women would (or should) behave when they do not welcome sexual overtures or abusive conduct in the workplace. Both social science and the facts of reported cases indicate that many women do not act according to these formalistic rules before or after encountering conduct they consider unwelcome or situations they perceive as sexually harassing. The basis for this incompatibility between the law's expectations and the actual conduct of many women may be explained in terms of the two distinct foundations for moral judgment identified by Gilligan. The standards for evaluating a workplace situation for signs that sexual conduct was unwelcome anticipate certain rights-based behavior by the complaining employee. Because the standards for interpreting welcomeness rely upon an "ethic of rights" (rights-based reasoning) and expect the victim of harassment to respond with rights-oriented behavior, women who tend to rely upon an "ethic of care" (relational reasoning) and consider relational implications in deciding how to act are likely to have their conduct misinterpreted as welcoming sexual harassment.

A. THE TIMELY, FORMAL COMPLAINT—WHY DIDN'T SHE COMPLAIN ABOUT IT?

Initially, it seemed that the target of the harassment was not required to object, protest, or complain in order to establish that she did not welcome particular conduct.⁹⁸ However, many decisions have affirmed the principle that if a woman does not welcome the conduct, she will assert her right to a harassment-free workplace by complaining about it.⁹⁹ Moreover, she is expected to complain within a relatively short amount of time after harassing conduct occurs.¹⁰⁰ The rule imposes the additional assumption that if conduct is truly unwelcome, the complaint will be made in a direct manner,

98. See EEOC POLICY STATEMENT NO. N-915-050 (March 19, 1990) (providing that a timely complaint is not necessary to establish unwelcome conduct).

99. See Fitzgerald, *supra* note 9, at 100-01 ("making a formal complaint appears to be the legal sine qua non of an 'appropriate' response"); *Stuart v. Gen. Motors Corp.*, 217 F.3d 621, 632 (8th Cir. 2000) (finding that when plaintiff failed to complain about the conduct, it was not determined to be unwelcome).

100. *Paraohao v. Bankers Club, Inc.*, 225 F. Supp. 2d 1353, 1360 (S.D. Fla. 2002) (finding that conduct was not unwelcome as a matter of law in part because the plaintiff did not complain until nearly four months after she started working with the harasser); *Weinsheimer v. Rockwell Int'l Corp.*, 754 F. Supp. 1559, 1564 (M.D. Fla. 1990), *aff'd.*, 949 F.2d 1162 (11th Cir. 1991) (finding that conduct was not unwelcome where reported months afterwards); *Vermett v. Hough*, 627 F. Supp. 587, 608 (W.D. Mich. 1986) (holding that a three month delay in reporting did not support actionable harassment).

using formal procedures.¹⁰¹ Merely mentioning sexually harassing incidents to supervisors during discussions about overall workplace problems will not necessarily indicate that conduct was unwelcome, especially if the complainant does not convey outward distress about them.¹⁰² Complaining solely to co-workers is similarly inadequate.¹⁰³ Failure to complain, complaining long after the harassing events have occurred, or raising the issue in an indirect manner are thus considered evidence that the conduct was welcome.

However, studies indicate that women who experience what they regard as unwelcome workplace sexual harassment often do not report it at all, much less near the time when it occurs.¹⁰⁴ Women are more likely to tolerate or avoid sexual harassment than they are to object to it.¹⁰⁵ This reluctance to complain about harassment is borne out by studies indicating that only a small percentage of women who feel they have experienced unwelcome sexual harassment at work decide to initiate formal claims.¹⁰⁶ Such women may quietly document what has occurred, but will not necessarily take any further action.¹⁰⁷ The small percentage of women who ultimately do report workplace problems are more likely than men to tolerate the behavior for some length of time before finally resorting to formal action.¹⁰⁸

101. See, e.g., *Paraohao*, 225 F. Supp. 2d at 1360 (determining that conduct was not unwelcome in part because complaint was made informally, to a co-worker, and that initial, more formal discussions with management left out certain details); *Weinsheimer*, 754 F. Supp. at 1564 (providing that conduct was not unwelcome in part because plaintiff reported harassment in casual conversation with supervisor); *Kouri v. Liberian Servs., Inc.*, Civ. A. No. 90-00582-A, 1991 WL 50003, 55 Fair Empl. Prac. Cases 125, 127-28 (E.D. Va. Feb. 6, 1991) (noting that plaintiff failed to report harassment through formal channels).

102. *Weinsheimer*, 754 F. Supp. at 1561, 1564. The *Weinsheimer* court focused on the fact that plaintiff delayed reporting the harassment and then did so in informal conversations with supervisors without appearing troubled. *Id.* at 1564.

103. See *Magrum v. Republic Indus., Inc.*, 260 F. Supp. 2d 1229, 1241, 1252 (N.D. Ga. 2003).

104. Anna-Maria Marshall, *Idle Rights: Employees' Rights Consciousness and the Construction of Sexual Harassment Policies*, 39 L. & SOC'Y REV. 83, 86 (2005) (citing a number of authors and studies on the issue).

105. See, e.g., James E. Gruber & Michael D. Smith, *Women's Responses to Sexual Harassment: A Multivariate Analysis*, 17 BASIC APPLIED SOC. PSYCHOL. 543, 544-46 (1995) (citing studies showing that few women respond assertively to or formally report harassment, but instead use various strategies for tolerating the harassment; when it becomes intolerable, women quit their jobs).

106. See *Morgan*, *supra* note 86, at 68 (citing surveys conducted by the U.S. Merit Systems Protection Board in 1981, 1988, and 1994 showing that 42 percent to 44 percent of female federal employees report legally actionable conduct, while only 7 percent file formal claims).

107. *Marshall*, *supra* note 104, at 105-15.

108. See Elizabeth A. Hoffmann, *Dispute Resolution in a Worker Cooperative: Formal Procedures and Procedural Justice*, 39 L. & SOC'Y REV. 51, 70 (2005) (finding that for women, toleration was perceived as the foremost alternative to using the formal grievance procedures at a

Women decide to delay or refrain from reporting the harassment based upon the nature of their relationships, including the relationship between themselves and the harasser.¹⁰⁹ The desire to avoid harming either their relationships or other people extends throughout their perceived web of connections. For example, women may refrain from reporting harassment because they are hesitant to cause trouble for the harasser and his family.¹¹⁰ The focus on relationships includes an examination of the relationship the woman has with her employer and supervisors. Instead of automatically asserting their rights, many women gage the relations they have with management and distinguish between formal rights they have and relationships and benefits that actually can be protected.¹¹¹

Rather than complaining through formal channels, women rely upon social support networks, such as friends and family members, to cope with the conduct they are enduring at work.¹¹² These relationships provide comfort, and also sometimes warn against taking any action to object.¹¹³ The absence of supportive relationships *inside* the workplace may be an additional cause of women refraining from complaining about or reporting harassment. Women who lack access or insider status perceive informal discussions with co-workers or supervisors about a problem as an option not available to them.¹¹⁴

worker cooperative, while men most often anticipated using informal negotiations and discussions to resolve job-related problems).

109. See Morgan, *supra* note 86, at 71 (citing William L. Felstiner, Richard L. Abel, and Austin Sarat, *Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 L. & SOC'Y REV. 631, 654 (1981)) (stating that character and depth of the relationship between disputing parties shape the options that litigants choose to consider and the actions they take).

110. See Louise F. Fitzgerald et al., *The Incidence and Extent of Sexual Harassment in Academia and the Workplace*, 32 J. OF VOCATIONAL BEHAVIOR 152, 162 (1988) (stating that female university students failed to report sexual harassment because, among other reasons, they did not want to cause trouble or be labeled as a troublemaker); Gruber & Smith, *supra* note 105, at 557-59 (stating that "women may fear that assertive responses will unduly harm the harasser").

111. Marshall, *supra* note 104, at 99; Patricia A. Gwartney-Gibbs & Denise H. Lach, *Sociological Explanations for Failure to Seek Sexual Harassment Remedies*, 9 MEDIATION Q., 365, 367-68 (1992).

112. See Marshall, *supra* note 104, at 114 (stating that co-workers can often provide emotional support for a complaining party, but also can remind them of the costs of the complaint); Gruber & Smith, *supra* note 105, at 545 (noting that studies indicate that women are more likely to discuss harassment with a friend or coworker than to report through formal channels and that defusion (masking and social support) is a strategy women use for dealing with sexual harassment).

113. Marshall, *supra* note 104, at 114. A woman participating in Marshall's study reported how her trusted female colleagues advised that if she wanted to succeed, she had to "learn to deal with it" and "suck it up" to avoid retaliation. *Id.*

114. See Hoffmann, *supra* note 108, at 63-64, 70 (concluding that even in the flattened hierarchical realm of a worker cooperative, significant differences existed in the ways in which men and women anticipated resolving workplace problems).

Women who fail to report harassment in a timely and direct manner are mindful of the potential effects such reporting would have on their relationships and the possible harm that would be caused to others. This focus mirrors the overriding concern for relationships and responsibilities that Gilligan and other psychologists have identified as tending to exist in women who make judgments using the ethic of care.¹¹⁵ As they assume responsibility for and sensitivity toward the needs of others, women consider perspectives other than their own in deciding whether to report harassment.¹¹⁶ Women reflect upon the potential social costs of reporting and the effects on their own responsibilities to others.¹¹⁷ Even when reporting the harassment, women may do so while attempting to maintain their connections and relationships with co-workers, even including the harasser.¹¹⁸ In doing so, women generally approach moral conflict from a premise of connectedness and a desire to solve the conflict without hurting anyone.¹¹⁹ An additional explanation for ignoring or avoiding the harasser, rather than reporting him, is that the woman feels morally tied to the feminine ideal of self-sacrifice, and therefore, is reluctant to consider, much less give priority to, her own needs.¹²⁰

Such perspectives are antithetical to the law's justice-oriented assumptions which expect a woman to view her right to work without being harassed as predominating other rights, including any held by the harasser or his family. The law prioritizes the right to be free of sexual harassment in the abstract, assuming that a person who is being harassed will stand up for her formal rights without considering context. This standard also imports a balancing of her rights with the "right" of the employer to be placed on notice of harassment.¹²¹ The legal standards tend to penalize a woman

115. See GILLIGAN, *supra* note 14, at 16-17, 22.

116. See *id.* at 16-17.

117. See *id.* at 21 (articulating a moral dilemma for a woman who uses relational reasoning as how "to lead a moral life which includes obligations to myself and my family and people in general").

118. See *infra* Part IV.B. (discussing the rules guiding interpretation of the harassment victim's conduct toward her harasser).

119. See CAROL GILLIGAN, *FROM IN A DIFFERENT VOICE TO THE BIRTH OF PLEASURE 2* (Vintage Books 2003) (stating that women started with the premise of connectedness rather than separateness); GILLIGAN, *supra* note 14, at 64-65 (noting the desire of some women to solve conflicts without hurting others).

120. See GILLIGAN, *supra* note 14, at 82, 128-50 (discussing "the morality of self-sacrifice" in the transitional second stage of female psychological development, and explaining that women have a difficult time choosing to act in their own self-interest when doing so might harm someone else, categorizing such conduct as selfish).

121. See Chambers, *supra* note 1, at 748 (criticizing potential justification for unwelcomeness requirement—that employer must be on notice that conduct is unwelcome for employer to be responsible for sexual harassment harm).

who balances inter-relational concerns in an attempt to harmonize the relationships involved. Employees who decide to protect their position and maintain their acceptance in the workplace social network by refraining from reporting harassment are often deemed to have welcomed the conduct.¹²²

A divergence exists between how women who have been harassed tend to behave, and how the law expects them to behave in order to establish that the conduct was unwelcome. This divergence reveals the disconnect between the law's abstract, rule-based standards and the ethic of care used by many women to resolve moral dilemmas. Courts often fail to recognize the significance of relational concerns that may influence a plaintiff's handling of sexual harassment. For example, Marilyn Labra was subjected to sexual revelations, inquiries, and propositions from her boss during a three-year period before she finally resigned from her employment.¹²³ Her boss, the owner and president of the company she worked for, was also her cousin.¹²⁴ Her concerns in deciding how to respond to the harassment included fearing the loss of her job, needing to support her family, not wanting to have to obtain another job further from her home, and hoping that she could help her boss obtain counseling.¹²⁵ In addition, her husband also worked for the same company.¹²⁶

When she brought suit for sexual harassment,¹²⁷ the trial court granted summary judgment for the defendant, finding that Labra had failed to show that the conduct was unwelcome.¹²⁸ The trial court found it significant that Labra had not complained about the behavior until after she learned that defendant was going to either lay off or reassign her husband.¹²⁹ The appellate court reversed, finding that a reasonable jury could still determine that the conduct was unwelcome.¹³⁰ However, even on appeal, the court focused strictly on the instances where Labra told her employer "to stop the

122. See, e.g., *Reed v. Shepard*, 939 F.2d 484, 491 (7th Cir. 1991) (discussing the plaintiff's "receptiveness" to sexually suggestive jokes).

123. *Labra v. Mid-Plains Constr., Inc.*, 90 P.3d 954, 956-57 (Kan. Ct. App. 2004).

124. *Id.* at 956.

125. *Id.* at 956, 958. These concerns echo the theory that women focus on survival, then goodness, then reach an ethic of care. *Id.*

126. *Id.* at 956.

127. *Id.* at 956. Suit was brought pursuant to the Kansas Act Against Discrimination. *Id.* at 956-57; see also KAN. STAT. ANN. § 44-1001 (1993) (providing the statement of purpose of the act). The interpretation and application of the Kansas Act Against Discrimination use federal cases construing Title VII of the Civil Rights Act of 1964 as persuasive authority.

128. *Labra*, 90 P.3d at 957.

129. *Id.* at 957-59.

130. *Id.* at 959.

stuff he was doing.”¹³¹ Left without discussion are potential explanations for why she tolerated the conduct for so long or why she may not have complained more formally about his sexual inquiries. In ascertaining unwelcomeness, both courts searched her conduct for a direct assertion of rights, even when the facts indicated that relational concerns were guiding her response to the situation.¹³² While ostensibly a jury or other fact finder could ultimately consider these facts to persuasively establish unwelcomeness, the legal standards favoring a timely complaint encourage the opposite conclusion.

B. HER REACTION TO THE HARASSER—WHY IS HE STILL WATCHING HER DOG?

Another rule for interpreting the harassment victim’s behavior governs how a woman who does not welcome the conduct is expected to react toward her harasser. A guiding principle has developed indicating that if the conduct actually is unwelcome, the way in which a plaintiff responds to the harasser will be overtly negative and confrontational.¹³³ The expectation is that she will sever ties with the harasser and treat him contemptuously. Preserving even minor social conventions and arrangements with the harasser, such as accepting pet care, weigh toward a finding that sexual conduct was welcome.¹³⁴ This precedent reinforces assumptions that behavior such as smoothing over the situation by ignoring it, maintaining some type of relationship with the harasser, or joking about what happened indicate that conduct was welcome.¹³⁵ Thus, sexual harassment law may consider silence as an invitation to proceed.¹³⁶

131. *Id.* at 958-59.

132. *See* Morgan, *supra* note 86, at 86-87 (showing that in a study of 31 female sexual harassment plaintiffs, more often than not, the decision to litigate was often made with impact on personal relationships as central concern).

133. *See, e.g.,* Kouri v. Liberian Servs., Inc., Civ. A. No. 90-00582-A, 1991 WL 50003, 55 Fair Empl. Prac. Cases 125, 127-28 (E.D. Va. Feb. 6, 1991) (demonstrating a sexual harassment case where continual requests that supervisor stop touching plaintiff and plaintiff’s efforts to avoid his hugs were deemed insufficiently serious or forceful to indicate unwelcomeness, in part because plaintiff had shared personal problems with her boss and had written notes thanking him for his friendship).

134. *See, e.g.,* Ripley v. Ohio Bureau of Employment Servs., No. 04AP-313, 2004 WL 2361571, at *1 (Ohio Ct. App. Oct. 21, 2005) (finding that harassment was welcome in part because a plaintiff accepted gifts from her harasser and had him care for her dog).

135. Women who decide to ignore inappropriate overtures or who use humor to subtly reject the harasser while downplaying the situation are much more likely to be perceived as welcoming the behavior. *See generally* Jeanne Henry & Julian Meltzoff, *Perceptions of Sexual Harassment as a Function of Target’s Response Type and Observer’s Sex*, 39 SEX ROLES 253, 255-56 (1998) (stating that the most common response of women experiencing sexual harassment was ignoring it). In fact, not responding at all was perceived as less welcoming than passively deflecting the conduct by joking. *Id.* Somewhat assertive responses that fall short of actual confrontation, such

Again, the behaviors defined by law as evidence of unwelcomeness conflict with how women tend to behave. Research shows that women are more likely to tolerate or avoid their harassers than they are to confront them directly.¹³⁷ Women tend to use less assertive responses to handle the harassment without disrupting work routines or relationships.¹³⁸ Rather than force a direct confrontation, women attempt to manage it in such a way that the harasser loses interest or otherwise recognizes his mistake in judgment.¹³⁹ Strategies that women develop to respond to sexually harassing behavior most often involve ignoring the behavior and avoiding the harasser.¹⁴⁰ Some harassed employees attempt to defuse the situation with humor or by playing along, as though nothing untoward has occurred.¹⁴¹

Here again, conduct grounded in relational reasoning may explain the disconnect between how women respond toward their harassers and how the law expects them to respond in order to establish the harassment as unwelcome. The law relies upon underlying assumptions favoring rights-based behavior. Women are expected to assert their rights by standing up to their harassers, or at least exhibiting indignation at the harasser's infringement on their rights. This principle not only fails to acknowledge how women actually behave, but disregards the extent to which women may make decisions based on care, connection, and context.

The fact that women sometimes maintain relationships with their harassers correlates with the ethic of care, in which women approach conflict with a "constant eye to maintaining relational order and connection."¹⁴² A woman may conclude that protecting the relationship from additional,

as silently glaring at a harasser, also are less likely to be taken as unwelcoming. *Id.* at 256, 261-62. The fact that these attitudes are found in society does not mean that the law should incorporate them.

136. See Stephen Schulhofer, *The Feminist Challenge In Criminal Law*, 143 U. PA. L. REV. 2151, 2181 (1995) (noting that the laws governing rape have been criticized for characterizing silence or indecision as evidence of consent; in contrast, a medical patient's silence or equivocation is not deemed to constitute consent).

137. Gruber & Smith, *supra* note 105, at 544-46.

138. *Id.* at 547.

139. *Id.*

140. Marshall, *supra* note 104, at 105-06. These responses were identified within the context of Marshall's study of employer's adversarial policies and practices concerning internal sexual harassment grievances, either as experienced previously by the target of harassment or as understood by her through information about the experiences of other employees. *Id.* at 99.

141. See Gruber & Smith, *supra* note 105, at 545 (stating that women try to defuse the situation by making a joke of it). One study showed that many harassed employees respond in indirect, non-confrontational ways, such as by "ignoring the harasser (44%), avoiding the harasser (28%), making a joke of the behavior (15%), or going along with the behavior (7%)." Marshall, *supra* note 104, at 86 n.1 (citing MERIT SYSTEMS PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS AND CONTINUING CHALLENGES (1995)).

142. GILLIGAN, *supra* note 14, at xiv.

overt conflict will have less of a negative impact on the web of connections that makes up her life than would direct confrontation.¹⁴³ After assessing her options in a sexually harassing situation, she may decide that her relationship with the harasser may be best preserved or even nudged toward normalcy if she ignores the conduct and pretends that it does not bother her.¹⁴⁴ If she does tell the harasser she is not interested, she may do so politely and indirectly,¹⁴⁵ or by making excuses.¹⁴⁶ A woman who operates according to an ethic of care may decide that supportive relationships enable her, and dependent relationships require her to return to a workplace where a harasser is still present.¹⁴⁷

Women who use relational reasoning may emphasize social context in their decision-making¹⁴⁸ to the point that they adhere to stereotypical gender roles, such as avoiding direct confrontation and expressions of anger.¹⁴⁹ These women nurture relationships and emphasize cooperation over compe-

143. See Marshall, *supra* note 104, at 110-11 (providing that the existence of relational reasoning is evident even when a woman does voice her objections directly to the harasser). Women who do confront a harasser may be motivated not by a right to be free of workplace harassment, but by a desire to protect the feelings of co-workers who also were uncomfortable with the conduct and to alleviate problems with workplace efficiency caused by the harassment. *Id.*

144. See Susan L. Miller & Sally S. Simpson, *Courtship Violence and Social Control: Does Gender Matter?*, 25 LAW & SOC'Y REV. 335, 340 (1991) (citing CAROL GILLIGAN, IN A DIFFERENT VOICE 62 (Harvard University Press 1993) (1982)) (explaining that the tendency to attempt to repair and maintain even morally problematic relationships has been connected to women's tendency to prioritize relationships over other socially valuable assets).

145. See GILLIGAN, *supra* note 14, at 80 (identifying care for others and inhibited self-expression in a woman who describes how, unlike her boyfriend, she never wants to hurt anyone and so criticizes people "in a very nice way"). The use of hedges, super polite forms, and other constructions that connote a lack of power have been defined as "women's language" and are exhibited to varying degrees by women testifying in court. WILLIAM M. O'BARR, LINGUISTIC EVIDENCE: LANGUAGE, POWER, AND STRATEGY IN THE COURTROOM 62-65 (1982) (citing ROBIN LAKOFF, LANGUAGE AND A WOMAN'S PLACE (1975)). O'Barr concluded that the tendency of women to use these language forms is at least in part due to "the greater tendency of women to occupy relatively powerless social positions." *Id.* at 70-71.

146. See Mangrum v. Republic Indus., Inc., 260 F. Supp. 2d 1229, 1253 (N.D. Ga. 2003) (stating that plaintiff sometimes told the defendant harasser "I'm busy," rather than an unequivocal "no").

147. See Burns v. McGregor Elec. Indus., Inc., 955 F.2d 559, 561 (8th Cir. 1992) (providing an example where the plaintiff returned to work three times after leaving due to harassment because a supervisor who seemed supportive had also returned and because she needed to support herself, her father, and her brother).

148. See GILLIGAN, *supra* note 14, at 79 (discussing the second phase in women's moral development, during which "moral judgment relies on shared norms and expectations. The woman at this point validates her claim to social membership through the adoption of societal values.").

149. Barbara A. Gutek & Bruce Morasch, *Sex-Ratios, Sex-Role Spillover, and Sexual Harassment of Women at Work*, 38 J. OF SOCIAL ISSUES 55, 58-59 (1982). In an effort to gain or maintain social acceptance, women fulfill the stereotypical female role. *Id.* See also Hoffmann, *supra* note 108, at 56-57 (providing that women may have difficulty advocating for themselves directly by confronting a harasser).

tion and conflict because they perceive that society expects them to behave that way. Such female employees will follow societal expectations by being more nurturing, sympathetic, loyal, or sexually attractive than men in the same work environment, despite the harassment.¹⁵⁰ Thus, relational reasoning may result in adherence to perceived societal expectations for women, such as preserving social decorum, refraining from making a scene, and remaining loyal to the harasser or employer at their own expense.¹⁵¹ Adherence to sex roles may mask true feelings about the harassment, resulting in behaviors that conflict with the rights-based assumption that a woman would confront or sever ties with the harasser if the conduct were unwelcome.¹⁵²

In *Kouri v. Liberian Services, Inc.*,¹⁵³ a woman working as a secretary found herself being smothered by her boss's overly-affectionate and protective conduct, such as insisting on accompanying her whenever she left the office, sending her complimentary notes, and frequently rubbing her hands and back.¹⁵⁴ She tried to rebuff his advances gently and politely, fulfilling her societal gender role by being loyal, sympathetic, and non-confrontational.¹⁵⁵ She also sought to reinforce her connection with her husband, enlisting him for a series of planned exhibitions of marital unity that were performed in front of her boss.¹⁵⁶ However, the judge characterized her behavior as "hopelessly indirect" and therefore welcoming of the conduct.¹⁵⁷ The assumption was that if the conduct was unwelcome, the plaintiff would have behaved toward her boss in a harsher, more confrontational manner, and since she didn't, the conduct was deemed not unwelcome.¹⁵⁸

150. See Gutek & Morasch, *supra* note 149, at 58.

151. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 36, 39 (Harvard University Press 1987). Catharine MacKinnon goes even further by suggesting that to the extent women use relational reasoning at all, they do so because they themselves are defined by society in terms of their relation to men. *Id.*

152. See Gwarty-Gibbs & Lach, *supra* note 111, at 370 (discussing how Professor Anita Hill "conformed to her gender role by not challenging her supervisor, by doing all she could to avoid interpersonal conflict and confrontation, and by attempting to maintain a semblance of normalcy in her social relations with Thomas").

153. Civ. A. No. 90-00582-A, 1991 WL 50003, 55 Fair Empl. Prac. Cases 125 (E.D. Va. Feb. 6, 1991).

154. See *Kouri*, 55 Fair Empl. Prac. Cases at 127-28.

155. See *id.* at 126, 129 (providing that the plaintiff unsuccessfully declined defendant's offers of rides, unsuccessfully asked him not to follow her into her house, turned her body away from his attempted kiss, and repeatedly asked him not to touch her).

156. *Id.* at 127, 129.

157. *Id.* at 129.

158. *Id.*

Instead of engaging in direct confrontation, women who factor in the impact of their actions on their web of relational connections may downplay the conflict between harasser and harassee. Adherence to these perceived societal expectations conflicts with the formalistic rules for establishing unwelcomeness. When women make decisions on this basis, the law is likely to deem them as having welcomed the harassment.

C. FUNGIBILITY AND ESCALATION— BUT I HEARD SHE TOLD A DIRTY JOKE

The unwelcomeness requirement sides with rights-based reasoning over relational reasoning by promoting an all-or-nothing rule concerning women's sexuality, without regard for context. The focus on the plaintiff's behavior and the requirement that a plaintiff establish the conduct as unwelcome connotes that women are sexually available in the workplace, absent affirmative proof to the contrary.¹⁵⁹ Plaintiffs must disprove the universally applied assumption that they somehow incited or sanctioned the harassment.¹⁶⁰ A woman who does not cover¹⁶¹ her sexuality with some co-workers may be assumed to welcome all types of sexual advances from other co-workers unless she establishes otherwise.¹⁶² Even sexual conduct that the harasser only heard about from others and sexually-related conduct that the woman engaged in outside of work can be asserted as constituting solicitation that negates unwelcomeness.¹⁶³ A woman who discusses her

159. See Chambers, *supra* note 1, at 747 (stating that the "possibility" of "some sex-based workplace conduct may not cause harm which has led some courts to assume such conduct is welcome until proven otherwise"); Fitzgerald, *supra* note 9, at 97 (stating that "[b]urdening the plaintiff with proving that the man's behavior was unwelcome assumes that any woman is sexually available to any man, known or unknown—unless and until she can convince him (and the court) otherwise").

160. See RHODE, *supra* note 5, at 102 (citing *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 69 (1986)).

161. See Rachael Knight, *From Hester Prynne to Crystal Chambers: Unwed Mothers, Authentic Role Models, and Coerced Speech*, 25 BERKELEY J. OF EMP. & LAB. L., 481, 488-89, 499-520 (2004) (discussing courts' unfavorable treatment of discrimination claims made by women who refuse to "cover" (i.e., hide, minimize, or neutralize) the fact that they were unmarried and pregnant).

162. See, e.g., *Beard v. Flying J Inc.*, 266 F.3d 792, 797-98 (8th Cir. 2001) (stating that *the accused supervisor* successfully argued that his conduct, touching of the plaintiff's breasts with his body, cooking tongs, and with a pen, was not unwelcome, because the plaintiff was alleged to have touched a male co-worker's thigh in a sexually suggestive way and to have frequently used suggestive language at work).

163. See *Horney v. Westfield Gage Co.*, 77 F. App'x 24, 28-30 n.1 (1st Cir. 2003) (stating that defendants could proffer evidence that plaintiff bared her breasts while working at a previous job to show that vulgar sexual remarks made to her by her supervisor at a later place of employment were not unwelcome); *Burns v. McGregor Elec. Indus., Inc.*, 955 F.2d 559, 565 (8th Cir. 1992) (explaining that evidence that plaintiff had posed for nude photos outside of work was relevant to determination of welcomeness). In 1994, Federal Rule of Evidence 412 was amended

sex life with one co-worker may be argued to have lost the right to complain about sexual inquiries from another co-worker.¹⁶⁴ A woman who openly engages in a sexual relationship with one co-worker may be assumed to welcome a potential sexual relationship with any other co-worker.¹⁶⁵ A woman who collects sexual jokes and makes comments about her breasts in a discussion with a female co-worker may be deemed to have welcomed a male co-worker's propositions and vulgar remarks.¹⁶⁶

By facilitating these types of arguments as potential defenses to sexual harassment claims, the unwelcomeness requirement supports the assumption that female sexuality is fungible and fails to recognize the obvious importance of context in sexual decision-making.¹⁶⁷ Someone who engages in relational reasoning will be particularly inclined to behave in a manner that emphasizes context and relationships—acting in a sexually open manner in one situation with certain persons, yet not welcoming sexual content from other persons in other contexts.¹⁶⁸ Just as a woman may select one person over others for a sexual relationship, some women may choose to express a certain degree of sexuality in defined ways (clothing, jokes, innuendo) or to certain persons in the workplace, using context, based upon

to provide some protection against the use of sexual history evidence, but the unwelcomeness requirement still allows ample opportunity to intimidate plaintiffs through discovery procedures and efforts to have such evidence admitted at trial. See Jane H. Aiken, *Protecting Plaintiffs' Sexual Past: Coping with Preconceptions Through Discretion*, 51 EMORY L.J., 559, 575-76 (2002) (discussing the changes to Rule 412 and its effect in sexual harassment cases on the unwelcomeness requirement).

164. See, e.g., *King v. Town of Hanover*, 959 F. Supp. 62, 66 (D. N.H. 1996) (explaining that innuendo used by a plaintiff with co-workers was relevant to determining whether sexual overtures from a supervisor were welcome); *Gatzke v. Campbell*, No. C9-97-507, 1997 WL 757383, at *3 (Minn. Ct. App. Dec. 9, 1997) (noting that the defendant argued that because plaintiff had engaged in off-color humor with bar staff, overtures from her supervisor were not welcome).

165. See, e.g., *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1105 (9th Cir. 2002) (noting that defendants offered evidence of plaintiff's sexual comments and behavior away from work with other co-workers to establish welcomeness of harassment from a co-worker).

166. *Ripley v. Ohio Bureau of Employment Servs.*, No. 04AP-313, 2004 WL 2361571, at *1 (Ohio Ct. App. Oct. 21, 2004) (mentioning the effect of plaintiff's use of sexual jokes on unwelcomeness).

167. See *Chambers*, *supra* note 1, at 747 n.69 (citing *Benedet*, *supra* note 58, at 140) (arguing that investigation of woman's sexual history in harassment matters is founded on the idea that "(s)exual acts are . . . essentially fungible for women, both as to the partner with whom they engage in them and as to the location in which they take place").

168. Studies of the sexual choices of adolescents have identified a significant difference between male and female approaches to sexual choices: girls place more importance on the nature of the interpersonal relationship and attachment involved. Kathleen Holland Bollerud et al., *Girls' Sexual Choices: Looking For What Is Right: The Intersection of Sexual and Moral Development*, in *MAKING CONNECTIONS: THE RELATIONAL WORLDS OF ADOLESCENT GIRLS AT EMMA WILLARD SCHOOL* 274, 274 (Carol Gilligan et al. eds., 1990). This difference occurs at all levels of sexuality. *Id.* Sexual decisions made from the attachment orientation exhibit the ethic of care, with concern for connection and interdependence. *Id.* at 276.

their relationships and perceptions about the social context of the workplace. She may consider herself able to express her sexuality with certain co-workers, while remaining uncomfortable with sexual colloquy or conduct in the context of relationships with other co-workers or supervisors. Women who emphasize relational reasoning also are likely to perceive the exchange of somewhat personal information with certain co-workers as part of establishing the bonds and connections that they value. The law, however, promotes the notion and provides the opportunity for defense counsel to argue that any expression of sexuality constitutes inviting or encouraging sexual conduct from all co-workers and supervisors.

A related precedent precludes a woman from establishing conduct as unwelcome if she is deemed to have participated in it.¹⁶⁹ Courts have held that a woman cannot even raise a triable issue of fact as to unwelcomeness when she is deemed to have participated in the complained of conduct.¹⁷⁰ The problem is that the law too often tends to support the proposition that any evidence of sexuality exhibited by a woman may constitute “participation” that welcomes even escalated sexual conduct and outright abuse. When women engage in limited sexually-related conduct, even severe escalations of the conduct can be deemed not unwelcome, such that mildly suggestive joking can be argued to welcome obscene gestures, touching, and abusive behavior.¹⁷¹ Women who participate in sexual banter and innuendo at work can be found to have welcomed being fondled, shoved, and threatened with violence.¹⁷² These holdings ignore the nuances of

169. See, e.g., *Balletti v. Sun-Sentinel Co.*, 909 F. Supp. 1539, 1547 (S.D. Fla. 1995) (stating that “[w]here a plaintiff’s action in the work place shows that she was a willing and frequent participant in the conduct at issue, courts are less likely to find that the conduct was ‘unwelcome’”).

170. See *Scusa v. Nestle USA Co.*, 181 F.3d 958, 966 (8th Cir. 1999) (holding that “[t]he undisputed evidence showed that appellant engaged in behavior similar to that which she claimed was unwelcome and offensive”).

171. See *Ripley*, 2004 WL 2361571, at *1-2. (holding that a woman who engages in sexual joking and conversation, publicly comments about her breasts, keeps a file of suggestive cartoons and jokes, does not hide her sexual encounters, compares breast sizes with a female co-worker, and one day does not wear a bra to work welcomed direct sexual advances from co-workers, including suggestive looks accompanied by lip-licking, daily outright demands for sex, lifting her skirt, and vulgar sexual gestures such as crotch-grabbing).

172. See, e.g., *Weinsheimer v. Rockwell Int’l Corp.*, 754 F. Supp. 1559, 1563-64 (M.D. Fla. 1990) (holding that because she engaged in sexual banter, plaintiff was deemed to have welcomed the actions of a co-worker who placed his penis in her hand); *Mangrum v. Republic Indus., Inc.*, 260 F. Supp. 2d 1229, 1252-53 (N.D. Ga. 2003) (stating that plaintiff who engaged in vulgar language, gave massages, and exchanged back scratches with co-workers is deemed to have welcomed supervisor’s repeated requests for sex and patting her behind); *Reed v. Shepard*, 939 F.2d 484, 487, 491-92 (7th Cir. 1991) (noting that a plaintiff who told dirty jokes, made sexual comments, showed off her abdominal scars, went braless, and gave suggestive gifts to her colleagues was found to have welcomed being punched in the kidneys, tickled, handcuffed to

context, which have particular significance in affecting the behavior of women who rely upon relational reasoning.¹⁷³

V. INVITING THE ETHIC OF CARE

Feminist scholars have long criticized the law's structural bias against women within seemingly neutral standards.¹⁷⁴ Recognizing the chasm between the formal legal equality promised by our system and the inequality experienced by women in their lives, feminist legal theory examines the ways in which the law contributes to women's subordination "by masking gendered norms as neutral and entrenching the status quo."¹⁷⁵ This inquiry has concluded that the law's gender bias is no accident, but is central to the development of the law itself.¹⁷⁶ Likewise, the supposedly objective standards developed to analyze sex discrimination have been attacked for lacking context¹⁷⁷ and for making "maleness the norm of what is human . . . all in the name of neutrality."¹⁷⁸

various objects in the office, forced to put her head in the laps of male co-workers, mocked with an electric cattle prod, dunked into a toilet, and maced).

173. Not all cases advance the assumption that participating in some sexual conduct welcomes escalated conduct. See, e.g., *Swentek v. USAir, Inc.*, 830 F.2d 552, 557 (4th Cir. 1987) ("Plaintiff's use of foul language or sexual innuendo in a consensual setting does not waive her legal protections against unwelcome harassment."); *Rahn v. Junction City Foundry, Inc.*, 152 F. Supp. 2d 1249, 1257 (D. Kan. 2001) (declining to hold that laughing at dirty jokes established that harassment was not unwelcome as a matter of law).

174. See, e.g., Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 400-01 (1984) (citing Catherine MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS: J. WOMEN IN CULTURE & SOC'Y 635, 655 (1983); GILLIGAN, *supra* note 14, at 8).

175. Hernandez-Truyol, *supra* note 32, at 120 (citing MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 15 (1999)). See also Patricia Peppin, *Power and Disadvantage in Medical Relationships*, 3 TEX. J. WOMEN & L. 221, 249 (1994) (citing SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 10-13 (1989)). Peppin argues that scientific knowledge and, as a result, medical care, is "constructed in ways that are biased against some or all members of disadvantaged groups," and notes that applying legal standards does not improve the dilemma, since the legal system also is built upon biases underlying asserted neutrality. *Id.* at 247. The touchstone of "reasonableness" has been exposed as judicially created, biased toward white male, middle-class, able-bodied norms, and following the perceived distinction between reason and emotion. *Id.* at 249.

176. Hernandez-Truyol, *supra* note 32, at 120 (citing MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 2 (1999)). See generally CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 114-16, 136-37, 140 (1979) (criticizing the "differences" approach to analyzing sex discrimination).

177. For example, it has been argued that an individualized standard, rather than the reasonable person test, should be used to determine whether conduct is sufficiently severe and pervasive so as to create a hostile work environment, so that, among other things, gender stereotypes about the appropriateness of the victim's conduct are less likely to be emphasized or reinforced. Jane L. Dolkart, *Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards*, 43 EMORY L.J. 151, 152-53 (1994); see also RHODE, *supra* note 5, at 106 (promoting context-specific reasonable person standard that was proposed and then

To the extent that more women than men employ relational reasoning, women's realities are distanced from the expectations of the law at a fundamental level. The foundation of modern legal theory embraces the hierarchical ("male") perspective by defining people as distinct individuals who act separately from one another.¹⁷⁹ Women who view themselves as acting within a web of connections with others often do not find their perceptions reflected in the laws that govern their lives.

The legal standards used in assessing unwelcomeness are vulnerable to similar charges of structural bias against women. Requiring a sexual harassment plaintiff to establish that the conduct she complains about was unwelcome may seem to be a neutral standard,¹⁸⁰ merely filtering out claims based on sexual conduct that the complainant herself solicited or invited.¹⁸¹ However, because the unwelcomeness element imposes standards that expect rights-based decision-making, those plaintiffs who make decisions based on an ethic of care are placed at a disadvantage when attempting to establish that conduct was unwelcome to them.

For women who rely upon relational reasoning, the structure of the analysis conflicts with their process of making moral judgments and misinterprets their decision-making. The concepts framing the unwelcomeness inquiry expect harassment victims to navigate difficult professional and personal conflicts using an ethic of justice, not an ethic of care. If the harassment is unwelcome, the victim's behavior assumedly will reflect a formal right to work in an environment free of harassment, without adjusting to the context of the particular situation. The victim of harassment is expected to act as though her notion of personal rights has been offended by complaining without delay and without downplaying the conflict. Precedent weighs against finding unwelcome conduct in instances where plaintiff delays or refrains from complaining or attempts to maintain the

withdrawn by the EEOC (58 Fed. Reg. 51, 266-69 (Oct. 1, 1993), *withdrawn*, 59 Fed. Reg. 51,396 (Oct. 11, 1994))).

178. Scales, *supra* note 91, at 1377 (citing *Bradwell v. Illinois*, 83 U.S. 130, 140-42 (1872) (Bradley, J., concurring) (asserting that for legal and "natural" reasons, women belong in a separate sphere from men and approved the denial of bar membership based on gender)).

179. West, *Jurisprudence*, *supra* note 18, at 2.

180. See Martha R. Mahoney, *Whiteness and Women, in Practice and Theory: A Response to Catharine MacKinnon*, 5 YALE J.L. & FEMINISM 217, 217 (1993) (discussing white privilege in the context of sex discrimination and stating that "[d]ominance and privilege tend to seem normal and neutral to the privileged").

181. The myth of the prevalence of false sexual harassment claims continues to live on, despite data indicating that plaintiffs rarely make baseless complaints. See Oliveros, *supra* note 15, at 1392 (citing a study indicating that less than one percent of all sexual harassment complaints made each year are false).

benefits of a positive relationship despite the existence of harassment.¹⁸² Where women act in accordance with their context-driven moral judgment to protect relationships, maintain social roles, and express sexuality within self-drawn boundaries, legal precedent supports an interpretation of welcomeness.

A substantial body of sociological research indicates that women typically do not respond to sexual harassment by overtly asserting their legal or moral rights.¹⁸³ Both social science and the factual assertions contained in reported decisions indicate that many women navigate their lives with relational reasoning. Because rights-based assumptions are ensconced in precedent, the analysis for unwelcome conduct weighs against their chances of establishing sexual harassment claims. As a consequence, women who use relational reasoning in making decisions about how to behave risk being deemed to have welcomed the harassment. Until the legal standards recognize the validity of moral judgments and behavior based upon an ethic of care,¹⁸⁴ women will be unfairly disadvantaged when they attempt to establish that sexual conduct at work was unwelcome to them. The resulting preclusion of legitimate sexual harassment claims hinders the elimination of gender bias, both in the workplace and in the legal system as a whole.

182. See, e.g., *Paraohao v. Bankers Club, Inc.*, 225 F. Supp. 2d 1353, 1360 (S.D. Fla. 2002) (rejecting plaintiff's claim that conduct was unwelcome, in part because she waited several months to complain and then did so only informally to a co-worker). No credence was allotted to the fact that plaintiff enjoyed working in the accounting department and wanted to move into a fulltime job in that department; that her other options with this employer appeared to be serving and hostessing; that she needed the job for financial reasons; and that she also had hoped to improve her financial situation through other business dealings with the harasser, with whom she believed she had begun a financially lucrative corporation. *Id.* at 1359-60.

183. See Gruber & Smith, *supra* note 105, at 544 (discussing "clear evidence that women generally give fairly nonassertive responses to their harassers").

184. See RHODE, *supra* note 5, at viii ("What most women seek is not simply equal access to opportunities traditionally reserved for men, but equal recognition of the concerns and values traditionally associated with women.").
